coinsurance provisions of title XVIII) as prescribed in regulations.

3. On page 48116, column 1, in line 13 of paragraph (b), "we" is changed to "were".

§ 408.2 [Corrected]

4. On page 48116, column 1, the second line of paragraph (b) is revised to read "that certain individuals must pay in".

§ 408.4 [Corrected]

5. On page 48116, column 2, the last word of paragraph (b)(1) is changed from "state" to "estate".

§ 408.26 [Corrected]

6. On page 48118, column 3, line 8, a close parenthesis ")" is inserted after "period".

§ 408.27 [Corrected]

7. On page 48119, column 1, at the end of the first line, the word "a" is inserted.

§ 408.50 [Corrected]

8. On page 48120, column 2, paragraph (c)(2), the following changes in verb tense are made:

a. In line 8, "is" is change to "was".

b. In line 11, "will" is changed to "would".

(Catalog of Federal Domestic Assistance Program No. 13.773 Medicare—Hospital Insurance, and No. 13.774—Supplementary Medical Insurance)

Dated: February 8, 1988.

James F. Trickett,

Deputy Assistant Secretary for Administrative and Management Services.

[FR Doc. 88-3033 Filed 2-11-88; 8:45 am]

BILLING CODE 4120-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 35

Implementation of the Program Fraud Civil Remedies Act

AGENCY: Department of the Interior.

ACTION: Final rule.

SUMMARY: This final rule implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99-509 enacted on October 21, 1986, codified at 31 U.S.C. 3801 through 3812. The Act generally provides that any person who knowingly submits a false claim in an amount less than $150,000 or a false statement to the Federal government may be liable for an administrative civil penalty of not more than $5,000 for each false claim or statement and, in cases where claims have been paid, for an assessment of up to double the amount falsely claimed. This final rule establishes administrative procedures for imposing the statutorily authorized civil penalties and assessments against any person who makes, submits, or presents a false, fictitious, or fraudulent claim or written statement to the Department of the Interior.

EFFECTIVE DATE: March 14, 1988.

FOR FURTHER INFORMATION CONTACT: Barbara Abate or Deborah Ryan Howard, Office of the Solicitor, (202) 343-5216.

SUPPLEMENTARY INFORMATION: The Congress has expressed that regulations implementing the Program Fraud Civil Remedies Act of 1986 should be substantially uniform throughout the government. On June 29, 1987, the Department of the Interior published for comment in the **Federal Register**, a proposed rule implementing the Program Fraud Civil Remedies Act of 1986 (52 FR 24186). In keeping with the Congress' expression for uniformity, the proposed rule adopted model regulations recommended by the President's Council on Integrity and Efficiency (PCIE).

By the end of the comment period, July 29, 1987, the Department of the Interior had received no public comments.

The Department of the Interior has adopted in this final rule those changes to the model regulations recommended by the PCIE in response to comments received by other federal agencies that published proposed rules implementing the Act. The following changes have been made to the Department of the Interior's proposed rule:

1. In the interest of clarity, the definition of "benefit" in Section 2 is amended to restrict it to application within the context of "statement".

2. We have deleted the final sentence in proposed Section 35.5(b)(6). This change results from the determination that the sufficiency of the basis for the reviewing official's statement concerning the financial condition of possible defendants is a matter best left to the Department of the Interior and the Department of Justice.

3. Section 8(b) has been modified to clarify that service under Section 8 is complete upon receipt, either through the mail as evidenced by an acknowledged return receipt card or by delivery as attested to by the person who made delivery or who received the complaint.

4. Section 9(c) has been added to provide that a defendant may file within 30 days of receipt of the complaint, a request for hearing and a request for an extension of time for up to an additional 30 days to file a complete answer in accordance with Section 9(b).

5. Section 18(c) has been revised slightly to state that "the ALJ does not have the authority to find Federal statutes or regulations invalid."

6. Section 39(b) has been amended to provide that a defendant may file a notice of appeal at any time within 30 days after the ALJ issues a decision, but that if another party files a request for reconsideration in accordance with Section 38, action on the appeal will be stayed automatically pending disposition of the motion for reconsideration.

7. The definition of "person" in Section 2 has been amended so that it now reiterates the statutory definition.

8. Editorial changes have been made in response to comments received from Department of the Interior personnel.

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 because it will not have an effect on the economy of $100 million or more or otherwise meet the threshold criteria. Therefore, the preparation of a regulatory impact analysis is not required.

The Department of the Interior certifies that this document is not expected to have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). While some of the penalties and assessments the Department of the Interior could impose as a result of this rule might have an impact on small entities, we do not anticipate that a substantial number of these small entities would be significantly affected by this rulemaking.

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

This rule is excluded from the National Environmental Protection Act (NEPA) process because it is administrative, financial, legal and procedural in nature, and therefore neither an environmental assessment nor an environmental impact statement is required. 516 DM 2, Appendix 1, 1.10.

The author of this rule is Barbara Abate, Office of the Solicitor.

List of Subjects in 43 CFR Part 35

Administrative practice and procedure, Fraud, Investigations, Penalties.

For the reasons set forth in the preamble, Title 43, Subtitle A of the Code of Federal Regulations is amended to add a new Part 35 as set forth below.

PART 35—ADMINISTRATIVE REMEDIES FOR FRAUDULENT CLAIMS AND STATEMENTS

Sec.

Authority: 5 U.S.C. 301; 31 U.S.C. 3801–3812.

§ 35.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99–509, sections 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 35.2 Definitions.

As used in this part:

(a) *ALJ* means an administrative law judge in the Department of the Interior appointed pursuant to 5 U.S.C. 3105 or detailed to the Department of the Interior pursuant to 5 U.S.C. 3344.

(b) *Benefit* means, in the context of "statement", anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(c) *Claim* means any request, demand, or submission—

(1) Made to the Department of the Interior for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from the Department of the Interior or to a party to a contract with the Department of the Interior—

(i) For property or services if the United States—

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Department of the Interior which has the effect of decreasing an obligation to pay or account for property, services, or money.

(d) *Complaint* means the administrative complaint served by the reviewing official on the defendant under § 35.7 of this part.

(e) *Defendant* means any person alleged in a complaint under § 35.7 to be liable for a civil penalty or assessment under § 35.3 of this part.

(f) *Department* means the Department of the Interior.

(g) *Director* means the Director of the Office of Hearings and Appeals, Office of the Secretary, who is the designee of the Secretary of the Interior authorized to consider and decide finally for the Department appeals under this part. The authority delegated to the Director includes the authority to redelegate appellate review authority to an *ad hoc* board of appeals appointed in accordance with 43 CFR 4.1(b)(4). Appeals to the Secretary under this part should be mailed or delivered to the Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Documents will be considered filed when received in the office of the Director.

(h) *Government* means the United States Government.

(i) *Individual* means a natural person.

(j) *Initial decision* means the written decision of the ALJ required by § 35.10 or § 35.37 of this part, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(k) *Investigating official* means the Inspector General of the Department of the Interior or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

(l) *Knows or has reason to know*, means that a person, with respect to a claim or statement—

(1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

(m) *Makes*, wherever it appears, shall include the terms "presents," "submits," and "causes to be made, presented, or submitted." As the context requires, "making" or "made", shall likewise include the corresponding forms of such terms.

(n) *Person* means any individual, partnership, corporation, association, or private oganization, and includes the plural of that term.

(o) *Representative* means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, or other representative meeting the qualifications of a non-attorney representative found at 43 CFR 1.3 and designated in writing.

(p) *Reviewing official* means the Solicitor of the Department of the Interior or his designated representative, who is:

(1) Not subject to supervision by, or required to report to, the investigating official; and

(2) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

(q) *Secretary* means the Secretary of the Interior or his designated representative.

(r) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) A grant, loan, or benefit from, the Department of the Interior, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 35.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent,

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Department, a recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or Territory, or political subdivision thereof, acting for or on behalf of the Department, recipient, or party.

(4) Each claim for property, services or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the Department when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or Territory, or political subdivision thereof, acting for or on behalf of the Department.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 35.4 Investigation.

(a) If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit the investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of the investigating official to report violations of criminal law to the Attorney General.

§ 35.5 Review by reviewing official.

(a) If, based on the report of the investigating official under § 35.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 35.3, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 35.7 of this part.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of § 35.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 35.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 35.7 of this part only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 35.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money, or the value of property or services, demanded or requested in violation of § 35.3(a) of this part does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 35.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 35.8 of this part.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 35.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 35.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. *Service is complete upon receipt.*

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgement of receipt by the defendant or his or her representative.

§ 35.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 35.11. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 35.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 35.9(a) of this part, the reviewing official may refer the complaint to the Office of Hearings and Appeals, Hearings Division, Department of the Interior, for assignment to an ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 35.8 of this part, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under § 35.3 of this part, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to

reconsideration under § 35.38 of this part.

(h) The defendant may appeal the decision denying a motion to reopen by filing a notice of appeal with the Director within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the appeal is decided.

(i) If the defendant files a timely notice of appeal with the Director, the ALJ shall forward the record of the proceeding to the Director.

(j) The Director shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Director decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the Director shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Director decides that the defendant's failure to file a timely answer is not excused, the Director shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the Director issues such decision.

§ 35.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing offical shall file the complaint and answer with the Office of Hearings and Appeals, Hearings Division, Department of the Interior, for assignment to an ALJ. The reviewing official shall include the name, address, and telephone number of a representative for the Government.

§ 35.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 35.8 of this part. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 35.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Department of the Interior.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 35.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Department who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Department, including in the offices of either the investigating official or the reviewing official.

§ 35.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 35.16 Disqualification of reviewing official or ALJ.

(a) A reviewing offical or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Director may determine the matter only as part of the review of the initial decision upon appeal, if any.

§ 35.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 35.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 35.19 Pre-hearing conferences.

(a) The ALJ may schedule pre-hearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one pre-hearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use pre-hearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a pre-hearing conference.

§ 35.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 35.4(b) of this part are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 35.5 of this part is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 35.9 of this part.

§ 35.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purposes of this section and §§ 35.22 and 23 of this part, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 35.24 of this part.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 35.24 of this part.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 35.8 of this part.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 35.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 35.33(b) of this part. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance

with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 35.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 35.8 of this part. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 35.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, or commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 35.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Department, a check for witness fees and mileage need not accompany the subpoena.

§ 35.26 Form, filing and service of papers.

(a) *Form.* (1) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(2) Every pleading and paper shall be signed by, and shall contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(3) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 35.8 shall be made by delivering a copy, or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 35.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 35.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a pre-hearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginnings of the hearing.

§ 35.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall

reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 35.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 35.3 of this part and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for food cause shown.

§ 35.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Director, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Director in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation.

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the Director from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 35.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 35.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 35.22(a) of this part.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the

manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 35.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 35.24.

§ 35.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Director.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 35.24 of this part.

§ 35.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 35.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 35.3 of this part;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 35.31 of this part.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Director. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Secretary, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 35.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Secretary in accordance with § 35.39 of this part.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Department and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Secretary in accordance with § 35.39 of this part.

§ 35.39 Appeal to the Secretary of the Interior.

(a) Any defendant who as filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Secretary by filing a notice of appeal with the Director in accordance with this section.

(b) (1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 35.38 of this part, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Director may extend the initial 30 day period for an additional 30 days if the defendant files with the Director a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Director and the time for filing motions for

reconsideration under § 35.38 of this part has expired, the ALJ shall forward the record of the proceeding to the Director.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Director.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Director shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Director that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Director shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The Director may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The Director shall promptly serve each party to the appeal with a copy of the Department's decision and a statement describing the right of any person determined to be liable for a civil penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Director serves the defendant with a copy of the Department's decision, a determination that a defendant is liable under § 35.33 of this part is final and is not subject to judicial review.

§ 35.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Secretary a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Secretary shall stay the process immediately. The Secretary may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 35.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Secretary.

(b) No administrative stay is available following a final decision of the Secretary.

§ 35.42 Judicial review.

Section 3805 of Title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Secretary imposing penalties or assessment under this part and specifies the procedures for such review.

§ 35.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 35.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 35.42 or § 35.43, or any amount agreed upon in a compromise or settlement under § 35.46 of this part, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 35.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 35.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The Secretary has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 35.42 or during the pendency of any action to collect penalties and assessments under § 35.43 of this part.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 35.42 of this part or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the Secretary, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Secretary, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 35.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 35.8 of this part within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 35.10(b) of this part shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

Joseph W. Gorrell,

Principal Deputy Assistant Secretary, Policy, Budget and Administration.

Date: December 31, 1987.

[FR Doc. 88-3083 Filed 2-11-88; 8:45 am]

BILLING CODE 4310-RK-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[MM Docket No. 87-13]

FM and TV Booster Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: Actions taken herein corrects incorrect text in § 74.501 of the *Report and Order* in MM Docket No. 87-13. The order also clarifies the Commission's intent to ensure that TV boosters do not cause interference to the signal of their primary station within the boundaries of the principal community served by that full service station and modifies Section 74.703 of the rules to reflect this policy. The final action adds omitted language indicating that short spaced adjacent channel FM stations will be permitted to serve areas within their predicted service areas provided that the ratio of

the signal of the adjacent channel station to the signal of the booster station is at least 6 dB.

EFFECTIVE DATE: March 3, 1988.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order* in MM Docket No. 87-13, adopted December 15, 1987, and released January 28, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete test of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, (202) 857-3800, 1919 M Street, NW., Room 246, Washington, DC 20554.

Summary of Order

1. The order inserts the designation of paragraph (a)(2) previously omitted from the *Report and Order*, as released by the Commission, but appearing correctly in the summary of that decision published in the **Federal Register** (52 FR 31398, August 20, 1987). It corrects the decision to indicate that it is paragraph (b)(5) that is revised, and not paragraph (a)(5) as stated in Appendix B of the *Report and Order*. The order also amends the decision in MM Docket No. 87-13 as described below.

2. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Inasmuch as these amendments impose no additional burdens and raise no issue upon which comments would serve any useful purpose, prior notice of rule making, effective date provisions, and public procedure thereon are unnecessary pursuant to the Administrative Procedure and Judicial Review Act provisions 5 U.S.C. 553(b)(3)(B).

3. Since a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

4. Therefore, it is ordered that pursuant to section 4(i), 303(r), and 5(c)(1) of the Communications Act of 1934, as amended, and §§ 0.61 and 0.238 of the Commission's rules, Parts 73 and 74 of the FCC Rules and Regulations are amended as set forth below, effective March 3, 1988.

List of Subjects in 47 Part 74

Radio broadcasting, Television broadcasting.

PART 74—[AMENDED]

Part 74 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citations for Part 74 continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 74.501 is amended by revising paragraphs (a) and (b) to read as follows:

§ 74.501 Classes of aural broadcast auxiliary stations.

(a) *Aural broadcast STL station.* A fixed station for the transmission of aural program material between the studio and the transmitter of a broadcasting station other than an international broadcasting station.

(b) *Aural broadcast intercity relay (ICR) station.* A fixed station for the transmission of aural program material between broadcasting stations other than international broadcasting stations, and between FM radio broadcast stations and their co-owned FM booster stations, or other purposes as authorized in § 74.531.

* * * * *

3. Section 74.703 is amended by revising paragraph (b) and adding paragraph (g) to read as follows:

§ 74.703 Interference.

* * * * *

(b) It shall be the responsibility of the licensee of a low power TV, TV translator, or TV booster station to correct at its expense any condition of interference to the direct reception of the signal of any other TV broadcast station operating on the same channel as that used by the low power TV, TV translator, or TV booster station or an adjacent channel which occurs as a result of the operation of the low power TV, TV translator, or TV booster station. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the low power TV, TV translator, or TV booster station, regardless of the quality of the reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending low power TV, TV translator, or TV booster station shall be suspended and shall not be resumed until the interference has been eliminated. If the complainant refuses to permit the low Power TV, TV translator, or TV booster station to apply remedial techniques that demonstrably will eliminate the interference without impairment of the original reception, the licensee of the low power TV, TV translator, or TV booster station is absolved of further responsibility. TV booster stations will be exempt from the provisions of this paragraph to the extent that they may cause limited interference to their primary stations' signal subject to the conditions of paragraph (g) of this section.

* * * * *

(g) A TV booster station may not disrupt the existing service of its primary station nor may it cause interference to the signal provided by the primary station within the principal community to be served.

4. Section 74.1235 is amended by revising paragraph (c) to read as follows:

§ 74.1235 Power limitations.

* * * * *

(c) The output power of FM booster stations shall be limited such that the predicted service contour of such stations, computed in accordance with § 73.313(a)-(d), may not extend beyond the area covered by the predicted service contour of the primary station that they rebroadcast and that such output power may not exceed 20 percent of the maximum allowable effective radiated power for the primary station's class. Further, FM booster stations shall be subject to the requirement that the signal of any first adjacent channel station must exeed the signal of the booster station by 6 dB at all points within the protected contour of any first adjacent channel station, except that in the case of FM stations on adjacent channels at spacings that do not meet the minimums specified in § 73.207, the signal of any first adjacent channel station must exceed the signal of the booster by 6 dB at any point within the predicted interference free contour of the adjacent channel station.

Federal Communications Commission.

Alex D. Felker,

Chief, Mass Media Bureau.

[FR Doc. 88-2654 Filed 2-11-88; 8:45 am]

BILLING CODE 6712-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 525 and 553

[APD 2800.12 CHGE 52]

General Services Administration Acquisition Regulation; Trade Agreements Act Threshold

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR), Chapter 5, is amended to revise Section 525.402 to reflect the new threshold for procurements subject to the Trade Agreements Act and to reflect current organization titles; section 553.370–3503 is revised to illustrate the December 1987 edition of the GSA Form 3503, Representations and Certifications and section 553.370–3521 is revised to illustrate the December 1987 edition of the GSA Form 3521, Blanket Purchase Agreement. The intended effect is to improve regulatory coverage by having it conform to applicable Federal regulations and to provide uniform procedures for contracting under the regulatory system.

EFFECTIVE DATE: Solicitations issued on or after February 14, 1988.

FOR FURTHER INFORMATION CONTACT: Ms. Ida M. Ustad, Office of GSA Acquisition Policy and Regulations on (202) 566–1224.

SUPPLEMENTARY INFORMATION: This rule was not published for public comment because it merely implements higher level issuances and does not result in an additional cost or administrative impact on contractors or offerors. The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1984, exempted certain agency procurement regulations from Executive Order 12291. The exemption applies to this rule. The General Services Administration (GSA) certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This rule reflects the new dollar threshold established by the U.S. Trade Representative for applicability of the Trade Agreements Act of 1979. Accordingly, no regulatory flexibility analysis has been prepared. This rule does not contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501 et seq.

List of Subjects in 48 CFR Parts 525 and 553.

Government procurement.

1. The authority citation for 48 CFR Parts 525 and 553 continues to read as follows:

Authority: 40 U.S.C. 486(c).

PART 525—FOREIGN ACQUISITION

2. Section 525.402 is amended by revising paragraphs (a) and (c) to read as follows:

525.402 Policy.

(a) Pursuant to FAR 25.402(a), contracting officers shall evaluate offers of $156,000 or more for an eligible product without regard to the restrictions of the Buy American Act or the Balance of Payments Program. The $156,000 threshold must be inserted in paragraph (b) of the FAR clause at 52.225–9.

* * * * *

(c) Acquisitions of eligible products without full and open competition (i.e., all otherwise responsible sources are not permitted to submit offers) shall be made under the authorities in FAR Subparts 6.2 or 6.3 and comply with the respective requirements of these FAR subparts for Determinations and Findings or approved justifications. When acquiring eligible products without full and open competition using the authorities in FAR 6.302–3(a)(2)(i) or 6.302–7, a copy of the approved justification shall be furnished to the Associate Administrator for Acquisition Policy for subsequent transmittal to the U.S. Trade Representative.

Editorial Note.—The forms listed in the summary are illustrated and made part of the regulation. However, the forms are not illustrated in the **Federal Register** or the Code of Federal Regulations. Individual copies may be obtained from any GSA contracting activity or the Director of the Office of GSA Acquisition Policy and Regulations, (VP), 18th and F Streets, NW, Washington, DC 20405.

Dated: February 8, 1988.

Richard H. Hopf III,

Deputy Associate Administrator for Acquisition Policy.

[FR Doc. 88–2993 Filed 2–11–88; 8:45 am]

BILLING CODE 6820–61–M

DEPARTMENT OF TRANSPORTATION

49 CFR Part 92

[OST Docket No. 45432; Notice No. 88–3]

Recovery of Debts to the United States by Salary Offset

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Final rule; request for comments.

SUMMARY: This rules sets forth procedures to enable the Department of Transportation (DOT) to offset a debt against the Federal pay of a current or former Federal employee who is indebted to the United States under a program administered by DOT. These regulations implement debt collection procedures authorized by the Debt Collection Act of 1982.

DATES: This rule is effective March 14, 1988. Comments must be received by April 12, 1988.

ADDRESS: Send comments to Docket Clerk, Docket No. 45432, Room 4107, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Comments are available for public examination at that address Monday through Friday, except Federal holidays, from 9:00 to 5:30 p.m. Commenters wishing the Department to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 45432." The postcard will be date/time stamped and returned to the commenter.

FOR FURTHER INFORMATION CONTACT: Paul B. Larsen, (202) 366–9161, Department of Transportation, Office of the General Counsel, 400 7th Street SW., Room 10102, Washington, DC 20590 or Rolf O. Wold, (202) 366–9874, Department of Transportation, Office of Financial Management, 400 7th Street SW., Room 9114, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Prior to the enactment of the Debt Collection Act of 1982, Pub. L. 97–365, 5 U.S.C. 5514 addressed only the deduction from the current pay account of an individual for collection of indebtedness arising as a result of an erroneous payment made by a Federal agency to or on behalf of an individual. Section 5 of the Debt Collection Act of 1982 amended 5 U.S.C. 5514 to permit Federal agencies to collect debts owed by current or former Federal employees to the United States through the use of a salary offset. Separate rules are being prepared for the more general collection of claims owed the United States under 31 U.S.C. 3711, 3716–18, 4 CFR Chapter II.

Under the Act, when the head of a Federal agency determines that one of the agency's current or former employees is indebted to the United States, or is notified by the head of another Federal agency that one of the agency's current or former employees is indebted to the United States, the employee's debt may be recovered by offsetting the debt against that employee's pay. The amount of the offset may not exceed 15 percent of the employee's disposable pay except that a greater percentage may be deducted with the written consent of the individual involved. Disposable pay is defined in the Act as gross Federal pay minus deductions required by law to be withheld. These deductions include amounts withheld for Federal, State, and

local income taxes, Social Security taxes, and Federal retirement programs. Whenever possible, subject to the limitations of the Act, deductions shall be sufficient in size to liquidate the debt in three years or less.

The Act also includes safeguards to protect the rights of employees. At least 30 days before an offset may be initiated, the head of the agency holding the debt must notify the debtor that he or she (1) is indebted to the United States indicating the nature and amount of the indebtedness, which the Government intends to collect through deductions from amounts payable, (2) may inspect and copy Government records relating to the debt, (3) may enter into an agreement with the head of the agency concerning a repayment schedule, and (4) may request a hearing contesting the existence or amount of the debt, or the proposed offset schedule where that schedule is not the result of a written agreement between the agency and the employee. In that notification the agency must also explain the employee's rights.

As required by 5 U.S.C. 5514(b) and in conformity with 5 CFR Part 550, Subpart K, DOT is promulgating regulations to implement the offset provisions of the Debt Collection Act of 1982 with regard to Federal employees who are indebted to the United States.

The procedures established here are designed to formalize a strong debt collection effort by DOT. Salary offset would be used as one tool to achieve the goal of effective and efficient debt collection, while providing appropriate safeguards for the due process rights of the individuals.

Regulatory Process Matters

This regulation is classified as a "non-major" regulation under Executive Order 12291. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures; the regulation is not significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted. This regulation does not require an environmental impact statement under the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) because it is not a major Federal action significantly affecting the quality of the human environment.

This rule is being promulgated as a final rule. The Department has not previously published a notice of proposed rulemaking on this matter. Under the Administrative Procedure Act, notice and an opportunity for public comment are not required with respect to rules of agency organization, practice or procedure (5 U.S.C. 553(b)(3)(A)). This is a procedural rule that falls within this exception to the notice and comment requirement.

In any case, the Administrative Procedure Act excepts rules from the notice and comment requirement where the agency finds for good cause that notice and public procedure are unnecessary, impracticable, or contrary to the public interest, 5 U.S.C. 555(b)(3)(B). The Department makes this finding in this case. The Department has been informed by the Treasury Department that there are several hundred claims against DOT employees which may be subject to collection by means of salary offset. Collection of these debts owed the United States would clearly be in the public interest. However, case law (*see American Bankers Association* v. *Bennett*, 618 F. Supp. 1528 (D.C.D.C., 1985)) (subsequently vacated for reasons not relevant to the point for which the case is cited, 802 F.2d 1478 (D.C. Cir., 1986)) suggests that the Department may lack authority to use Debt Collection Act offset procedures in the absence of a rule like this one. To resolve this legal uncertainty and ensure that the Department can begin to use the offset mechanism authorized by the statute, the Department needs to promulgate a final rule at this time.

The Department does, however, solicit public comment on the provisions of this rule. A 60-day comment period is being provided. The Department will review the comments, amend the rule if appropriate, and publish a notice indicating the Department's responses to the comments.

List of Subjects in 49 CFR Part 92

Administrative practice and procedure, Debt collection, Government employees.

For the reasons set forth in the preamble, the Department of Transportation adopts a new Part 92 to Title 49, Code of Federal Regulations, to read as follows:

PART 92—RECOVERING DEBTS TO THE UNITED STATES BY SALARY OFFSET

Sec.

Authority: 5 U.S.C. 5514, as amended; 5 CFR Part 550, Subpart K; 4 CFR Parts 101–105.

§ 92.1 Purpose.

This part implements 5 U.S.C. 5514 (Installment Deduction for Indebtedness to the United States), as amended by the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749, 1751). It supplements 5 CFR Part 550, Subpart K, and the Federal Claims Collections Standards (4 CFR Parts 101–105) issued jointly by the Comptroller General of the United States and the Attorney General of the United States under 31 U.S.C. 3711(e)(2). It sets forth the procedures by which the Department of Transportation (DOT), including its operating elements (see 49 CFR 1.3):

(a) Collects debts owed to the United States by current and former DOT employees;

(b) Determines and collects interest and other charges on that indebtedness.

(c) Offsets the salary of DOT employees to collect debts owed to the United States by those employees; and,

(d) Obtains salary offset to collect debts owed to the United States by employees of other agencies under programs administered by DOT.

§ 92.3 Scope.

The provisions of this Part are applicable to the indebtedness of a current or former employee of DOT incurred under any program administered by DOT. The provisions of this Part do not apply to the collection of indebtedness by authority other than 5 U.S.C. 5514.

§ 92.5 Definitions.

As used in this part:

(a) "Agency" means an Executive Agency as defined by Section 105 of Title 5, United States Code, the U.S. Postal Service, the U.S. Postal Rate Commission, a Military Department as

defined by section 102 of Title 5, United States Code, an agency or court in the judicial branch, an agency of the legislative branch, and any other independent establishments which are entities of the Federal Government. In DOT each operating element will act for the agency in collecting debts under this rule.

(b) "Creditor agency" means the agency to which the debt is owed.

(c) "Debt" means an amount owed to the United States from sources which include, but are not necessarily limited to, erronerous payments made to employees, overpayments of benefits, salary or other allowances, loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, fines and forfeitures (except those arising under the Uniform Code of Military Justice) and all other similar sources. This term does not include a Government claim arising under the Internal Revenue Code of 1954 (26 U.S.C. 1–9602) as amended; the Social Security Act (42 U.S.C. 301–1397f); the tariff laws of the United States; or any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., emergency and travel advances under 5 U.S.C. 5522, 5705 or 5724 and employee training expenses under 5 U.S.C. 4108).

(d) "Debt Claim Form" means the form used by DOT when requesting that an agency, other than DOT, assist in the recovery of funds.

(e) "Delinquent debt" means a debt which has not been paid by the date specified in the agency's initial written notification or applicable contractual agreement, unless other satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy obligations under a payment agreement with the creditor agency.

(f) "Disposable pay" means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. (See 5 CFR 581.105 (b) through (f) for items required by law to be withheld, and therefore excluded from disposable pay for the purposes of this regulation).

(g) "DOT operating element" (see 49 CFR 1.3) means a DOT Operating Administration including—

(1) U.S. Coast Guard.

(2) Federal Aviation Administration.

(3) Federal Highway Administration.

(4) Federal Railroad Administration.

(5) National Highway Traffic Safety Administration.

(6) Urban Mass Transportation Administration.

(7) St. Lawrence Seaway Development Corporation.

(8) Maritime Administration.

(9) Research and Special Program Administration.

(10) The Office of the Secretary.

(h) "Employee" means a current or former employee of a Federal agency, including a member of the Armed Forces (including retired members) or a Reserve of the Armed Forces (Reserves). However, employees paid from non-appropriated funds are not included.

(i) "FCCS" means the Federal Claims Collection Standards, 4 CFR Ch. II, jointly published by the Department of Justice and the General Accounting Office.

(j) "Hearing" means an informal conference before a hearing official in which the employee and the DOT operating element are given an opportunity to present evidence, witnesses, and argument. The hearing official shall be either an administrative law judge or an individual not under the supervision or control of the Department.

(k) "Paying agency" means the agency authorizing the payment of the employee's current pay.

(l) "Salary offset" means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of a present or former employee with or without his or her consent. It includes a single offset from the final salary of an employee whose employment ends.

(m) "Waiver" means the cancellation, remission, forgiveness or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 5 U.S.C. 8346(b), 10 U.S.C. 2774, or 32 U.S.C. 716, or any other law.

§ 92.7 Notice, hearing, written response and decision.

(a) Except as provided in § 92.9 of this part, each employee from whom the department proposes to offset a debt against the Federal pay of an employee who is indebted to the United States under a program administrated by DOT under these regulations is entitled to receive a minimum of 30 days written notice as described in § 92.11 of this part (see also § 92.21(a)).

(b) Each employee owing a debt to the United States which will be collected by salary offset is entitled to petition for a hearing before collection starts. This petition shall be filed directly with the accounting or finance office of the DOT creditor operating element which shall make appropriate hearing arrangements consistent with law and regulations. The DOT creditor operating element shall provide an explanation of the rights of the employee. If a hearing is provided, the following issues shall be heard:

(1) The determination of the DOT creditor operating element concerning the existence and amount of the debt; and

(2) The terms of the repayment schedule, if not previously established by written agreement between the employee and the DOT creditor operating element. (See § 92.21(c) regarding copy of written decision by hearing officer describing method and amount of salary offset).

§ 92.9 Exceptions to notice, hearing, written response, and final decision.

(a) *Exceptions.* The procedural requirements of 5 U.S.C. 5514 do not apply to recovery by way of retroactive deductions of amounts which are not considered debts, such as inadequacies in deductions resulting from normal processing delays in implementing increases in deduction for Federal benefits programs, or other administrative adjustments in pay rates or allowances subject to normal processing delays. In such cases the content of the notification to employees is stated in § 92.9(b).

(b) *Simplified procedures to be followed.* In the event that a retroactive deduction from pay or allowances is required to recover an insufficiency of deductions arising through normal processing delays, and those insufficient deductions did not occur in more than four pay periods, rather than following the specific procedures required by 5 U.S.C. 5514(a)(2), and set forth in § 92.11 through § 92.17 of this part, the DOT creditor operating element shall issue in advance of the collection a simplified notice to the employee that:

(1) Because of the employee's election for changes in voluntary payroll deduction, corresponding deductions shall be imposed on the employee's salary to cover the period between the effective date of the election and the first regular withholding. The employee may dispute the amount of the retroactive collection by notifying his or her accounting or finance officer; or

(2) Due to a normal ministerial adjustment in pay or allowances which could not be placed into effect immediately, future pay will be reduced to permit the DOT creditor operating element to recover any excess pay or

allowances received by the employee. The employee may dispute the amount of the retroactive collection by notifying his or her accounting or finance officer.

(c) *Limitation on exceptions.* The exceptions described in paragraph (a) of this section shall not include a recovery required to be made for any reason other than routine processing delays in putting the change into effect, even if the period of time for which the amounts must be retroactively recovered is less than four pay periods. If normal processing delays exceed four pay periods, then the full procedures prescribed under 5 U.S.C. 5514 and §§ 92.11 through 92.17 of this part will be extended to the employee.

§ 92.11 Demand for payment.

(a) The DOT creditor operating element shall send a debtor a total of three progressively stronger written demands at not more than 30-day intervals, unless a response to the first or second demand indicates that a further demand would be futile and the debtor's response does not require rebuttal (see also § 92.21(a)). Other information may also indicate that additional written demands are unnecessary.

(b) The initial written demand for payment shall inform the debtor of:

(1) The basis for the indebtedness;

(2) The amount of the claim;

(3) The date by which payment is to be made;

(4) The debtor's liability for interest, penalties and administrative charges in accordance with 31 U.S.C. 3717 and § 92.35 of this part, if payment is not received within 30 days of the due date (see § 92.35 for details regarding interest, penalties and administrative costs);

(5) The intent of the agency to collect by salary offset, including asking the assistance of other Federal agencies to help in the offset whenever possible, if the debtor:

(i) Has not made payment by the payment due date;

(ii) Has not requested a review of the claim within the agency as set out in paragraph (b)(8) of this section; or

(iii) Has not made an arrangement for payment by the payment due date;

(6) The possible submission of claims to a collection agency or referral to the General Accounting Office or the Department of Justice for litigation in accordance with the procedures in 4 CFR Part 105.

(7) The right of the debtor to inspect and copy the records of the agency related to the claim. Any reasonable costs associated with the inspection and copying of these records shall be borne by the debtor. The debtor shall give reasonable notice in advance to the agency of the date upon which he or she intends to inspect and copy the records involved.

(8) The right of the debtor to a review of the claim within the agency. If the claim is disputed in full or in part, the debtor shall respond to the demand by making a request in writing for a review of the claim within the agency by the payment due date stated in the demand. The debtor's written response shall state the basis for the dispute. If only part of the claim is disputed, the undisputed portion shall be paid by the due date. The DOT creditor operating element shall acknowledge receipt of the request for a review, and upon completion of consideration shall notify the debtor whether its determination has been sustained, amended, or canceled within 15 days of the receipt of the request for a review. If the DOT operating element either sustains or amends its determination, it shall notify the debtor of its intent to collect by salary offset unless payment is received within 15 days of the mailing of the notification of its decision following a review of the claim.

(9) The right of the debtor to offer to make a written agreement to repay the amount of the claim (see § 92.23). The acceptance of such an agreement is discretionary with the agency. If the debtor requests a repayment arrangement because a payment of the amount due would create a financial hardship, the DOT creditor operating element will analyze the debtor's financial condition. Depending on its evaluation of the financial strength of the debtor, the DOT operating element may agree to a written installment repayment schedule with the debtor. The debtor shall execute a confession of judgment note which specifies all of the terms of the arrangement. The size and frequency of installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. Interest, penalties and administrative charges shall be provided in the note (see § 92.35). The debtor shall be provided with a written explanation of the consequences of signing a confession of judgment note. The debtor shall sign a statement acknowledging receipt of the written explanation which shall recite that the statement was read and understood before execution of the note and that the note is being signed knowingly and voluntarily. Some form of evidence of these facts shall be maintained in the agency's file on the debtor.

(10) The right to an oral hearing or a hearing based on written submissions conducted by an administrative law judge or by a hearing official not under the control of the head of the Department in accordance with § 92.13 of this part.

(11) The consequences of any knowingly false statements, representations, or evidence provided by the employee, which may include:

(i) Disciplinary procedures under 5 U.S.C. Chapter 75, 5 CFR Part 752, or any other applicable statutes or regulations;

(ii) Criminal penalties under 18 U.S.C. 286, 287, 1001 and 1002, or any other applicable statute; or,

(iii) Penalties under the False Claims Act, 31 U.S.C. 3729, *et seq.*, or any other applicable statute.

(12) Proceedings under any other statutory authority for the collection of claims of the DOT operating element.

(13) The fact that amounts paid on or deducted from the debt which are later waived or found not owed to the United States will be promptly refunded to the employee unless there are applicable contractual or statutory provisions to the contrary.

(14) The name, address, and telephone number of the accounting or finance officer who may be contacted if the employee wishes to review the records or to obtain information.

§ 92.13 Request for hearing.

(a) The employee shall be advised in the notification that a hearing may be requested by filing a written petition within 15 calendar days of receipt of the notification, addressed to the chief of the paying agency's accounting or finance office.

(b) The petition shall state the grounds upon which the employee disputes the proposed collection of the alleged debt. The petition shall identify and explain with reasonable specificity the facts, evidence which, and witnesses who the employee believes support his or her position.

(c) The timely filing of a petition for hearing shall stay any further collection proceedings. A decision by the administrative law judge or other hearing official (see § 92.5(j)) will be issued at the earliest practical date, but no later than 60 days after the filing of a petition for hearing, unless a delay is granted at the request of the employee.

§ 92.15 Request for hearing after time expires.

The Department may accept late requests for a hearing if the employee can show that delay in requesting a hearing beyond the period provided in the notice described in § 92.11 of this part was caused by circumstances

beyond his or her control or because of failure to receive notice of the time limit (unless he or she was otherwise aware of it) or because of new information.

§ 92.17 Form of hearings and written decisions.

(a) Hearings shall consist of informal conferences before an administrative law judge or other hearing official (see § 92.5(j)) in which the employee and the DOT creditor operating element are given full opportunity to present evidence, witnesses, and argument. The DOT operating element will maintain a summary record of a hearing provided under these procedures.

(b) Written decisions provided after a request for hearing shall, at a minimum, summarize the evidence alleged to substantiate the nature and origin of the alleged debt; the administrative law judge's or other hearing official's analysis, findings and conclusions; the amount and validity of the alleged debt; and, where applicable, the repayment schedule.

(c) A copy of the administrative law judge's or other hearing official's final decision shall be provided to the employee as well as the chief of the office authorized to collect debts by deduction from salary.

(d) The decision of the administrative law judge or other hearing official shall be final and binding on the parties.

§ 92.19 Obtaining the services of a hearing official.

(a) Where a DOT operating element is the creditor agency, the chief of the appropriate accounting or finance office shall schedule a hearing before an administrative law judge or other hearing official.

(b) If another (non-DOT) agency is the creditor agency, then it is the responsibility of that agency to arrange for a hearing if one is requested.

(c) Agents for the paying agency are designated in Appendix A to 5 CFR Part 581. (This appendix lists the agents designated to accept legal process for the executive branch, the U.S. Postal Service, the Postal Rate Commission, the District of Columbia, American Samoa, Guam, the Virgin Islands, and the Smithsonian Institution.

§ 92.21 Deduction from pay.

(a) After other, less severe collection actions have failed, the DOT operating element (see § 92.5(g)) may implement steps to obtain collection by salary offset. The method and the amount of the salary offset shall be the method and amount stated in the creditor agency's demand letter (see § 92.11) or notice (see § 92.7), or, if applicable, in the decision of an administrative law judge or other hearing official after an employee-requested hearing on the matter. If a DOT operating element is the creditor, the procedures stated in § 92.11 shall be followed.

(b) Before a collection by salary offset may be made, the chief of the accounting or finance office of the paying DOT operating element shall be furnished with certified documentation by the creditor agency indicating that the creditor agency has sent the employee a demand letter pursuant to § 92.11 of this part stating as a minimum:

(1) The nature and amount of the indebtedness and the intention of the agency to initiate, at the expiration of thirty days, a proceeding to collect the debt by salary offset; and an explanation of the rights of the employee under this subsection;

(2) That the employee has the opportunity to inspect and copy Government records relating to the debt;

(3) That the employee has an opportunity to enter into a written agreement with the agency to establish a schedule for the repayment of the debt;

(4) That the employee has an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement as described in paragraph (b)(3) of this section concerning the terms of the repayment schedule; and

(5) That the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM (see 5 CFR 550.1108(a)).

(c) Where a hearing has been held, a copy of the decision of the administrative law judge or other hearing official must be furnished to the chief of the accounting or finance office of the paying DOT operating element before collection of the indebtedness by salary offset may be initiated. The method and amount of the offset will be as stated in the decision.

§ 92.23 Collection.

(a) A debt shall be collected in a lump sum or by installment deductions at officially established pay intervals from an employee's current pay account, unless the employee and the DOT operating element agree to alternative arrangements for payment (see § 92.11(b)(9) describing such voluntary repayment arrangements). The alternative arrangement shall be in writing, signed by both the employee and the chief of the appropriate accounting or finance office, and shall be documented in the DOT operating element's files.

(b) Under 31 U.S.C. 3716 and 4 CFR 102.3(b)(3), agencies may not initiate offset to collect a debt more than 10 years after the Government's right to collect the debt accrued, unless facts material to the Government's rights to collect the debt were not known by the DOT operating element's official or officials charged with the responsibility to discover and collect the debt.

§ 92.25 Source of deductions.

Except as provided in § 92.31 and § 92.33 of this part (with respect to separated employees), the paying DOT operating element will make deductions only from disposable pay (see § 92.5(f).

§ 92.27 Duration of deductions.

Debts shall be collected in one lump sum where possible. However, if the employee is financially unable to pay in one lump sum or the amount of the debt exceeds 15 percent of disposable pay payable in one pay period, collection will be made in installments. Such installment deductions will be made over a period not greater than the anticipated period of employment or active duty, as the case may be, except as provided in § 92.29, § 92.31, and § 92.33 of this part.

§ 92.29 Limitation on amount of deductions.

The size and frequency of installment deductions shall bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period may not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

§ 92.31 Liquidation from final payment.

If the employee retires, resigns his or her employment, is terminated, or the employment or period of active duty ends before collection of the debt is completed, there shall be an offset from subsequent payments of any nature (e.g., final salary, lump sum leave, etc.) due the employee from the DOT operating element on the date of separation to the extent necessary to liquidate the debt.

§ 92.33 Recovery from other payments due a separated employee.

If the debt cannot be liquidated by offset from any final payment due the employee as of the date of separation, the DOT operating element shall liquidate the debt by administrative offset pursuant to 31 U.S.C. 3716 from later payments of any kind due the

former employee from the United States, where appropriate (see § 92.41(b)(2)(ii)).

§ 92.35 Interest, penalties and administrative costs.

(a) Where a DOT creditor operating element (see § 92.5(g)) is the creditor, it shall charge interest on an outstanding debt at the rate published by the Secretary of the Treasury in accordance with 31 U.S.C. 3717. The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the **Federal Register** and the Treasury Financial Manual Bulletins annually or quarterly, in accordance with 31 U.S.C. 3717. The DOT creditor operating element shall charge a penalty of six percent a year, in addition to interest, on any portion of a debt that is more than 90 days past due. It shall assess administrative charges to cover additional costs incurred in processing and handling the debt beyond the payment due date. The imposition of interest, penalties and administrative charges is made in accordance with 31 U.S.C. 3717 and 4 CFR 102.13.

(b) Interest on debt shall begin to accrue on the date on which the debtor is first sent or delivered notice of the debt and of the interest requirements or, in the case of advance billings, on the calendar date following the specified due date of the debt provided the advance billing gives notice of the interest requirements for late payment. Interest on the debt shall continue to accrue until payment is received. Interest shall be calculated only on the principal of the debt (simple interest). The rate of interest charged shall be the rate in effect on the date from which interest begins to accrue, and shall remain fixed for the duration of the indebtedness.

(c) A DOT creditor operating element shall waive the monthly interest on debt that is paid within 30 calendar days after the date on which interest began to accrue.

(d) A DOT creditor operating element may waive interest, penalties and/or administrative charges if it finds that:

(1) The debtor is unable to pay any significant sum toward the claim within a reasonable period of time;

(2) Collection of interest, penalties or administrative charges will jeopardize collection of the principal of the debt; or

(3) It is otherwise in the best interests of the United States, including the situation where an offset or installment payment agreement is in effect.

§ 92.37 Non-waiver of rights by payment.

An employee's payment or agreement to pay, whether voluntary or involuntary, of all or any portion of an alleged debt being collected pursuant to these procedures shall not be construed as a waiver of any rights which the employee may have under this Part to the extent of such payment or agreement.

§ 92.39 Refunds.

(a) Amounts paid or deducted from the account of a current or former employee of the United States Government, pursuant to this part, for a debt which is found not owing to the United States shall be promptly refunded to the employee.

(b) Amounts which are waived shall, after proper application, be promptly returned after approval of the application.

§ 92.41 Requesting recovery when the Department is not the paying agency.

(a) *Format of the request for recovery.* (1) Where the DOT operating element is the creditor agency and another agency is the paying agency, the chief of the accounting of finance office of the appropriate DOT operating element (see § 92.5(g)) shall complete and certify the "Debt Claim Form" (see Attachment 1), and attach a copy of the demand letter sent to the employee pursuant to § 92.11 with a statement of the employee's response thereto, or, if a hearing was held pursuant to § 92.13, attach a copy of the decision of the administrative law judge or other hearing official. The DOT creditor operating element shall certify that the employee owes the debt, the amount and basis of the debt, the date on which payment is due, the date the Government's right to collect the debt accrued, and that the Departmental regulations implementing 5 U.S.C. 5514 have been approved by the Office of Personnel Management.

(2) If the collection is to be made in voluntary or involuntary installments (see Attachment 1), the DOT creditor operating element shall also advise the paying agency of the amount of the installments and, if a date for the beginning of payments other than the next officially established pay period is required, the date of the first installment.

(3) Unless the employee has voluntarily agreed to the salary offset in writing or, in the absence of such agreement, has signed a statement acknowledging receipt of the procedures required by 5 U.S.C. 5514(a)(2) and the writing or statement is attached to the debt claim form, the DOT creditor operating element shall also indicate the action(s) taken under 5 U.S.C. 5514 and give the date(s) the action(s) were taken.

(b) *Submitting the request for recovery*—(1) *Current employees.* The DOT creditor operating element shall submit the "Debt Claim Form" (Attachment 1) to the employee's paying agency.

(2) *Employees who are separating or have separated*—(i) *Employees who are in the processs of separating.* If the employee is in the process of separating, the DOT creditor operating element shall submit its debt claim (Attachment 1) to the employee's paying agency for collection as provided in § 92.31 of this part. The paying agency is required to certify the total amount of its collection made or to be made prior to separation and notify the DOT creditor operating element and the employee as provided in § 92.41 (b)(2)(iii). If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it shall advise the DOT operating element and send a copy of the debt claim and certification to the agency responsible for making such payments as notice that a debt is outstanding.

(ii) *Employees who have already separated.* If the employee has already separated and all payments due from his or her former paying agency have been paid, the DOT operating element may request, unless otherwise prohibited for example by court order, that monies which are due and payable to the employee from the Civil Service Retirement and Disability Fund (5 CFR 831.1801 et seq.) or other similar funds, be administratively offset in order to collect the debt (see 31 U.S.C. 3716 and the FCCS).

(iii) *Employees who transfer from one paying agency to another.* If, after the DOT creditor operating element has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates shall certify the total amount of the collection made on the debt. One copy of the certification shall be furnished to the employee and another to the DOT operating element along with notice of the employee's transfer. The original of the debt claim form shall be inserted in the employee's official personnel folder along with a copy of the certification of the amount which has been collected. Upon receiving the official personnel folder, the new paying agency shall, in accordnce with the DOT operating element's properly certified claim,

resume the collection from the employee's current pay account and notify the employee and the DOT creditor operating element of the resumption. The DOT operating element is not required to repeat the required collection procedures from the beginning in order to resume the collection. However, it shall be the responsibility of the DOT creditor operating element to review the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

§ 92.43 Requests for recovery when the Department is the paying agency.

(a) *Incomplete request for recovery.* If the request for recovery received by the chief of the accounting or finance office of the appropriate DOT operating element is incomplete in any respect (see § 92.21(b)) including, but not limited to, the failure to certify in writing that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the creditor agency's right to collect the debt first accrued, and that the creditor agency's regulations implementing 5 U.S.C. 5514 were approved by OPM, the request shall be returned to the creditor agency with a statement of the deficiency. No action to implement salary offset may be initiated until a complete request has been received.

(b) *Complete request for recovery.* If a complete request for recovery is received by the chief of the accounting or finance office of the appropriate DOT operating element, a copy of the request and any supporting documentation shall be transmitted to the appropriate payroll office, and deductions shall be scheduled to begin at the next officially established pay interval. A copy of the request and any supporting documentation shall be provided to the debtor, along with a notice of the date deductions will begin.

(c) The DOT operating element may not review the merits of the creditor agency's determination with respect to the amount or validity of the debt as stated in the request for recovery.

§ 92.45 Other debt collections.

Separate rules exist for general collection of debts owed the United States under 31 U.S.C. 3711, 3716–18; 4 CFR Ch. II.

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Attachment 1

DEBT CLAIM FORM

1. Paying agency identification	2. Employee identification
a. Name	a. Name
b. Address	b. Address
	c. DOB d. SSN

To liquidate a debt to the United States, the named creditor agency asks that the debt be collected as shown from the current pay of the employee identified above. Notices and inquiries concerning the debt should be sent to the address shown below.

3. Debt information

a. Reason for debt:			
b. Date right to collect accrued	c. Debt identification number, if any		
d. Original debt: amount $	e. Number of installments	@	Amount $
f. Interest due (if none, show N/A $			$
g. Penalty due (if none, show N/A $			$
h. Administrative cost (if none, show N/A $			$
i. Total collection to be made $	j. Commence deductions on (date)		

4. Due process: __/__/__ date actions taken: or attach __/__/__ acknowledgement __/__/__ consent

Creditor agency 30-day salary offset notice		Hearing held	
Employee did not respond (consent assumed)		Decision for creditor agency	
Employee requested a hearing		Other -	

I certify the following: (1) the debt identified above is properly due the United States from the named employee in the amount shown; (2) this agency's regulations implementing 5 U.S.C. 5514 have been approved by the Office of Personnel Management, and (3) the information concerning this agency's and the employee's actions is correct as stated.

5. Creditor agency information

a. Name	b. Appropriation/fund (title/symbol #)
c. Address	d. Disbursing officer (name/symbol #)
e. Signature of certifying official	f. Date
g. Title	h. Telephone number

BILLING CODE 4910-62-C

Issued at Washington DC, this 11th day of January, 1988.

Jim Burnley,

Secretary of Transportation.

[FR Doc. 88-2843 Filed 2-11-88; 8:45 am]

BILLING CODE 4910-62-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 675

[Docket No. 71147-8002]

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of closure.

SUMMARY: NOAA announces the closure of the Bering Sea subarea joint venture processing (JVP) directed fishery on pollock under provisions of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). The intent of this action is to assure optimum use of groundfish and promote the orderly conduct of the groundfish fisheries. This closure is effective from 2400 G.m.t. February 9, 1988 to April 16, 1988.

DATES: This closure is effective from 2400 G.m.t. February 9, 1988 to April 16, 1988. Comments will be accepted through February 24, 1988.

ADDRESS: Comments should be mailed to Robert W. McVey, Director, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK. 99802, or be delivered to Room 453, Federal Building, 709 West Ninth Street, Juneau, Alaska.

FOR FURTHER INFORMATION CONTACT: Janet E. Smoker (Resource Management Specialist, NMFS), 907-586-7230.

SUPPLEMENTARY INFORMATION: The FMP governs the groundfish fishery in the exclusive economic zone under the Magnuson Fishery Conservation and Management Act. The FMP was developed by the North Pacific Fishery Management Council (Council) and is implemented by rules appearing at 50 CFR 611.93 and Part 675. Amendment 11 to the FMP established a split season apportionment of pollock for JVP. Under this rule, the JVP amount of pollock is divided into two parts, Part One equal to 40 percent of the sum of the initial JVP for pollock plus 15 percent of the TAC for pollock. Part One is made available to the JVP fishery for pollock during the period January 15 through April 15.

The Bering Sea subarea Part One JVP pollock apportionment in 1988 is 274,335 mt (50 CFR 894, January 14, 1988). Up to ninety U.S. catcher boats have delivered pollock to about seventy foreign processors each day since the January 15 opening, with total daily catches as high as 11,000 mt. NMFS estimates the pollock catch through February 6 to be 228,806 mt.

Notice of Closure Directed Fishing

Under 50 CFR 675.20(b)(3)(i) as described in the final rule of Amendment 11 to the FMP (52 FR 45966, December 3, 1987), when the Regional Director determines that the unharvested amount of Part One is necessary for bycatch in JVP fisheries for other groundfish fisheries during the first period, the Secretary will publish a notice in the **Federal Register** prohibiting directed JVP fishing for pollock for the remainder of the first period. Directed fishing is defined in § 675.2.

The Regional Director estimates that the JVP tonnage of groundfish target species other than pollock (Pacific cod, yellowfin sole, and flatfish) taken during the nine weeks prior to April 16 will require a bycatch amount without exceeding the 274,335 mt Part One quota, directed fishing for pollock by U.S. fishermen delivering catches to foreign processing vessels must cease in the Bering Sea subarea effective 1500, Alaska Standard Time (A.S.T.) February 9, 1988. Subject to further notices, U.S. fishermen delivering catches to foreign processing vessels may resume directed fishing for pollock in the Bering Sea subarea at 0800, A.S.T., April 16, 1988.

Classification

This action is taken under the authority of 50 CFR 675.20(b) and complies with Executive Order 12291.

The Assistant Administrator for Fisheries finds for good cause that it is impractical and contrary to the public interest to provide prior notice and comment. Immediate effectiveness of this notice is necessary to prevent the Part One JVP quota for the Bering Sea subarea from being prematurely exceeded. However, interested persons are invited to submit comments in writing to the address above for 15 days after the effective date of this notice.

List of Subjects in 50 CFR Part 675

Fish, Fisheries, Reporting and recordkeeping requirements.

(16 U.S.C. 1801 *et seq.*)

Dated: February 9, 1988.

Richard H. Schaefer,

Acting Director, Office of Fisheries Conservation and Management, National Marine Fisheries Services.

[FR Doc. 88-3049 Filed 2-9-88; 3:18 pm]

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