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Jonathan G. Katz,

Secretary.

July 27, 1988.

[FR Doc. 88-17383 Filed 7-29-88; 8:47 am]

BILLING CODE 8010-01-M

Corrections

Federal Register

Vol. 53, No. 148

Tuesday, August 2, 1988

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

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[OPTS-62053A; FLR 3369-2]

Polychlorinated Biphenyls; Exclusions, Exemptions and Use Authorizations

Correction

In rule document 88-14291 beginning on page 24206 in the issue of Monday,

June 27, 1988, make the following correction:

On page 24212, in the third column, in the second complete paragraph, in the 17th line, after "(A)," insert "(B)."

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO-0030-08-4332-09]

Proposed Change in Wilderness Suitability Recommendation; Colorado

Correction

In notice document 88-16264 appearing on page 27403 in the issue of Wednesday, July 20, 1988, make the following correction:

In the second column, under **DATE:**, in

the second line, "August 9, 1988" should read "August 19, 1988".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV-930-08-4212-22]

Filing of Plats of Survey; Nevada

Correction

In notice document 88-15774 beginning on page 26680 in the issue of Thursday, July 14, 1988, make the following corrections:

On page 26681, in the third column, under T. 12 N., R. 68 E., in Sec. 15, "SE $\frac{1}{4}$ S $\frac{1}{4}$ " should read "SE $\frac{1}{4}$ SE $\frac{1}{4}$ ". Also, in Sec. 23, in the second line, "W $\frac{1}{2}$ NE $\frac{1}{4}$ " should read "W $\frac{1}{2}$ NW $\frac{1}{4}$ ".

BILLING CODE 1505-01-D

Crane or Derrick Suspended Personnel Platforms; Final Rule

Tuesday
August 2, 1988

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926 Crane or Derrick Suspended Personnel Platforms; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. S-409]

Crane or Derrick Suspended Personnel Platforms

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

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) hereby amends its Construction Standards for Cranes and Derricks, 29 CFR 1926.550, by adding a new paragraph (g) to prohibit the use of cranes or derricks to hoist personnel except in the situation where no safe alternative is possible, and as long as the requirements for such hoisting set out in paragraph (g) are satisfied. OSHA initiated this rulemaking action to establish clearly the conditions under which employees on personnel platforms may be hoisted by cranes or derricks, and to insure that this information is readily available to employers. The intended effect of this regulation is to increase safety for workers.

EFFECTIVE DATE: October 3, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Occupational Safety and Health Administration, Office of Information and Consumer Affairs, Room N-3637, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, Telephone: (202) 523-8148.

SUPPLEMENTARY INFORMATION:**I. Background**

Congress amended the Contract Work Hours Standards Act (40 U.S.C. 327 *et seq.*) in 1969 by adding a new section 107 (40 U.S.C. 333) to provide employees in the construction industry with a safer work environment and to reduce the frequency and severity of construction accidents and injuries. The amendment, commonly known as the Construction Safety Act (CSA), significantly strengthened employee protection by providing occupational safety and health standards for employees of the building trades and construction industry in Federal and federally financed or federally assisted construction projects.

The Occupational Safety and Health Act of 1970 (29 U.S.C. 650 *et seq.*), expanded coverage to virtually all employments, and authorized the Secretary of Labor to adopt established

Federal standards issued under other statutes, including the CSA, as occupational safety and health standards. Accordingly, the Secretary adopted the construction standards issued under the CSA as OSHA standards on May 29, 1971 (36 FR 10466) and redesignated these rules as 29 CFR Part 1926 on December 30, 1971 (36 FR 25232). The standard entitled "Cranes and Derricks," § 1926.550, was adopted as an OSHA standard in Subpart N of Part 1926 as part of this process.

Paragraph (b)(2) of § 1926.550 requires employers to ensure that their crawler, locomotive and truck crane operations meet the applicable requirements in the American National Standards Institute (ANSI) standard B30.5-1968, "Safety Code for Crawler, Locomotive and Truck Cranes." Section 5-3.2.3(e) of ANSI B30.5-1968 provides that "the operator shall hoist, lower, swing, or travel while anyone is on the load or hook." Section 5-3.2.1.4(r) of the most recent ANSI edition (1982) retains the ban on riding a bare hook or a load of material.

A similar requirement appears in section 6-3.3.3 of ANSI B30.6-1984, "Safety Code for Derricks," which requires that "the operator shall not hoist, lower, or swing while anyone is on the load or hook."

Ever since OSHA first adopted the CSA standards, the construction industry has expressed concern as to the application of the above-described provisions, particularly with regard to whether they should be interpreted to prohibit the hoisting of personnel platforms, sometimes also known as man baskets or man-skip boxes, by cranes and derricks. OSHA's approach to this question can best be understood by examining the chronology of this rulemaking.

In 1972, a group of Florida contractors requested that OSHA clarify the meaning of the § 1926.550(b)(2) ban on "riding the hook." OSHA responded that, where there were no other practical alternative means of transporting employees, no citations would be issued under § 1926.550(b)(2) provided that employers took specified measures to safeguard hoisted employees (Ex. 2-1).

In 1973, OSHA received an ANSI B30 Committee interpretation of ANSI B30.5, section 5-3.2.3(e). ANSI interpreted the section as referring to the hoisting of employees on the hook itself or on normal material loads, such as beams, girders or concrete buckets. The committee further stated its view that a specially designed scale box or other guarded platform for personnel that was attached to the crane hook was

permissible under controlled conditions (Ex. 2-2).

Also in 1973, the Boeing Corporation applied to OSHA for a variance from the application of § 1926.550(b)(2) to its personnel hoisting operations. OSHA determined that Boeing did not need a variance because Boeing's specially designed suspended work platform was not a "load." OSHA further stated that riding and working on these platforms while using a lifebelt-lifeline system did not constitute riding the hook (Ex. 2-3).

In December 1973, the Advisory Committee on Construction Safety and Health (ACCSH) appointed an informal subgroup to examine this issue, to evaluate the need for regulatory action, and to make recommendations to the full committee.

On July 30-31, 1974, the ACCSH subgroup held a public meeting in which interested parties were invited to participate (Ex. 2-4). The ACCSH subgroup reviewed the comments received, along with data developed by the subgroup, and prepared recommendations for consideration by the full committee. On October 30-31, 1974, the Advisory Committee voted to recommend that OSHA initiate rulemaking to regulate employee hoisting operations. (Ex. 2-5).

Since 1975, OSHA has issued four interpretations which provided guidelines for the use of crane suspended work platforms (Exs. 2-6, 2-7, 2-8 and 2-9). On October 8, 1981, the provisions of these guidelines were incorporated into OSHA Instruction STD 1-11.2A. (Ex. 2-10). That instruction, in turn, was replaced by OSHA Instruction STD 1-11.2B on August 8, 1983 (Ex. 2-11).

Despite the issuance of these guidelines, there have been persistent questions about the required equipment and procedures, and a rising toll of fatalities and injuries among hoisted employees. In particular, OSHA is concerned that those guidelines, since they are generally available only to compliance officers, are not known to employers who might be hoisting personnel. Therefore, employers might learn about the approved procedures only after an inspection or accident investigation has taken place.

OSHA determined that these administrative interpretations of § 1926.550(b) have not provided adequate guidance for employers or protection for workers. OSHA initiated this rulemaking action to establish clearly the conditions under which employees on personnel platforms may be hoisted by cranes or derricks, and to

insure that this information is readily available to employers.

Accordingly, OSHA developed a draft proposed rule, which incorporated the best available information on feasible equipment and work practices, language from an adopted but then unpublished revision of ANSI B30.5, and a draft ANSI A10.28 "Crane or Derrick Suspended Work Platforms," which had not yet been adopted by ANSI (Exs. 2-14 and 2-15). The draft OSHA proposal was discussed by ACCSH on May 23 and 24, 1983 (Ex. 2-12). The recommendations of ACCSH were substantially the same as those received by OSHA in 1974, and are discussed in the preamble in conjunction with the appropriate provisions. In addition to the ACCSH review, OSHA distributed drafts of the proposal to interested parties. The Agency received 30 comments, which diverged substantially regarding the limits to be placed on personnel hoisting. On October 31, 1983, ANSI formally issued its revised B30.5, in which section 5-3.2.2 provided guidelines for personnel hoisting.

On February 17, 1984, OSHA issued a notice of proposed rulemaking (NPR) (49 FR 6280). The Agency proposed adding a new paragraph (g), regulating the use of crane or derrick hoisted personnel platforms, to 29 CFR 1926.550, "Cranes and derricks." The NPR established a sixty day period, which ended April 17, 1984, for submission of written comments. The comments received raised a number of important issues and included a hearing request. As discussed below, commenters were particularly concerned with the proposed scope and application of the standard, equipment safety factors, anti-two-blocking precautions and testing requirements.

On June 20, 1984, OSHA announced that it would convene an informal public hearing on September 11, 1984, and extended the period for submitting testimony, documentary evidence and additional comments until August 10, 1984 (49 FR 25248). On July 26, 1984, the Agency rescheduled the hearings to begin on September 18, 1984 (49 FR 30077). The hearings were held on September 18-19, 1984, with Administrative Law Judge Leonard N. Lawrence presiding. At the close of the hearings, Judge Lawrence set a period, ending November 7, 1984, for the submission of additional comments and information. On January 25, 1985, Judge Lawrence certified the hearing transcript and related submissions, closing the record for this proceeding.

OSHA received 92 comments in response to its NPR and hearing notices. A wide range of employees, businesses, labor unions, trade associations, state

governments and other interested parties contributed to the development of this record. OSHA appreciates the efforts interested parties have made to help develop a rulemaking record which would provide a sound basis for the promulgation of a final rule.

Based on its review of the record, OSHA has determined that hoisting with crane or derrick suspended personnel platforms constitutes a significant hazard to hoisted employees, and that it will not be permitted unless conventional means of transporting employees are not feasible, or unless they present greater hazards. OSHA has determined that compliance with the provisions of this standard will provide the best available protection for hoisted personnel, in those limited situations where personnel hoisting is necessary.

Employees who are hoisted in crane or derrick suspended personnel platforms are exposed to several serious hazards, including being spilled from the platform or having the platform dropped while they are on board. These hazards, whether caused by mechanical failures or human errors, can result in fatalities and crippling injuries to the hoisted personnel. Those same hazards would simply cause inconvenience and monetary loss when construction materials are spilled or dropped.

As the accident reports presented below indicate, many things can go wrong in a personnel hoisting operation. For example, "two-blocking," one of the most serious and commonly experienced hazards, occurs when a crane operator who is adjusting the elevation of a platform or the length of the crane boom causes the load block on the load line to contact the boom tip, thereby severing the load line and dropping the platform to the ground. Employees can also be injured or killed when a crane tips due to inadequate stabilization; when they ride the hook or a material load attached to a hook; when employers improperly select, assemble and maintain their cranes, derricks and personnel platforms; when the position of the platform or its occupants shifts suddenly; and when the platform is overloaded. Overloading, in particular, results when a crane attempts to hoist a weight which exceeds either the stated capacity of the crane or the crane capacity as limited by worksite conditions.

OSHA determined, in the course of preparing the regulatory analysis for this rulemaking, that accidents resulting from the use of cranes or derricks to hoist personnel result in approximately 63 injuries annually. Of those injuries, approximately 15 are fatal, and at least seven result in total disability.

OSHA believes that the primary cause of non-compliance is the lack of clear regulatory language in Subpart N of 29 CFR Part 1926. In particular, existing § 1926.550(b)(2) provides no direct regulatory guidance. It simply incorporates ANSI B30.5-1968 by reference. Therefore, under the current regulations, employers are expected to obtain and read an ANSI document which, as stated above, has been superseded, and determine from it the procedures for personnel hoisting. In view of this situation, it is easy to see why, despite OSHA's adoption of the ANSI ban on riding the load, so many employees continue to ride the load and are killed or injured each year while doing so. Because of this problem of outdated ANSI Standards, OSHA has avoided the use of incorporation by reference whenever possible in recent years, and has attempted to include all relevant provisions within the regulatory text.

The text of the current directive, the proposed rule and the final rule are very similar. OSHA has found, however, that many employers are unaware of or simply do not follow the interpretations and guidelines in OSHA's directive on § 1926.550(b). Therefore, in order to protect employees who must be hoisted on personnel platforms, the Agency is promulgating this standard to eliminate any uncertainty about what is required. OSHA expects that employers will comply with the requirements of paragraph (g) of § 1926.550, and that compliance will prevent most of the fatalities and injuries which have been experienced under the existing standard. In addition, OSHA anticipates that compliance with this new standard will reduce the number of injuries and fatalities among employees who might otherwise be assigned to construct, use, and disassemble scaffolds, or other "conventional" means of access, in workplace situations which would expose these employees to greater hazards than would be involved with the use of crane or derrick suspended platforms.

OSHA has determined, through its regulatory impact analysis, that the number of employees exposed to the hazards of personnel hoisting is relatively small. However, the injuries which can result from accidents occurring during personnel hoisting are usually very severe. A review of some hoisting accidents illustrates the magnitude of the danger to which employees are exposed.

An accident in Cheyenne, Wyoming (1973) resulted in two deaths when a telescoping boom severed the load line.

Those deaths would have been averted if the employees in the platform had been wearing safety belts and lanyards attached to a lifeline secured to the boom tip, or if the crane had been equipped with a positive acting anti-two-blocking device. The operator, while experienced in operating cranes, was not familiar with the specific machine being used, nor with the hoisting operation during which the accident occurred. OSHA has found that even crane operators who are well acquainted with telescoping boom cranes have had problems when working with this equipment in new locations and in unfamiliar surroundings.

In Kansas City (1972), a structural framework carrying five men and a significant amount of material and equipment fell to the ground when an outrigger of the crane failed. The total weight was reported to be only half the rated capacity of the crane when boomed out to the work location, but the outrigger broke loose from its mounting and the boom collapsed before it reached the intended radius. Failures of this nature point out the need for exact knowledge of crane or derrick stability, and the need for careful inspection and testing of such machinery prior to its use for hoisting employees.

In Chicago (1981), five employees were killed and a sixth employee was seriously injured when a job-built personnel basket fell 100 feet. The employees were being hoisted by a mobile crane to a work station atop a tower crane being assembled on the site. The metal framework at the top of the cage, to which the hoisting rope was attached, separated, causing the platform and its occupants to fall. The implementation of the specific design criteria and inspection and testing requirements in the final rule should prevent such accidents caused by structural failure.

In Tampa, Florida (1983), four men on a personnel platform were killed in an accident at Tampa Stadium when they were being raised by a crane to a work station 135 feet above the ground at the top of the stadium. When the platform reached 130 feet, the boom of the crane fell and the men in the platform fell with it. The Agency believes the implementation of inspection and testing requirements should prevent these types of accidents.

OSHA has carefully developed and reviewed the record for this rulemaking to ensure that the standard, as promulgated, is based on substantial evidence. OSHA has determined, based on the record, that crane and derrick personnel hoisting poses significant

risks for affected employees, even when employers comply with the final rule, and, therefore, prohibits personnel hoisting except where there is no feasible safe alternative. The new provisions in paragraph (g) of § 1926.550 provide criteria for equipment and work practices that will enable those employers who have no safe alternative means of transporting employees to or supporting them at their workplace, to hoist personnel as safely as possible.

OSHA has determined that personnel hoisting operations for which there is no safe alternative and which comply with paragraph (g) will protect workers from the kind of accidents that resulted in most of the fatalities and crippling injuries which occurred under the existing crane and derrick regulations; from most of the fatalities and injuries which occurred when employees inappropriately used scaffolds or other "conventional" means of access; and from virtually all of the fatalities and injuries which have occurred when employees rode the hook or load. The Agency believes that although compliance with these regulations will lessen the potential for fatalities and serious injuries, it will not totally eliminate accidents related to the use of crane or derrick suspended personnel platforms. The Agency concludes that this type of operation is inherently dangerous and must only be used as a last resort. OSHA notes that three states (Maryland, Washington and California) with stringent personnel platform regulations were reported by JACA (Ex. 5-2, p. 4-13) as having had no personnel platform accidents for at least five years. While the Agency believes this sample is too small to represent or predict national experience, OSHA observes that the three state standards in question would tend to minimize accidents because of the tight limits on the circumstances where personnel platforms may be used.

II. Summary and Explanation of the Final Rule

OSHA requested comments on ten specific issues in the preamble of the proposed standard (49 FR 6282-6284). All these issues are addressed in conjunction with the appropriate provisions of this final rule.

Paragraph (g)(1) presents the scope and application of the final rule. OSHA identified this subject as a matter of special concern in Issue 1 in the preamble of the proposal. This paragraph has been revised extensively in order to simplify the language and clarify OSHA's regulatory intent. Several changes were made in response

to public comment or as clarifications, as discussed below.

As a matter of clarification, the Agency has revised this provision to indicate that paragraph (g) covers not only the hoisting of the personnel platform, but the design, construction, testing, use and maintenance of the personnel platform as well. OSHA recognizes that several paragraphs of this final rule do, indeed, regulate other matters related to personnel platforms and that this was not explicitly stated in the proposed rule. Additionally, OSHA has added a definitions section to paragraph (g)(1) which incorporates some of the definitions which were provided as "Notes" in the proposal. Other definitions in this paragraph are new and reflect changes in terminology which OSHA feels will most clearly express its regulatory intent. Finally, some notes which functioned as definitions in the proposed rule have been incorporated directly into the affected provisions. This reformatting reflects OSHA's recognition that the definition of terms used in the standard is more appropriately placed within the text of the regulation instead of in explanatory notes, and will provide clearer guidance to employers.

In its proposal, OSHA presented a list of cranes which it believed might be used for personnel hoisting. OSHA received many comments, like that of the Granite Construction Company (Ex. 3-50), which stated that the listing of particular machines in proposed paragraph (g)(1) was unnecessarily lengthy and machine-specific. Indeed, several commenters pointed out that, by being so specific, OSHA could create loopholes for specific cranes not listed. For example, the State of California (Ex. 3-33) asserted that OSHA's proposed language did not cover electric cranes, such as hammerhead-type tower cranes. In addition, Unit Crane & Shovel Corporation (Unit Crane) (Ex. 3-47) listed five cranes not mentioned in the proposed rule and recommended that the rule cover all cranes which could be used for personnel hoisting. Unit Crane also recommended that the proposed specification of "friction or hydraulic" be replaced by the word "all." The Associated General Contractors of America (AGC), in turn, testified (Tr. 164) that "Reference to specific types of equipment will result in overly broad coverage which * * * will regulate operations outside of those areas of concern. The AGC, therefore, recommends that the standard apply only to the hoisting of personnel platforms on the load line of cranes and derricks."

The list of cranes and derricks was intended to illustrate what types of equipment are covered, rather than to limit the scope of the standard. OSHA recognizes that the list gave a misleading impression of the intended scope and that the scope can be set forth without using a list. Therefore, based on the comments received, OSHA has revised paragraph (g)(1) to cover all cranes and derricks used to hoist personnel platforms.

OSHA received comments from Ingersoll-Rand Company (Ex. 3-18) which suggested that the use of derricks for hoisting personnel be prohibited. Ingersoll-Rand asserted that derrick hoisting was more likely than crane hoisting to result in accidents, even if derrick operators complied with the draft revision of ANSI B30.6-1982, because derricks are material handling devices which do not incorporate the safety devices needed for personnel hoisting. Furthermore, the commenter noted that derricks are usually designed and assembled at the jobsite, and that safe alternatives are available. On the other hand, the National Constructors Association and DuPont (Exs. 3-74 and 3-75) stated that derrick hoisting which complies with the existing derrick standards and with the requirements of this standard will not expose hoisted employees to an unreasonable risk, because derricks, though temporary structures, are more stable than mobile cranes and because derricks are available with the same safety devices which would be required for cranes.

OSHA has determined, upon review of the record, that derricks can comply with the provisions of this standard; that there are circumstances, such as during the painting of a water tower (Tr. 554), where there is no safe alternative to the use of a derrick to hoist personnel; and that derrick hoisting in compliance with this standard does not pose a greater danger than crane hoisting. Therefore, OSHA has retained derricks within the scope of paragraph (g), as proposed.

OSHA has deleted the second and third sentences of proposed paragraph (g)(1) because the Agency has determined that they do not deal with the scope and application, and because they add nothing to the requirements of the standard. These sentences merely pointed out that the requirements of this paragraph must be met before hoisting personnel, and that paragraph (g)(2) specifies when this practice is permitted.

The Magma Copper Company and National Constructors Association (Exs. 3-27 and 3-30) suggested that the definition of "hoisting," which appeared as a note to proposed paragraph (g)(1), be revised to cover explicitly booming

up or down; extending the boom; swinging; and positioning, so that the term would more fully cover the circumstances encountered during personnel hoisting.

OSHA's intent has been to establish a single term, "hoisting," which could be applied to all operations covered by paragraph (g). Therefore, OSHA has made the suggested change in order to state clearly the meaning of the term "hoisting."

Paragraph (g)(2) of this final rule sets forth OSHA's general policy regarding the use of cranes or derricks to hoist personnel platforms. In proposed paragraph (g)(2), OSHA "permitted" the use of cranes or derrick to hoist personnel when that use was "as safe as the erection, use or dismantling of conventional means of reaching the worksite * * *". OSHA has modified proposed paragraph (g)(2) so it clearly states OSHA's recognition that cranes and derricks are not manufactured for use as personnel hoists. In particular, paragraph (g)(2) of the final rule states that personnel hoisting is "prohibited," subject to exceptions based on necessity. The AGC (Ex. 3-28 and Tr. 164) and Granite Construction (Ex. 3-50), suggested that OSHA permit crane or derrick hoisting "where the use of other conventional means of reaching the worksite is more hazardous or is not practical because of structural design and worksite conditions." In addition, Johnson Brothers Corporation and Gulf Oil Corporation (Exs. 3-43 and 3-68) stated that OSHA should concern itself with ensuring that the appropriate equipment and procedures are used, rather than with limiting circumstances where cranes or derricks may be used for personnel hoisting. Furthermore, Organization Resource Counselors, Inc. (Ex. 3-89) commented that, given the "difficult, if not impossible, task of determining the safest way to perform work, employers will continue to base their decision to use personnel platforms on many considerations, not just safety." As stated above, OSHA has determined that, given the significant risk posed by personnel hoisting, concern for employee safety is the only justification for the practice. Therefore, the Agency will consider personnel hoisting conducted for reasons of practicality or convenience alone, to violate this standard. As discussed above, the experience of three states with stringent personnel platform standards indicates that setting such narrow limits on the circumstances under which personnel platforms may be used will minimize personnel platform accidents.

Several commenters, including the Frey & Egle Company and the United Steelworkers of America (Exs. 3-7 and 3-10) objected to the use of cranes or derricks for personnel hoisting under any circumstances. They stated that personnel hoisting is inherently dangerous and noted that cranes and derricks are not designed or manufactured for personnel hoisting. In addition, the Farm and Industrial Equipment Institute [FIEI] (Ex. 3-37) commented that using a boom-mounted bucket is always safer than using a suspended personnel platform. National Crane Services (Ex. 3-71), while disagreeing with the FIEI contention that boom-mounted baskets are always safer than crane-hoisted platforms, supported harrowly limiting personnel hoisting because cranes are not designed to hoist personnel and because crane hoisting requires more skill and process control than material hoisting.

OSHA recognizes the seriousness of these concerns. In addition, the Agency has received written comments (Ex. 3-7) and public hearing testimony (Tr. 58-163) from Frey & Egle which states that its product, the Crane Air Bridge (CAB), hoists personnel for all the purposes where employers might use cranes or derricks without exposing employees to the hazards associated with crane or derrick hoisting.

OSHA, however, is concerned that the CAB has not been extensively marketed or operated in the United States. OSHA also notes that there is inadequate information in the record to determine if the CAB could satisfactorily replace crane and derrick personnel hoisting equipment totally, now or in the future. Additionally, due to the lack of information, the Agency is unable to determine whether the CAB can be considered a conventional means of access under § 1926.556, Aerial Lifts, or under § 1926.451(f) Elevating and Rotating Work Platforms. That determination will depend upon compliance with ANSI A92.2-1969, Vehicle Mounted Elevating and Rotating Workplatforms, required by both §§ 1926.556 and 1926.451(f). Therefore, while the use of the CAB is arguably as safe as or safer than crane or derrick personnel hoisting, OSHA is going forward with the promulgation of this standard, pending a future determination as to whether or not the CAB can indeed provide safe and reliably available personnel positioning.

The final rule requires that employers take a hard look at their workplace situations before deciding how employees will be transported to or maintained at different elevations.

Where conventional means of access, such as scaffolds, ladders and, perhaps ultimately, CAB's are less hazardous, personnel hoisting by crane or derrick will be prohibited. Where conventional means of access would not be considered safer, personnel hoisting operations which comply with the terms of this standard would be authorized, only to the limited extent that the dangers of using conventional means would justify them or to the extent that it is not possible to transport or position employees using conventional means. OSHA stresses that employee safety, and not practicality or convenience, must be the basis for the employer's choice of method.

The Construction Industry Manufacturers Association (Ex. 3-31) stated that OSHA's use of the word "permitted" in proposed paragraph (g)(2) seemed to promote rather than limit the use of cranes or derricks to hoist personnel. As has already been discussed, OSHA is limiting, not promoting, crane or derrick personnel hoisting. Therefore, OSHA has revised the language of paragraph (g)(2) to reflect the Agency's policy more clearly.

Also, in paragraph (g)(2), OSHA has added "personnel hoist" to the list of conventional means used to reach a worksite. OSHA had intended only to provide examples of such means, not an exhaustive list. However, since a personnel hoist is a commonly used piece of conventional access equipment, OSHA decided that the addition was appropriate.

Paragraph (g)(3) presents the requirements for operating and equipping cranes or derricks used to hoist employees.

Paragraph (g)(3)(i) presents general operational criteria. OSHA received a number of comments regarding the provisions of this paragraph, and has revised it to reflect commenter input as discussed below.

In proposed paragraph (g)(3)(i)(A), OSHA required that hoisting speed not exceed 100 feet per minute. This proposed requirement was based on ANSI B30.5-1982 and recommendations from ACCSH in 1974 and 1983, and reflected the recognition that employee hoisting requires even greater caution and margin of safety than material hoisting. In particular, OSHA was concerned that hoisted personnel or their platforms could be tipped or dropped if hoist speed outstripped the operator's ability to maneuver safely. The Agency believes that those dangers would be especially great when a hoist operation is beginning or ending.

OSHA observed, in its discussion of the proposed provision and in Issue 5,

that there were questions regarding the feasibility of and need for a specific speed limit, and for a device to indicate the line speed to the operator. In light of these questions, OSHA did not propose to require that cranes used to hoist personnel be equipped with line speed indicators. The Agency noted that ACCSH in 1974 viewed line speed indicators as either infeasible or unnecessary. In addition, OSHA cited a draft revision of ANSI B30.5-1982, section 5-3.2.2(a)(13), (Ex. 2-14) under which the 100 foot per minute limit would have been changed to a requirement "that movement of the work platform with personnel shall be done in a slow, controlled, cautious manner with no sudden movements of the crane or work platform." (49 FR 6285). OSHA also noted that Grove Crane (Ex. 2-17) included a 100 foot per minute limit in the specifications for the use of its cranes to hoist personnel. As with ANSI and ACCSH, Grove did not suggest specific means by which operators could determine if they were operating within the 100 feet per minute limit.

OSHA received a number of comments on this proposed paragraph. The Tennessee Road Builders Association and the Commonwealth of Puerto Rico (Exs. 3-41 and 3-55) expressed support for the provision as proposed, with Puerto Rico suggesting that employers following the draft revision of ANSI B30.5 use 100 feet per minute as the upper limit of "slow," even if ANSI revised its standard to require "caution" instead of a set limit. On the other hand, Bechtel Corporation (Ex. 3-45) commented that the proposed limit was overly conservative because crane manufacturers' technical specifications for personnel hoisting showed speeds between 150 and 300 feet per minute, and because a requirement that the hoist speed be "reasonable for the conditions" would provide adequate protection. In addition, the Standard Oil Company (Indiana) (Ex. 3-46) emphasized that it is the rate of acceleration or deceleration, not the speed, itself, that was the primary safety concern. Also, the T.A. Loving Company (Ex. 3-82) and the AGC of America (Tr. 191-192) suggested that OSHA not require a line speed indicator because watching it would distract the operator from watching the platform and thus increase the risk of two-blocking.

Most of the comments received on this proposed provision, such as those from the State of California, the Boeing Company and the Panama Canal Commission (Exs. 3-33, 3-38 and 3-51) supported wording similar to that in the

draft revision of ANSI B30.5, section 5-3.2.2(a)(13).

ANSI retained the 100 foot per minute speed limit when it revised B30.5. OSHA has determined, however, based on its review of the record, that requiring "slow, cautious and controlled" hoisting will provide hoisted personnel with better protection than would a 100 foot per minute limit.

In the course of this rulemaking, OSHA has determined that line speed indicators capable of measuring a speed as slow as 100 feet per minute are not readily available for many cranes. Additionally, OSHA agrees with comments that the operator's attention should be directed to the platform during a lift, and not to a line speed indicator. Also, OSHA agrees with Standard Oil that line speed indicators are not needed on cranes or derrick hoisting personnel because the rate of acceleration or deceleration is more important than the line speed itself in determining the safety of hoisting operations. OSHA notes that the size of the crane or derrick hoist drum and the height of the lift are important considerations in determining what is "slow." For example, when using a crane with a large hoist drum for personnel lifts of several hundred feet, OSHA believes that hoisting at 100 feet per minute is unnecessarily slow. On the other hand, when using cranes with small hoist drums, a rate of 100 feet per minute or less may be necessary for proper control of the platform. As a point of reference, OSHA notes that 100 feet per minute is equivalent to a very slow walk. Site conditions also are important in deciding what rate is safe for a particular lift. Furthermore, a limit on the number of feet a platform can travel in a minute will not protect employees unless the crane or derrick operator otherwise exercises caution while hoisting. Finally, OSHA believes that requiring "slow, cautious and controlled" hoisting will ensure that the operator pays attention to the location of the platform during the lift, the rate of acceleration and deceleration, and the rate of ascent or descent. OSHA, therefore, agrees with the commenters who suggest that the Agency require "slow, cautious and controlled" hoisting as the appropriate means of protecting hoisted employees from sudden pitching of the crane or platform. Accordingly, OSHA is issuing paragraph (g)(3)(i)(A) as revised.

In Issue 5 of the proposed rule, OSHA also asked for comments and information on the need for load line position indicators. The commenters who responded to this Issue (Exs. 3-9, 3-

14, 3-22, 3-30, 3-33 and 3-47) generally stated that the position indicator would be an unnecessary burden because the requirement in proposed paragraph (g)(6)(viii) for continuous sight and communication would protect hoisted employees. The State of California (Ex. 3-33) also stated that specifications for use and maintenance raised concerns. OSHA has determined, based on the record, that the requirements for continuous sight and communication in paragraph (g)(6)(vi) of the final rule make a requirement for a loadline position indicator unnecessary.

Paragraph (g)(3)(i)(B) sets forth the safety factors for load hoist wire ropes on cranes or derricks used to hoist personnel. The proposed paragraph simply stated that the minimum hoist load safety factor would be seven. It became clear to OSHA from commenter responses that the proposal did not indicate clearly how the safety factor for hoisting personnel compared to the safety factor already required for materials hoisting in § 1926.550. The Agency also determined employers need additional information in the standard to determine if their operations comply with the standard. Therefore, the Agency has revised this paragraph to state clearly the required strength of wire rope used to hoist personnel.

OSHA has also added definitions for "failure," "load refusal," and "maximum intended load" in paragraph (g)(1)(ii) in order to state clearly the usage of those terms in the final rule. Additionally, OSHA has added an explanation of how employers are to comply with this requirement.

Section 1926.32(m) defines "safety factor" as "the ratio of the ultimate breaking strength of a member or piece of material or equipment to the actual work stress or safe load when in use."

Under existing OSHA regulations, § 1926.550 (b) and (e), which incorporate ANSI B30.5-1968 (cranes) and B30.6-1969 (derricks) by reference, wire ropes used to hoist material must have a minimum safety factor of 3.5. OSHA has determined, based in part on information from the ACCSH, and ANSI B30.5 Committee and the "Rigging Manual" published by the Construction Safety Association of Ontario, Canada, that a wire rope safety factor of 3.5, alone, is inadequate to protect hoisted personnel from hoisting risks such as the severing of the load line. The ACCSH recommended that the safety factor be eight, while a draft revision of ANSI B30.5, section 5-3.2.2.3(a)(5) recommended a safety factor of eight for rotation resistant rope, and five for other wire rope. The draft revision was not adopted by ANSI as a national

consensus standard. The Canadian "Rigging Manual" specifies 10 as the minimum wire rope safety factor for personnel hoisting.

OSHA did not propose any of the suggested safety factors in paragraph (g)(3)(i)(B). Instead, OSHA determined that the necessary employee protection could be achieved by keeping the existing 3.5 safety factor requirement and derating the capacity of a crane or derrick by 50 percent, which would effectively double the safety factor to seven. The proposed safety factor, seven, was intended as an adequate and easy to calculate upgrade in the protection provided by wire ropes used for personnel hoisting.

In Issue 4 of the proposal, OSHA discussed the above-mentioned safety factors and explained how the requirements of proposed paragraph (g)(3)(i)(B) and the 50 percent derating required in paragraph (g)(3)(i)(F) are intended to provide the safety factor of seven. OSHA also requested input regarding the adequacy of the proposed regulatory approach and regarding the need for a different safety factor for rotation resistant wire rope. The latter topic reflected OSHA's concern that while rotation resistant rope reduces platform swaying and spinning, it is also subject to internal, often undetectable, damage.

Ebasco Constructors, Inc. (Ex. 3-6), the National Constructors Association (Ex. 3-30) and Organization Resource Counselors (Exs. 3-89) suggested that OSHA simply refer employers to the manufacturers' specifications for their cranes or derricks and apply the derating provisions of proposed paragraph (g)(3)(i)(B) without setting a separate safety factor provision. Ebasco, in particular, stated that OSHA would confuse compliance efforts if it promulgated both as 50 percent derating and a safety factor, because employers might conclude that they were required both to use wire ropes with a safety factor of seven and to derate capacity by 50 percent. Indeed, the Commonwealth of Puerto Rico (Ex. 3-55) apparently drew that conclusion, as reflected by its comments which favored the proposed safety factor of seven because the 50 percent derating would raise the safety factor to 14.

On the other hand, some commenters, such as Unit Crane, Dupont, and Union Wire Rope (Exs. 3-47, 3-75 and 3-22), stated that the proposed deratings alone would not raise the wire rope safety factors to the extent predicted by OSHA. Those commenters noted that variations in a crane or derrick boom angle, boom weight, or rigging configuration would determine the

extent to which derating increased the safety factor. Indeed, Unit Crane observed that, if the boom weighed 20,000 pounds and the rated load was 5,000 pounds, derating by 50 percent would reduce the suspension system load by only 10 percent. Dupont, however, noted that derating capacity by 50 percent would provide a "generous" addition margin of safety for personnel hoisting operations, as long as the minimum boom angle was at least 40 degrees. Another commenter, the United Steelworkers of America (Ex. 3-10), suggested that OSHA require employers to make charts available to crane operators so that they can quickly and accurately calculate a crane's capacity when the crane boom is at a particular angle.

Several commenters, such as Magma Copper, Bechtel Corporation and the Granite Construction Corp. (Exs. 3-27, 3-45 and 3-50), stated that a safety factor lower than seven would protect workers adequately. Bechtel suggested that OSHA retain 3.5 as the safety factor, without derating, while Magma Copper and Granite Construction suggested that the safety factor be set at five, as recommended by a draft revision of ANSI B30.5 which was then in circulation. The Salt River Project (Ex. 3-61) specifically opposed raising the wire rope safety factor either to seven or 10. Other commenters, including the Wire Rope Safety Board, Kerr-McGee Corporation and Spartan Equipment Company (Exs. 3-15, 3-23 and 3-82), stated that setting the wire rope safety factor at seven would provide adequate protection. In particular, Spartan expressed its understanding that the safety factor of seven would be achieved through derating.

Several commenters, including the Boeing Company, Unit Crane & Shovel and Boeing Aerospace Company (Exs. 3-38, 3-47 and 3-57) suggested that OSHA set the minimum wire rope safety factor for personnel hoisting at 10. In particular, those commenters cited the Canadian "Rigging Manual" published by the Construction Safety Association to support their position. The Boeing commenters also referenced regulations for powered platforms (29 CFR 1910.66) and consensus standards for personnel hoists (ANSI A10.4). In addition, Unit Crane & Shovel based its recommendation on the Power Crane and Shovel Association Standard No. 4-1983, the American Petroleum Institute's API Spec. 2C, Third Edition, March 1983, and the retirement criteria for wire rope presented in ANSI B30.5-1982. The Boeing Company (Ex. 3-78) later reversed its position regarding wire rope

safety factors, suggesting that OSHA raise the safety factors above the levels mandated for material hoisting only if OSHA determined, through a review of accident data, that hoisting personnel with ropes satisfying the existing safety factors poses a significant risk to employees.

The commenters differed in their suggestions for the standard wire rope safety factor but were uniform in their recommendation that OSHA ban or limit the use of rotation resistant wire rope for personnel hoisting. Many commenters suggested that OSHA set a higher safety factor for rotation resistant wire rope. Granite Construction specifically invoked ANSI and, in addition, suggested that OSHA prohibit the use of rotation resistant rope for personnel hoisting. Kerr-McGee suggested that employers avoid the use of rotation resistant rope for personnel hoisting because of problems with the rate and detection of rope deterioration. The Wire Rope Safety Board noted that static tests on rotation resistant rope indicated reduction in breaking strength of up to 50 percent when compared to the same tests on non-rotation resistant rope. The Wire Rope Safety Board also observed that, while the safety factor of seven would provide a reassuring level of protection, the tendency for rotation resistant rope to break down could be important if the rope was burdened at its full breaking strength. That situation could occur in an emergency, such as the snagging of a platform on a projection.

Both the Boeing Company and Boeing Aerospace (Exs. 3-38 and 3-57) expressed special concern about the use of rotation resistant wire rope for personnel hoisting, because that rope is "susceptible to internal damage (from overload) that cannot be detected by inspection." They noted that wire rope manufacturers recommended that employers effectively double the safety factors when using rotation resistant rope. Therefore, they suggested that OSHA set the safety factor for rotation resistant wire rope at double that for other hoisting rope.

The United Steelworkers of America (USWA) and the Construction Industry Manufacturers Association (CIMA) (Exs. 3-10 and 3-31), suggested that, because of the potential hazards to hoisted personnel, OSHA set the safety factor for rotation resistant wire rope at 10, rather than at seven. The USWA cited MSHA's proposed regulation for personnel lifts which requires a 10:1 safety factor for rotation resistant ropes. Also, the CIMA pointed out that, since section 5-1.7.1(c) of ANSI B30.5-1982

requires rotation resistant wire rope to have a minimum design factor of five, setting the minimum safety factor at 10 for personnel hoisting would be consistent with OSHA's position that halving the rated capacity doubles the safety factor.

OSHA has determined, based on its review of the record, that requiring a safety factor of seven for running ropes, other than rotation resistant ropes, provides adequate protection for hoisted personnel. In particular, the Agency believes that setting the safety factor below seven would not satisfy OSHA's intention that hoisted personnel receive more protection than hoisted material. On the other hand, OSHA has decided that setting the safety factor at 10 for standard design running rope is not necessary to protect employees, and would be unnecessarily burdensome, without providing a significant increase in employee safety. In addition, OSHA notes that compliance would be more complicated if the Agency set the safety factor at 10 because the simple 50 percent derating approach could not be applied. OSHA believes that using the 50 percent derating is a convenient and easy to use method of providing the required employee protection. OSHA's deliberations regarding derating are discussed below in more detail under paragraph (g)(3)(i)(F).

OSHA has determined, through its review of the numerous comments received and other information in the record, that although the minimum safety factor of seven is adequate for standard wire rope, it would not adequately protect employees being hoisted with rotation resistant wire rope. In particular, OSHA has concluded that rotation resistant rope is more easily damaged and is more difficult to inspect than other wire rope. Section 5-1.7.1 of ANSI B30.5-1982, for example, takes those differences into account in the context of material hoisting, by setting the minimum design factor at 3.5 for live or running ropes and at five for rotation resistant ropes. Therefore, consistent with its calculations for other wire rope, OSHA believes that derating cranes using rotation resistant wire rope by 50 percent will raise the effective safety factor to 10. The Agency has determined that this increase in the safety factor is necessary to protect employees from the combined hazards of personnel hoisting and rotation resistant rope. OSHA has chosen to set a separate, higher, safety factor for rotation resistant rope rather than limit or prohibit its use because, when used in compliance with the provisions of this standard, rotation resistant rope

increases the crane or derrick operator's control over the movement and position of a personnel platform during hoisting, and precludes having to change ropes on a crane already using rotation resistant rope that is used to hoist personnel. OSHA has determined that rotation resistant rope which satisfies the safety factor of 10 is already used by or readily available to employers, so this requirement imposes a minimal additional burden.

Paragraph (g)(3)(i)(C) requires that all brakes and other locking devices be engaged when a personnel platform is in a stationary working position, so that hoisted employees are not exposed to the hazards of cable to slip. The Boeing Company, Boeing Aerospace and Unit Crane & Shovel (Exs. 3-38, 3-57 and 3-47), were the only commenters on this provision. The Boeing commenters supported regulatory language which would protect hoisted employees against sudden platform movement during periods when the platform was suspended at a work position. Unit Crane commented that "this provision in this position is a good one and should be retained." United Crane also noted that this provision, while not part of section 5-3.2.2, Personnel lifting, of ANSI B30.5, was implied by section 5-3.2.1.3(c), "Holding the load." In addition, the commenters suggested that OSHA require automatic brakes in order to prevent inadvertent platform movement. This issue is discussed in detail below. Based on the record, OSHA has determined that paragraph (g)(3)(i)(C) is necessary to protect hoisted employees from the hazards of being spilled from the platform.

Paragraph (g)(3)(i)(D) of the final rule requires that cranes and derricks used to hoist personnel be equipped for and operated with controlled load lowering. This provision also prohibits free fall. The paragraph is based on ANSI B30.5-1982, section 5-3.2.2(a)(9). Issue 2 specifically requested additional comments on this subject. This paragraph is intended to ensure that employers operate their personnel hoisting equipment so that hoisted personnel are not exposed to the hazards of sudden, fast descents.

The Agency received many comments on this provision. The Milwaukee Construction Industry Safety Council (MCISC), (Exs. 3-26 and 3-70), for example, asserted that engineering and economic constraints would prevent all but the largest contractors from retrofitting their cranes, so the small contractors would be unable to hoist employees. In addition, the Associated General Contractors of America (AGC)

(Ex. 3-28) suggested that such a requirement should be phased in as new equipment is marketed. The AGC joined with the MCISC in recommending that cranes used for pile driving be exempted from this paragraph because "companies engaged in pile driving cannot operate with power load lowering" and those companies "have to hoist personnel aloft to perform pile driving work." Therefore, according to the AGC, the proposed requirement was impracticable for pile driving cranes. Also, the National Association of Demolition Contractors (NADC) (Ex. 3-8) commented that controlled load lowering would impede demolition operations which require free fall. The NADC suggested that the use of oversized brakes and clutches would ensure the safety of hoisted personnel, because the oversized brakes and clutches could be engaged to slow descent safely. Unit Crane & Shovel (Exs. 3-47 and 3-81), on the other hand, asserted that effective field-installed retrofit kits are available at reasonable cost. Unit Crane also observed that the restrictions on personnel hoisting would mean that relatively few cranes with the required equipment would be needed and that contractors could plan ahead to have a properly equipped crane on hand when needed. Indeed, the vast majority of commenters who addressed this issue agreed that OSHA should require controlled load lowering features on all cranes which hoist personnel. These commenters included Northwest Engineering Company, the State of Alaska, the U.S. Air Force, Johnson Brothers Corporation, the Farm and Industrial Equipment Institute, the National Construction Association and the Spartan Equipment Company. (Exs. 3-3, 3-4, 3-24, 3-43, 3-47, 3-73, 3-74 and 3-82). The Parsons Corporation (Ex. 3-22) stated that "We agree with OSHA's proposal to require controlled load lowering; in fact, we consider such a function as essential. DuPont (Ex. 3-75) took issue with those commenters who suggested that OSHA exempt cranes used for pile driving and demolition from the controlled load lowering requirements, stating that most cranes are available with drum drives that allow operation in free fall or controlled lowering mode and that the cost of retrofitting is reasonable. In addition, Northwest Engineering Company (Ex. 3-3) noted that, while it may be impractical to retrofit old cranes, there are enough properly equipped cranes which could be borrowed or rented to hoist employees safely.

OSHA has determined that a controlled load lowering requirement

will effectively protect hoisted employees from sudden stops, starts and free fall, without unduly burdening employers. Although they can help stop a fall once it has begun, oversized brakes or clutches will not themselves prevent precipitous free fall. OSHA is also concerned that without controlled load lowering, the use of oversize brakes to stop free fall would jolt the platform, possibly throwing employees off. As documented by JACA, OSHA's contractor for this rulemaking (Ex. 5-2, Appendix C) many employees have been killed or injured in accidents which would have been prevented by the use of controlled load lowering. Therefore, OSHA has decided, based on the evidence in the record, to promulgate paragraph (g)(3)(i)(D) as proposed, except that the explanatory note in the proposed provision has been incorporated into the standard itself.

In addition, Issue 7 requested information on the need for an automatic brake which stops the load when the operator releases the controls. The comments received indicated that opinions on automatic brakes (also referred to as "deadman brakes") intertwined with views on the proposed controlled load lowering requirement. Thus, commenters, such as the AGC of America (Exs. 3-28 and 3-67), and the National Constructors Association mixed their statements of opposition to automatic brakes with assertions that free fall was necessary. Commenters such as Dupont, Spartan Equipment, and Organization Resource Counselors (Exs. 3-75, 3-82 and 3-89) stated that an automatic brake requirement would pose great expense and difficulty for users of mechanical clutch-drive cranes (i.e., cranes which do not have controlled load lowering). On the other hand, Puerto Rico and Boeing Aerospace (Exs. 3-55 and 3-57) stated that automatic brakes were needed to prevent free-fall, and the Construction Safety Association of Ontario (Ex. 3-81) stated that inexpensive automatic brake retrofit kits were readily available.

OSHA has determined, based on its review of the record on Issue 7, that the benefits of an automatic brake requirement will be gained through the promulgation of the proposed controlled load lowering and, in part, anti-two blocking requirements, because the equipment and procedures necessary to prevent free fall or two-blocking will approximate those envisioned for an automatic brake. Therefore, OSHA has decided not to promulgate a separate requirement for an automatic brake.

Paragraph (g)(3)(i)(E) requires that cranes used to hoist personnel be

uniformly level within one percent of level grade and located on firm footing. In addition, cranes equipped with outriggers shall have all of them deployed, according to manufacturer's specifications, when personnel are to be hoisted. This language is essentially identical to that in the proposed requirement.

This requirement, based on ANSI B30.5-1968, section 5-1.2, B30.5-1982, sections 5-1.2.2(e) and 5-3.2.1.4(a)(1), and the specifications provided by manufacturers such as Grove (Ex. 2-17), requires that the crane be "level." The Agency notes that B30.5-1968 as referenced in § 1926.550(b)(2), sets the requirements for compliance with the existing standard. OSHA is aware that a crane loses between five and 30 percent of its capacity when it deviates from level by as little as one degree. Indeed, capacity charts generally are based on the assumption that hoisting cranes are within one percent of level. Also, OSHA is aware that most cranes used to hoist personnel are "free-swinging," so that the boom of a crane which is not level will swing around to the "low spot." Based on those considerations and the Agency's concern about the tipping hazards to which hoisted employees are exposed, OSHA has determined that limiting deviation to within one percent of level will provide operators with reliable capacity information and overall stability.

Some of the commenters, such as the Carolinas Branch of the AGC and the T.A. Loving Company (Exs. 3-39 and 3-82), stated that it was impossible to operate a crane uniformly level within one percent of level grade because movement of certain crane components causes one percent deviation, even when no load is hoisted. OSHA observes that the proposed provision covers the placement of the crane, not the operation. Even so, the Agency has determined that the operation of a crane on a surface which has been properly leveled will not result in deviation beyond one percent of level grade. Therefore, OSHA notes the importance of choosing the appropriate set up location and leveling materials and procedures to ensure that deviation does not exceed one percent. Also, the Equitable Gas Company (Ex. 3-25) stated that requiring mobile cranes to be leveled within one percent of level grade would defeat the design of the rear tires, which are designed to be load bearing under certain conditions. OSHA notes that mobile cranes equipped with outriggers are often required to deploy all outriggers, and that the leveling of the crane is accomplished by use of the

outriggers, so that the tires are not load bearing during hoisting operations.

The AGC of America (Ex. 3-28 and Tr. 165, 197), suggested that a crane operating within three percent of level grade would be safe. Another commenter, Granite Construction (Ex. 3-50), suggested that mobile cranes equipped with outriggers can readily satisfy the proposed one percent limit, while crawler cranes, which are not so equipped, should only have to operate within three percent of level grade because it would be too difficult for the crawler cranes to achieve one percent.

The Agency agrees that providing a level grade for a crane without outriggers may be more difficult. OSHA has determined, however, based on the record, that all cranes can be leveled within one percent of grade and that the additional effort required to do so is not an unreasonable burden. The Agency reiterates that employee safety, not the employer's convenience, controls the setting of requirements for personnel hoisting.

Several commenters, such as the State of Maryland, the Construction Industry Manufacturer's Association (CIMA), the Boeing Company and Boeing Aerospace (Exs. 3-19, 3-31, 3-38 and 3-57), expressed support for the one percent limit.

In particular, the CIMA stated that "the correct level is critical to the safe operation of the crane," especially because, as stated above, the load charts only apply when the crane is level. CIMA suggested that the one percent limit be measured as one foot of rise for one hundred feet of run.

The State of Maryland (Ex. 3-19) suggested that OSHA revise this paragraph to specify that *all* outriggers on a given crane be deployed because otherwise employers could interpret the provision as not requiring that all outriggers be used. The danger is that deploying only some of the outriggers could permit the crane to tip out of balance as the boom swings, as documented by JACA, OSHA's contractor for this rulemaking (Ex. 5-2, Case No. P-6). Since some manufacturers do not specify that *all* outriggers must be used, OSHA is requiring that, in the absence of applicable manufacturer instructions, all outriggers be fully extended and positioned.

OSHA believes that the crane leveling requirement, as clarified, provides the necessary protection for hoisted employees, while taking into account the deviation from level for which crane load charts make allowance. OSHA has concluded that allowing greater leeway for deviation from level would

dangerously reduce the reliability of the load charts and increase the likelihood of the crane tipping over. Therefore, OSHA promulgates this paragraph, as revised.

Paragraph (g)(3)(i)(F) requires a 50 percent derating of a crane used to hoist personnel, so that the crane would be authorized to lift no more than half the load it could lift if it were hoisting materials. This provision is based on section 5-3.2.2(a)(17) of ANSI B30.5-1982. Parsons Corporation (Ex. 3-22) and the National Constructors Association (Ex. 3-74), among others, supported the proposed derating, focusing on the ease of applying a provision which simply requires the crane operator to divide the referenced load chart figure by two, and on the attendant safety benefit. Universal Wire Rope Products (Ex. 3-36) and DuPont (Ex. 3-75) supported the derating, but noted that achieving the advantages of derating depended on carefully controlling boom angle. Other commenters, such as the United Steelworkers of America (Ex. 3-10) and the Organization Resources Counselors (Ex. 3-89), emphasized the need to provide crane operators with charts so they could calculate the crane's capacity at different boom angles.

The National Association of Demolition Contractors (NADC) (Ex. 3-8) and Unit Crane & Shovel (Ex. 3-47) recommended the cranes be derated to 25 percent, with Unit Crane considering derating to 33 percent adequate for some cranes. NADC apparently viewed derating as a substitute for controlled load lowering and other paragraph (g)(3) requirements. Unit Crane, in turn, based its recommendation on the American Petroleum Institute's Specification 2C, March 1982, which addresses tipping hazards.

OSHA received comments from the Associated General Contractors of St. Louis (Ex. 3-14), the Carolinas Branch of the AGC, (Exs. 3-39 and 3-82), Bechtel (Ex. 3-45) and the State of Michigan (Ex. 3-84) which challenged the need for the proposed derating. Those commenters generally stated that existing safeguards were adequate or that the anticipated platform load was too low compared to the rating of the crane to justify derating. The AGC of America (Ex. 3-28 and Tr. 199) and Granite Construction (Ex. 3-50) asserted that existing and proposed safety requirements made it unnecessary to derate below 75 percent of rated capacity.

OSHA notes that load rating charts are already required by existing § 1926.550(a)(2). OSHA also notes that the commenters who opposed derating and other proposed criteria generally did not distinguish between the

safeguards considered adequate for hoisting material and those necessary for hoisting personnel. OSHA has determined that personnel hoisting, insofar as it is allowed, requires a higher degree of caution and a greater margin of safety than is required for material hoisting because the potential for employee injury in a personnel hoisting accident is far greater. OSHA agrees with the commenters who stress that the 50 per cent derating is both protective and easy to apply, increasing the assurance that crane operators will calculate correctly the load limits and safely hoist personnel platforms. OSHA has no basis for concluding that setting the derating requirement at some other percentage would provide more safety. Indeed, the Agency is concerned that setting a different derating percentage would increase the likelihood that the operator would miscalculate the load limit, possibly causing an accident. Therefore, based on the evidence in the record, OSHA is promulgating paragraph (g)(3)(i)(F) as proposed.

Paragraph (g)(3)(i)(G) prohibits employers from hoisting personnel using cranes or derricks with live booms. This provision is based on ANSI A10.28-1983, "Work Platforms Suspended from Cranes or Derricks—Safety Requirements," section 3.1 ANSI A10.28 defines a live boom as one whose lowering is controlled by brakes without aid from other devices. OSHA agrees with ANSI that the use of live booms would endanger hoisted employees.

The agency received comments on this provision from the Carolinas Branch of the AGC (Ex. 3-39 and 3-82) and the Tennessee Roadbuilders Association (Ex. 3-41), requesting that OSHA add an exemption for "life or death emergencies." OSHA understands that during a "life or death emergency" people will do what is necessary, using whatever equipment is available to prevent death or injury. Therefore, this provision is promulgated as proposed, except that the explanatory note in the proposal has been incorporated into the standard.

Paragraph (g)(3)(ii) requires that cranes or derricks used to hoist personnel be equipped with certain operational aids in order to prevent tipping, two-blocking or other accidents. OSHA specifically requested additional input in this subject in Issue 5.

Proposed paragraph (g)(3)(ii)(A) required employers to equip those cranes and derricks having variable angle booms with boom angle indicators which are readily visible to the operator. This provision is based on ANSI B30.5-1982, section 5-1.9.1(c). The Agency

received comments from Unit Crane & Shovel (Ex. 3-47) and Puerto Rico (Ex. 3-55) which supported this requirement as proposed. The State of California, the Boeing Company and Boeing Aerospace (Exs. 3-33, 3-38 and 3-57) supported the proposed requirements and suggested that the Agency also require a radius chart. That suggestion has not been adopted because the necessary data is incorporated in the load chart which is already required by § 1926.550(a)(2) of the construction standards.

As proposed, paragraph (g)(3)(ii)(A) appeared to require that cranes be equipped with boom angle indicators, whether or not they had variable angle booms. Therefore, in promulgating the final rule, OSHA has rephrased paragraph (g)(3)(ii)(A) to make it clear that only cranes and derricks equipped with variable angle booms and used to hoist personnel must have boom angle indicators.

Proposed paragraph (g)(3)(ii)(B) required employers to equip or mark any telescoping boom so that the extended length is clearly indicated. This provision is based on ANSI B30.5-1982, section 5-1.9.1(e). However, commenters such as the Daniel Construction Company and the Carolinas Branch of the AGC (Exs. 3-17 and 3-39), indicated that the marking would be ineffective because the marking would not be visible to the crane operator at the controls. Another commenter, the Al Johnson Construction Company (Ex. 3-42), asserted that effective instruments are not available, and that compliance with paragraph (g)(6)(vi), which requires continuous contact between the operator or signal person and the platform occupants, will provide the operator with the information necessary to hoist employees safely. On the other hand, Wylie Systems presented testimony at the public hearings (Tr. 472-73, 489-90) and the PAT Equipment Corporation submitted information (Ex. 7-E) which indicated that effective instrumentation is available.

Standard Oil (Indiana) (Ex. 3-46) commented that "Safe work practice requires that a crane operator knows the load weight, load radius and height of lift prior to actually making the lift." Using that information, the operator could refer to the crane's range diagram to determine the required boom length without reference to length markings or indicators.

OSHA has determined that there are effective boom length indicators readily available for installation on telescoping booms. In addition, the Agency believes that markings on the boom can provide the operator with boom length information. OSHA also agrees with

Standard Oil (Indiana) that an operator preparing to hoist personnel could determine the boom length without using a boom length indicator. Therefore, OSHA has revised proposed paragraph (g)(3)(ii)(B) so that, as promulgated, it permits operators, as an alternative to using the required markings or indicators, to determine the anticipated load radius accurately and use that finding to calculate the necessary boom length.

Paragraph (g)(3)(ii)(C) of this final rule requires the use of an anti-two-blocking device, or a two-block damage prevention feature on cranes or derricks used to hoist personnel. These devices are intended to prevent the boom tip from contacting the load block or overhaul ball and severing the hoist rope. Anti-two-blocking devices detect that the overhaul ball has come close to the boom tip and activate a brake which immediately stops the hoist and holds the platform in place. This provision is based, in part, on ANSI B30.5-1982, section 5-3.2.2, which states that employers shall have warning or other limiting devices "to prevent two-blocking, unless audible communications have been provided and one of the persons being lifted has been specifically assigned" to warn against two-blocking hazards. OSHA did not adopt this approach in the proposed rule. The Agency, however, did request (49 FR 6285) that commenters inform OSHA of any conditions where the use of warning devices would be more feasible than the use of positive acting mechanisms.

OSHA received a great volume of comment on this provision, most of it opposing the requirement or urging that OSHA require something less than the proposed positive acting preventive devices. For example, Longview Fibre Company, Columbia Nitrogen Corporation and the AGC of California (Exs. 3-52, 3-58 and 3-66) asserted that available anti-two-blocking equipment does not work properly and that careful operation of a crane would obviate the need for installation of anti-two-block controls. In addition, Dupont (Ex. 3-75) stated that the kind of automatic brake needed to prevent two-blocking has not yet been developed to the point where it could be considered "a reliable safety component." Therefore, Dupont along with other commenters, such as the Pennzoil Company (Ex. 3-29), Boeing Company (Ex. 3-38), Boeing Aerospace (Ex. 3-57) and the Carolinas Branch of the AGC (Exs. 3-39 and 3-82) requested that OSHA permit employers to use warning devices so that operators could be alerted to two-blocking situations and avoid two-blocking accidents.

These commenters stated that requiring positive acting devices would impose unreasonable economic burdens; that many cranes and derricks, particularly older ones, could not be retrofitted; and that anti-two-blocking devices require excessive maintenance, are unreliable, and are misused or abused by operators.

On the other hand, comments by Unit Crane & Shovel (Exs. 3-47 and 3-81) and Kenny Construction Company (Ex. 3-56), in addition to testimony by the Operating Engineers at the public hearing (Tr. 454-457), indicated that workable anti-two-blocking "stop and hold" devices are available and should be required. BWB Controls, Inc. (Ex. 3-63), a manufacturer of anti-two-blocking warning devices, submitted product literature and testimonials attesting to the reliability of its products. OSHA also noted that the CAL/OSHA hearing transcript from May 12, 1983, submitted by opponents of a requirement for anti-two-blocking devices (Exs. 3-28 and 3-66), also included testimony that the devices were, in fact, available and workable.

OSHA does not believe that alarm devices or shouted warnings would provide effective protection for hoisted personnel because they place too much reliance on operator reaction time. For example, the system may function properly, but the operator may be distracted by the noise of the construction site, or the noise of the crane engine and hoist mechanism and not notice the alarm or warning for several seconds, or the reaction time of the operator may simply be too slow. In either case, a two-blocking incident could easily result. Therefore, because the Agency believes that only two-blocking preventive devices will provide the necessary employee protection, OSHA has not followed the pertinent ANSI standard. As stated in its discussion of Issue 7, above, OSHA has, in part, based its decision not to promulgate a separate automatic brake requirement on its determination that the brake mechanism of an anti-two-blocking device will provide reliable protection for hoisted personnel.

OSHA concludes, based on the evidence in the record and its regulatory impact analysis, that the anti-two-blocking device requirement is both feasible and cost effective. The Agency agrees that cranes equipped with these devices require more maintenance than cranes which are not so equipped. OSHA notes, however, that this maintenance would be comparable to that required on the alarm devices which many commenters recommended. The major maintenance and malfunction

concern with either system is the switch at the boom tip. OSHA believes that proper maintenance of the device and proper treatment during rig up, rig down, and transport, coupled with proper adjustment of the device once the crane is in place, will prevent the reported unreliability and malfunctioning.

OSHA has received a considerable amount of information regarding the misuse of anti-two blocking devices by operators. OSHA has determined that the proper selection and training of operators is necessary to prevent the misuse of these devices as "operational controls." In particular, operators must be taught that an anti-two-blocking device is a backup for proper operator control, and must not be used routinely as a stopping device.

Therefore, based on its review of the evidence in the record, which includes many two-blocking accident reports, such as the one discussed earlier in this preamble (Cheyenne, Wyoming, 1973), OSHA is promulgating paragraph (g)(3)(ii)(C) as proposed, except that the term "fall ball" has been replaced by the term "overhaul ball," to conform with current industry terminology.

Paragraph (g)(4) provides design criteria, platform specifications, loading requirements and rigging requirements for personnel platforms.

Paragraph (g)(4)(i) provides design criteria for personnel platforms. One proposed provision, paragraph (g)(4)(i)(D), has been moved to paragraph (g)(4)(ii)(E) because it involves platform specifications. The language of the remaining three provisions is identical to that in the proposal, except as discussed below.

Paragraph (g)(4)(i)(A) requires the employer to ensure that personnel platforms and suspension systems are designed by a qualified engineer or qualified person who has demonstrated skill and experience in structural design. The term "qualified" is defined in § 1926.32(e). In the proposed standard, this provision required that the employer have a qualified engineer design the platform, based on ANSI A10.28-1983, section 5.1. The States of Maryland and California (Exs. 3-19 and 3-33) commented favorably on the proposed requirement. However, the International Cargo Gear Bureau Inc. (ICGBI) (Ex. 3-1) asserted that the proposed language was too vague and asked OSHA to specify design criteria and accredited persons who would certify that the platforms were built to specifications. The ICGBI did not express an opinion on the need to require that only engineers provide the certification. On the other hand, Magma Copper (Ex. 3-27) and Lunda

Construction Company (Ex. 3-92) suggested that only a "competent" individual is necessary to design a personnel platform. OSHA notes that the term "competent person" has a unique meaning by definition in §1926.32(f). However, the Magma Copper and Lunda Construction comments appear to use the term "competent" to indicate that the person designing the platform must be "competent" to design and construct platforms which meet this standard, and that a person need not be an engineer to demonstrate such competence. In other words, they indicate that the standard should not require design by an engineer, because platforms can be properly designed by knowledgeable non-engineers, as well. OSHA agrees that some individuals, who lack engineering degrees, have the requisite skill and experience to design and construct a personnel platform which meets the requirements of the standard. Based on the above discussion, OSHA has determined, notwithstanding ANSI A10.28-1983, that design by a qualified engineer or a qualified person with specific structural design skills and experience will ensure that a personnel platform and its rigging provide the necessary employee protection and has revised this provision as noted.

This paragraph has also been modified to make it clear that the suspension system (i.e., the permanently attached rigging), as well as the platform, must be designed by a qualified engineer or qualified person. Based on comments from Bechtel (Ex. 3-45), OSHA determined that the compatibility of the platform structure with the attached rigging is critical to safe hoisting. OSHA also notes that the rigging is subject to the same loads and operating conditions as the platform, and that the platform tackle is often attached to the platform at the time the platform is made. The Agency notes that in some circumstances the person who designs the platform will also design the tackle attached to the platform.

Proposed paragraph (g)(4)(i)(B) required that the suspension system for personnel platforms be designed to minimize tipping. The Agency received very few comments on this provision. Bechtel (Ex. 3-45) commented that the requirement was unnecessary in light of the preceding paragraph. The State of Maryland (Ex. 3-19) suggested that OSHA require a suspension system consisting of a factory-made wire bridle with four legs and suspended at 60 degrees to the horizontal, because this configuration has a known rated capacity and is easily inspected. OSHA notes that employers use personnel

platforms to access a wide variety of workplaces and believes a specific bridle configuration would not be appropriate with all platforms or for all hoists. In addition, as was stated in the discussion of the previous paragraph, OSHA has determined that requiring qualified engineers or qualified persons to design the bridle provides adequate protection. Therefore, OSHA will not prescribe what tackle may be used. The ICGBI (Ex. 3-1) argued that the requirement should be "to prevent tipping." OSHA agrees with the ICGBI that "to prevent tipping" is the desired goal, but believes it is not feasible to prevent tipping totally, due to the nature of personnel platforms. Therefore, this paragraph is promulgated as proposed.

Proposed paragraph (g)(4)(i)(C) required that personnel platforms be designed with a minimum safety factor of five. As discussed under paragraph (g)(3)(i)(B), above, OSHA is incorporating language related to safety factors which the Agency believes will express clearly the regulatory intent of the provision. OSHA based this provision on ANSI standards B30.5-1982, section 5-3.2.2(b)(3) and A10.28-1983, section 5.2.

In 1974, as noted in the proposal, the ACCSH recommended a safety factor of six for the design of personnel platforms. In 1983, the ACCSH discussed setting a safety factor for personnel platforms, but made no recommendations. OSHA specifically requested input regarding the sufficiency of the proposed safety factor in Issue 4 of the proposal (49 FR at 6283).

Bechtel (Ex. 3-45) stated that the proposed safety factor of five was "unnecessary and wasteful," because existing American Institute of Steel Construction (AISC) specifications provided sufficient guidance for the design of personnel platforms, just as they already did for other temporary personnel supports."

The Department of the Air Force, Milwaukee Construction Industry Safety Council, National Constructors Association and Unit Crane & Shovel (Exs. 3-24, 3-26, 3-30 and 3-47) expressed support for the proposed safety factor. In particular, Unit Crane cited ANSI B30.5-1982 to support this provision and noted that, "since a platform is not subject to the same sorts of fatigue as running ropes," there was no inconsistency in supporting five as a safety factor for platforms, while suggesting that OSHA set the wire rope safety factor at 10.

The Boeing Company (Ex. 3-38) recommended setting the safety factor at four, as provided in the § 1910.28(a)(4)

requirements for "suspended scaffolds," so that the provision would be consistent with the "safety factors established for similar set ups." Boeing Aerospace (Ex. 3-57) disagreed with this recommendation, suggesting that "the safety factor should be at least 5," because personnel platforms are exposed to hazards, such as snagging, which ordinary scaffolds do not confront. Boeing Aerospace also stated that setting the safety factor at five was appropriate so that hoisted personnel would have at least as much protection as hoisted material, citing § 1926.251(c)(i), rigging, and § 1926.251(f)(1), shackles and hooks for material handling.

The United Steelworkers of America and the Spartan Equipment Company (Exs. 3-10 and 3-82) suggested that setting the platform safety factor at 10 would provide adequate protection. In particular, the United Steelworkers stated that the higher the safety factor, the greater the assurance that OSHA is satisfying its statutory duty to protect employees.

Norpac Engineering (Ex. 3-88) suggested that OSHA set personnel platform safety factors which are comparable to those for elevator design and which are at least as safe as those required for scaffolds. OSHA has determined that the current ANSI standard for Elevators, A17.1-1984, is not an appropriate reference because it does not provide clear guidance for the construction of personnel platforms. Norpac (Ex. 3-88) also recommended that OSHA use the scaffold standards, §§ 1926.28(a)(4) and 1926.451(a)(7) which, as noted above, require a safety factor of four.

OSHA has determined that setting the platform safety factor at five provides adequate protection for hoisted personnel, consistent with the applicable consensus standards and most of the comments received. In addition, the Agency believes that neither the AISC specifications nor the ANSI elevator standard provides the specific pertinent information which an employer needs to fabricate a platform properly. Furthermore, OSHA has determined that setting the safety factor at four, as is required under the scaffold standard, would not adequately protect hoisted personnel because, as noted by Boeing Aerospace (Ex. 3-57), platforms are exposed to hazards which suspended scaffolds do not face.

OSHA also has determined that it is unnecessary to set the safety factor at six or ten, as recommended by the ACCSH and certain commenters because, as observed by Unit Crane & Shovel (Ex. 3-47), five is recognized by

ANSI as providing adequate protection under the conditions where platforms are used. Accordingly, the Agency promulgates this paragraph as revised and has added an explanation to clarify that the criteria for guardrails and body belt/harness system anchorage points are found in other Subparts of the Construction Standards. OSHA believes that this revision will clarify the requirements and increase consistency within the construction standards, thereby improving compliance.

Proposed paragraph (g)(4)(i)(D) required that personnel platforms have six feet minimum headroom. The commenters uniformly considered this provision as overly restrictive in that it limited the employer's flexibility. Ebasco Constructors and the International Brotherhood of Boilermakers (Exs. 3-6 and 3-53) suggested a minimum height of six feet, six inches. The National Association of Demolition Contractors and Parson Corporation (Exs. 3-8 and 3-22) suggested seven feet. Other commenters, such as Magma Copper, Bechtel, Unit Crane & Shovel and the Commonwealth of Puerto Rico (Exs. 3-27, 3-45, 3-47 and 3-55), suggested that OSHA simply require "adequate" headroom. OSHA agrees that specifying a minimum height is unnecessary to protect workers and has deleted this specification from paragraph (g)(4)(ii)(E) of the final rule. OSHA has also determined that the headroom requirements for hoisted personnel are already properly addressed in paragraph (g)(4)(ii), "Platform specifications," instead of in paragraph (g)(4)(i), "Design criteria."

Paragraph (g)(4)(ii) of this final rule specifies that personnel platforms must have certain features.

Proposed paragraph (g)(4)(ii)(A) required employers to equip personnel platforms with perimeter protection from the floor to 42 inches, plus or minus three inches, which would consist of either solid construction or expanded metal with openings no greater than one-half inch. This provision was based on § 1926.500(f) and ANSI A10.28-1983, section 5.6. Commenters, including the National Association of Demolition Contractors, Equitable Gas, the Associated General Contractors of America and Standard Oil (Indiana) (Exs. 3-8, 3-25, 3-28 and 3-46), stated that standard guardrails have satisfactorily prevented accidental falls. Commenters, such as Columbia Nitrogen and the Milwaukee Construction Industry Safety Council (Ex. 3-26 and 3-58), suggested that OSHA permit the use of standard guardrails, except with six inch or 12 inch toe plates in lieu of enclosure between the toe plate and

mid-rail. In addition, commenters, such as Granite Construction (Ex. 3-50) and Organization Resources Counselors, Inc. (Ex. 3-32 and 3-89) stated that requiring enclosure to 42 inches, as proposed, would unnecessarily interfere with the intended use of the platform. The State of Maryland (Ex. 3-19) noted that the requirement would necessitate the frequent repositioning of the platform to make the work area accessible.

Further, Unit Crane & Shovel (Ex. 3-47) commented that permitting the use of solid sidewalls would increase the tendency of a platform to swing in the wind and recommended that only expanded metal be allowed.

On the other hand, the Boeing Company (Ex. 3-38), Boeing Aerospace (Ex. 3-57), and the Salt River Project (SRP) (Ex. 3-61) stated that the proposed enclosure requirement was "acceptable." The Boeing commenters also stated that "Guardrails have been satisfactory," and SRP noted that it has a variance for certain operations which require top guardrails at 30 inches.

OSHA has revised this provision to require simply that the employer provide a guardrail system which meets the requirements of Subpart M. OSHA anticipates that employers will already be familiar with the requirements for guardrail systems in Subpart M, so it would be unnecessary to set out specifications in this provision. OSHA notes that, under Subpart M, the required height for a top rail is approximately 42 inches, as was proposed. In addition, OSHA has determined that perimeter enclosure between the toe board and the midrail of the guardrail provides appropriate platform level protection against the hazard to employees below from falling objects. Further, OSHA has determined that since perimeter enclosure will only be required between the toe board and the mid-rail, swinging will not pose difficulties and employers will have flexibility to address workplace circumstances.

Paragraph (g)(4)(ii)(B) requires that the employer provide a grab rail inside the entire perimeter of the personnel platform. This provision is based, in part, on A10.28-1983, section 5.8. The proposal did not specify that the grab rail would extend along the entire inside perimeter of the platform. OSHA revised the provision because it determined that, as noted by the State of Maryland (Ex. 3-19) and Unit Crane & Shovel (Ex. 3-47), a worker might not otherwise have a grab rail readily available when needed.

The Salt River Project (Ex. 3-61) suggested that the top rail of a platform

constitutes an adequate grab rail. OSHA, however, believes that permitting the use of the top rail as a grab rail would expose employees to the risk of having their hands smashed against external objects while grabbing the top rail. The ACCSH drew a clear distinction between the use of the guardrail to prevent falls and the use of a grab rail to help employees maintain balance during hoists (Tr. 5-23-83, pp. 123-124.) Therefore, OSHA has determined that the required grab rails must be inside the personnel platform, and promulgates this provision as revised.

Proposed paragraph (g)(4)(ii)(C) required that an access gate, if provided, must not swing outward during hoisting and must be equipped with a restraining device to prevent accidental opening. This provision was based on ANSI A10.28-1983, section 5.4 and B30.5-1982, section 5.3.2.2(b)(7). The Agency has decided, however, to relocate the restraining device requirement to a separate provision (paragraph (g)(4)(ii)(D)) of this final rule, for the sake of clarity. OSHA received several comments, including those from Ebasco Constructors, The National Constructors Association and Granite Construction (Exs. 3-6, 3-30 and 3-50), which suggested a revision of the proposed rule to permit the use of sliding or folding gates. Since the modifications requested are in line with the Agency's original intent, paragraph (g)(4)(ii)(D) of the final rule reflects the acceptability of these other approaches and incorporates the proposed requirement for restraining devices. This provision is discussed further below.

OSHA also received comments from the Carolinas Branch of the AGC (Exs. 3-39 and 3-82) which requested that OSHA permit the access gate on small platforms to swing out when there is not room for it to swing in. The Agency has not adopted this suggestion because, as noted by Unit Crane & Shovel (Ex. 3-47), an outward opening gate could strike against a wall or other object during hoisting, possibly upsetting the platform. In addition, OSHA is concerned that an improperly designed outward opening gate could open accidentally if objects or personnel inside the platform were thrown against it. On the other hand, OSHA recognizes that the restrictive approach of the proposed standard is not necessary to protect workers because the Agency knows of platforms which do not conform to the proposed rule but which adequately protect occupants. OSHA also recognizes that some personnel platforms are used in emergency situations to transport

injured employees on stretchers or to effect rescues. In such circumstances access gates that only swing inward would create access and egress problems, especially on smaller platforms. OSHA also notes that sliding or folding gates may not be feasible for a given personnel platform. The Agency does not wish to preclude the use of properly designed personnel platforms in emergency situations by requiring a gate swing which would render them useless.

In order to resolve these conflicting concerns, OSHA has decided that access gates that swing, must be configured so that they do not open outward during hoisting. OSHA notes that it is technically feasible and equally protective to install a single gate which is capable of swinging both inwardly and outwardly, provided that the gate not open outwardly during hoisting. Therefore, based on the above discussion, OSHA promulgates this paragraph as revised and relocated.

Paragraph (g)(4)(ii)(D) requires that access gates be equipped with a restraining device to prevent accidental opening. This provision was proposed as part of paragraph (g)(4)(ii)(C). The Agency determined that, because of the above-described revisions to paragraph (g)(4)(ii)(C), retaining this provision within paragraph (g)(4)(ii)(C) could obscure this important requirement. Therefore, the Agency decided to incorporate the appropriate comments received on this provision and promulgate the revised requirement as a separate provision. The comments received on this provision are discussed above under paragraph (g)(4)(ii)(C).

As discussed above, paragraph (g)(4)(ii)(E) of this final rule presents the revised requirements of proposed paragraph (g)(4)(i)(D) for adequate headroom in the personnel platform. Specifically, this provision requires that platforms have headroom which allows employees to stand upright. OSHA has determined that this performance-oriented approach is appropriate for a provision where, as the commenters observed, the circumstances for its application may vary significantly. Therefore as revised and relocated, OSHA is promulgating this provision.

Paragraph (g)(4)(ii)(F) requires that personnel platforms have overhead protection when there is employee exposure to falling objects. This provision is based on ANSI A10.28-1983, section 5.5, and B30.5-1982, section 5.3.2.2(b)(8). This requirement is similar to that in proposed paragraph (g)(4)(ii)(D), and has been shifted

because of the addition or relocation of paragraphs, as discussed above.

OSHA requested additional information on the need for overhead protection on personnel platforms in Issue 6. A number of commenters, such as the State of Alaska (Ex. 3-4), Unit Crane & Shovel (Ex. 3-47) and Kenny Construction (Ex. 3-56), agreed that overhead protection should be required "as needed." Several commenters, including the State of Maryland (Ex. 3-19) and the AGC of America (Exs. 3-28 and 3-67) expressed general support for the requirement, while noting that certain work cannot be performed when overhead protection is in place. Unit Crane (Ex. 3-47) noted that the boom tip and hoist lines above the platform effectively block work which is directly overhead and constitute falling object hazards because they may be lowered into a landed platform. Unit Crane also noted that, "Anytime the occupants must work above shoulder height and might be restricted from the work piece (SIC) by overhead protection, such a condition can be eliminated by merely elevating the platform another three feet."

Gulf Oil (Ex. 3-68), stated that overhead protection on the platform was unnecessary and would reduce visibility. Gulf suggested that, "If a hazard of falling objects is present, a more positive means of protection should be provided other than assuming the personnel platform would withstand the dropping objects." Gulf Oil, however, did not specify any "positive means." The Carolinas Branch of the AGC (Exs. 3-39 and 3-82) observed that requiring overhead protection would negate the possibility of employees tying off to anything other than the platform itself, an action which is useless and impractical. The Carolinas Branch was apparently concerned that if the platform tipped or fell the lanyard attached to an employee's body belt or harness would pull the employee up against the overhead protection, preventing escape from the platform and increasing the likelihood and severity of injuries. The Carolinas Branch was also concerned that "work from a platform often must be done above the top of the platform, such as, but not limited to: Rubbing concrete; form work; passing and receiving tools and material, etc." In addition, the Al Johnson Company (Ex. 3-42) stated that the proposed overhead protection was unnecessary because it is more effectively handled under the general safety regulations which limit work overhead * * *. Some commenters, including Equitable Gas, Standard Oil (Indiana) and Organization

Resources Counselors (Exs. 3-25, 3-46 and 3-89), suggested that requiring the use of hard hats would generally be preferable to requiring overhead protection.

OSHA has determined, based on the evidence in the record, that hoisted personnel who are exposed to falling objects need overhead protection. Given the small area of a personnel platform, OSHA is concerned that workers would not be able to avoid falling materials, and that head protection alone would not be sufficient. OSHA notes that this provision is consistent with the requirements for scaffolds in §§ 1926.451(a)(16) and 1926.451(h)(13), which require overhead protection when employees working on other types of scaffolds are exposed to overhead hazards. The Agency is concerned that overhead protection and the use of hard hats could be viewed as either equivalent or mutually exclusive. Therefore, OSHA has added language to this provision so it is clear that overhead protection is required in addition to the use of hard hats.

The final rule is drafted in performance-oriented language which requires that employers install the protective covering whenever employees are exposed to falling objects. Therefore, when there is no potential for injury, whether due to the nature of the work or the work practices enforced at the workplace, the employer need not provide overhead protection other than hard hats.

OSHA notes that this paragraph does not prohibit the use of a personnel platform with overhead protection that incorporates a removable top, a hinged top, or a trap door to permit overhead work, if such work is necessary, as long as the necessary overhead protection function is not compromised. In addition, this paragraph does not prohibit the use of transparent materials to provide a viewing port in the overhead protection.

In response to the concern that overhead protection would complicate tying off (as required by paragraph (g)(6)(viii) of the final rule), the Agency notes that the requirement to tie off is intended to protect employees from falling in the event the platform tips or the employees are thrown from the platform. It is not intended to protect workers in the event that the platform breaks free of the load line or hook. Most of the remaining provisions of the standard focus on preventing the platform from dropping. These provisions, such as the requirement for tests, derating and prevention of two-blocking are intended to prevent

situations where the personnel platform breaks free of the load line or hook.

Paragraph (g)(4)(ii)(C) of this final rule requires employers to ensure that all rough edges of the platform exposed to employee contact are so surfaced as to prevent injury to employees from punctures or lacerations. This paragraph, based on ANSI A10.28-1983, section 6.1, is similar to (g)(4)(ii)(E) of the proposal, but has been rephrased to clarify OSHA's intent. The Agency received virtually no comment on this provision. Bechtel (Ex. 3-45) asserted that this requirement was a matter of common sense and that it need not be covered by an OSHA standard. OSHA believes that this provision provides necessary guidance to employers, so it is promulgating this provision as revised.

Proposed paragraph (g)(4)(ii)(H) has been deleted from the final rule. That proposed paragraph required that a personnel platform be readily identifiable by color or marking. This provision was based on ANSI B30.5-1982, section 5-3.2.2(b)(9).

Most of the comments received, such as those from Magma Copper, Bechtel, and Granite Construction (Exs. 3-27, 3-45 and 3-50), indicated that this provision was unnecessary and would impose high maintenance costs. The State of California and Boeing Company (Exs. 3-33 and 3-38) supported the proposed provision. OSHA has determined, based on its consideration of the record, that the proposed provision is not needed to protect workers, given the other provisions of paragraph (g) which cover the design, construction, testing and use of the personnel platform. The Agency, therefore has eliminated proposed paragraph (g)(4)(ii)(H).

Paragraph (g)(4)(ii)(I) requires that all welding of the platform and components be performed by a qualified welder familiar with the weld grades, types and materials specified in the design. This provision, which is virtually identical to proposed paragraph (g)(4)(ii)(F), is based on ANSI A10.28-1983, section 6.3.

In addition, OSHA solicited comments on whether a welder who is "qualified" as defined in § 1926.32(1) is sufficient or if a certified welder would be more appropriate. Magma Copper (Ex. 3-27) cautioned OSHA regarding use of the term "qualified," because "Any experienced * * * welder could assemble a cage." Unit Crane & Shovel (Ex. 3-47) suggested that OSHA require American Welding Society certified-welders, while the Boilermakers Union (Ex. 3-53) suggested that OSHA require that fabrication be done by a certified welder who has passed a welding test

that meets the specifications of the ASME welding code. On the other hand, Puerto Rico (Ex. 3-55) suggested that requiring a "qualified" welder, as understood in terms of section 1926.32(1), provided adequate assurance that the platform would be safe. The Agency believes that requiring welder certification or specifying a particular set of credentials for a platform welder would not improve employee protection. Indeed, OSHA agrees with Puerto Rico that the term "qualified," as defined, provides appropriate assurances that the welder assigned to construct a personnel platform will assemble it properly.

Paragraph (g)(4)(ii)(I) of this final rule requires that employers post personnel platforms with plates or other permanent markings indicating the platform weight and its rated load capacity or maximum intended load. This provision is based on ANSI A10.28-1983, section 5-3 and, in part, on B30.5-1982, section 5-3.2.2(b)(4). This requirement was proposed as paragraph (g)(4)(ii)(G) and has been redesignated.

A few commenters, including the International Cargo Gear Bureau, the United Steelworkers, and Norpac Engineering, Inc. (Exs. 3-1, 3-10 and 3-88), suggested that the marking also indicate the maximum number of personnel who may be lifted. OSHA notes that ANSI B30.5-1983, section 5-3.2.2(b)(4), provides that the plate shall specify the maximum number of persons to be hoisted. In addition, the United Steelworkers of America (Ex. 3-10) recommended that this provision be revised to include a platform certification requirement, with the certification posted on the platform.

OSHA has determined that the platform posting provision as proposed will provide adequate protection for hoisted workers by alerting everyone involved in a lift of the rated load capacity or maximum intended load of the platform. Furthermore, insofar as A10.28 and B30.5 differ in their provisions for marking of personnel platforms, OSHA has decided to rely on ANSI A10.28-1983, which exclusively covers personnel platforms, rather than B30.5-1982, which focuses on cranes, in deciding not to require the plate to state the maximum number of passengers. The Agency believes that an additional requirement to post the personnel platform with the maximum number of passengers will not add to the degree of employee protection provided by the requirement to post the maximum intended load or rated load capacity. Finally, OSHA has determined that although a personnel platform designed

and built at the worksite may not have a rated load capacity (such capacities are normally determined for manufactured platforms) the design will have been based on a determinable maximum intended load. In those situations where a platform does not have a rated load capacity, the maximum intended load shall be posted. Therefore, this paragraph is being promulgated as revised.

Paragraph (g)(4)(iii) of this final rule covers personnel platform loading.

Paragraph (g)(4)(iii)(A) prohibits loading the platform in excess of its rated load capacity or maximum intended load, whichever is less. This provision is similar to the proposed requirement and is based on ANSI B30.5-1982, sections 5-3.2.1.1-(b) and (c). The Agency received no comments which opposed this requirement. Ebasco Constructors (Ex. 3-6) suggested that OSHA base the rated load capacity on a specified minimum pounds-per-square-foot requirement.

The performance-oriented language of the provision, as originally proposed, allows the employer to determine what criteria are used to rate the capacity of the personnel platform. OSHA believes that this provision, when coupled with the design, construction, and testing requirements presented in this standard, will provide adequate protection for employees. As noted above, a job built and designed personnel platform may not have a rated capacity, but the design will have been based on a maximum intended load. Therefore, for platforms whose rated load capacity has not been determined, or for which there is no such rating, the employer can comply with this provision by ensuring that the maximum intended load is not exceeded.

Paragraph (g)(4)(iii)(B) limits the number of employees being hoisted to those required to do the work. This provision, which is identical to the proposed requirement, is based on ANSI A10.28-1983, section 12.2. OSHA specifically requested additional input on this subject in Issue 3. Many commenters, especially contractors such as Parsons, Johnson Bros. and Granite (Exs. 3-22, 3-43 and 3-50), supported the provision as proposed. Supportive comments were also received from the Boilermakers Union (Ex. 3-53).

As indicated by the discussion of paragraph (g)(4)(ii)(I) above, some commenters suggested that OSHA limit the number of employees to be hoisted and that the maximum intended load and rated load capacity be based on that number of employees times a pounds per employee load factor (Exs. 3-24, 3-27, 3-33, 3-47, 3-76, and 3-82).

However, other commenters, such as Puerto Rico (Ex. 3-55) and the Salt River Project (Ex. 3-61), asserted that OSHA should focus on preventing loads from exceeding capacity, not on the number of employees needed to perform work duties. OSHA agrees with those commenters who favored compliance capacity requirements set forth in terms of total load weight. Indeed, OSHA has determined that compliance with the load limits of the platform and maintenance of the platform safety factor established by the standard will provide the necessary protection, while allowing the employer the flexibility to determine how many employees must be hoisted to perform assigned work. The Agency believes that specifying a limit on the number of hoisted personnel would unreasonably restrict the determination of how many workers are required to perform a particular task safely. Accordingly, OSHA has promulgated this paragraph unchanged.

Paragraph (g)(4)(iii)(C) limits the occupancy of the personnel platform to employees, and the tools and materials necessary to do the work they are assigned. This provision reflects input from the ACCSH which urged OSHA to ensure that personnel platforms were not used as material hoists (Tr. 5-23-83 pp. 50-52). Unit Crane & Shovel (Ex. 3-47) recommended that OSHA prohibit the use of personnel platforms to hoist bulk material because a shifting load could endanger the hoisted personnel. The Carolinas Branch of the AGC (Exs. 3-48 and 3-82) opposed such a restriction on transporting material in bulk or other loads not related to the task to be performed on personnel platforms, as long as the capacity of the platform was not exceeded. OSHA believes that compliance with capacity limitations above does not provide adequate assurance of employee safety when loading personnel platforms. OSHA believes that it is less likely that the appropriate concern for capacity limitations would be shown when using a personnel platform as a material hoist. This misuse would cause structural fatigue which may not be readily detected by inspection, until failure occurs. The Agency reiterates its concern that personnel hoisting, insofar as it is permitted under the terms of this standard, must satisfy more demanding criteria than are required for material hoisting. Given the special concern OSHA has expressed regarding the hazards of personnel hoisting, the Agency has determined that it would be inappropriate to allow personnel platforms to be used as material hoists. In addition, the Agency believes that any blurring of the distinction between

personnel hoisting and material hoisting would increase the likelihood of operator error. Therefore, OSHA is promulgating this paragraph as proposed, with a clarification that the platforms are not to be used for other purposes when they are not hoisting personnel.

Proposed paragraph (g)(4)(iii)(D) has been separated into two provisions for the sake of clarity, but the provisions will be discussed jointly since it was proposed as one provision. The proposed paragraph required that materials on a personnel platform be secured and evenly distributed while the platform is in motion. Paragraph (g)(4)(iii)(D) requires that materials and tools on an occupied personnel platform be secured to prevent displacement. Paragraph (g)(4)(iii)(E) requires materials to be evenly distributed within the confines of the platform. These provisions are based on ANSI A10.28-1983, section 8.1. The few comments received support these provisions in principle. The Boeing Company and Boeing Aerospace (Exs. 3-38 and 3-57), however, suggested that OSHA change the wording to "loaded in such a way that they do not present a hazard to personnel." Ebasco Construction (Ex. 3-6) suggested that the language be changed to require materials to be "evenly distributed within the confines of the platform." The Agency believes that the Boeing commenters' suggested revision provides less guidance to the employer, and would be less protective than the requirement, as proposed. On the other hand, OSHA has determined that Ebasco's suggested language better expresses OSHA's original intent that the load be evenly distributed within the platform. Therefore, the Agency has adopted Ebasco's suggested change and promulgates these paragraphs as revised and separated.

Paragraph (g)(4)(iv) addresses the rigging used to suspend personnel platforms.

Paragraph (g)(4)(iv)(A) requires that if a rope bridle is used to connect the personnel platform to the load line, the bridle legs shall be connected to a master link or shackle, so that the weight of the platform is evenly distributed among the bridle legs.

The State of California (Ex. 3-33) suggested requiring that four part bridles be designed as if only two legs were supporting the platform to ensure stability, because the weight of the loaded platform would probably not be evenly distributed. Although this suggestion, in general, is technically sound rigging practice, OSHA has determined that other bridle

configurations will provide the necessary protection. In addition, OSHA believes that the bridle configuration suggested by the State of California may not be appropriate in all circumstances. Therefore, OSHA has determined that the requirement, as proposed, provides the necessary protection for hoisted employees.

Lift-All Company, Inc., the Boeing Company and Boeing Aerospace (Exs. 3-13, 3-38 and 3-57) commented that the use of the term "ring" in paragraph (g)(4)(iv)(A) was inappropriate. They suggested that OSHA use the term "master link" adopted by ANSI B30.9-1984, "Slings". OSHA has decided that the suggested change is proper and has reworded the final rule accordingly.

Standard Oil (Indiana) (Ex. 3-46) expressed concern that this provision as proposed would not permit alternatives to wire rope bridles and requested that OSHA clearly state that such alternatives were permitted. OSHA believes that it is sufficiently clear from the use of the expression "when a wire rope bridle is used" that OSHA is simply taking into account the consequences of a particular rigging choice and does not mean to limit the choice of equipment. Therefore, OSHA has not made the requested change.

The Organization Resources Counselors (Ex. 3-32) asserted that hoisted personnel would be safer if OSHA permitted bridle legs to be attached to the hook individually, rather than joined at a single ring or shackle. OSHA has determined that the suggested change would allow hoisted personnel to be exposed to greater danger than would be permitted under the standard as proposed, because the displacement of any one of the bridle legs could cause the platform to tip. Therefore, the suggested change has not been made.

Paragraph (g)(4)(iv)(B) requires that the hooks or other attachment assemblies used for rigging personnel hoists be of types that can be closed and locked. This provision, which is identical to the proposed requirement, is based on ANSI A10.28-1983, section 9.2. OSHA highlighted this subject in Issue 8. Many commenters, including Johnson Bros. Corporation, Unit Crane & Shovel and Lunda Construction Company (Ex. 3-43, 3-47 and 3-92), strongly supported this requirement. On the other hand, Bechtel (Ex. 3-45) asserted that this provision was redundant with existing safety standards, and the American Road & Transportation Builders Association (ARTBA) (Ex. 3-65) stated that the proposed requirements were "excessively descriptive and restrictive," though ARTBA did suggest

that OSHA require positive locking devices on hooks. As has been discussed above, OSHA believes that the hoisting of personnel requires even greater care than the hoisting of material, so the precautions required by this paragraph are necessary.

Some commenters, such as Standard Oil (Indiana) (Ex. 3-46) and Gulf Oil (Ex. 3-68), suggested that OSHA permit "mousing," a practice by which wire rope is wrapped around a hook to cover the hook opening and to prevent the dropping of a hoisted load, as an alternative to the shackles and locking hooks required in the proposed standard. These commenters asserted that mousing was a safe and proven technique and that the provision, as proposed, would impose hardship. Indeed, ANSI B30.5-1982, section 5-3.2.2(b)(10), recognizes mousing as a means of securing the hook opening for personnel hoisting operations. Other commenters, including Parsons Corporation (Ex. 3-22), the State of California (Ex. 3-33), the Boilermakers Union (Ex. 3-53) and NORPAC Engineering (Ex. 3-88), asserted that OSHA should not allow mousing. These commenters stated that mousing was unsafe and that a strong, securely locked hook should be used instead. In addition, the International Union of Operating Engineers testified (Tr. 465-466) that mousing does not close a hook opening and that properly closing safety hooks are available.

OSHA has determined that mousing would not provide the necessary assurance that a personnel platform would not be dropped, because the platform could still slip off the hook despite the mousing. The Agency agrees with those commenters who suggest that only hooks whose openings lock closed may be used. Therefore, OSHA has not made the suggested revision. OSHA has followed ANSI A10.28 instead of ANSI B30.5 in this case, because the Agency believes that permitting mousing under this standard would not effectuate the purposes of the OSHA Act.

OSHA has revised the wording of proposed paragraph (g)(4)(iv)(B) in several places to clarify the intended meaning. As was the case with paragraph (g)(3)(ii)(C), the term "overhaul ball" has replaced "fall ball" to be consistent with current industry terminology. In addition, OSHA has replaced the term "screw pin" with "bolt" and has specified that any shackles used must be of the "alloy anchor-type," in response to comments from Columbus McKinnon Corporation (Ex. 3-16), which reflect current usage in the industry. Otherwise, this paragraph has been promulgated unchanged.

Proposed paragraph (g)(4)(iv)(C) required that all wire rope and hardware used to rig personnel platforms have a minimum safety factor of seven, in order to be consistent with the proposed load line (running rope) safety factor. Issue 4 of the proposal discussed the proposed equipment safety factors and solicited additional input. Some commenters, including Lift-All and the Wire Rope Technical Board (Exs. 3-13 and 3-15), supported setting the safety factor at seven. Other commenters, such as the Salt River Project and the Spartan Equipment Co. (Exs. 3-61 and 3-82), "accepted" the proposed safety factor, while Standard Oil (Indiana) (Ex. 3-46) simply took it as a "given." Spartan suggested that setting the safety factor at five instead of seven would still provide "satisfactory" protection. These comments either did not provide a basis for using seven or they relied on the rationale presented in the proposal to support setting seven as the safety factor for hoist ropes.

Unit Crane & Shovel, the Boeing Company, and Boeing Aerospace (Exs. 3-47, 3-38 and 3-57) suggested that OSHA set the safety factor for rigging at 10, based on the same authorities and rationale used to support their suggestion that the safety factor for running ropes be set at 10 (See discussion of paragraph (g)(3)(i)(A) of the final rule.) The Boeing commenters also suggested that OSHA require a higher safety factor when employers use rotation resistant rope. OSHA notes that Unit Crane would set different safety factors for the personnel platform and its "attaching devices" (safety factor of 5) on the one hand, and running ropes (safety factor of 10) on the other, citing ANSI B30.5-1982, section 5-3.2.2(b)(3). This raises the question whether platform rigging should be considered part of the platform or part of the load line for the purpose of setting a safety factor for rigging.

ANSI A10.28-1983 does not specify a safety factor for rigging, but it does agree with ANSI B30.5-1982 in setting the safety factor for the personnel platform at five. The National Constructors Association, Johnson Bros. Corporation and Granite Construction (Exs. 3-30, 3-43 and 3-50) suggested setting the rigging safety factor at five so that it would be consistent with the personnel platform safety factor. Magma Copper and the AGC of America (Exs. 3-27 and 3-28) suggested that setting the safety factor for rigging at five would be adequate. In addition, Columbus McKinnon (Ex. 3-16) opposed the proposed rigging safety factor of seven because it was inconsistent with the

industry practice regarding hooks (safety factor of three to five) and shackles (five to six).

OSHA notes that the load imposed on the hoist line is greater than that imposed on any single static line, such as a platform sling. Based on the comments and the pertinent consensus standards, OSHA is convinced that it is critical to provide employers with clear, readily applicable guidance for designing the platform and its rigging. Accordingly, the Agency has determined that the platform rigging safety factor should be the same as for the platform itself and has revised the proposed paragraph to require a safety factor of five. OSHA agrees that rotation resistant rope is subject to greater and harder to detect deterioration than standard wire rope, therefore the Agency has set the safety factor for rotation resistant rope at 10. Therefore, OSHA promulgates paragraph (g)(4)(iv)(C), as revised.

Paragraph (g)(4)(iv)(D) requires that all eyes in wire rope slings be fabricated with thimbles to prevent excessive wear on the rigging.

Magma Copper (Ex. 3-27) commented that thimbles were unnecessary, based on its suggestion that OSHA set the wire rope and hardware safety factors at five. In addition, Standard Oil (Indiana) (Ex. 3-46) commented that thimbles would only be minimally useful, based on a safety factor of seven. The Salt River Project (Ex. 3-61) and Lunda Construction Company (Ex. 3-92) supported the proposed provision, with the Salt River Project emphasizing that OSHA should require thimbles of the flemish eye type, rather than the fold back splice type.

OSHA has determined that there is a reasonable basis for this requirement because thimbles are generally used in the fabrication of slings intended for use more than one time, whether hoisting material or personnel. Thimbles allow a smoother bending of the portion of wire rope used to make eyes, and help prevent kinks and crimps that would occur without the thimble. This results in less deformation of the wire rope, and, therefore, reduces deterioration of the ropes strength. In keeping with the performance-oriented approach OSHA has taken in setting requirements for personnel platforms, the Agency will not specify the type of thimble to be used. Therefore, this paragraph is promulgated unchanged.

Paragraph (g)(4)(iv)(E) prohibits the use of personnel hoisting bridles and other personnel hoisting rigging for any other purpose. This provision appeared in the proposed standard as paragraph (g)(6)(x). It has been relocated so it will

appear with other provisions which regulate rigging.

The Construction Industry Manufacturers Association (Ex. 3-31) recommended that "no external load shall be lifted by attaching to the personnel platform." The State of California (Ex. 3-33) and the National Constructors Association (Ex. 3-74), while generally opposed to hoisting of other loads, commented that it should be permitted in the isolated circumstances when need was shown. The Milwaukee Construction Industry Safety Council (MCISC) (Ex. 3-70) commented that a crane should not hoist other loads while employees are aloft, suggesting that the platform be lowered when the workers need more materials. DuPont (Ex. 3-75) and the State of Michigan (Ex. 3-84) suggested that OSHA expressly prohibit any other crane operations while employees are being hoisted. On the other hand, Kenny Construction (Ex. 3-69) asserted that it needs to use a "whip" line to assist hoisted personnel in their work.

As already stated in the discussion of paragraph (g)(4)(iii)(C), OSHA believes that the use of a personnel platform for material hoisting would expose hoisted employees to increased risks. Given the close relationship between the platform and the attached rigging, OSHA has concluded that the ban on material hoisting should also apply to the rigging. In particular, OSHA has determined based on the evidence in the record, that the danger of excessive wear and entanglement from hoisting other loads far outweighs the convenience value of permitting the practice. OSHA has revised the language to prohibit clearly the use of the rigging for other service and to make the language consistent with the similar restrictions for use of the platform found in paragraph (g)(4)(iii)(C).

In addition, OSHA solicited comments in Issue 10 regarding the need for an additional sling (bridle) which would be in position to support the personnel platform in case the primary connection failed. Several commenters, such as Parsons Corporation, the U.S. Air Force and the Research and Trading Corporation (Exs. 3-22, 3-24 and 3-60) stated that a secondary bridle was necessary for protection of hoisted personnel. Other commenters, the Boeing Company and Boeing Aerospace (Exs. 3-38 and 3-57), stated that secondary bridles were not always needed, particularly where independent lifelines were feasible. The Boeing commenters noted that the "safety" bridle protected against only one possible cause of platform fall. The State of California (Ex. 3-33) noted that

a secondary bridle would not be needed where the requirement in proposed paragraph (g)(4)(iv)(B) for positive locking load hook was satisfied and suggested that hooks be designed to ensure that secondary bridles would not be needed. The Milwaukee Construction Industry Safety Council (Ex. 3-26), in turn, noted that a standard hook with a safety latch would be sufficient to comply with proposed paragraph (g)(4)(iv)(B) if the second sling was required.

On the other hand, the Northwest Engineering Company, the AGC of St. Louis, Unit Crane and Shovel and Norpac Engineering, Inc. (Exs. 3-3, 3-14, 3-47 and 3-88) commented that a safety sling requirement was neither necessary nor desirable. In particular, the AGC of St. Louis and Unit Crane stated that the proximity of the "redundant" sling to the load line would cause damage through chafing and tangling. Unit Crane added that compliance with the proposed requirements for closing the hook throat, prohibiting free fall, using lifelines and performing prelift safety checks would properly protect hoisted personnel. In addition, the Boilermakers Union (Ex. 3-53) stated that there had been no accidents involving its members which indicated need for a safety bridle. The Boilermakers added that the "rigorous testing" required under the proposed rule made the possibility of such an accident "virtually non-existent."

OSHA agrees with the commenters who noted that compliance with the provisions of the proposed rule, such as the requirements for hook throat closing and equipment testing, will protect hoisted personnel, so that a secondary sling is not needed.

Paragraph (g)(5) of this final rule details the inspection and testing requirements for cranes, derricks and platforms used to hoist personnel. This paragraph has been extensively revised, as discussed below.

Paragraph (g)(5)(i) as proposed required the inspection, by a competent person, of the crane or derrick used to hoist personnel, before each shift and after material handling operations where the load exceeded 50 percent of the rated capacity. The Boeing Company and Boeing Aerospace (Exs. 3-38 and 3-57) commented that the latter requirement would necessitate disruptive mid-shift inspections. In addition, the National Constructors Association and Bechtel (Exs. 3-30 and 3-45) noted that inspections are already required by other paragraphs in § 1926.550.

OSHA has determined that any potential problem involving a crane or

derrick supported personnel hoisting system or set-up would be detected through compliance with the existing requirements of § 1926.550, or through the evaluation of a trial lift which satisfies the terms of new paragraph (g). Therefore, OSHA has deleted the inspection requirements set out in proposed paragraph (g)(5)(i).

In the proposed rule, OSHA required that employers perform trial lifts, and the Agency provided guidance regarding the information to be obtained through the trial lifts. OSHA recognizes that some commenters were confused by the proposed language.

OSHA intended to require that employers conduct trial lifts with the personnel platform unoccupied. The trial lift would encompass the entire operational cycle—from the point where an employee entered the platform; through each work location accessible from the set up location, in sequence; and, return to the point where the employees would exit the platform. The trial lift would be repeated each time the crane was set up in a new location. The Agency position regarding this provision has not changed. In this final rule, OSHA provides specific guidance to employers as to what must be determined during this trial lift.

Commenters also expressed uncertainty regarding the Agency's purpose in requiring trial lifts. Many commenters apparently confused the trial lift and proof testing requirements. In order to eliminate misunderstanding, OSHA notes that the purpose of the trial lift is to determine that the lift route is free of obstacles; to determine work location accessibility; to confirm that no work locations will place the crane or derrick in such a configuration where the intended load would exceed the 50 percent limit of the crane's rated capacity; to ensure soil or other supporting surface stability, and to determine suitability for the intended lift. The trial lift is conducted just prior to commencing actual hoisting operations. The proof test, on the other hand, is conducted to test the capacity and construction of the personnel platform. Proof testing is required prior to hoisting personnel and after any repair or modification. The proof test and trial lift can be conducted simultaneously, as long as the specific requirements for each are satisfied.

Paragraph (g)(5)(i), as promulgated, requires that the operator perform a full cycle operational trial lift before allowing personnel in the platform. This paragraph is similar to proposed paragraph (g)(5)(ii) and is based on ANSI B30.5-1982, section 5-3.2.2(a)(6). Additionally, this paragraph requires the

operator to determine that all systems, controls and safety devices actuate and function properly; that there is nothing along the hoisting route which would interfere with the platform reaching the work location and returning; and that all configurations needed during the hoisting operation will allow the operator to remain within the derated capacity. OSHA believes that the crane or derrick operator is the best and, probably, the only person qualified to make these determinations.

Most of the commenters supported proposed paragraph (g)(5)(ii), although they diverged as to the circumstances when the trial lift must be performed. A few commenters, such as Columbia Nitrogen (Ex. 3-58), stated that the requirement would impose a burden without providing a benefit, because the 50 percent derating already provided the necessary protection. Some commenters, such as Unit Crane & Shovel and the Organization Resources Counselors (Exs. 3-47 and 3-88), suggested that OSHA promulgate the provision as proposed. Others, such as the Associated General Contractors of America and Granite Construction (Exs. 3-28 and 3-50), asserted that trial lifts should only be required at the beginning of a shift. Granite Construction's comment, however, reflected the mistaken impression that operators would have to interrupt hoisting to perform a trial lift each time the platform was repositioned, even if the crane or derrick were not moved. OSHA's intent is for operators to run the unoccupied platform through all movements and positions necessary to do the work before permitting employees aboard the platform. By contrast, a change in the set-up location of the crane or derrick, the addition of one or more work locations to those already reached from an existing set-up location, or a significant change in the lift route, will require another trial lift.

OSHA has determined that a trial lift should be performed directly before personnel are hoisted, rather than at the beginning of a shift, as was proposed. The Agency is concerned that a trial lift would not take into account the circumstances under which personnel hoisting would take place if the trial lift were conducted hours before the hoisting. Under those circumstances, the proposed trial lift might not provide the necessary assurance that the lift would be completed safely.

OSHA believes that the requirement as revised will impose a more reasonable regulatory burden on employers than did the requirement as proposed. Employers will only need to perform trial lifts when they will

actually be hoisting employees, instead of having to perform them at the beginning of any shift in which there is a possibility that they might need to hoist personnel. Therefore, OSHA has decided that this requirement, as revised, most effectively regulates the timing of trial lifts.

Paragraph (g)(5)(ii) of this final rule requires that the trial lift be repeated whenever the crane is moved and set up in a new location or returned to a previously used location. This provision is similar to and replaces paragraph (g)(5)(iii) of the proposal.

In the proposal, OSHA required that the test lift at each new set-up location be conducted at 150 percent of the intended load. OSHA recognizes that the proposed language was not sufficiently clear. Several commenters apparently misconstrued the trial lift requirement as requiring a proof test of the platform. For example, the Bechtel Power Corporation (Ex. 3-45) commented as follows:

The proposed requirement is excessive, costly and nonproductive. We agree a load test of the personnel platform is a good practice but there is no sense in requiring load testing more often than that for the crane. ANSI requires load testing of cranes at the time they first come on the job or when modified or possibly damaged or on an annual basis.

The National Constructors Association, Standard Oil Company (Indiana), the American Road and Transportation Builders Association, and the Carolinas Branch of the ACC, (Exs. 3-30, 3-46 3-65 and 3-82), opposed the proposed requirement on the grounds that compliance would involve frequent handling of materials, which could damage the platform and cause employee injury, and would require employers to carry test weights or ensure test weights are available.

On the other hand, many commenters, such as the Commonwealth of Puerto Rico (Ex. 3-55) and the Milwaukee Construction Industry Safety Council (Ex. 3-26), supported the proposed trial lift requirements. Unit Crane & Shovel (Ex. 3-47) suggested that, in addition, OSHA require a trial lift when a crane or derrick is moved back to a former set-up location. Further, the International Union of Operating Engineers testified:

And whenever that crane is relocated, I mean, from coming around from this side of the building over to this other side of the building, and set up to work to operate again with a work platform, it should be tested again.

Our feeling is that it should be tested again. Because, we're not just testing, and load the

sandbags in and take it up to the point where the work is going to be performed.

We're not just testing for the rigging or the stability of the crane, but we're testing for clearances on whatever obstructions there might be, like the edge of a building, or a tree over here, or a guide wire going up to a stack.

We're going to see if we can get the crane into this place with this work platform, with the men in it, without hitting any kind of an obstruction. So, we're testing for clearances, as well as for stability of the crane.

And, of course, there could be something. There's always the possibility that there's an old manhole or a sewer or something down there. And we get this concentrated ground bearing pressure under an outrigger or under the end of the cats or something, that we might drop down through. (Tr. 424-425)

OSHA agrees with the Operating Engineers' reasons for performing trial lifts in these situations. Accordingly, based on the evidence in the record, the Agency is requiring that the employer conduct a trial lift, with the platform loaded to the anticipated lift weight, at each new set-up location and when returning to previously used locations.

OSHA has relocated the provisions of proposed paragraph (g)(6)(vii) to paragraph (g)(5)(iii) in the final rule. This consolidates the inspection and testing requirements in paragraph (g)(5), as suggested by the National Constructors Association (Ex. 3-30). Proposed paragraph (g)(6)(vii), which is based on ANSI B30.5-1982, section 5-2.4.2(a), requires testing and inspection to ensure, prior to hoisting, that a personnel platform is secure and properly balanced. In particular, the inspection must ensure that hoist ropes are free of kinks; lines are not twisted around each other; the primary attachment is centered over the platform; and all ropes are properly seated on drums and in sheaves.

Several commenters, including the American Road & Transportation Builders Association (ARTBA) (Ex. 3-65), stated that these proposed provisions were unnecessary and should be deleted. In particular, the ARTBA contended that the determinations required under proposed paragraph (g)(6)(vii) could be made in conjunction with the trial lift. This was OSHA's intent, and in order to clarify this intent, the Agency now specifically states that this is to be done as part of the trial lift.

OSHA has relocated these provisions, related to hoist rope and rigging inspection, to paragraph (g)(5)(iii) because the Agency believes that they deserve specific mention as a reminder to employers that these items must be inspected at the end of the trial lift, and directly before actually hoisting personnel.

Paragraph (g)(5)(iv) provides that a competent person shall inspect the equipment and base support or ground immediately after a trial lift, to determine whether the test exposed any defects or had any adverse effects. This requirement is virtually identical to proposed paragraph (g)(5)(iii)(A). The added "competent person" requirement reflects input from the ACCSH (Tr. 5-23-83 pp. 148-149) and is intended to ensure that the designated person has the skill, experience and authority to perform the inspection and have any defects repaired. Unit Crane & Shovel (3-47) suggested that OSHA specifically require employers to inspect the rigging after a trial lift. The Agency intended the employers to include the rigging when they performed their post-trial lift inspection. For the sake of clarity, OSHA has revised this provision as suggested. Therefore, OSHA promulgates paragraph (g)(5)(iv) as renumbered and revised.

Paragraph (g)(5)(v) requires that employers correct any defects found during an inspection before hoisting personnel. This provision is identical to proposed paragraph (g)(5)(iii)(B). There were no comments regarding this requirement. Therefore, OSHA promulgates proposed paragraph (g)(5)(iii)(B) as paragraph (g)(5)(v).

Paragraph (g)(5)(vi) requires that employers proof test their personnel platforms and hoist rigging at 125 percent of the rated capacity of the platform, with the test load evenly distributed on the platform. The proof test is to be performed prior to hoisting personnel for the first time at a work site, or whenever the platform or rigging has been repaired or modified. This provision, based on ANSI A10.28-1983, section 7.2, has been added because of OSHA's concern that employees might otherwise be hoisted unsafely in personnel platforms whose structural integrity may have been compromised by damage, repair or modification. In its discussion of proposed paragraph (g)(4)(ii)(F), covering welding (49 FR 6286), OSHA requested input regarding the need for proof testing and the appropriate weight and procedure. Unit Crane & Shovel (Ex. 3-47) recommended that "the platform be proof tested after fabrication and certified to have withstood a load five times its assigned capacity rating." The Specialized Carriers and Rigging Association (Ex. 3-54) noted that "B30.9 of ANSI requires that all welded assemblies used in overhead lifting (personnel platform) must be proof tested to twice their rated capacity." The Commonwealth of Puerto Rico (Ex. 3-55) recommended proof testing at 150 percent of rated capacity

after fabrication, and the Boeing Company and Boeing Aerospace (Exs. 3-38 and 3-57) recommended proof testing at 200 percent every three months, if the platform is in continual use. In addition, Bechtel (Ex. 3-45) suggested that OSHA require proof testing at 125 percent of the rated capacity of the personnel platform.

The State of California (Ex. 3-33) recognized proof testing as an option, but suggested that OSHA instead require personnel platform certification by an engineer, coupled with periodic inspection by a competent person.

OSHA has determined that proof testing at each job site is the most effective way to evaluate structural integrity, because the testing would detect deficiencies in fabrication and any damage caused in transit. OSHA also believes that a platform certification requirement is unnecessary because the required proof testing and inspection requirements would disclose any defects.

OSHA believes that field proof testing at 200 percent of the rated capacity could possibly permanently deform structural members. The Agency has further determined that suspending the platform for five minutes, loaded at 125 percent of the rated capacity, is considered an adequate, non-destructive field test and will provide the necessary assurance that any defect in the platform or rigging would be detected and corrected before any personnel were hoisted. Therefore, new paragraph (g)(5)(vi) incorporates such a requirement.

Paragraph (g)(6) addresses work practices which the Agency has determined will enhance the safety of workers being hoisted in personnel platforms.

Paragraph (g)(6)(i) of this final rule requires that hoisted employees keep all parts of their bodies inside the platform during raising, lowering and positioning. This provision, which is based on ANSI A10.28-1983, section 12.6, is identical to the proposed provision, except that the Agency has added an explanation which states that the requirement does not apply to an occupant of the platform performing the duties of a signal person. Thus, the paragraph, as promulgated, takes into account a common sense consideration which was overlooked in the proposal. OSHA determined that this revision was needed based on comments submitted by Magma Copper and Bechtel (Exs. 3-27 and 3-45). The Construction Industry Manufacturers Association (Ex. 3-31) expressed support for the provision as proposed.

Proposed paragraph (g)(6)(ii) required that the platform be landed or secured to the structure before employees enter or exit the platform. This provision was based on ANSI A10.28-1983, section 12.7. One commenter, the State of Maryland (Ex. 3-19), disagreed with the proposed requirement, stating that "securing the platform to another structure can be dangerous." On the other hand, commenters such as the Commonwealth of Puerto Rico (Ex. 3-55) supported the proposed provision. In addition, Unit Crane & Shovel (Ex. 3-47) commented that "it is unclear what structure OSHA is referring to." Unit Crane suggested that OSHA use the term "stable structure." Unit Crane also noted that the movement of workers in a personnel platform could cause dangerous instability and suggested that the hoisted platform be secured to a "stable structure" whenever employees were working either in the platform or outside.

OSHA has reviewed the evidence in the record regarding this issue and agrees that the language of this provision needs to be clarified. In response to Unit Crane's concern, the Agency is revising the paragraph to make it clear that the platform is to be secured to "the structure where the work is to be performed * * *". On the other hand, the Agency concluded that a requirement to secure the platform to a "stable structure" would be inappropriate for certain work activities, such as demolition, where securing to the structure would create an unsafe condition. Indeed, OSHA recognizes that there are circumstances where there is no structure to which it is possible to secure the platform safely, and has revised the paragraph accordingly. Therefore, OSHA has decided to promulgate this provision as revised.

Paragraph (g)(6)(iii) of the final rule is identical to the proposed provision. This provision, which is based on ANSI A10.28-1983, section 12.8, requires the use of tag lines, unless the use of a tag line creates an unsafe condition. The Agency believes, based on ANSI B30.5-1982, section 5-3.2.1.4(m) and the *Crane Handbook* (Ex. 5-2D), that compliance with this provision will be an important element in ensuring that any hoisting while traveling, as regulated by paragraph (g)(7) below, proceeds safely. The Agency received few comments on this provision. Kerr-McGee (Ex. 3-23) commented that the use of a tag line as a means of controlling platform motion was preferable to the use of rotation resistant wire rope. In addition, the Milwaukee Construction Industry Safety

Council (Ex. 3-26) and Organization Resources Counselors (Ex. 3-89) expressed support for the proposed requirement. Therefore, OSHA promulgates the requirement as proposed.

Proposed paragraph (g)(6)(iv), which prohibited traveling with personnel suspended on a hoisted platform, has been deleted. Traveling is now addressed in paragraph (g)(7), below.

Proposed paragraph (g)(6)(v) has been redesignated as paragraph (g)(6)(iv) in the final rule. The proposed provision required that the crane or derrick operator remain at the controls at all times when hoisting employees. The requirement was based on ANSI A10.28-1983, section 12.4, and B30.5-1982, section 5-3.2.2(a)(12), which provide that the crane or derrick operator shall stay at the controls while the platform is suspended. Boeing (Ex. 3-38) and Standard Oil (Indiana) (Ex. 3-46) agreed that this requirement should only apply when the platform was suspended. In addition, Unit Crane & Shovel (Ex. 3-47) suggested that the crane operator remain at the controls, with "attention directed to the platform at all times when the platform is suspended." Unit Crane recognized that careful regulatory drafting would be necessary to ensure that compliance with this requirement did not detract from the performance of the operator's other duties. OSHA believes that a requirement for the operator to remain at the controls and carefully conduct the lift ((g)(3)(i)(A)) will ensure that the necessary attention is paid to the position of the platform. Therefore, OSHA has responded to Unit Crane's concern, but has not adopted the suggested language.

Also, the Construction Industry Manufacturers Association (CIMA) and the Boilermakers Union (Exs. 3-31 and 3-53) stated that the operator should remain at the controls while the platform is "occupied." The CIMA emphasized the alertness required to ensure the safety of platform passengers while the crane engine is running, and the Boilermakers Union was particularly concerned that hoisted personnel would be endangered if the operator left the controls once the platform had been hoisted to and secured at its working position.

OSHA agrees with the CIMA and Boilermakers Union that the operator should be at the controls once the crane engine is running and the personnel platform is occupied, because inadvertent movement by the crane before hoisting or after landing could cause injuries. Therefore, OSHA has

revised this paragraph to require that the operator remain at the controls whenever the crane engine is running and the personnel platform is occupied.

Paragraph (g)(6)(v) requires that employers discontinue personnel hoisting promptly when there are indications that hoisted employees would be exposed to dangerous weather conditions or other impending danger. This provision is virtually identical to paragraph (g)(6)(vi) of the proposed standard. The Agency has added the word "promptly" to this paragraph, as recommended by the Construction Industry Manufacturers Association (Ex. 3-31). The Agency believes that this modification clarifies its regulatory intent.

Some commenters suggested that OSHA set a specific wind speed at which operations would be discontinued (Ex. 3-31 and 3-46). Other commenters, such as the Boeing Company (Ex. 3-38), suggested that OSHA specify the weather conditions under which employers would be required to discontinue personnel hoisting operations. OSHA believes that it is neither possible nor necessary to compile such a list, because circumstances vary so much between construction sites. Indeed, the ACCSH declined to suggest more specific language for this provision because it felt that a broadly worded requirement was needed to cover the many hazards which could arise (Tr. 5-23-83 pp. 147-148). OSHA also notes that its enforcement efforts would be adversely affected if problems arose due to conditions not specifically included in a list.

In addition, the Boilermakers Union (Ex. 3-53) suggested that OSHA require a "constant monitor" to detect hazardous gases when employees are hoisted to repair the tops of foundry stacks, coke ovens and other chimneys at facilities where normal operations are continuing. Although OSHA is concerned that hoisted employees could be harmed by toxic materials, the hazards raised by the Boilermakers are already regulated by other construction standards, such as the permissible exposure limits set forth in § 1926.55. Therefore, the Agency believes that it is not necessary to adopt the suggested revision.

The provisions of proposed paragraph (g)(6)(vii) have been moved to paragraph (g)(5) and have been discussed above.

Paragraph (g)(6)(vi) of this final rule, which is virtually identical to proposed paragraph (g)(6)(viii), requires that employees being hoisted remain in continuous sight of and in direct

communication with the operator or signal person, while allowing the use of direct communications alone only if the circumstances warrant. This provision is consistent with ANSI A10.28-1983, sections 11.1 and 11.2, and with B30.5-1982, section 5-3.2.2(a)(15). Proposed paragraph (g)(6)(viii) required in all circumstances both continuous visual contact, and communication with the operator or signal person. OSHA received written comments and hearing testimony which indicated that radios or other means of communication would enable the hoist to proceed safely when direct visual contact with the operator or signal person was impossible or unsafe.

A representative of Sigma Associates, Ltd. testified as follows:

I can envision times when it's going to be impractical and really unsafe to place a signalman in a position where he would have view of the crane operator as well as the personnel work platform. So I can see some conditions where it would not be possible or practical to have a signalman in view and, under these conditions, would recommend that communications would be permitted in lieu of the signalman concept. (Tr. 39)

Several other commenters suggested that OSHA permit the use of two-way audio communication equipment as an alternative to visual contact. Some commenters, such as Morrison-Knudsen Co. and Standard Oil Company (Indiana) (3-9 and 3-46), stated that audio contact was appropriate where visual contact could be lost in the course of the hoisting operation, such as where employees are hoisted inside a silo or furnace stack. Other commenters, such as the National Constructors Association, Boeing Aerospace and the Organization Resources Counselors (Exs. 3-30, 3-57 and 3-89), stated that audio contact was a satisfactory means of maintaining communication.

OSHA has determined that there are circumstances where it would be impossible or unsafe for hoisted personnel to maintain visual contact with the signal person or crane operator. In particular, the Agency believes that stationing a signal person atop a chimney or silo to observe hoist operations would be dangerous. Therefore, OSHA has revised the proposed standard to provide that hoisted employees may use direct communication, such as audio contact, as an alternative to continuous sight when it would be more dangerous for the signal person to remain in continuous sight.

Paragraph (g)(6)(vii) of this final rule is essentially the same as paragraph (g)(6)(ix) of the proposed standard, except that proposed paragraph

(g)(6)(ix) provided only for the use of body belts. The final rule reflects the ACCSH recommendations for flexible approaches to protection of hoisted personnel from fall hazards (Tr. 5-23-83 p. 143). This provision requires employees occupying a personnel platform to use a body belt or harness system, with a lanyard attached to either the load block, overhaul ball or a structural member of the platform capable of supporting the anticipated fall impact. This provision is based on ANSI A10.28-1983, sections 10.1 and 10.2. However, at the suggestion of the Boeing Company (Ex. 3-38), OSHA has added the option for personnel to use a body harness system to comply with this provision.

Several commenters, including the Panama Canal Commission (Ex. 3-51) and Standard Oil Company (Indiana) (Ex. 3-46), asserted that the tie-off requirement, especially during over water operations, would be hazardous. The Panama Canal Commission pointed out that:

In the event of cable or crane failure, employees attached to the work platform by belts or lanyards would be dragged under with the dropped platform.

In addition, the American Road and Transportation Builders Association (ARTBA) (Ex. 3-65) commented that the proposed provision was "not realistic." ARTBA stated that tie-off should not be required "where it creates another hazardous situation."

OSHA recognizes that there is a basis for special concern regarding crane or cable failure over water, and has incorporated this suggestion into this revised paragraph. In addition, OSHA notes that the revision is consistent with the existing § 1926.106 which requires specific precautions for all construction work over water.

Proposed paragraph (g)(6)(x) has been relocated to paragraph (g)(4)(iv)(E) of the final rule so that all provisions related to rigging are consolidated. The provisions of that paragraph are discussed as part of paragraph (g)(4).

OSHA has added a new paragraph (g)(6)(viii) to the final rule. This provision prohibits cranes or derricks being used to hoist personnel from hoisting any other loads at the same time. OSHA added this paragraph because, as noted by several commenters, including the Construction Industry Manufacturing Association and the National Roofing Constructors Association (Exs. 3-31 and 3-59), the use of other lines would endanger hoisted personnel due to risks of entanglement and destabilization.

OSHA has added a new paragraph (g)(7) to the final rule in order to provide requirements for cranes which need to travel with employees suspended in a personnel platform.

Proposed paragraph (g)(6)(iv) prohibited hoisting personnel while the supporting crane was traveling, except where a portal or tower crane was operating on a fixed track. This proposed provision reflected OSHA's concern that a crane moving across a construction site would be unable to maintain the stability necessary to protect employees from tipping or other hazards. OSHA notes that section 5-3.2.2(a)(14) of ANSI B30.5-1982 prohibits "travel while personnel are on the platform." On the other hand, ANSI A10.28-1983, section 12.9, provides that cranes shall not travel while hoisting personnel, "except under carefully controlled conditions." In Issue 9, the Agency presented questions regarding the circumstances which would make it necessary for a truck or crawler crane to travel while hoisting personnel.

Several commenters, such as the State of Alaska, Granite Construction Company and the Spartan Equipment Company (Exs. 3-4, 3-50 and 3-82), stated that traveling while hoisting was sometimes necessary in order to protect employees from greater hazards. In particular, Alaska stated that the decision should be based on the weather, terrain, the height to which personnel would be hoisted and the obstacles anticipated in lowering and rehoisting personnel and suggested that employers be required to demonstrate the need for travel. Also, Granite Construction stated that traveling while hoisting would be necessary where the crane was so hemmed in by structures that the boom could not be adjusted to reach all work stations. Granite Construction and Spartan Equipment stated that limited travel should be permitted to position the crane properly. In addition, the AGC of America (Exs. 3-28 and 3-67) stated that the proposed provision was too restrictive and unrealistic in light of workplace realities. The AGC suggested that OSHA permit travel when the terrain is firm, smooth and even; when traveling is done at a very slow speed; when travel is limited to the radius of the boom; when the boom is parallel to the direction of travel; and with outriggers, if equipped, fully extended with rams no more than 50 percent raised.

The National Constructors Association and the State of California (Exs. 3-30, and 3-33) generally favored prohibition of traveling, subject to exception for minor movement for final

positioning. California added that "traveling on rail, prepared level pads, or concrete floors could be acceptable." The State of Maryland (Ex. 3-19) also commented that hoisting while traveling on rails was acceptable.

Other commenters, such as Ebasco Constructors, Inc., Unit Crane & Shovel and the Commonwealth of Puerto Rico (Exs. 3-6, 3-47 and 3-55), suggested that OSHA prohibit travel. Ebasco Constructors noted the continual "changes in the physical surrounding" and the high rate of employee turnover as reasons why traveling would be unsafe. Unit Crane & Shovel stated that even slightly uneven terrain could cause a personnel platform to bounce and swing, and that traveling would cause stability and occupant footing problems. Unit Crane and Puerto Rico noted that swinging of the boom during travel was a particularly dangerous situation. Norpac Engineering, Inc. (Ex. 3-88) commented that cranes should not be allowed to travel while hoisting and that requiring mobile cranes to deploy their outriggers while hoisting would ensure that cranes would not travel.

The Parsons Corporation (Ex. 3-22) supported the proposed ban on travel by truck or crawler cranes while hoisting. Parsons also suggested that OSHA regulate travel by cranes on fixed tracks to ensure that the speed and path of movement are safe.

Sigma Associates, in its hearing testimony (Tr. 48-49), stated that it knew of "no condition where a pneumatic or rubber tired crane or even a crawler would * * * need to travel." Sigma Associates emphasized the importance of ensuring that the crane was supported on a firm level surface and indicated that travel would detract from crane stability and would endanger employees.

OSHA has determined, based on the evidence in the record, that hoisting of employees while traveling is, in general, an extremely dangerous practice. Therefore, the Agency has prohibited the practice, *except* under very limited circumstances. Because this practice is so inherently dangerous, OSHA has determined that the ANSI A10.28 requirement for "careful control" of operations is not sufficient to protect employees from the hazards of traveling. The Agency has determined that a prohibition against all hoisting while traveling, except as set forth in paragraph (g)(7) of this standard, is the only way to ensure that personnel hoisting is done only in those situations where it is necessary, and not just for an employer's convenience. OSHA notes that the Panama Canal Commission (Ex. 3-51) has had successful experience

with locomotive cranes and agrees that those types of cranes should be included, along with tower and portal cranes, in the exception to the prohibition. In addition, OSHA believes that the circumstances where other kinds of cranes would need to travel while hoisting are so rare that the proper course is to require an employer to demonstrate to OSHA, as suggested by the State of Alaska (Ex. 3-4), that traveling is necessary to avoid greater hazards while performing work.

Paragraph (g)(7)(i) prohibits cranes from traveling while hoisting employees, except for portal, tower and locomotive cranes, or where the employer demonstrates that there is no less hazardous way for employees to perform their work. This paragraph, which is similar to proposed paragraph (g)(6)(iv), adds exceptions for personnel hoisting operations involving locomotive crane and other circumstances where traveling has been shown to be necessary. OSHA stresses that this practice would still have to satisfy all of the other requirements of the standard so that employees would be hoisted safely. This provision reflects a recommendation from Granite Construction (Ex. 3-50) which commented:

Hoisting of personnel while the crane travels should be permitted to a limited extent under carefully controlled conditions where necessitated by worksite restrictions.

Other commenters, including the State of Alaska (Ex. 3-4), The National Constructors Association (Ex. 3-30), and the Spartan Equipment Company (Ex. 3-82) also suggested that OSHA allow some travel under controlled conditions, when the circumstances required it.

Paragraph (g)(7)(ii) provides additional rules that must be followed when cranes travel while hoisting employees.

Paragraph (g)(7)(ii)(A) requires crane travel to be restricted to a fixed track or runway. This provision is similar to the exception in proposed paragraph (g)(6)(iv). OSHA has added provision for traveling on a "runway," as defined in paragraph (g)(1)(ii)(E), to reflect recognition that there may be cranes, other than those on fixed tracks, which need to travel while hoisting personnel. This requirement, as revised, reflects comments from the State of California (CAL/OSHA) (Ex. 3-33) and the approved revision of ANSI A10.28-1983, which has not yet been published. In particular, CAL/OSHA stated that "traveling on rail, prepared level pads, or concrete floors could be acceptable."

Paragraph (g)(7)(ii)(B) limits travel to the load radius of the boom used during

the lift. This requirement was suggested by the AGC of America (Ex. 3-28) and Granite Construction (Ex. 3-50). Therefore, if travel would exceed the boom radius used during a particular personnel hoisting operation, the crane operator would be required to lower the platform, unload the occupants, reposition the crane, and perform another trial lift at the new position, before resuming the hoist operations. OSHA believes that this limitation will ensure that only the minimal, necessary traveling takes place.

Paragraph (g)(7)(ii)(C) requires that the boom be parallel to the direction of travel. This requirement, also suggested by the AGC (Ex. 3-28) and Granite Construction (Ex. 3-50), is consistent with ANSI B30.5-1982, section 5-3.2.1.4(m) which covers travel while hoisting material. This provision is intended to minimize the possibility that the crane will tip over, due to swinging of the boom and platform during travel.

Paragraph (g)(7)(ii)(D) requires that an employer perform a complete trial run before allowing employees on the platform. OSHA intends this requirement to supplement the requirements of paragraph (g)(5). It imposes only a nominal additional burden, because all testing requirements can be satisfied through one full cycle trial lift or run. This provision reminds the employer to test the route of travel as well as the route of the lift.

Paragraph (g)(7)(ii)(E) provides requirements for travel by rubber-tired cranes, reflecting OSHA's concern that rubber-tired cranes have lower capacity ratings than crawler cranes. These provisions are based on generally accepted good safety practice and comments received from the AGC of America (Ex. 3-28).

Paragraph (g)(8) requires that a pre-lift meeting be held prior to the trial lift. This paragraph reflects a suggestion received from the ACCSH at the May 23-24, 1983 meeting (Tr. 149-150), and is very similar to proposed paragraph (g)(7). The pre-lift meeting requirements have been modified slightly to clarify the Agency's regulatory intent.

One commenter, the Farm and Industrial Equipment Institute (FIEI) (Ex. 3-37), suggested that OSHA require employers to document, in writing, that they have complied with the standard. The FIEI stated "such documentation will fix accountability, aid enforcement and immeasurably improve the overall effectiveness of the rule in actual practice." Another commenter, the State of California (Ex. 3-33) suggested that OSHA require a written pre-lift plan.

OSHA has determined that the suggested written plan and recordkeeping requirements are not necessary. The procedures to be followed are clearly set forth and whether or not they have been followed can be readily determined by employee interviews at the hoist site.

The Agency has undertaken several recent rulemakings which follow the mandate of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and section 8(d) of the OSH Act (29 U.S.C. 657(d) to reduce recordkeeping requirements where they do not significantly contribute to employee safety and, therefore, unnecessarily burden employers. Accordingly, OSHA is very concerned that there be a clear benefit from any additional recordkeeping requirements. OSHA believes that requiring employers to document their compliance efforts, as suggested, would not significantly enhance the protection provided to employees by this standard. Therefore, the Agency has not adopted the suggested paperwork requirements, and promulgates paragraph (g)(8) as revised.

III. Final Analyses of Regulatory Impact, Regulatory Flexibility, and Environmental Impact

The following is a summary of the final regulatory impact and regulatory flexibility analyses prepared by OSHA for the final revised standard for crane or derrick suspended personnel platforms. The full text of the document may be examined and copied in OSHA's Docket Office, 200 Constitution Avenue, NW., Room N-3670, Washington, DC, 20210; telephone (202) 523-7894.

Summary of Effects

Affected Firms and Industries and Construction

The hoisting of personnel occurs in construction firms classified under a broad range of four-digit Standard Industrial Classification Codes (SICs). OSHA has determined that the final rule could potentially affect all firms within SICs 1541, Industrial Buildings and Warehouses; 1542, Nonresidential, not elsewhere classified; 1622, Bridge, Tunnel, and Elevated Highway Construction; 1629, Heavy Construction, Not Elsewhere Classified; 1791, Steel Erection; and 1795, Demolition. There were 42,804 firms in these SICs in 1982, and OSHA estimates that the number increased to about 45,000 firms in 1987. However, a number of these firms may adopt alternative means for hoisting personnel, such as aerial lifts, once the standard is implemented.

In addition to directly affecting the construction industry, the final rule will also indirectly affect the crane manufacturing industry and the firms that sell, lease, or rent cranes. In 1983, there were 26 companies that manufactured the types of cranes covered by the final rule, 7 of which were considered large companies. Crane rental agencies buy about 60 percent of all new construction cranes and construction companies buy most of the remainder.

Feasibility, Benefits, and Costs

OSHA has determined that compliance with this standard is technologically feasible. The standard does not require any devices that are not presently available for use on cranes and derricks. However, some cranes, especially the older mechanical ones, would require considerable modification in order to comply with the standard.

The benefits of the rule accrue to those workers who are at risk from current hoisting practices in the construction industry. Although the JACA Corp., OSHA's contractor, was unable to estimate the total number of workers who would benefit from the final standard due to the infrequency of such operations and the wide diversity of potentially affected workers, JACA was able to estimate the rate of injuries per lift. It is estimated that 1 injury occurs for every 36,500 persons lifted and that 3 fatalities and 3 nonfatal injuries occur each year as a result of crane- or derrick-suspended platform accidents. OSHA concludes that compliance with the final standard will avert most of these predicted fatalities and nonfatal injuries. In fact, a review of the experience of the states with stringent suspended platform rules in place for five years revealed no accidents during the five-year period.

Using current industry practice as a baseline, OSHA estimates that the annualized costs of full compliance with the final standard would be \$5.8 million in 1987 and \$5.5 million each for the years 1988-1991. The cost of using substitutes where they are a safe alternative to hoisting personnel by means of cranes or derricks accounts for over half of the estimated annual compliance cost for this baseline. The costs of retrofitting or converting cranes, retrofitting or building personnel platforms, and providing locking hooks and test weights comprise about 26% of the total cost. Delay-of-job, pre-lift meeting, and familiarization costs comprise the remainder. If all firms were in full compliance with the current OSHA Directive on work platforms suspended from crane booms, the cost of

the proposed changes would be \$2.8 million in 1987, and from \$2.4 million to \$2.6 million on an annual basis over the 1988-1991 period. There would be no cost for the substitution of alternative hoisting methods because the current OSHA Directive requires the use of less hazardous substitutes. This category represents the bulk of the cost difference between the two baselines.

Economic Effect

JACA used model firms to characterize the impacts on major users of suspended platforms. JACA estimated that the percentage increases in prices that would be needed for model firms to pass forward their compliance costs fully to their customers were insignificant; none would exceed 0.1 percent. JACA also calculated the effects of compliance costs on return-on-assets and profit margins assuming costs would be fully absorbed by model firms, and concluded that the decline in the rates of return on assets and profit margins was insignificant for all size firms. JACA concluded further that firms would be able to pass on most of their incremental costs to customers, and projected that compliance with the proposed standard would not result in decreased competition within the affected sectors of the construction industry as compliance costs are not likely to force the closure of any firms. In view of these factors, OSHA concludes that compliance with this final rule is economically feasible.

OSHA has assumed that crane manufacturers would be able to pass forward to the construction industry the increased costs of their product attributable to the standard because the magnitude of the costs is small. But if it were assumed that manufacturers would not be able to pass forward the increased costs, any adverse financial effects would be mitigated by the very small proportion of total output represented by cranes used for personnel hoisting. OSHA therefore concludes that the final rule will have no adverse economic effects on the crane manufacturing industry.

Regulatory Flexibility Certification and Environmental Impact Assessment

Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), OSHA has assessed the impact of the final rule and concludes that it would not significantly affect a substantial number of small entities. Specialization and the highly fragmented nature of the market structure in the construction industry

tend to minimize the extent of direct competition between small and large firms.

Assuming that the full cost of compliance would be passed through, OSHA estimated the economic impacts according to firm size by examining the relationship between compliance costs (in both low and high-cost estimates) and annual contract revenues for three size categories of model firms (annual revenues of \$11 million, \$50 million, and \$250 million). The ratio of these costs to annual revenues was nearly proportional across all size categories for both low and high cost estimates, in no case exceeding 0.1 percent. However, if firms would be forced to absorb all of their compliance costs, OSHA found that the percentage decline in the profit margins of small firms would be slightly greater than for larger firms under both cost estimates. Under the low cost estimate, the small firm's profitability declined an average 1.7 percent over the five year period while the large firm's profitability declined an average 1.5 percent. Under the high cost estimate, the small firm's profitability declined 5 percent over the five years while the large firm's profitability declined 3 percent. The significance of the differential impact on profit margins is reduced by the likelihood that all firms in the industry should be able to pass on a substantial portion, if not all, of their compliance costs. OSHA believes the demand for the projects built by construction firms which rely on hoisting of personnel by cranes and derricks is inelastic. Therefore, construction firms would have no incentive to underbid on projects requiring cranes since they would be unable to reduce operating costs merely by using equipment other than cranes to hoist personnel platforms or by redesigning structures to eliminate the use of cranes. In effect, both large and small firms will shift costs forward to the buyer.

For these reasons, OSHA concludes that small entities would not be significantly affected by the final rule.

Environmental Impact Assessment

This final rule has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4231 *et seq.*), the Guidelines of the Council on Environmental Quality (CEQ) (40 CFR Parts 1500-1517), and the Department of Labor's NEPA Procedures (29 CFR Part 11). As the result of this review, the Assistant Secretary of Labor for OSHA has determined that the final rule qualifies as a categorically excluded action according to Subpart B, § 11.10 of

the DOL NEPA regulations and that the final rule would have no significant environmental impact.

OSHA's final rule contains provisions for work practices which will enhance worker safety and reduce safety hazards from the hoisting of personnel platforms by cranes and derricks. The provisions include design criteria for cranes, derricks, and platforms; inspection and testing of cranes and derricks; required test lifts; and pre-lift meetings. Because the final rule focuses on the reduction of accident or injury by means of compliance with design criteria and work practices and procedures, it does not impact on air, water, or soil quality, plant or animal life, the use of land or other aspects of the environment.

IV. Recordkeeping

The recordkeeping requirements in this standard have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* The approval number is 1218-0151 and the approval has been granted until June, 1991.

List of Subjects in 29 CFR Part 1926

Construction safety, Construction industry, Cranes, Derricks, Hoisting, Personnel platform, Rigging.

V. State Plan Standards

The 25 States with their own OSHA-approved Occupational Safety and Health plans must adopt a comparable standard within six months of this publication date. These States are: Alaska, Arizona, California, Connecticut,¹ Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York,¹ North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Until such time as a State standard is promulgated, Federal OSHA will provide interim enforcement assistance, as appropriate.

VI. Authority

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

Accordingly, pursuant to sections 4, 6(b), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), section 107 of the Construction Safety Act (40 U.S.C. 333), Secretary of Labor's Order No. 9-83 (48 FR 35736),

¹ Plan covers only State and local government employees.

and 29 CFR Part 1911, 29 CFR Part 1926 is amended as set forth below.

Signed at Washington, DC this 26th day of 1988.

John A. Pendergrass,
Assistant Secretary of Labor.

29 CFR Part 1926 is amended as follows:

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

1. The authority citation for Subpart N of Part 1926 is revised to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); secs. 4, 6, 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), or 9-83 (49 FR 35736), as applicable. Section 1926.550 also issued under 29 CFR Part 1911.

2. In § 1926.550, a new paragraph (g) is added to read as follows:

§ 1926.550 Cranes and derricks.

* * * * *

(g) *Crane or derrick suspended personnel platforms*—(1) *Scope, application and definitions*—(i) *Scope and application.* This standard applies to the design, construction, testing, use and maintenance of personnel platforms, and the hoisting of personnel platforms on the load lines of cranes or derricks.

(ii) *Definitions.* For the purposes of this paragraph (g), the following definitions apply:

(A) "Failure" means load refusal, breakage, or separation of components.

(B) "Hoist" (or hoisting) means all crane or derrick functions such as lowering, lifting, swinging, booming in and out or up and down, or suspending a personnel platform.

(C) "Load refusal" means the point where the ultimate strength is exceeded.

(D) "Maximum intended load" means the total load of all employees, tools, materials, and other loads reasonably anticipated to be applied to a personnel platform or personnel platform component at any one time.

(E) "Runway" means a firm, level surface designed, prepared and designated as a path of travel for the weight and configuration of the crane being used to lift and travel with the crane suspended platform. An existing surface may be used as long as it meets these criteria.

(2) *General requirements.* The use of a crane or derrick to hoist employees on a personnel platform is prohibited, except when the erection, use, and dismantling

of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.

(3) *Cranes and derricks—(i)*

Operational criteria. (A) Hoisting of the personnel platform shall be performed in a slow, controlled, cautious manner with no sudden movements of the crane or derrick, or the platform.

(B) Load lines shall be capable of supporting, without failure, at least seven times the maximum intended load, except that where rotation resistant rope is used, the lines shall be capable of supporting without failure, at least ten times the maximum intended load. The required design factor is achieved by taking the current safety factor of 3.5 (required under § 1926.550(b)(2)) and applying the 50 per cent derating of the crane capacity which is required by § 1926.550(g)(3)(i)(F).

(C) Load and boom hoist drum brakes, swing brakes, and locking devices such as pawls or dogs shall be engaged when the occupied personnel platform is in a stationary working position.

(D) The load line hoist drum shall have a system or device on the power train, other than the load hoist brake, which regulates the lowering rate of speed of the hoist mechanism (controlled load lowering.) Free fall is prohibited.

(E) The crane shall be uniformly level within one percent of level grade and located on firm footing. Cranes equipped with outriggers shall have them all fully deployed following manufacturer's specifications, insofar as applicable, when hoisting employees.

(F) The total weight of the loaded personnel platform and related rigging shall not exceed 50 percent of the rated capacity for the radius and configuration of the crane or derrick.

(G) The use of machines having live booms (booms in which lowering is controlled by a brake without aid from other devices which slow the lowering speeds) is prohibited.

(ii) *Instruments and components.* (A) Cranes and derricks with variable angle booms shall be equipped with a boom angle indicator, readily visible to the operator.

(B) Cranes with telescoping booms shall be equipped with a device to indicate clearly to the operator, at all times, the boom's extended length, or an accurate determination of the load radius to be used during the lift shall be made prior to hoisting personnel.

(C) A positive acting device shall be used which prevents contact between the load block or overhaul ball and the boom tip (anti-two-blocking device), or a system shall be used which deactivates the hoisting action before damage occurs in the event of a two-blocking situation (two block damage prevention feature).

(4) *Personnel Platforms.—(i) Design criteria.* (A) The personnel platform and suspension system shall be designed by a qualified engineer or a qualified person competent in structural design.

(B) The suspension system shall be designed to minimize tipping of the platform due to movement of employees occupying the platform.

(C) The personnel platform itself, except the guardrail system and body belt/harness anchorages, shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load. Criteria for guardrail systems and body belt/harness anchorages are contained in other Subparts, E and M, respectively of this part.

(ii) *Platform specifications.* (A) Each personnel platform shall be equipped with a guardrail system which meets the requirements of Subpart M, and, shall be enclosed at least from the toeboard to mid-rail with either solid construction or expanded metal having openings no greater than ½ inch (1.27 cm).

(B) A grab rail shall be installed inside the entire perimeter of the personnel platform.

(C) Access gates, if installed, shall not swing outward during hoisting.

(D) Access gates, including sliding or folding gates, shall be equipped with a restraining device to prevent accidental opening.

(E) Headroom shall be provided which allows employees to stand upright in the platform.

(F) In addition to the use of hard hats, employees shall be protected by overhead protection on the personnel platform when employees are exposed to falling objects.

(G) All rough edges exposed to contact by employees shall be surfaced or smoothed in order to prevent injury to employees from punctures or lacerations.

(H) All welding of the personnel platform and its components shall be performed by a qualified welder familiar with the weld grades, types and material specified in the platform design.

(I) The personnel platform shall be conspicuously posted with a plate or other permanent marking which indicates the weight of the platform and its rated load capacity or maximum intended load.

(iii) *Personnel platform loading.* (A) The personnel platform shall not be loaded in excess of its rated load capacity. When a personnel platform does not have a rated load capacity then the personnel platform shall not be loaded in excess of its maximum intended load.

(B) The number of employees occupying the personnel platform shall not exceed the number required for the work being performed.

(C) Personnel platforms shall be used only for employees, their tools, and the materials necessary to do their work, and shall not be used to hoist only materials or tools when not hoisting personnel.

(D) Materials and tools for use during a personnel lift shall be secured to prevent displacement.

(E) Materials and tools for use during a personnel lift shall be evenly distributed within the confines of the platform while the platform is suspended.

(iv) *Rigging.* (A) When a wire rope bridle is used to connect the personnel platform to the load line, each bridle leg shall be connected to a master link or shackle in such a manner to ensure that the load is evenly divided among the bridle legs.

(B) Hooks on overhaul ball assemblies, lower load blocks, or other attachment assemblies shall be of a type that can be closed and locked, eliminating the hook throat opening. Alternatively, an alloy anchor type shackle with a bolt, nut and retaining pin may be used.

(C) Wire rope, shackles, rings, master links, and other rigging hardware must be capable of supporting, without failure, at least five times the maximum intended load applied or transmitted to that component. Where rotation resistant rope is used, the slings shall be capable of supporting without failure at least ten times the maximum intended load.

(D) All eyes in wire rope slings shall be fabricated with thimbles.

(E) Bridles and associated rigging for attaching the personnel platform to the hoist line shall be used only for the platform and the necessary employees, their tools and the materials necessary to do their work, and shall not be used for any other purpose when not hoisting personnel.

(5) *Trial lift, inspection, and proof testing.* (i) A trial lift with the unoccupied personnel platform loaded at least to the anticipated lightweight shall be made from ground level, or any other location where employees will enter the platform, to each location at

which the personnel platform is to be hoisted and positioned. This trial lift shall be performed immediately prior to placing personnel on the platform. The operator shall determine that all systems, controls and safety devices are activated and functioning properly; that no interferences exist; and that all configurations necessary to reach those work locations will allow the operator to remain under the 50 percent limit of the hoist's rated capacity. Materials and tools to be used during the actual lift can be loaded in the platform, as provided in paragraphs (g)(4)(iii) (D), and (E) of this section for the trial lift. A single trial lift may be performed at one time for all locations that are to be reached from a single set up position.

(ii) The trial lift shall be repeated prior to hoisting employees whenever the crane or derrick is moved and set up in a new location or returned to a previously used location. Additionally, the trial lift shall be repeated when the lift route is changed unless the operator determines that the route change is not significant (i.e. the route change would not affect the safety of hoisted employees.)

(iii) After the trial lift, and just prior to hoisting personnel, the platform shall be hoisted a few inches and inspected to ensure that it is secure and properly balanced. Employees shall not be hoisted unless the following conditions are determined to exist:

(A) Hoist ropes shall be free of kinks;
(B) Multiple part lines shall not be twisted around each other;

(C) The primary attachment shall be centered over the platform; and

(D) The hoisting system shall be inspected if the load rope is slack to ensure all ropes are properly stated on drums and in sheaves.

(iv) A visual inspection of the crane or derrick, rigging, personnel platform, and the crane or derrick base support or ground shall be conducted by a competent person immediately after the trial lift to determine whether the testing has exposed any defect or produced any adverse effect upon any component or structure.

(v) Any defects found during inspections which create a safety

hazard shall be corrected before hoisting personnel.

(vi) At each job site, prior to hoisting employees on the personnel platform, and after any repair or modification, the platform and rigging shall be proof tested to 125 percent of the platform's rated capacity by holding it in a suspended position for five minutes with the test load evenly distributed on the platform (this may be done concurrently with the trial lift). After proof testing, a competent person shall inspect the platform and rigging. Any deficiencies found shall be corrected and another proof test shall be conducted. Personnel hoisting shall not be conducted until the proof testing requirements are satisfied.

(6) *Work practices.* (i) Employees shall keep all parts of the body inside the platform during raising, lowering, and positioning. This provision does not apply to an occupant of the platform performing the duties of a signal person.

(ii) Before employees exit or enter a hoisted personnel platform that is not landed, the platform shall be secured to the structure where the work is to be performed, unless securing to the structure creates an unsafe situation.

(iii) Tag lines shall be used unless their use creates an unsafe condition.

(iv) The crane or derrick operator shall remain at the controls at all times when the crane engine is running and the platform is occupied.

(v) Hoisting of employees shall be promptly discontinued upon indication of any dangerous weather conditions or other impending danger.

(vi) Employees being hoisted shall remain in continuous sight of and in direct communication with the operator or signal person. In those situations where direct visual contact with the operator is not possible, and the use of a signal person would create a greater hazard for that person, direct communication alone such as by radio may be used.

(vii) Except over water, employees occupying the personnel platform shall use a body belt/harness system with lanyard appropriately attached to the lower load block or overhaul ball, or to a structural member within the personnel platform capable of supporting a fall impact for employees

using the anchorage. When working over water, the requirements of § 1926.106 shall apply.

(viii) No lifts shall be made on another of the crane's or derrick's loadlines while personnel are suspended on a platform.

(7) *Traveling.* (i) Hoisting of employees while the crane is traveling is prohibited, except for portal, tower and locomotive cranes, or where the employer demonstrates that there is no less hazardous way to perform the work.

(ii) Under any circumstances where a crane would travel while hoisting personnel, the employer shall implement the following procedures to safeguard employees:

(A) Crane travel shall be restricted to a fixed track or runway;

(B) Travel shall be limited to the load radius of the boom used during the lift; and

(C) The boom must be parallel to the direction of travel.

(D) A complete trial run shall be performed to test the route of travel before employees are allowed to occupy the platform. This trial run can be performed at the same time as the trial lift required by paragraph (g)(5)(i) of this section which tests the route of the lift.

(E) If travel is done with a rubber tired-carrier, the condition and air pressure of the tires shall be checked. The chart capacity for lifts on rubber shall be used for application of the 50 percent reduction of rated capacity. Notwithstanding paragraph (g)(3)(i)(E) of this section, outriggers may be partially retracted as necessary for travel.

(8) *Pre-lift meeting.* (i) A meeting attended by the crane or derrick operator, signal person(s) (if necessary for the lift), employee(s) to be lifted, and the person responsible for the task to be performed shall be held to review the appropriate requirements of paragraph (g) of this section and the procedures to be followed.

(ii) This meeting shall be held prior to the trial lift at each new work location, and shall be repeated for any employees newly assigned to the operation.

[FR Doc. 88-17199 Filed 8-1-88; 8:45 am]

BILLING CODE 4510-26-M

Food Label

Tuesday
August 2, 1988

Part III

Department of Agriculture

Food and Nutrition Service

7 CFR Part 210

National School Lunch Program Revision; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 210

National School Lunch Program,
Revision

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rulemaking is a complete revision of 7 CFR Part 210, the regulations governing the National School Lunch Program and the Commodity School Program. This revision finalizes an interim rule (51 FR 4864) which was intended to resolve ambiguities and inconsistencies; eliminate unnecessary, duplicative and obsolete provisions; and clarify both language and style so that Part 210 is easily understood. Further, this rulemaking makes several policy changes which are addressed in detail in the following preamble.

EFFECTIVE DATE: This rule is effective on September 1, 1988.

FOR FURTHER INFORMATION CONTACT: Mr. Lou Pastura, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, Alexandria, Virginia 22302; telephone (703) 756-3620.

SUPPLEMENTARY INFORMATION:

Classification

This final rule has been reviewed under Executive Order 12291 and has been classified as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of \$100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601-612). The Administrator of the Food and Nutrition Service has certified that this rule will not have a significant economic impact on a substantial number of small entities.

Although this rule reflects a number of changes to Part 210, the reporting and recordkeeping requirements remain

unchanged. These requirements have been approved by the Office of Management and Budget (OMB) for use through June 30, 1990 (OMB No. 0584-0006).

The National School Lunch Program is listed in the Catalog of Federal Domestic Assistance under No. 10.555 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V and 48 FR 29112, June 24, 1983.)

Background

The last major revision of 7 CFR Part 210, the regulations governing the National School Lunch and Commodity School Programs, was published in the *Federal Register* on January 20, 1970 (35 FR 753). Since that time, Part 210 was amended by over 70 final and interim rules, many of which were promulgated quickly in response to legislation or litigation. As a result, Part 210 contained ambiguities and inconsistencies as well as duplicative and obsolete provisions.

On February 12, 1985, the Department published a proposed revision of Part 210 in the *Federal Register* (50 FR 5950). The proposal was intended to clear up ambiguities and inconsistencies, remove unnecessary, duplicative and obsolete provisions; examine the organization of Part 210 and its components; rewrite as necessary to ensure that Part 210 is easily understood; and, based on the resultant revisions, redesignate paragraphs and sections to accommodate the changes. Several policy changes were also proposed. The Department provided a 60-day comment period, during which time 927 comments were received.

The Department determined that, in recognition of the large number of comments received and the extensive changes made, a second round of public comments would be beneficial. Thus, on September 30, 1986, the Department published an interim rule in the *Federal Register* (51 FR 34864). This interim rule provided commenters with a 120-day comment period. During this comment period, 154 comments were received from a variety of sources, including State educational agencies, school personnel, industry, and the general public. The Department would like to thank all those commenters who responded to both the proposed and interim rules. Especially appreciated were those many detailed suggestions which proved helpful in formulating this final rule.

General Comments

Of the 154 comments received on the interim rule, 82 addressed a single issue, i.e., the duration of contracts between school food authorities and food service management companies. Only 75 commenters addressed other aspects of Part 210 (three of whom also addressed the duration issue). Of the 75 commenters addressing other issues, the major areas of concern included the elimination of Federal reimbursement for second lunches, the newly defined "subsidized lunch", and the substitution of food items for handicapped children.

Since commenters did not express any opposition to the reorganization of Part 210, the Department has adopted the new format. A redesignation table was provided in the interim rule which indicated the old section numbers and the corresponding new section numbers. Since this final rule has adopted the same format provided in the interim rule, the redesignation table was not restated in this rule. Interested parties may obtain a copy of the redesignation table from the Department upon request.

The remainder of this preamble discusses concerns expressed by commenters and the specific changes being made in the final rule. For ease in reference, commenter concerns and any corresponding changes are explained under the final rule section headings. The preamble does not address sections for which no substantive objections were raised by commenters or those comments which resulted in nonsubstantive revisions which simply serve to clarify the regulatory wording. Commenters will note that the Appendices remain unchanged, except for minor corrections, and are not restated in this final rule. Subsequent amendments will be numbered consecutively, beginning with number 1.

Subpart A—General

Section 210.2 Definitions.

Several commenters requested clarification of the definition "Commodity School Program" and an explanation of how it relates to Commodity Only Schools. To clarify the definition, several changes were made to the final rule. "Commodity School Program" is defined to mean a program under which participating schools operate a nonprofit lunch program in accordance with the provisions of Part 210 and receive donated food assistance in lieu of general cash assistance. Participating schools also receive special cash assistance, the entitlement value of donated food assistance and bonus donated foods.

Prior to August 1981, the National School Lunch Act authorized the participation of schools which received only commodity assistance. Such schools were termed "Commodity Only Schools". In 1981, Pub. L. 97-35 amended the Act to allow these schools to receive special cash assistance, thus changing their commodity only status. To acknowledge this change in status, the interim rule termed these schools as the Commodity School Program. While usage of this term suggests a totally separate program, it does provide a technical advantage. The Department defined "Program" to mean both the National School Lunch Program and Commodity School Program, thus throughout Part 210, references to Program refer to both types of operations.

Several commenters expressed concerns regarding the definition "Food item". The interim rule defined food item to mean one of the five required food servings that compose the reimbursable school lunch. Commenters were concerned that the word "servings" suggested that each food item would need to be a distinct item, thus disallowing a food that combined food items, such as pizza. To clarify the definition, the final rule defines a food item as one of the five required foods that compose the reimbursable school lunch.

The definition, "High tuition private school", has been deleted. This definition was added in response to the Child Nutrition Amendments of 1986 which increased the tuition limit on private schools from \$1,500 to \$2,000. Subsequently, Pub. L. 100-71, enacted July 11, 1987, removed all tuition limitations, thereby making this definition obsolete.

The interim rule defined "Lunch" to mean a meal which meets the school lunch pattern for specified age/grade groups of children as designated in section 210.10 and, unless otherwise exempted by FNS, which is served at or about midday. Several commenters requested clarification of "unless otherwise exempted by FNS". For purposes of clarity, that portion of the definition regarding timeframes has been moved to § 210.10(g), *Lunch period*.

This final rule presents a slightly abbreviated definition of "School". The Department is hopeful that this definition will provide the clarity requested by commenters. To ensure that no misinterpretation occurs, the Department would like to restate its intent regarding preprimary classes. Preprimary classes are eligible to participate: (a) When they are recognized as part of the educational

system of the State; or (b) when they are conducted in a participating school having classes of primary or higher grades.

"School food authority" has been revised to clarify that a school food authority means the governing body which is responsible for the administration of one or more schools. Such governing body " * * shall have the legal authority to operate the Program therein or be otherwise approved by FNS to operate the Program." This definition is designed to provide FNS with the authority to approve arrangements between schools which are administered by different legal entities. For example, FNS may authorize a public school district to act as a school food authority for schools within the public school district and, provided that a contractual arrangement exists, for any nearby eligible private schools. The school food authority would be required to ensure all program requirements are met for any school for which it acts as governing body.

Almost 40 commenters disapproved of the definition of "Subsidized lunch" and suggested a return to the term "paid lunch". However, each "paid lunch" bought by students is subsidized by the Department with both cash assistance and donated food assistance. Therefore, the final rule restates the definition without change.

The definition "Tuition" has been deleted. Pub. L. 100-71, enacted on July 11, 1987, removed all tuition limitations previously imposed upon private schools, thereby making this definition obsolete.

Subpart B—Assistance to States and School Food Authorities

Section 210.8 Method of reimbursement.

One commenter expressed some concern regarding the intent of paragraph (b), *Content of claim*, which states that the State agency "may authorize a school food authority to submit a consolidated Claim for Reimbursement * * *". The commenter suggested that this wording allowed a school food authority to make the determination of whether or not to submit a consolidated claim. This is not the Department's intent; clearly, the determination rests with the State agency. The final rule restates this provision without change.

Paragraph (c), *Advance funds*, of both the interim and final regulations establishes procedures whereby State agencies may make advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to

be needed for one month's operation. Several commenters noted that the regulatory language conflicts with the Department's policy on making advance funds available.

The Department would like to point out that while the authority currently exists to make advance funding available, all funding is contingent upon the extent to which funds are available. Currently, the Department is unable to make such advance funding available. However, the States continue to have the authority to make advances available to schools. While the Department will not provide the funds to do so, States may rely on available State funds or on their existing authority to vary rates of reimbursement.

Subpart C—Requirements for School Food Authority Participation

Section 210.9 Agreement With State Agency.

Paragraph (b), *Annual agreement*, of the interim rule required each school food authority to maintain a current written agreement on file at the State agency each year. State agencies were authorized to allow school food authorities to extend by amendment a previous year's agreement in lieu of taking a new agreement annually, provided that a current written agreement is on file each year. Fifteen commenters recommended revising the interim provision to allow agreements to stay on file until substantial changes necessitate the development of a new agreement.

The Department cannot accept the commenters' suggestion. The Program is a grant program with funds appropriated on a fiscal year basis. The Department does not believe a longstanding agreement would be supported by the National School Lunch Act nor would it be in the best interest of the Program. Maintenance of a current agreement is a good management practice which enables State agencies and FNS to be fully apprised of the responsible parties and their duties. This requirement also serves to assure the Department that any new school officials will be cognizant of their responsibilities under the Program. Therefore, the final rule restates the interim wording.

Section 210.10 Lunch components and quantities.

Several commenters to the proposed rule recommended deletion of production records, contending that the prohibition on claiming reimbursement for second lunches obviates the need for production records. The Department

retained the requirement for production records in paragraph (b), *General*, of the interim rule; however, commenters were encouraged to address the usefulness of retaining production records.

Of the 12 commenters who addressed this issue, 8 opposed the retention of production records arguing that offer versus serve and the prohibition on claiming for second lunches make production records obsolete. Commenters in favor of retaining these records indicated that this requirement leads to good management practices. This complements the Department's contention that schools can use the historical perspective provided by production records to assist in forecasting the number of lunches and quantities of each food item needed to provide one lunch per child per day. Since so few commenters expressed concern regarding this issue, the Department does not believe that sufficient cause exists to remove this requirement. Thus, the final rule remains unchanged.

Approximately 60 commenters addressed the requirement in paragraph (b), for the elimination of reimbursement for excess lunches. Most of these commenters (95%) opposed the elimination of reimbursement for excess lunches citing the difficulties in monitoring and in predicting the actual number of lunches needed and the burden placed on satellite programs.

The Department recognizes the validity of commenter concerns and the consequent burden of such a requirement. However, fiscal constraints mandate that no Federal reimbursement be claimed for lunches served in excess of one reimbursable lunch per child per day. In support of the Department's position, several commenters identified the costs of allowing excess lunches to be claimed. Extrapolation of those costs nationwide suggests that an excessive amount of program funds are being expended to provide children more than one lunch per child per day. The Department remains firm in its position to prohibit reimbursement for lunches served in excess of one reimbursable lunch per child per day. Therefore, the final rule remains unchanged from the interim.

Several commenters questioned whether the "one lunch per child per day" provision applied to enrolled or participating children. To ensure no confusion exists, the Department would like to clarify that this provision applies to participating children and in no way may it be construed to apply to enrolled children.

One commenter pointed out an inconsistency between the meal pattern

chart and the regulatory language in paragraph (d)(2)(ii). The interim rule stated that nuts and seeds served as a meat alternate meet 50 percent of the meat/meat alternate requirement and must be combined with 50 percent of another meat/meat alternate. This language was revised in the final rule to state that nuts and seeds served as a meat alternate may be used to meet "no more than" 50 percent of the meat/meat alternate requirement and must be used in combination with any other meat/meat alternate.

Readers will note that the meal pattern chart and paragraphs (d)(1), *Milk*, and (i)(5), *Insufficient milk supply*, have been revised to include a revision of the milk requirement mandated by Public Laws 99-500 and 99-591 and subsequently implemented by a final rule published in the *Federal Register* on March 23, 1987 (52 FR 9109). Specifically, the meal pattern chart and paragraphs (d)(1) and (i)(5) have been revised to require schools to offer students fluid whole milk in addition to at least one type of unflavored fluid milk containing two percent or less milk fats, such as lowfat milk, skim milk, or buttermilk.

Readers should also note that paragraph (e), *Offer versus serve*, has been revised to make it clear that a school must offer all five required food items; however, senior high school students must be permitted to decline up to two of the five required food items and, at local discretion, students below the senior high school level may be permitted to decline one or two of the required five food items. While the decision to implement the offer versus serve provision for students below senior high rests with the local school food authority, the decision regarding which food items to decline rests solely with the student.

In response to commenters concerns, paragraph (g), *Lunch period*, has been clarified to specify that "mid-day" means between 10:00 a.m. and 2:00 p.m., unless otherwise exempted by FNS. The Department believes that with few exceptions schools can schedule lunches within these hours. To provide flexibility for unusual circumstances, such as some split-shifts, the Department has provided for FNS exceptions to these hours. However, the Department does not believe evening meals can be considered lunch and does not intend to provide reimbursement for such meals.

Paragraph (h), *Infant lunch pattern*, has been revised to incorporate the provisions of a final rule which establishes consistency in the infant meal pattern requirements among the Child Nutrition Programs and reflects the most recent information regarding

infant feeding practices. This rule was published in the *Federal Register* on July 6, 1988 (53 FR 25303), and becomes effective on September 6, 1988.

Interim paragraph (i)(1), *Medical or dietary needs*, requires substitutions in the meal pattern to be made for those handicapped children whose handicap restricts their diet and allows, at local discretion, substitutions to be made for nonhandicapped children who are unable to consume the regular lunch because of medical or other special dietary needs. In order to claim reimbursement for such lunches, substitutions are to be made on a case by case basis and supported by a statement of the need for substitutions signed, in the case of a handicapped child, by a physician, and, in the case of a nonhandicapped child, by a recognized medical authority.

Commenters requested clarification and guidance in implementing this provision. Special areas of concern included the definitions of handicapped and recognized medical authority, and the responsibility of the school food service to provide special food items. While the Department has additional guidance on the implementation of this provision, it would like to take this opportunity to clarify some of the areas of confusion.

A handicapped student, as defined in 7 CFR Part 15b, is one who has " * * * a physical or mental impairment which substantially limits one or more major life activities * * * ". Major life activities are defined to include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Lunches claimed for reimbursement under this section must be supported by a statement from a physician, in the case of a handicapped child, and by a statement from a recognized medical authority, in the case of a nonhandicapped child. A recognized medical authority may include a physician, a registered nurse, or other health professionals specified by the State agency.

Several commenters recommended that the required signature authority be the same for handicapped as for nonhandicapped, but there was no consensus on whether the signature authority should be a physician or recognized medical authority. Since a school is required to make substitutions for a handicapped child, the physician is indeed the appropriate authority. However, in the case of a nonhandicapped child, the school is authorized by not required to make substitutions, thus the signature of a

physician was determined to be too stringent. For these reasons, the final rule remains unchanged.

Commenters also expressed concerns regarding whether a school food service is to provide foods not readily available to the kitchen. Nothing in this regulation is meant to require schools to operate special diet kitchens. Usually there is no difficulty acquiring substitute items in local markets.

However, if the authorized substitute foods are not normally kept in inventory or are not generally available in local markets, the parents should provide the substitute food prescribed by the physician or recognized medical authority.

Section 210.14 Resource management.

Paragraph (a), *Nonprofit school food service*, has been revised to incorporate a provision of Public Laws 99-500 and 99-591 which authorizes schools to use facilities, equipment and personnel supported with nonprofit school food revenues to support a nonprofit nutrition program for the elderly. A final rule implementing this provision was published in the *Federal Register* on April 28, 1987 (52 FR 15297).

Section 210.16 Food service management companies.

Paragraph (a), *General*, has been revised to include the provisions of Public Laws 99-500 and 99-591 which prohibit a school or school food authority from contracting with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and school food authority designated full price reimbursable meals to all eligible children. Implementing regulations were published in the *Federal Register* on April 8, 1987 (52 FR 11186).

Paragraph (d), *Duration of contract*, has also been revised to accommodate a change published in the *Federal Register* on February 16, 1988 (53 FR 4377). That final rule responded to comments originally received on the interim Part 210 rewrite. Seventy-nine comments were received which recommended revising the existing requirement which limits a contract to one year with two yearly renewals, i.e., a 3-year bidding cycle. However, no change in the number of possible contract renewals had been proposed. Hence, the Department issued a separate proposal rather than make any change without soliciting additional comments. A proposed rule was published in the *Federal Register* on September 1, 1987 (52 FR 32930) which solicited comments on expanding the current requirement to

allow a one year contract with four yearly renewals. One hundred sixty-seven comment letters were received on the proposal. Of these comments, 151 expressed support for the proposal. The supportive comments generally fell into three categories: reduction of administrative burden at all levels, impact on school food service staff, and impact on food service management company contract provisions and operations. Therefore, the final rule published on February 16, 1988 allows school food authorities to annually renew their one-year contracts with food service management companies four times for a maximum contract term of five years. Only new contracts signed after February 16, 1988, are covered by this change. All previously existing contracts are subject to the two-year renewal maximum that was in effect when those contracts were negotiated.

Several commenters suggested additional revisions to the food service management company portion of the regulations. Specifically, some commenters recommended revisions to a number of requirements in this section to reflect the diverse arrangements between school food authorities and food service management companies. A number of commenters recommended requiring all food service management companies to register with the State. The Department has taken these comments under consideration and is reviewing the requirements of this section for possible revision in the future. No substantive changes have been made in this final rule because the Department would first issue a proposed rulemaking in order to implement such changes. Readers will, however, note several minor technical changes to paragraphs (a)(6) and (c) of this section which are not intended to change current operating procedures.

Subpart D—Requirements for State Agency Participation

Section 210.17 Matching Federal funds.

Paragraph (g), *Reports*, has been revised to extend the submission of the Annual Report of Revenues (FNS-13) from 90 days to 120 days. This revision is intended to reflect actual operating policy.

Section 210.18 Monitoring responsibilities.

Paragraph (c), *Improved management*, of the interim rule restated the requirement that the State agency shall work with a school food authority toward improving a school food authority's management practices where the State agency has found poor food

service management practices leading to decreasing or low student participation and/or poor student acceptance of the Program or of foods served. Efforts to assist in the correction of management problems were to include the promotion of student and parent involvement in Program activities.

Over 20 commenters opposed the requirement for parent/student involvement, arguing that the correction of management problems is very subjective, and that an additional requirement for parent/student involvement is difficult to administer and monitor. In response to commenter concerns, this paragraph has been revised in the final rule to remove the requirement for parent/student involvement. The Department has also revised its assessment of what constitutes poor student acceptance to allow for more flexibility.

Readers will note a number of changes to § 210.18 which implement the provisions of a final rule which revised the AIMS reporting and recordkeeping requirements. This final rule was published in the *Federal Register* on February 26, 1987 (52 FR 5735). In addition to these changes, paragraph (m), *AIMS recordkeeping*, has been revised to require State agencies to maintain AIMS records for 3 years after the end of the school year in which the review or audit was conducted. Previously, such records were to be maintained for 3 years after the date of the exit conference. This revision is intended to ensure that AIMS records are maintained for a complete 4-year cycle and not, as previously authorized, for only a portion of that cycle.

Appendix A, B and C

The Appendices remain unchanged, except for minor corrections, and are not restated in this final rule.

List of Subjects in 7 CFR Part 210

Food assistance programs, National School Lunch Program, Commodity School Program, Grant programs-Social programs, Nutrition, Children, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, Subpart A, B, C, D, E, and F of Part 210 are revised as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

Subpart A—General

Sec.

- 210.1 General purpose and scope.
- 210.2 Definitions.
- 210.3 Administration.

Subpart B—Assistance to States and School Food Authorities

- 210.4 Cash and donated food assistance to States.
- 210.5 Payment process to States.
- 210.6 Use of Federal funds.
- 210.7 Reimbursement for school food authorities.
- 210.8 Method of reimbursement.

Subpart C—Requirements for School Food Authority Participation

- 210.9 Agreement with State agency.
- 210.10 Lunch components and quantities.
- 210.11 Competitive food services.
- 210.12 Student, parent and community involvement.
- 210.13 Facilities management.
- 210.14 Resource management.
- 210.15 Reporting and recordkeeping.
- 210.16 Food service management companies.

Subpart D—Requirements for State Agency Participation

- 210.17 Matching Federal funds.
- 210.18 Monitoring responsibilities.
- 210.19 Additional responsibilities.
- 210.20 Reporting and recordkeeping.

Subpart E—State Agency and School Food Authority Responsibilities

- 210.21 Procurement.
- 210.22 Audits.
- 210.23 Other responsibilities.

Subpart F—Additional Provisions

- 210.24 Suspension, termination and grant closeout procedures.
- 210.25 Penalties.
- 210.26 Educational prohibitions.
- 210.27 State Food Distribution Advisory Council.
- 210.28 Regional office addresses.
- 210.29 OMB control numbers.

Appendices

- A—Alternate foods for meals.
- B—Categories of foods of minimal nutritional value.
- C—Child Nutrition Labeling Program.

Authority: The provisions of Part 210 issued under sec. 2-12, 60 Stat. 230, as amended; sec. 10, 80 Stat. 889, as amended; 84 Stat. 270; 42 U.S.C. 1751-1760, 1779.

Subpart A—General**§ 210.1 General purpose and scope.**

(a) *Purpose of the program.* Section 2 of the National School Lunch Act (42 U.S.C. 1751), states: "It is declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of food and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs." Pursuant to this act, the Department

provides States with general and special cash assistance and donations of foods acquired by the Department to be used to assist schools in serving nutritious lunches to children each school day. In furtherance of Program objectives, participating schools shall serve lunches that are nutritionally adequate, as set forth in these regulations, and shall to the extent practicable, ensure that participating children gain a full understanding of the relationship between proper eating and good health.

(b) *Scope of the regulations.* This part sets forth the requirements for participation in the National School Lunch and Commodity School Programs. It specifies Program responsibilities of State and local officials in the areas of program administration, preparation and service of nutritious lunches, payment of funds, use of program funds, program monitoring, and reporting and recordkeeping requirements.

§ 210.2 Definitions.

For the purpose of this part:

"Act" means the National School Lunch Act, as amended.

"AIMS" means the Assessment, Improvement and Monitoring System. This is a management improvement system used in the National School Lunch and the Commodity School Programs.

"Child" means—(a) a student of high school grade or under as determined by the State educational agency, who is enrolled in an educational unit of high school grade or under as described in paragraphs (a) and (b) of the definition of "School," including students who are mentally or physically handicapped as defined by the State and who are participating in a school program established for the mentally or physically handicapped; or (b) a person under 21 chronological years of age who is enrolled in an institution or center as described in paragraphs (c) and (d) of the definition of "School."

"CND" means the Child Nutrition Division of the Food and Nutrition Service of the Department.

"Commodity School Program" means the Program under which participating schools operate a nonprofit lunch program in accordance with this part and receive donated food assistance in lieu of general cash assistance. Schools participating in the Commodity School Program shall also receive special cash and donated food assistance in accordance with § 210.4(c).

"Department" means the United States Department of Agriculture.

"Distributing agency" means a State agency which enters into an agreement with the Department for the distribution

to schools of donated foods pursuant to Part 250 of this chapter.

"Donated foods" means food commodities donated by the Department for use in nonprofit lunch programs.

"Fiscal year" means a period of 12 calendar months beginning October 1 of any year and ending with September 30 of the following year.

"FNS" means the Food and Nutrition Service, United States Department of Agriculture.

"FNSRO" means the appropriate Regional Office of the Food and Nutrition Service of the Department.

"Food component" means one of the four food groups which compose the reimbursable school lunch, i.e., meat or meat alternate, milk, bread or bread alternate, and vegetable/fruit.

"Food item" means one of the five required foods that compose the reimbursable school lunch, i.e., meat or meat alternate, milk, bread or bread alternate, and two (2) servings of vegetables, fruits, or a combination of both.

"Food service management company" means a commercial enterprise or a nonprofit organization which is or may be contracted with by the school food authority to manage any aspect of the school food service.

"Free lunch" means a lunch served under the Program to a child from a household eligible for such benefits under 7 CFR Part 245 and for which neither the child nor any member of the household pays or is required to work.

"Handicapped student" means any child who has a physical or mental impairment as defined in § 15b.3 of the Department's nondiscrimination regulations (7 CFR Part 15b).

"Lunch" means a meal which meets the school lunch pattern for specified age/grade groups of children as designated in § 210.10.

"National School Lunch Program" means the Program under which participating schools operate a nonprofit lunch program in accordance with this part. General and special cash assistance and donated food assistance are made available to schools in accordance with this part.

"Net cash resources" means all monies, as determined in accordance with the State agency's established accounting system, that are available to or have accrued to a school food authority's nonprofit school food service at any given time, less cash payable. Such monies may include, but are not limited to, cash on hand, cash receivable, earnings on investments, cash on deposit and the value of stocks, bonds or other negotiable securities.

"Nonprofit", when applied to schools or institutions eligible for the Program, means exempt from income tax under section 501(c)(3) of the Internal Revenue Code of 1954, as amended; or, in the Commonwealth of Puerto Rico, certified as nonprofit by the Governor.

"Nonprofit school food service" means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

"OIG" means the Office of the Inspector General of the Department.

"Program" means the National School Lunch Program and the Commodity School Program.

"Reduced price lunch" means a lunch served under the Program: (a) to a child from a household eligible for such benefits under 7 CFR Part 245; (b) for which the price is less than the school food authority designated full price of the lunch and which does not exceed the maximum allowable reduced price specified under 7 CFR Part 245; and (c) for which neither the child nor any member of the household is required to work.

"Reimbursement" means Federal cash assistance including advances paid or payable to participating schools for lunches meeting the requirements of § 210.10 and served to eligible children.

"Revenue", when applied to nonprofit school food service, means all monies received by or accruing to the nonprofit school food service in accordance with the State agency's established accounting system including, but not limited to, children's payments, earnings on investments, other local revenues, State revenues, and Federal cash reimbursements.

"School" means: (a) An educational unit of high school grade or under, recognized as part of the educational system in the State and operating under public or nonprofit private ownership in a single building or complex of buildings; (b) any public or nonprofit private classes of preprimary grade when they are conducted in the aforementioned schools; (c) any public or nonprofit private residential child care institution, or distinct part of such institution, which operates principally for the care of children, and, if private, is licensed to provide residential child care services under the appropriate licensing code by the State or a subordinate level of government, *except* for residential summer camps which participate in the Summer Food Service Program for Children, Job Corps centers funded by the Department of Labor, and private foster homes. The term "residential child

care institutions" includes, but is not limited to: homes for the mentally, emotionally or physically impaired, and unmarried mothers and their infants; group homes; halfway houses; orphanages; temporary shelters for abused children and for runaway children; long-term care facilities for chronically ill children; and juvenile detention centers. A long-term care facility is a hospital, skilled nursing facility, intermediate care facility, or distinct part thereof, which is intended for the care of children confined for 30 days or more; or (d) with respect to the Commonwealth of Puerto Rico, nonprofit child care centers certified as such by the Governor of Puerto Rico.

"School food authority" means the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the Program therein or be otherwise approved by FNS to operate the Program.

"School year" means a period of 12 calendar months beginning July 1 of any year and ending June 30 of the following year.

"Secretary" means the Secretary of Agriculture.

"7 CFR Part 3015", means the Uniform Federal Assistance Regulations published by the Department to implement Office of Management and Budget Circulars A-21, A-87, A-102, A-110, A-122, A-124, and A-128; the Single Audit Act of 1984 (31 U.S.C. 7501 et seq.); and Executive Order 12372.

Note: OMB Circulars, referred to in this definition, are available from the EOP Publications, New Executive Office Building, 726 Jackson Place NW, Room 2200, Washington, DC 20503.

"State" means any of the 50 States, District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

"State agency" means (a) the State educational agency; (b) any other agency of the State which has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer the Program in schools, as specified in § 210.3(b); or (c) the FNSRO, where the FNSRO administers the Program as specified in § 210.3(c).

"State educational agency" means, as the State legislature may determine, (a) the chief State school officer (such as the State Superintendent of Public Instruction, Commissioner of Education,

or similar officer), or (b) a board of education controlling the State department of education.

"State food distribution advisory council" means a group which meets to advise the State educational agency and the State distributing agency with respect to the needs of schools participating in the Program concerning the manner of selection and distribution of commodities.

"Subsidized lunch" (paid lunch) means a lunch served to children who are either not eligible for or elect not to receive the free or reduced price benefits offered under 7 CFR Part 245. The Department subsidizes each paid lunch with both general cash assistance and donated foods. Although a paid lunch student pays for a large portion of his or her lunch, the Department's subsidy accounts for a significant portion of the cost of that lunch.

§ 210.3 Administration.

(a) *FNS.* FNS will act on behalf of the Department in the administration of the Program. Within FNS, the CND will be responsible for Program administration.

(b) *States.* Within the States, the responsibility for the administration of the Program in schools, as defined in § 210.2, shall be in the State educational agency. If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by FNSRO as provided in paragraph (c) of this section, or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools. Each State agency desiring to administer the Program shall enter into a written agreement with the Department for the administration of the Program in accordance with the applicable requirements of this part; Part 235; Part 245; Parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

(c) *FNSRO.* The FNSRO will administer the Program in nonprofit private schools or public or nonprofit private residential child care institutions if the State agency is prohibited by law from disbursing Federal funds paid to such schools. In addition, the FNSRO will continue to administer the Program in those States in which nonprofit private schools or public or nonprofit private residential child care institutions have been under continuous FNS administration since October 1, 1980,

unless the administration of the Program in such schools is assumed by the State. The FNSRO will, in each State in which it administers the Program, assume all responsibilities of a State agency as set forth in this part and Part 245 of this chapter as appropriate. References in this part to "State agency" include FNSRO, as applicable, when it is the agency administering the Program.

(d) *School food authorities.* The school food authority shall be responsible for the administration of the Program in schools. State agencies shall ensure that school food authorities administer the Program in accordance with the applicable requirements of this part; Part 245; Parts 15, 15a, 15b, and 3015 of Departmental regulations; and FNS instructions.

Subpart B—Assistance to States and School Food Authorities

§ 210.4 Cash and donated food assistance to States.

(a) *General.* To the extent funds are available, FNS will make cash assistance available in accordance with the provisions of this section to each State agency for lunches served to children under the National School Lunch and Commodity School Programs. To the extent donated foods are available, FNS will provide donated food assistance to distributing agencies for each lunch served in accordance with the provisions of this part and Part 250 of this chapter.

(b) *Assistance for the National School Lunch Program.* The Secretary will make cash and/or donated food assistance available to each State agency and distributing agency, as appropriate, administering the National School Lunch Program, as follows:

(1) *Cash assistance:* Cash assistance payments are composed of a *general* cash assistance payment, authorized under section 4 of the Act, and a *special* cash assistance payment, authorized under section 11 of the Act. General cash assistance is provided to each State agency for all lunches served to children in accordance with the provisions of the National School Lunch Program. Special cash assistance is provided to each State agency for lunches served under the National School Lunch Program to children determined eligible for free or reduced price lunches in accordance with Part 245 of this chapter. The total general cash assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the

number of lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year, by the applicable national average payment rate prescribed by FNS. The total special assistance paid to each State for any fiscal year shall not exceed the lesser of amounts reported to FNS as reimbursed to school food authorities in accordance with § 210.5(d)(3) or the total calculated by multiplying the number of free and reduced price lunches reported in accordance with § 210.5(d)(1) for each month of service during the fiscal year by the applicable national average payment rate prescribed by FNS. In accordance with section 11 of the Act, FNS will prescribe annual adjustments to the per meal national average payment rate (general cash assistance) and the special assistance national average payment rates (special cash assistance) which are effective on July 1 of each year. These adjustments, which reflect changes in the food away from home series of the Consumer Price Index for all Urban Consumers, are annually announced by Notice in July of each year in the *Federal Register*. FNS will also establish maximum per meal rates of reimbursement within which a State may vary reimbursement rates to school food authorities. These maximum rates of reimbursement are established at the same time and announced in the same Notice as the national average payment rates.

(2) *Donated food assistance.* For each school year, FNS will provide distributing agencies with donated foods for lunches served under the National School Lunch Program as provided under Part 250 of this chapter. The per lunch value of donated food assistance is adjusted by the Secretary annually to reflect changes as required under section 6 of the Act. These adjustments, which reflect changes in the Price Index for Foods Used in Schools and Institutions, are effective on July 1 of each year and are announced by Notice in the *Federal Register* in July of each year.

(c) *Assistance for the Commodity School Program.* FNS will make special cash assistance available to each State agency for lunches served in commodity schools in the same manner as special cash assistance is provided in the National School Lunch Program. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). FNS will provide donated food assistance in accordance with Part 250 of this chapter. Of the total value of donated food assistance to which it is entitled, the school food authority may

elect to receive cash payments of up to 5 cents per lunch served in its commodity school(s) for donated foods processing and handling expenses. Such expenses include any expenses incurred by or on behalf of a commodity school for processing or other aspects of the preparation, delivery, and storage of donated foods. The school food authority may have all or part of these cash payments retained by the State agency for use on its behalf for processing and handling expenses by the State agency or it may authorize the State agency to transfer to the distributing agency all or any part of these payments for use on its behalf for these expenses. Payment of such amounts to State agencies is subject to the reporting requirements contained in § 210.5(d). The total value of donated food assistance is calculated on a school year basis by adding:

(1) The applicable national average payment rate (general cash assistance) prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program; and

(2) The national per lunch average value of donated foods prescribed by the Secretary for the period of July 1 through June 30 multiplied by the total number of lunches served during the school year under the Commodity School Program.

§ 210.5 Payment process to States.

(a) *Grant award.* FNS will specify the terms and conditions of the State agency's grant in a grant award document and will generally make payments available by means of a Letter of Credit issued in favor of the State agency. The State agency shall obtain funds for reimbursement to participating school food authorities through procedures established by FNS in accordance with 7 CFR Part 3015. State agencies shall limit requests for funds to such times and amounts as will permit prompt payment of claims or authorized advances. The State agency shall disburse funds received from such requests without delay for the purpose for which drawn. FNS may, at its option, reimburse a State agency by Treasury Check. FNS will pay by Treasury Check with funds available in settlement of a valid claim if payment for that claim cannot be made within the grant closeout period specified in paragraph (d) of this section.

(b) *Cash-in-lieu of donated foods.* All Federal funds to be paid to any State in place of donated foods will be made

available as provided in Part 240 of this chapter.

(c) *Recovery of funds.* FNS will recover any Federal funds made available to the State agency under this part which are in excess of obligations reported at the end of each fiscal year in accordance with the reconciliation procedures specified in paragraph (d) of this section. Such recoveries shall be reflected by a related adjustment in the State agency's Letter of Credit.

(d) *Substantiation and reconciliation process.* Each State agency shall maintain Program records as necessary to support the reimbursement payments made to school food authorities under § 210.7 and § 210.8 and the reports submitted to FNS under this paragraph. The State agency shall ensure such records are retained for a period of 3 years or as otherwise specified in § 210.23(c).

(1) *Monthly report.* Each State agency shall submit a final Report of School Program Operations (FNS-10) to FNS for each month. The final reports shall be limited to claims submitted in accordance with § 210.8 and shall be postmarked and/or submitted no later than 90 days following the last day of the month covered by the report. States shall not receive Program funds for any month for which the final report is not submitted within this time limit unless FNS grants an exception. Upward adjustments to a State's report shall not be made after 90 days from the month covered by the report unless authorized by FNS. Downward adjustments to a State's report shall always be made regardless of when it is determined that such adjustments are necessary. FNS authorization is not required for downward adjustments. Any adjustments to a State's report shall be reported to FNS in accordance with procedures established by FNS.

(2) *Quarterly report.* Each State agency shall also submit to FNS a quarterly Financial Status Report (SF-269) on the use of Program funds. Such reports shall be postmarked and/or submitted no later than 30 days after the end of each fiscal year quarter.

(3) *End of year report.* Each State agency shall submit a final Financial Status Report (SF-269) for each fiscal year. This final fiscal year grant closeout report shall be postmarked and/or submitted to FNS within 120 days after the end of each fiscal year or part thereof that the State agency administered the Program. Obligations shall be reported only for the fiscal year in which they occur. FNS will not be responsible for reimbursing Program obligations reported later than 120 days after the close of the fiscal year in which

they were incurred. Grant closeout procedures are to be carried out in accordance with 7 CFR Part 3015.

§ 210.6 Use of Federal funds.

General. State agencies shall use Federal funds made available under the Program to reimburse or make advance payments to school food authorities in connection with lunches served in accordance with the provisions of this part; *except that*, with the approval of FNS, any State agency may reserve an amount up to one percent of the funds earned in any fiscal year under this part for use in carrying out special developmental projects. Advance payments to school food authorities may be made at such times and in such amounts as are necessary to meet the current fiscal obligations. All Federal funds paid to any State in place of donated foods shall be used as provided in Part 240 of this chapter.

§ 210.7 Reimbursement for school food authorities.

(a) *General.* Reimbursement payments to finance nonprofit school food service operations shall be made only to school food authorities operating under a written agreement with the State agency. Subject to the provisions of § 210.8(b), such payments may be made for lunches served in accordance with provisions of this part and Part 245 in the calendar month preceding the calendar month in which the agreement is executed. These reimbursement payments include general cash assistance for all lunches served to children under the National School Lunch Program and special cash assistance payments for free or reduced price lunches served to children determined eligible for such benefits under the National School Lunch and Commodity School Programs. The school food authority shall not claim reimbursement for any lunches produced in excess of the one lunch per child per day limitation specified under § 210.10(b). Any excess lunches that are produced may be served, but shall not be claimed for general or special cash assistance provided under § 210.4. Nor shall any school food authority claim or be eligible for special cash assistance reimbursement for free or reduced price lunches in excess of the number of children approved for and served such lunches in each school food authority. Approval shall be in accordance with Part 245 of this chapter.

(b) *Assignment of rates.* At the beginning of each school year, State agencies shall establish the per meal rates of reimbursement for school food authorities participating in the Program.

These rates of reimbursement may be assigned at levels based on financial need; *except that*, the rates are not to exceed the maximum rates of reimbursement established by the Secretary under § 210.4(b) and are to permit reimbursement for the total number of lunches in the State from funds available under § 210.4. Within each school food authority, the State agency shall assign the same rate of reimbursement from general cash assistance funds for all lunches served to children under the Program. Assigned rates of reimbursement may be changed at any time by the State agency, *provided that* notice of any change is given to the school food authority. The total general and special cash assistance reimbursement paid to any school food authority for lunches served to children during the school year are not to exceed the sum of the products obtained by multiplying the total reported number of lunches, by type, served to eligible children during the school year by the applicable maximum per lunch reimbursements prescribed for the school year for each type of lunch.

§ 210.8 Method of reimbursement.

(a) *Monthly claims.* To be entitled to reimbursement under this part, each school food authority shall submit to the State agency, a monthly Claim for Reimbursement, as described in paragraph (b) of this section. A final Claim for Reimbursement shall be postmarked or submitted to the State agency not later than 60 days following the last day of the full month covered by the claim. State agencies may establish shorter deadlines at their discretion. Claims not postmarked and/or submitted within 60 days shall not be paid with Program funds unless otherwise authorized by FNS. The State agency shall promptly take corrective action with respect to any Claim for Reimbursement as determined necessary through its claims review process or otherwise. In taking such corrective action, State agencies may make adjustments on claims filed within the 60-day deadline if such adjustments are completed within 90 days of the last day of the claim month and are reflected in the final Report of School Program Operations (FNS-10) for the claim month required under § 210.5(d). Upward adjustments in Program funds claimed which are not reflected in the final FNS-10 for the claim month shall not be made unless authorized by FNS. Downward adjustments in amounts claimed shall always be made, without FNS authorization, regardless of when it

is determined that such adjustments are necessary.

(b) *Content of claim.* The Claim for Reimbursement shall include data in sufficient detail to justify the reimbursement claimed and to enable the State agency to provide the Report of School Program Operations required under § 210.5(d). The State agency may authorize a school food authority to submit a consolidated Claim for Reimbursement for all schools under its jurisdiction, *provided that* the data on each school's operations required in this section are maintained on file at the local office of the school food authority, and the claim separates consolidated data for commodity schools from data for other schools. Unless otherwise approved by FNS, the Claim for Reimbursement for any month shall include only lunches served in that month except if the first or last month of Program operations for any year contains 10 operating days or less, such month may be combined with the Claim for Reimbursement for the appropriate adjacent month. However, Claims for Reimbursement may not combine operations occurring in two fiscal years.

(c) *Advance funds.* The State agency may advance funds available for the Program to a school food authority in an amount equal to the amount of reimbursement estimated to be needed for one month's operation. Following the receipt of claims, the State agency shall make adjustments, as necessary, to ensure that the total amount of payments received by the school food authority for the fiscal year does not exceed an amount equal to the number of lunches by reimbursement type served to children times the respective payment rates assigned by the State in accordance with § 210.7(b). The State agency shall recover advances of funds to any school food authority failing to comply with the 60-day claim submission requirements in paragraph (a) of this section.

Subpart C—Requirements for School Food Authority Participation

§ 210.9 Agreement with State agency.

(a) *Application.* An official of a school food authority shall make written application to the State agency for any school in which it desires to operate the Program. Applications shall provide the State agency with sufficient information to determine eligibility. The school food authority shall also submit for approval a Free and Reduced Price Policy Statement in accordance with Part 245 of this chapter.

(b) *Annual agreement.* The school food authority shall annually enter into

a written agreement with the State agency. The State agency may allow school food authorities to extend by amendment a previous year's agreement in lieu of taking a new agreement annually *provided that* each year a current written agreement is on file at the State agency. The agreement shall contain a statement to the effect that the "School Food Authority and participating schools under its jurisdiction, shall comply with all provisions of 7 CFR Parts 210 and 245." This agreement shall provide that each school food authority shall, with respect to participating schools under its jurisdiction:

(1) Maintain a nonprofit school food service and observe the limitations on the use of nonprofit school food service revenues set forth in § 210.14(a) and the limitations on any competitive school food service as set forth in § 210.11(b);

(2) Limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved in accordance with § 210.19(a);

(3) Maintain a financial management system as prescribed under § 210.14(c);

(4) Comply with the requirements of the Department's regulations regarding financial management (7 CFR Part 3015);

(5) Serve lunches, during the lunch period, which meet the minimum requirements prescribed in § 210.10;

(6) Price the lunch as a unit;

(7) Serve lunches free or at a reduced price to all children who are determined by the school food authority to be eligible for such meals under 7 CFR Part 245;

(8) Claim reimbursement at the assigned rates only for lunches served in accordance with the agreement;

(9) Submit Claims for Reimbursement in accordance with § 210.8;

(10) Comply with the requirements of the Department's regulations regarding nondiscrimination (7 CFR Parts 15, 15a, 15b);

(11) Make no discrimination against any child because of his or her eligibility for free or reduced price meals in accordance with the approved Free and Reduced Price Policy Statement;

(12) Enter into an agreement to receive donated foods as required by 7 CFR Part 250;

(13) Maintain, in the storage, preparation and service of food, proper sanitation and health standards in conformance with all applicable State and local laws and regulations;

(14) Accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such

foods as may be offered as a donation by the Department;

(15) Maintain necessary facilities for storing, preparing and serving food;

(16) Upon request, make all accounts and records pertaining to its school food service available to the State agency and to FNS, for audit or review, at a reasonable time and place. Such records shall be retained for a period of 3 years after the date of the final Claim for Reimbursement for the fiscal year to which they pertain, except that if audit findings have not been resolved, the records shall be retained beyond the 3 year period as long as required for resolution of the issues raised by the audit;

(17) Maintain files of currently approved and denied free and reduced price applications, respectively. If applications are maintained at the school food authority level, they shall be readily retrievable by school;

(18) Retain the individual applications for free and reduced price lunches submitted by families for a period of 3 years after the end of the fiscal year to which they pertain or as otherwise specified under paragraph (b)(16) of this section.

§ 210.10 Lunch components and quantities.

(a) *Meal pattern definitions.* For the purpose of this section:

(1) "Infant cereal" means any iron-fortified dry cereal especially formulated and generally recognized as cereal for infants and that is routinely mixed with formula or milk prior to consumption.

(2) "Infant formula" means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants; excluding those formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems. Infant formula, as served, must be in liquid state at recommended dilution.

(b) *General.* School food authorities shall ensure that participating schools provide nutritious and well-balanced lunches to children in accordance with the provisions of this section. The requirements and recommendations of this section are designed so that the nutrients of the lunch, averaged over a period of time, approximate one-third of the Recommended Dietary Allowances for children of each age/grade group as specified in paragraph (c) of this section. School food authorities shall ensure that each lunch is priced as a unit. Except as otherwise provided herein, school food authorities shall ensure that sufficient quantities of food are planned and

produced so that lunches provided contain all the required food items in at least the amounts indicated in the table presented under paragraph (c) of this section. School food authorities shall ensure that lunches are planned and produced on the basis of participation trends, with the objective of providing one reimbursable lunch per child per day. Production and participation records shall be maintained to demonstrate positive action toward providing one reimbursable lunch per child per day. Any excess lunches that are produced may be served, but shall not be claimed for general or special cash assistance provided under § 210.4.

(c) *Minimum required lunch quantities.* Schools that are able to provide quantities of food to children solely on the basis of their ages or grade level should do so. Schools that cannot serve children on the basis of age or grade level shall provide all school age children Group IV portions as specified in the table presented in this paragraph. Schools serving children on the basis of age or grade level shall plan and produce sufficient quantities of food to provide Groups I-IV no less than the amounts specified for those children in the table presented in this paragraph, and sufficient quantities of food to provide Group V no less than the

specified amounts for Group IV. It is recommended that such schools plan and produce sufficient quantities of food to provide Group V children the larger amounts specified in the table. Schools that provide increased portion sizes for Group V may comply with children's requests for smaller portion sizes of the food items; however, schools shall plan and produce sufficient quantities of food to at least provide the serving sizes required for Group IV. Schools shall ensure that lunches are served with the objective of providing the per lunch minimums for each age and grade level as specified in the following table:

SCHOOL LUNCH PATTERN—PER LUNCH MINIMUMS

Food Components and Food Items	Minimum Quantities				Recommended quantities: Group V, 12 years and older (7-12)
	Group I, age 1-2 (Preschool)	Group II, age 3-4 (Preschool)	Group III, age 5-8 (K-3)	Group IV, age 9 and older (4-12)	
Milk (as a beverage): Fluid whole milk and fluid unflavored lowfat milk, skim milk or buttermilk must be offered (Flavored fluid milk optional).	¾ cup (6 fl. oz.)	¾ cup (6 fl. oz.)	½ pint (8 fl. oz.)	½ pint (8 fl. oz.)	½ pint (8 fl. oz.)
Meat or Meat Alternate (quantity of the edible portion as served):					
Lean meat, poultry, or fish	1 oz.	1 ½ oz.	1 ½ oz.	2 oz.	3 oz.
Cheese	1 oz.	1 ½ oz.	1 ½ oz.	2 oz.	3 oz.
Large egg	½	¾	¾	1	1 ½
Cooked dry beans or peas	¼ cup	¾ cup	¾ cup	½ cup	¾ cup
Peanut butter or other nut or seed butters	2 Tbsp.	3 Tbsp.	3 Tbsp.	4 Tbsp.	6 Tbsp.
The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above:					
Peanuts, soybeans, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1oz. of nuts/seeds = 1oz. of cooked lean meat, poultry, or fish).	½ oz. = 50%	¾ oz. = 50%	¾ oz. = 50%	1 oz. = 50%	1 ½ oz. = 50%
Vegetable or Fruit: 2 or more servings of vegetables or fruits or both.	½ cup	½ cup	½ cup	¾ cup	¾ cup
Bread or Bread Alternate (Servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains.	5 per week—minimum of ½ day.	8 per week—minimum of 1 per day.	8 per week—minimum of 1 per day.	8 per week—minimum of 1 per day.	10 per week—minimum of 1 per day.

(d) *Lunch components.* This section specifies the basic food components of the school lunch pattern which shall be served as food items in quantities specified in paragraph (c) of this section.

(1) *Milk.* Schools shall offer students fluid whole milk and at least one of the following:

- (i) Fluid unflavored milk containing two percent or less milk fats;
- (ii) Fluid unflavored skim milk; or
- (iii) Buttermilk.

All milk served shall be pasteurized fluid types of milk which meet State and local standards for such milk; except that, in the meal pattern for infants under 1 year of age, the milk shall be unflavored types of whole fluid milk or

an equivalent quantity of reconstituted evaporated milk which meets such standards. All milk shall contain vitamins A and D at levels specified by the Food and Drug Administration and consistent with State and local standards for such milk. School food authorities that served ¾ cup (6 fluid ounces) of milk to Group III children prior to May 1, 1980, may continue to do so. Such school food authorities shall retain documentation of the date on which they began such service and the reasons for adopting this portion size.

(2) *Meat or meat alternate.* The quantity of meat or meat alternate shall be the quantity of the edible portion as served. When the school determines

that the portion size of a meat alternate is excessive, it shall reduce the portion size of that particular meat alternate and supplement it with another meat/meat alternate to meet the full requirement. To be counted as meeting the requirement, the meat or meat alternate shall be served in a main dish or in a main dish and only one other menu item. The Department recommends that if schools do not offer children choices of meat or meat alternates each day, they serve no one meat alternate or form of meat (e.g., ground, diced, pieces) more than three times in a single week.

(i) Vegetable protein products, cheese alternate products, and enriched

macaroni with fortified protein defined in Appendix A may be used to meet part of the meat or meat alternate requirement when used as specified in Appendix A. An enriched macaroni product with fortified protein as defined in Appendix A may be used as part of a meat alternate or as a bread alternate, but not as both food components in the same meal.

(ii) Nuts and seeds and their butters listed in program guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts shall not be used as meat alternates due to their low protein and iron content. Nut and seed meals or flours shall not be used as a meat alternate except as defined in this part under Appendix A: Alternate Foods for Meals. As noted in the School Lunch Pattern table of this section, nuts or seeds may be used to meet no more than one-half of the meat/meat alternate requirement. Therefore, nuts and seeds must be used in the meal with another meat/meat alternate to fulfill the requirement.

(3) *Vegetable or fruit.* Full strength vegetable or fruit juice may be counted to meet not more than one-half of the vegetable/fruit requirement. Cooked dry beans or peas may be used as a meat alternate or as a vegetable, but not as both food components in the same meal.

(4) *Bread or bread alternate.* (i) All breads or bread alternates such as bread, biscuits, muffins or rice, macaroni, noodles, other pastas or cereal grains such as bulgur or corn grits, shall be enriched or whole grain or made with enriched or whole grain meal or flour.

(ii) Unlike the other component requirements, the bread requirement is based on minimum daily servings and total servings per week. Schools shall serve daily at least one-half serving of bread or bread alternate to children in Group I and at least one serving to children in Groups II-V. Schools which serve lunch at least 5 days a week shall serve a total of at least five servings of bread or bread alternate to children in Group I and eight servings per week to children in Groups II-V. Schools serving lunch 6 or 7 days per week should increase the weekly quantity by approximately 20 percent ($\frac{1}{5}$) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent ($\frac{1}{5}$) for each day less than five. The servings for biscuits, rolls, muffins, and other bread alternates are specified in the *Food Buying Guide for Child Nutrition Programs* (PA 1331), an FNS publication.

(e) *Offer versus serve.* Each school shall offer its students all five required food items as set forth in the table presented under paragraph (c). Senior high students shall be permitted to decline up to two of the five required food items. At the discretion of the school food authority, students below the senior high level may be permitted to decline one or two of the required five food items. The price of a reimbursable lunch shall not be affected if a student declines food items or accepts smaller portions. State educational agencies shall define "senior high."

(f) *Choice.* To provide variety and to encourage consumption and participation, schools should, whenever possible, provide a selection of foods and types of milk from which children may make choices. When a school offers a selection of more than one type of lunch or when it offers a variety of foods and milk for choice within the required lunch pattern, the school shall offer all children the same selection regardless of whether the children are eligible for free or reduced price lunches or pay the school food authority designated full price. The school may establish different unit prices for each type of lunch served provided that the benefits made available to children eligible for free or reduced price lunches are not affected.

(g) *Lunch period.* At or about mid-day schools shall serve lunches which meet the requirements of this part during a period designated as the lunch period by the school food authority. Such lunch periods shall occur between 10:00 a.m. and 2:00 p.m., unless otherwise exempted by FNS. With State approval, schools that serve children 1-5 years old are encouraged to divide the service of the specified quantities and food items into two distinct service periods. Such schools may divide the quantities and/or food items between these service periods in any combination that they choose.

(h) *Infant lunch pattern.* Infants under 1 year of age shall be served an infant lunch as specified in this paragraph when they participate in the Program. Foods within the infant lunch pattern shall be of texture and consistency appropriate for the particular age group being served, and shall be served to the infant during a span of time consistent with the infant's eating habits. For infants 4 through 7 months of age, solid foods are optional and should be introduced only when the infant is developmentally ready. Whenever possible the school should consult with the infant's parent in making the decision to introduce solid foods. Solid foods should be introduced one at a time on a gradual basis with the intent of

ensuring health and nutritional well-being. For infants 8 through 11 months of age, the total amount of food authorized in the meal patterns set forth below must be provided in order to qualify for reimbursement. Additional foods may be served to infants 4 months of age and older with the intent of improving their overall nutrition. Breast milk, provided by the infant's mother may be served in place of infant formula from birth through 11 months of age. However, meals containing only breast milk do not qualify for reimbursement. Meals containing breast milk served to infants 4 months of age or older may be claimed for reimbursement when the other required meal component or components are supplied by the school. Although it is recommended that either breast milk or iron-fortified infant formula be served for the entire first year, whole milk may be served beginning at 8 months of age as long as infants are consuming one-third of their calories as a balanced mixture of cereal, fruits, vegetables, and other foods in order to ensure adequate sources of iron and vitamin C. The infant lunch pattern shall contain, as a minimum, each of the following components in the amounts indicated for the appropriate age group:

(1) Birth through 3 months—4 to 6 fluid ounces of iron-fortified infant formula.

(2) 4 through 7 months—(i) 4 to 8 fluid ounces of iron-fortified infant formula; (ii) 0 to 3 tablespoons of iron-fortified dry infant cereal (optional); and (iii) 0 to 3 tablespoons of fruit or vegetable of appropriate consistency or a combination of both (optional).

(3) 8 through 11 months—(i) 6 to 8 fluid ounces of iron-fortified infant formula or 6 to 8 fluid ounces of whole milk; (ii) 2 to 4 tablespoons of iron-fortified dry infant cereal and/or 1 to 4 tablespoons meat, fish, poultry, egg yolk, or cooked dry beans or peas, or $\frac{1}{2}$ to 2 ounces (weight) of cheese or 1 to 4 ounces (weight or volume) of cottage cheese, cheese food or cheese spread of appropriate consistency; and (iii) 1 to 4 tablespoons of fruit or vegetable of appropriate consistency or a combination of both.

(i) *Exceptions.* Lunches claimed for reimbursement shall meet the school lunch pattern requirements specified in paragraphs (c) and (d) of this section. However, lunches served which accommodate the exceptions and variations authorized under this paragraph are also reimbursable. Exceptions and variations are restricted to the following:

(1) *Medical or dietary needs.* Schools shall make substitutions in foods listed in this section for students who are

considered handicapped under 7 CFR Part 15b and whose handicap restricts their diet. Schools may also make substitutions for nonhandicapped students who are unable to consume the regular lunch because of medical or other special dietary needs. Substitutions shall be made on a case by case basis only when supported by a statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement shall, in the case of a handicapped student, be signed by a physician or, in the case of a nonhandicapped student, by a recognized medical authority.

(2) *Ethnic, religious or economic variations.* FNS may approve variations in the food components of the lunch on an experimental or on a continuing basis in any school where there is evidence that such variations are nutritionally sound and are necessary to meet ethnic, religious, or economic needs.

(3) *Foreign meal patterns.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the bread or bread alternate requirement. For the Commonwealth of the Northern Mariana Islands, FNS has established a meal pattern which is consistent with local food consumption patterns and which, given available food supplies and food service equipment and facilities, provides optimum nutrition consistent with sound dietary habits for participating children. The State agency shall attach to and make a part of the written agreement required under § 210.9, the requirements of that pattern.

(4) *Natural disaster.* In the event of a natural disaster or other catastrophe, FNS may temporarily allow schools to serve lunches for reimbursement that do not meet requirements of this section.

(5) *Insufficient milk supply.* The inability of a school to obtain a supply of milk shall not bar it from participation in the Program and is to be resolved as follows:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may approve the service of lunches during the emergency period with an available alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of fluid whole milk and fluid unflavored milk containing two percent or less milk fats on a continuing basis, the State agency may approve the service of either fluid whole milk or fluid unflavored milk containing two percent or less milk fats. The Department

recommends that the State agency approve for service the available fluid milk with the lowest fat and sugar content. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, "milk" shall include reconstituted or recombined milk, or as otherwise provided under written exception by FNS.

(iii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of lunches without milk if the school uses an equivalent amount of canned, whole or nonfat dry milk in the preparation of the lunch.

§ 210.11 Competitive food services.

(a) *Definitions.* For the purpose of this section:

(1) "Competitive foods" means any foods sold in competition with the Program to children in food service areas during the lunch periods.

(2) "Food of minimal nutritional value" means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the United States Recommended Dietary Allowances (USRDA) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the USRDA for each of eight specified nutrients per 100 calories and less than five percent of the USRDA for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are—protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron. All categories of food of minimal nutritional value and petitioning requirements for changing the categories are listed in Appendix B of this part.

(b) *General.* State agencies and school food authorities shall establish such rules or regulations as are necessary to control the sale of foods in competition with lunches served under the Program. Such rules or regulations shall prohibit the sale of foods of minimal nutritional value, as listed in Appendix B of this part, in the food service areas during the lunch periods. The sale of other competitive foods may, at the discretion of the State agency and school food authority, be allowed in the food service area during the lunch period only if all income from the sale of such foods accrues to the benefit of the nonprofit school food service or the school or student organizations approved by the school. State agencies and school food authorities may impose additional restrictions on the sale of and income

from all foods sold at any time throughout schools participating in the Program.

§ 210.12 Student, parent and community involvement.

(a) *General.* School food authorities shall promote activities to involve students and parents in the Program. Such activities may include menu planning, enhancement of the eating environment, Program promotion, and related student-community support activities. School food authorities are encouraged to use the school food service program to teach students about good nutrition practices and to involve the school faculty and the general community in activities to enhance the Program.

(b) *Food service management companies.* School food authorities contracting with a food service management company shall comply with the provisions of § 210.16(a) regarding the establishment of an advisory board of parents, teachers and students.

(c) *Residential child care institutions.* Residential child care institutions shall comply with the provisions of this section, to the extent possible.

§ 210.13 Facilities management.

(a) *Health standards.* The school food authority shall ensure that food storage, preparation and service is in accordance with the sanitation and health standards established under State and local law and regulations.

(b) *Storage.* The school food authority shall ensure that the necessary facilities for storage, preparation and service of food are maintained. Facilities for the handling, storage, and distribution of purchased and donated foods shall be such as to properly safeguard against theft, spoilage and other loss.

§ 210.14 Resource management.

(a) *Nonprofit school food service.* School food authorities shall maintain a nonprofit school food service. Revenues received by the nonprofit school food service are to be used only for the operation or improvement of such food service, except that, such revenues shall not be used to purchase land or buildings, unless otherwise approved by FNS, or to construct buildings. Expenditures of nonprofit school food service revenues shall be in accordance with the financial management system established by the State agency under § 210.19(a) of this part. School food authorities may use facilities, equipment, and personnel supported with nonprofit school food revenues to

support a nonprofit nutrition program for the elderly, including a program funded under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*).

(b) *Net cash resources.* The school food authority shall limit its net cash resources to an amount that does not exceed 3 months average expenditures for its nonprofit school food service or such other amount as may be approved by the State agency in accordance with § 210.19(a).

(c) *Financial management system.* The school food authority shall maintain a financial management system in accordance with § 210.19(a) of this part. School food authorities shall keep records for the nonprofit school food service cited in paragraph (a) of this section separate from records for any other food service which may be operated by the school food authority.

(d) *Use of donated foods.* The school food authority shall enter into an agreement with the distributing agency to receive donated foods as required by Part 250 of this chapter. In addition, the school food authority shall accept and use, in as large quantities as may be efficiently utilized in its nonprofit school food service, such foods as may be offered as a donation by the Department.

§ 210.15 Reporting and recordkeeping.

(a) *Reporting summary.* Participating school food authorities are required to submit forms and reports to the State agency or the distributing agency, as appropriate, to demonstrate compliance with Program requirements. These reports include, but are not limited to:

(1) A Claim for Reimbursement as specified by the State agency in accordance with § 210.8;

(2) An application and agreement for Program operations between the school food authority and the State agency, and a Free and Reduced Price Policy Statement as required under § 210.9;

(3) Documentation of corrective action taken for any program deficiency found on any review/audit as required under § 210.18(k);

(4) A formal corrective action plan whenever AIMS performance standard violations in excess of error tolerances are disclosed on either a first or second review as specified under § 210.18(i);

(5) A written response to AIMS audit findings under § 210.18(k);

(6) A commodity school's preference whether to receive part of its donated food allocation in cash for processing and handling of donated foods as required under § 210.19(b);

(7) A written response to audit findings pertaining to the school food

authority's operation as required under § 210.22; and

(8) Information on civil rights complaints, if any, and their resolution as required under § 210.23.

(b) *Recordkeeping summary.* In order to participate in the Program, a school food authority shall maintain records to demonstrate compliance with Program requirements. These records include but are not limited to:

(1) Documentation of participation data by school in support of the Claim for Reimbursement, as required under § 210.8(b);

(2) Production and participation records to demonstrate positive action toward providing one lunch per child per day as required under § 210.10(b);

(3) Records of revenues and expenditures to demonstrate that the food service is being operated on a nonprofit basis, as required under § 210.14(a) including net cash resources, or the information necessary for the State to compute net cash resources through a review or audit as specified under § 210.18(b); and

(4) Currently approved and denied applications for free and reduced price lunches and a description of the verification activities, as required under 7 CFR Part 245.

§ 210.16 Food service management companies.

(a) *General.* Any school food authority (including a State agency acting in the capacity of a school food authority) may contract with a food service management company to manage its food service operation in one or more of its schools. However, no school or school food authority may contract with a food service management company to operate an a la carte food service unless the company agrees to offer free, reduced price and paid reimbursable lunches to all eligible children. Any school food authority that employs a food service management company in the operation of its nonprofit school food service shall:

(1) Adhere to the procurement standards specified in § 210.21 when contracting with the food service management company;

(2) Ensure that the food service operation is in conformance with the school food authority's agreement under the Program;

(3) Monitor the food service operation through periodic on-site visits;

(4) Retain control of the quality, extent, and general nature of its food service, and the prices to be charged the children for meals;

(5) Retain signature authority on the State agency-school food authority

agreement, free and reduced price policy statement and claims;

(6) Ensure that all federally donated foods received by the school food authority and made available to the food service management company accrue only to the benefit of the school food authority's nonprofit school food service and are fully utilized therein;

(7) Maintain applicable health certification and assure that all State and local regulations are being met by a food service management company preparing or serving meals at a school food authority facility; and

(8) Establish an advisory board composed of parents, teachers, and students to assist in menu planning.

(b) *Invitation to bid.* In addition to adhering to the procurement standards under § 210.21, school food authorities contracting with food service management companies shall ensure that:

(1) The invitation to bid or request for proposal contains a 21-day cycle menu to be used as a standard for the purpose of basing bids or estimating average cost per meal. If a school food authority has no capability to prepare a cycle menu, it may, with State agency approval, request that a 21-day cycle menu be developed and submitted by each food service management company which intends to submit a bid or proposal to the school food authority. The food service management company must adhere to the cycle for the first 21 days of meal service. Changes thereafter may be made with the approval of the school food authority.

(2) Any invitation to bid or request for proposal indicate that nonperformance subjects the food service management company to specified sanctions in instances where the food service management company violates or breaches contract terms. The school food authority shall indicate these sanctions in accordance with the procurement provisions stated in § 210.21.

(c) *Contracts.* Contracts that permit all income and expenses to accrue to the food service management company and "cost-plus-a-percentage-of-cost" and "cost-plus-a-percentage-of-income" contracts are prohibited. Contracts that provide for fixed fees such as those that provide for management fees established on a per meal basis are allowed. Contractual agreements with food service management companies shall include provisions which ensure that the requirements of this section are met. Such agreements shall also include the following:

(1) The food service management company shall maintain such records as the school food authority will need to support its Claim for Reimbursement under this part, and shall, at a minimum, report claim information to the school food authority promptly at the end of each month. Such records shall be made available to the school food authority, upon request, and shall be retained in accordance with § 210.23(c).

(2) The food service management company shall have State or local health certification for any facility outside the school in which it proposes to prepare meals and the food service management company shall maintain this health certification for the duration of the contract.

(3) No payment is to be made for meals that are spoiled or unwholesome at time of delivery, do not meet detailed specifications as developed by the school food authority for each food component specified in § 210.10, or do not otherwise meet the requirements of the contract. Specifications shall cover items such as grade, purchase units, style, condition, weight, ingredients, formulations, and delivery time.

(d) *Duration of contract.* The contract between a school food authority and food service management company shall be a of a duration of no longer than 1 year; and options for the yearly renewal of a contract signed after February 16, 1988, may not exceed 4 additional years. All contracts shall include a termination clause whereby either party may cancel for cause with 60-day notification.

Subpart D—Requirements for State Agency Participation

§ 210.17 Matching Federal funds.

(a) *State revenue matching.* For each school year, the amount of State revenues appropriated or used specifically by the State for program purposes shall not be less than 30 percent of the funds received by such State under section 4 of the National School Lunch Act during the school year beginning July 1, 1980; *provided that*, the State revenues derived from the operation of such programs and State revenues expended for salaries and administrative expenses of such programs at the State level are not considered in this computation. However, if the per capita income of any State is less than the per capita income of the United States, the matching requirements so computed shall be decreased by the percentage by which the State per capita income is below the per capita income of the United States.

(b) *Private school exemption.* No State in which the State agency is

prohibited by law from disbursing State appropriated funds to nonpublic schools shall be required to match general cash assistance funds expended for meals served in such schools, or to disburse to such schools any of the State revenues required to meet the requirements of paragraph (a) of this section. Furthermore, the requirements of this section do not apply to schools in which the Program is administered by a FNSRO.

(c) *Territorial waiver.* American Samoa and the Commonwealth of the Northern Mariana Islands shall be exempted from the matching requirements of paragraph (a) of this section if their respective matching requirements are under \$100,000.

(d) *Applicable revenues.* The following State revenues, appropriated or used specifically for program purposes which are expended for any school year shall be eligible for meeting the applicable percentage of the matching requirements prescribed in paragraph (a) of this section for that school year:

(1) State revenues disbursed by the State agency to school food authorities for program purposes, including revenue disbursed to nonprofit private schools where the State administers the program in such schools;

(2) State revenues made available to school food authorities and transferred by the school food authorities to the nonprofit school food service accounts or otherwise expended by the school food authorities in connection with the nonprofit school food service program; and

(3) State revenues used to finance the costs (other than State salaries or other State level administrative costs) of the nonprofit school food service program, i.e.:

- (i) Local program supervision;
- (ii) Operating the program in participating schools; and
- (iii) The intrastate distribution of foods donated under Part 250 of this chapter to schools participating in the program.

(e) *Distribution of matching revenues.* All State revenues made available under paragraph (a) of this section are to be disbursed to school food authorities participating in the Program, *except as* provided for under paragraph (b) of this section. Distribution of matching revenues may be made with respect to a class of school food authorities as well as with respect to individual school food authorities.

(f) *Failure to match.* If, in any school year, a State fails to meet the State revenue matching requirement, as prescribed in paragraph (a) of this

section, the general cash assistance funds utilized by the State during that school year shall be subject to recall by and repayment to FNS.

(g) *Reports.* Within 120 days after the end of each school year, each State agency shall submit an Annual Report of Revenues (FNS-13) to FNS. This report identifies the State revenues to be counted toward the State revenue matching requirements specified in paragraph (a) of this section.

(h) *Accounting system.* The State agency shall establish or cause to be established a system whereby all expended State revenues counted in meeting the matching requirements prescribed in paragraph (a) of this section are properly documented and accounted for.

§ 210.18 Monitoring responsibilities.

(a) *General program compliance.* Each State agency shall require that school food authorities comply with the applicable provisions of this part. The State agency shall ensure compliance through audits, supervisory assistance reviews, visits to participating schools, or by other means.

(b) *Net cash resources.* Each State agency shall monitor through review or audit or by other means, the net cash resources of the nonprofit school food service in each school food authority participating in the Program. In the event that such resources exceed 3 months average expenditures for the school food authority's nonprofit school food service or such other amount as may be approved in accordance with § 210.19(a), the State agency may require the school food authority to reduce the price children are charged for meals, improve food quality or take other action designed to improve the nonprofit school food service. In the absence of any such action, the State agency shall make adjustments in the rate of reimbursement under the Program.

(c) *Improved management.* The State agency shall work with the school food authority toward improving the school food authority's management practices where the State agency has found poor food service management practices leading to decreasing or low student participation and/or poor student acceptance of the Program or of foods served. Poor student acceptance may be indicated by a substantial number of students who routinely and over a period of time:

- (1) Do not favorably accept a particular menu item;
- (2) Return foods; or

(3) Choose less than all five food items as authorized under § 210.10(e).

(d) *Food service management companies.* Each State agency shall annually review each contract between any school food authority and food service management company to ensure compliance with all the provisions and standards set forth in § 210.16. Each State agency shall perform an on-site review of each school food authority contracting with a food service management company at least once during each 4-year period. Such reviews shall include an assessment of the school food authority's compliance with § 210.16. The State agency may require that all food service management companies that wish to contract for food service with any school food authority in the State must register with the State agency. State agencies shall provide assistance upon request of a school food authority to assure compliance with Program requirements.

(e) *Investigations.* Each State agency shall promptly investigate complaints received or irregularities noted in connection with the operation of the Program, and shall take appropriate action to correct any irregularities. State agencies shall maintain on file evidence of such investigations and actions. FNS and OIG may make investigations at the request of the State agency or where FNS or OIG determines investigations are appropriate.

(f) *Assessment, Improvement and Monitoring System (AIMS).* Each State agency shall perform AIMS reviews, audits or a combination thereof of all school food authorities participating in the Program in accordance with the provisions of this section; or a State agency may develop an alternate monitoring system as specified in paragraph (n) of this section.

(g) *AIMS definitions.* The following definitions are provided in order to clarify AIMS requirements:

(1) "AIMS audits" means on-site evaluations of school food authorities participating in the Program for compliance with AIMS performance standards, by State auditors or State contracted auditors once every 2 years, in accordance with USDA's audit guide or an audit guide approved by FNS and USDA's OIG.

(2) "AIMS error tolerance level" means the degree of error of an AIMS performance standard as specified in paragraph (i)(4) of this section which, if exceeded in a reviewed school food authority, triggers a second AIMS review in all large school food authorities and in at least 25 percent of those small school food authorities

which exceed error tolerance levels on a first AIMS review.

(3) "AIMS performance standards" means the following standards which measure compliance with Program regulations:

(i) Performance Standard 1—Certification—Within the school food authority, each child's application for free and reduced price meals is correctly approved or denied in accordance with the applicable provisions of Part 245.

(ii) Performance Standard 2—Claims—The numbers of free and reduced price meals claimed for reimbursement by each school for any review period are, in each case, less than or equal to the number of children in that school correctly approved for free and reduced price meals, respectively for the review period, times the days of operation for the review period.

(iii) Performance Standard 3—Counting—The system used for counting and recording meal totals, by type, claimed for reimbursement at both the school food authority and school levels yields correct claims.

(iv) Performance Standard 4—Components—Meals claimed for reimbursement within the school food authority contain food items as required by § 210.10.

(4) "AIMS reviews" means on-site evaluation, of all school food authorities participating in the Program during each 4-year AIMS review period, by the State agency or State auditors for compliance with the AIMS performance standards and follow-up reviews, as required.

(5) "Corrective action plan" means the written description a school food authority submits to the State agency to explain how and when a program deficiency will be corrected.

(6) "Large school food authority" means, in any State:

(i) All school food authorities that participate in the Program and have enrollments of 40,000 students or more each; and

(ii) The two largest school food authorities that participate in the Program and have enrollments of 2,000 students or more each.

(7) "Small school food authority" means, in any State, a school food authority that participates in the Program and is not a large school food authority.

(h) *Number of schools reviewed or audited under AIMS.* The number of schools within the school food authority which must be included in a review or audit is dependent upon the total number of schools in the school food authority. The minimum number of schools the State agency shall review or

audit is illustrated in Table A:

TABLE A

Number of schools in the school food authority	Minimum ¹
1 to 5.....	1
6 to 10.....	2
11 to 20.....	3
21 to 40.....	4
41 to 60.....	6
61 to 80.....	8
81 to 100.....	10
101 or more.....	² 12

¹ Minimum number of schools to be reviewed or audited.

² Twelve plus 5 percent of the number of schools over 100. Fractions shall be rounded to the nearest whole number.

(i) *AIMS reviews.* States performing AIMS reviews shall monitor compliance with the AIMS performance standards described in paragraph (g) of this section. On the first AIMS review, the State agency shall review the school food authority for Performance Standards 1-4. On second AIMS reviews, the State agency shall, at a minimum, review the school food authority for the performance standards which exceeded error tolerances in the first review.

(1) *Scope of AIMS reviews.* In reviewing performance standards:

(i) The State agency shall analyze and determine the adequacy of local approval procedures for free and reduced price meals by examining the eligibility determinations made within the school food authority. The State agency shall review the applications for all children for whom application was made attending the reviewed schools, or a statistically valid sample of the applications for such children. The State agency shall also ensure that the system to update the application file is adequate. If the State agency chooses to review a statistically valid sample of applications, the State agency shall ensure that the sample size is large enough so that there is a 95 percent chance that the actual error rate for all applications is not less than 2 percentage points less than the error rate found in the sample (i.e., the lower bound of the one-sided 95 percent confidence interval is no more than 2 percentage points less than the point estimate). In addition, the State agency shall determine the need for a second review and base fiscal action upon the error rate found in the sample.

(ii) The State agency shall ensure that, at a minimum, for each school reviewed, the number of free meals claimed in the school food authority's most recent Claim for Reimbursement does not exceed the number of children correctly

approved for free meals for the claim period times the days of operation of that school, as reported to the school food authority for the claim month. The State agency shall apply the same procedure to the claim for reduced price meals.

(iii) The State agency shall ensure that each school reviewed has an adequate system for counting and recording meals served by reimbursement type and that the school food authority properly consolidates meal counts from its schools.

(iv) The State agency shall determine by observation of a representative sample of meals that meals contain food items as required in § 210.10.

(2) *Timing of AIMS reviews.* During each 4-year AIMS review period, the first AIMS review of a school food authority shall be completed within the school year in which the review was begun. A second AIMS review, when required, is recommended to be conducted in the same school year as the first review and is required to be conducted no later than December 31 of the school year following the first review.

(3) *Method of selecting school food authorities and schools to review.*

(i) Each school year, the State agency shall use its own criteria to select school food authorities for AIMS reviews; provided that all participating school food authorities are reviewed at least once every 4 years and that school food authorities found on the first review to exceed error tolerance levels are subject to second reviews as specified in paragraph (i)(4) of this section.

(ii) On a first AIMS review of a school food authority, the State agency shall select, to the extent practicable, the required minimum number of schools to review on a proportionate basis from each type of attendance unit (e.g., elementary school, middle school, high school), and shall select schools within attendance unit grouping either randomly or by using State agency criteria which shall be kept on file at the State agency. If using its own criteria, the State agency shall ensure that some of the schools selected are chosen because of the likelihood of problems. On a second AIMS review, the State agency shall choose schools using State agency criteria, which may include random selection. State agency criteria for selecting schools for second AIMS reviews shall also be kept on file. The minimum number of schools to be selected and reviewed during a first or second AIMS review of a school food authority is specified in paragraph (h) of this section.

(4) *Error tolerance for AIMS review.*

State agencies shall ensure that corrective action plans are completed by all school food authorities which are found on first reviews to exceed the error tolerance described below.

Further, State agencies shall conduct second reviews of: all large school food authorities found to exceed such tolerances on first reviews; and at least 25 percent of small school food authorities found to exceed such tolerances on first reviews. An error tolerance is exceeded when:

(i) For AIMS Performance Standard 1, 10 percent or more (but not less than 10 children) of the children listed on reviewed applications and attending reviewed schools in a school food authority are incorrectly approved or denied for free or reduced price meal benefits; and/or

(ii) For AIMS Performance Standard 2, a number of schools reviewed in a school food authority, as specified in Table B of paragraph (i)(5), claim reimbursement for more free or more reduced price meals, respectively, than the number of children correctly approved for such meals for the test period times the days of operation for the period; and/or

(iii) For AIMS Performance Standard 3, a number of schools reviewed in a school food authority, as specified in Table B of paragraph (i)(5), have an inadequate system for counting and recording meal totals by type claimed for reimbursement, or the school food authority does not use valid procedures for consolidating claims; and/or

(iv) For AIMS Performance Standard 4, 10 percent or more of the total meals observed in a school food authority are missing one or more required food items.

(5) *Performance standards 2 and 3 tolerances.* Table B indicates the number of schools violating Performance Standards 2 or 3, thus necessitating a corrective action plan in the applicable school food authority and a second review in all large school authorities and at least 25 percent of the small school food authorities which exceed error tolerance levels on a first AIMS review.

TABLE B

Number of schools reviewed	Number of schools ¹
1 to 10	1
11 to 20	2
21 to 30	3
31 to 40	4
41 to 50	5
51 to 60	6
61 to 70	7
71 to 80	8

TABLE B—Continued

Number of schools reviewed	Number of schools ¹
81 to 90	9
91 to 100	10
101 or more	* 10

¹ Number of schools violating Performance Standards 2 or 3 respectively, thus necessitating a second review of the school food authority.

* 10 plus the number identified above for the appropriate increment.

(6) *Corrective action plans for AIMS reviews.* Corrective action plans are required to address AIMS performance standard deficiencies exceeding the error tolerance levels described in this section. The following procedures shall be followed to develop a corrective action plan:

(i) The State agency shall assist the school food authority in developing a mutually agreed upon corrective action plan.

(ii) The corrective action plan shall identify the corrective actions and timeframes needed to correct the deficiencies found during the review. Corrective action shall include all necessary fiscal actions as described in § 210.19(c), including adjusting data to be used in preparing the Claim for Reimbursement.

(iii) The plan shall be written, signed by the proper official of the school food authority, and submitted to and approved by the State agency within 60 days following the exit conference of a review. State agencies may extend this deadline to 90 days. Extensions beyond 90 days may be made, for cause, with written justification to and approval by FNSRO.

(iv) The State agency shall require the school food authority to implement an amended or extended corrective action plan when error tolerance levels are exceeded on a second AIMS review.

(7) *New violations found on a second AIMS review.* If, during the course of a second AIMS review, a performance standard violation is found that has not been noted on a previous AIMS review, the State agency shall institute and document appropriate corrective action. If the violation exceeds the error tolerance level, the State agency shall require a corrective action plan and the completion of corrective action. The State agency shall take fiscal action as described in § 210.19(c) of this part for any degree of violation of AIMS Performance Standards 2, 3, and 4.

(j) *AIMS audits.* Audits by State agency, State or State-contracted auditors may be used as an alternative to AIMS reviews, if the State agency

chooses this option, the audit must ensure that the four performance standards listed under paragraph (g) of this section are being complied with by the audited school food authority. This includes performing all activities described in paragraph (i)(1) of this section. Additionally, a State using AIMS audits in place of AIMS reviews shall:

(1) Audit school food authorities once every 2 years;

(2) Take fiscal action in accordance with § 210.19(c);

(3) Have a documented system for achieving corrective action;

(4) Select schools within a school food authority based upon generally accepted audit principles; and

(5) Use a State audit guide approved by FNS. A State agency shall submit its guide to FNSRO by February 1 of each year; except that portions of the guide which do not change annually need not be resubmitted. State agencies shall provide the title of the sections that remain unchanged, as well as the year of the last guide in which the sections were submitted.

(k) *AIMS exit conference, notification and corrective action.* The State agency and the school food authority shall hold an exit conference at the close of an AIMS review or audit to discuss the deficiencies observed, the extent of the deficiencies and the corrective action needed to correct the deficiencies. If a corrective action plan is required as described in paragraph (i)(6) of this section, it shall be discussed during the exit conference. After every AIMS review or audit, the State shall provide written notification of the review or audit findings to the school food authority's superintendent or authorized representative who signed the State agency/school food authority agreement or who is otherwise authorized to represent the superintendent. The State shall require that the school food authority take and document corrective action for any program deficiency found on any review or audit. Corrective action may include training, assistance, recalculation of data to ensure the correctness of any claim that the school food authority is preparing at the time of the review, or other actions.

(l) *AIMS reporting.* Each State agency shall report to FNSRO:

(1) The name of any school food authority which exceeds an error tolerance level on a second AIMS review in any review period and the type and extent of the regulatory violations; and

(2) Beginning March 1, 1989, the results of AIMS reviews/audits by March 1 of each school year, on a form

designated by FNS. In such annual reports, the State agency shall include the results of all AIMS reviews/audits conducted in the preceding school year and any consequent second AIMS reviews performed in the preceding school year or by December 31 of the current school year.

(m) *AIMS recordkeeping.* Each State agency shall keep records which document the details of all AIMS reviews or audits and demonstrate the degree of compliance with AIMS performance standards. AIMS records shall be kept on file by the State agency for a minimum of 3 years after the end of the school year in which the review or audit was conducted or after the school year in which problems have been resolved, whichever is later. Such records shall include documentation of AIMS first reviews and any consequent second reviews. When necessary, the records must include a corrective action plan as described in this section. Additionally, the State agency must have on file:

(1) Criteria for selecting schools on first and second reviews, if the selection is not random;

(2) Its system for selecting small school food authorities for second reviews; and

(3) Documentation demonstrating compliance with the statistical sampling requirements specified in § 210.18(i).

(n) *State alternate to AIMS.* Any State developed monitoring system shall:

(1) Be equivalent to AIMS in scope;

(2) Monitor compliance with AIMS Performance Standards 1-4;

(3) Include on-site visits of all school food authorities on a cyclical basis;

(4) Require that corrective action be taken and documented for any Program deficiency found;

(5) Provide for fiscal action and set forth the State agency's criteria for taking such action;

(6) Provide for the maintenance of a detailed description of the system and records of all monitoring visits and activities which demonstrate the degree of compliance with AIMS performance standards, corrective action needed and taken, and fiscal action taken;

(7) Receive approval by the appropriate FNSRO prior to implementation; and

(8) Beginning March 1, 1989, submit annual reports of the results of such alternate State monitoring reviews to FNSRO on a form designated by FNS.

§ 210.19 Additional responsibilities.

(a) *General program management.* Each State agency shall provide an adequate number of consultative, technical and managerial personnel to

administer programs and monitor performance in complying with all program requirements. Such personnel shall, at a minimum, visit participating schools to monitor for compliance with Program regulations and instructions, the Department's nondiscrimination regulations (7 CFR Parts 15, 15a and 15b), and the Department's Uniform Federal Assistance Regulations (7 CFR Part 3015). Each State agency shall establish a financial management system under which school food authorities shall account for all revenues and expenditures of their nonprofit school food service. The system shall prescribe the allowability of nonprofit school food service expenditures in accordance with this part, and, as applicable, 7 CFR Part 3015. The system shall permit determination of school food service net cash resources, and shall include any criteria for approval of net cash resources in excess of 3 months' average expenditures.

(b) *Commodity distribution information.* The State agency shall periodically assess school needs for donated foods under 7 CFR Part 250, notify the distributing agency of the schools' commodity needs, and recommend appropriate variations in rates of distribution. In assessing the commodity needs of schools, usage history and existing donated food inventories should be considered. As early as practicable each school year, but later than September 1, the State agency shall forward to the distributing agency and FNSRO an estimate of the average daily number of Program lunches to be served by school food authorities; an estimate of the average daily number of lunches to be served by commodity schools; and the amount of any cash payments in lieu of commodities for donated food processing and handling expenses to be received by or on behalf of commodity schools in accordance with § 240.5 of this chapter. That State agency shall promptly revise the information required by this paragraph to reflect additions or deletions of eligible schools and provide any necessary adjustment in the number of lunches served.

(c) *Fiscal action.* Fiscal action includes, but is not limited to, the recovery of overpayments through direct assessment or offset of future claims; disallowance of overclaims as reflected in unpaid Claims for Reimbursement; and correction of records to ensure that unfiled Claims for Reimbursement are corrected when filed. State agencies are responsible for ensuring program integrity at the school food authority level. As such, they shall take fiscal

action against school food authorities for Claims for Reimbursement that are not properly payable under this part. In taking fiscal action, State agencies shall use their own procedures, within the constraints of this part, and shall maintain all records pertaining to action taken under this section. The State shall determine the extent of fiscal action based on the severity and longevity of the problems. The State agency may refer to FNS for assistance in making a claims determination under this paragraph.

(1) *AIMS.* When a State agency chooses to conduct AIMS reviews, as described in § 210.18(j), fiscal action may be taken on a first review: *except* fiscal action shall be taken when, under Performance Standard 3, the number of meals claimed for school food authority reimbursement has been incorrectly aggregated from individual school reports so that an excessive number of meals has been claimed. State agencies shall take fiscal action on the second review for any degree of violation of AIMS Performance Standards 2, 3 and 4. When a State agency chooses to conduct AIMS audits, as described in § 210.18(j), fiscal action shall be assessed for any degree of violation of Performance Standards 2, 3 and 4. When a State agency develops its own compliance monitoring system in accordance with § 210.18(n), fiscal action shall be taken in accordance with the criteria established under that system. The criteria shall be consistent in principle with the fiscal action requirements for AIMS reviews and audits as set forth in this section.

(2) *Failure to collect.* If a State agency fails to disallow a claim or recover an overpayment from a school food authority, as described in this section, FNS will notify the State agency that a claim may be assessed against the State agency. In all such cases, the State agency shall have full opportunity to submit evidence concerning overpayment. If after considering all available information, FNS determines that a claim is warranted, FNS will assess a claim in the amount of such overpayment against the State agency. If the State agency fails to pay any such demand for funds promptly, FNS will reduce the State agency's Letter of Credit by the sum due in accordance with FNS' existing offset procedures for Letter of Credit. In such event, the State agency shall provide the funds necessary to maintain Program operations at the level of earnings from a source other than the Program.

(3) *Interest charge.* If an agreement cannot be reached with the State agency

for payment of its debts or for offset of debts on its current Letter of Credit, interest will be charged against the State agency from the date the demand letter was sent, at the rate established by the Secretary of Treasury.

(4) *Use of recovered payment.* The amounts recovered by the State agency from school food authorities may be utilized during the fiscal year for which the funds were initially available, first, to make payments to school food authorities for the purposes of the Program; and second, to repay any State funds expended in the reimbursement of claims under the Program and not otherwise repaid. Any amounts recovered which are not so utilized shall be returned to FNS in accordance with the requirements of this part.

(5) *Exception.* In the event that the State agency finds, during a State review or State audit, that a school food authority is failing to meet the quantities for each food item required under the meal pattern in § 210.10, the State agency need not disallow payment or collect an overpayment arising out of such failure, if the State agency takes such other action as, in its opinion, will have a corrective effect.

(6) *Claims adjustment.* FNS will have the authority to determine the amount of, to settle, and to adjust any claim arising under the Program, and to compromise or deny such claim or any part thereof. FNS will also have the authority to waive such claims if FNS determines that to do so would serve the purposes of the Program. This provision shall not diminish the authority of the Attorney General of the United States under section 516 of Title 28, U.S. Code, to conduct litigation on behalf of the United States.

(d) *Management evaluations.* Each State agency shall provide FNS with full opportunity to conduct management evaluations of all State agency Program operations and shall provide OIG with full opportunity to conduct audits of all State agency Program operations. Each State agency shall make available its records, including records of the receipt and disbursement of funds under the Program and records of any claim compromised in accordance with paragraph (d)(1) of this section, upon a reasonable request by FNS, OIG, or the Comptroller General of the United States. FNS and OIG retain the right to visit schools and OIG also has the right to make audits of the records and operations of any school.

(1) *Disregard overpayment.* In conducting management evaluations or audits for any fiscal year, the State agency, FNS, or OIG may disregard any

overpayment which does not exceed \$35 or, in the case of State agency administered programs, does not exceed the amount established under State law, regulations, or procedure as a minimum amount for which claim will be made for State losses. However, no overpayment is to be disregarded where there are unpaid claims of the same fiscal year from which the overpayment can be deducted or there is substantial evidence of violations of criminal law or civil fraud statutes.

(2) *AIMS.* As a part of its management evaluation of a State agency, FNS will evaluate the State's progress in effectively meeting the AIMS requirements consistent with administrative responsibilities placed upon the State agency by this part.

(e) *Additional requirements.* Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part.

§ 210.20 Reporting and recordkeeping.

(a) *Reporting summary.* Participating State agencies shall submit forms and reports to FNS to demonstrate compliance with Program requirements. The reports include but are not limited to:

(1) Requests for cash to make reimbursement payments to school food authorities as required under § 210.5(a);

(2) Information on the amounts of Federal Program funds expended and obligated to date (SF-269) as required under § 210.5(d);

(3) Statewide totals on Program participation (FNS-10) as required under § 210.5(d);

(4) Information on State funds provided by the State to meet the State matching requirements (FNS-13) specified under § 210.17(g);

(5) Names of school food authorities found in violation of AIMS performance standards on AIMS second reviews, together with information on the type and extent of violations, as required under § 210.18(l);

(6) Result of AIMS reviews/audits as required under § 210.18(l); and

(7) Results of the commodity preference survey and recommendations for commodity purchases as required under § 210.27(d).

(b) *Recordkeeping summary.* Participating State agencies are required to maintain records to demonstrate compliance with Program requirements. The records include but are not limited to:

(1) Accounting records and source documents to control the receipt,

custody and disbursement of Federal Program funds as required under § 210.5(a);

(2) Documentation supporting all school food authority claims paid by the State agency as required under § 210.5(d);

(3) Documentation to support the amount the State agency reported having used for State revenue matching as required under § 210.17(h);

(4) Records supporting the State agency's review of net cash resources as required under § 210.18(b);

(5) Reports on the results of investigations of complaints received or irregularities noted in connection with Program operations as required under § 210.18(e);

(6) Confirmation of a State agency's approval of a school food authority's AIMS corrective action plan as required under § 210.18(i) and records of all AIMS reviews and audits, including records of action taken to correct program deficiencies as required under § 210.18(m);

(7) State agency criteria, for selecting schools for AIMS reviews and small school food authorities for AIMS second reviews as required under § 210.18(m);

(8) Documentation of action taken to disallow improper claims submitted by school food authorities, as required by § 210.19(c) and as determined through claims processing, resulting from actions such as AIMS reviews, AIMS audits, and USDA audits;

(9) Records of USDA audit findings, State agency's and school food authorities' responses to them and of corrective action taken as required by § 210.22(a);

(10) Records pertaining to civil rights responsibilities as defined under § 210.23(b); and

(11) Records pertaining to the annual food preference survey of school food authorities as required by § 210.27(d).

Subpart E—State Agency and School Food Authority Responsibilities

§ 210.21 Procurement.

(a) *General.* State agencies and school food authorities shall comply with the requirements of 7 CFR Part 3015 concerning the procurement of supplies, food, equipment and other services with Program funds. These requirements ensure that such materials and services are obtained for the Program efficiently and economically and in compliance with applicable laws and executive orders.

(b) *Contractual responsibilities.* The standards contained in 7 CFR Part 3015 do not relieve the State agency or school food authority of any contractual

responsibilities under its contracts. The State agency or school food authority is the responsible authority, without recourse to FNS, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in connection with the Program. This includes, but is not limited to source evaluation, protests, disputes, claims, or other matters of a contractual nature. Matters concerning violation of law are to be referred to the local, State, or Federal authority that has proper jurisdiction.

(c) *Procurement procedure.* The State agency or school food authority may use its own procurement procedures which reflect applicable State and local laws and regulations, *provided that* procurements made with Program funds adhere to the standards set forth in 7 CFR Part 3015.

§ 210.22 Audits.

(a) *General.* State agencies and school food authorities shall comply with the requirements of 7 CFR Part 3015 concerning the audit requirements for recipients and subrecipients of the Department's financial assistance.

(b) *Audit procedure.* These requirements call for organization-wide financial and compliance audits to ascertain whether financial operations are conducted properly; financial statements are presented fairly; recipients and subrecipients comply with the laws and regulations that affect the expenditures of Federal funds; recipients and subrecipients have established procedures to meet the objectives of federally assisted programs; and recipients and subrecipients are providing accurate and reliable information concerning grant funds. States and school food authorities shall use their own procedures to arrange for and prescribe the scope of independent audits, provided that such audits comply with the requirements set forth in 7 CFR Part 3015.

§ 210.23 Other responsibilities.

(a) *Free and reduced price lunches.* State agencies and school food authorities shall ensure that lunches are made available free or at a reduced price to all children who are determined by the school food authority to be eligible for such benefits. The determination of a child's eligibility for free or reduced price lunches is to be made in accordance with 7 CFR Part 245.

(b) *Civil rights.* In the operation of the Program, no child shall be denied benefits or be otherwise discriminated

against because of race, color, national origin, age, sex, or handicap. State agencies and school food authorities shall comply with the requirements of: Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Department of Agriculture regulations on nondiscrimination (7 CFR Parts 15, 15a, and 15b); and FNS Instruction 113-6.

(c) *Retention of records.* State agencies and school food authorities may retain necessary records in their original form or on microfilm. State agency records shall be retained for a period of 3 years after the date of submission of the final Financial Status Report for the fiscal year. School food authority records shall be retained for a period of 3 years after submission of the final Claim for Reimbursement for the fiscal year. In either case, if audit findings have not been resolved, the records shall be retained beyond the 3-year period as long as required for the resolution of the issues raised by the audit.

Subpart F—Additional Provisions

§ 210.24 Suspension, termination and grant closeout procedures.

Whenever it is determined that a State agency has materially failed to comply with the provisions of this part, or with FNS guidelines and instructions, FNS may suspend or terminate the Program in whole, or in part, or take any other action as may be available and appropriate. A State agency may also terminate the Program by mutual agreement with FNS. FNS and the State agency shall comply with the provisions of the Department's Uniform Federal Assistance Regulations, 7 CFR Part 3015, Subpart N concerning grant suspension, termination and closeout procedures. Furthermore, the State agency shall apply these provisions to suspension or termination of the Program in school food authorities.

§ 210.25 Penalties.

Whoever embezzles, willfully misapplies, steals, or obtains by fraud any funds, assets, or property provided under this part whether received directly or indirectly from the Department, shall if such funds, assets, or property are of a value of \$100 or more, be fined no more than \$10,000 or imprisoned not more than 5 years or both; or if such funds, assets, or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever

receives, conceals, or retains for personal use or gain, funds, assets, or property provided under this part, whether received directly or indirectly from the Department, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be subject to the same penalties.

§ 210.26 Educational prohibitions.

In carrying out the provisions of the Act, neither the Department nor the State agency shall impose any requirements with respect to teaching personnel, curriculum, instructions, methods of instruction, or materials of instruction in any school as a condition for participation in the Program.

§ 210.27 State Food Distribution Advisory Council.

(a) *Council composition.* Each State educational agency, in cooperation with the State distributing agency, shall establish a State Food Distribution (SFD) Advisory Council which is composed of at least five representatives, excluding ex officio representatives, of schools which participate in the Program in the State. The State should make every effort to appoint individuals who represent large urban public schools; small rural public schools; residential child care institutions; private schools; parent teacher organizations; students from junior or senior high schools; nutritionists; school administrators; and teachers. These representatives shall be appointed for not more than 3 years.

(b) *Council leadership.* The Chairman and Vice Chairman of the SFD Advisory Council shall be elected by members of the Council. The Chief State School Officer, or designee, shall be an ex officio member of the SFD Advisory Council acting in an advisory capacity and as a non-voting member. The Chief Officer of the State distributing agency which distributes USDA donated foods to schools within the State, or designee will be an ex officio member of the SFD Advisory Council, also acting in an advisory capacity and as a non-voting member. If the State educational agency and the State distributing agency are the same entity within the State, the ex officio member of the SFD Advisory Council shall be the Chief Food Distribution Officer of the State educational agency, or designee.

(c) *Council timeframe.* The Council shall meet at least once a year and shall report to the State educational agency and State distributing agency, if it is a different entity, no later than March 30 of each year, recommendations concerning the manner of selection and

distribution of commodity assistance for the next school year. The State educational agency shall inform FNSRO of the Council's recommendations no later than April 30 of each year.

(d) *Council responsibilities.* Major responsibilities of the Council include providing the State educational and distributing agencies with information concerning the most desired foods and the least desired foods. This information shall be obtained in a survey of school food authorities within the State. The Council shall also advise the State educational and distributing agencies on the types and amounts of available donated food items to order, the preferred available package size, and donated foods school food authorities would like processed and desired end products. The Council may also advise the State educational and distributing agency on intra State distribution systems, delivery schedules, and State food distribution program operations. Recommendations for the Department regarding national purchasing practices, changes in donated food specifications and packaging improvements may also be included in the report.

(e) *State responsibilities.* In reporting the Council's recommendations to FNSRO, the State educational agency shall include the number of school food authorities providing the required information to the Council; the average daily number of lunches served by schools in these school food authorities during April of the previous year; and the average daily number of lunches served by all school food authorities within the State during April of the previous year.

(f) *State recordkeeping.* The State educational agency shall maintain records concerning the survey of school food authorities including, at a minimum, a description of survey methods and a copy of the format used to obtain food preferences; the name and address of each school food authority included in the survey; and a record of the data obtained from each school food authority.

(g) *Expenses.* The State educational agency may make payment for justified expenses incurred for or by the SFD Advisory Council from State Administrative Expense funds. In instances when State Administrative Expense funds are used, payments shall be made in accordance with Part 235 of this chapter. State agencies which are the same entity as the State distributing agency may also use food distribution assessment funds as provided for in § 250.6 (i) and (j) of this chapter. Members of the SFD Advisory Council shall serve without compensation. The

State educational agency shall provide compensation for necessary travel and subsistence expenses incurred by Council members in the performance of Council duties. Parent and student participant members, in addition to necessary travel and subsistence expenses, shall be compensated for personal expenses related to participation on the Council, such as child care expenses and lost wages during scheduled Council meetings. The State educational agency shall establish a system whereby expenses are paid in advance for any member who indicates that they cannot financially afford to meet any of the allowed expenses. In instances where members can meet these expenses, a reimbursement shall be provided in a timely manner.

§ 210.28 Regional office addresses.

School food authorities desiring information concerning the Program should write to their State educational agency or to the appropriate Regional Office of FNS as indicated below:

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont: Northeast Regional Office, FNS, U.S. Department of Agriculture, 10 Causeway Street, Room 501, Boston, Massachusetts 02222-1065.

(b) In the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee: Southeast Regional Office, FNS, U.S. Department of Agriculture, 1100 Spring Street, N.W., Atlanta, Georgia 30367.

(c) In the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin: Midwest Regional Office, FNS, U.S. Department of Agriculture, 50 E. Washington Street, Chicago, Illinois 60602.

(d) In the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas: Southwest Regional Office, FNS, U.S. Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, Texas 75242.

(e) In the States of Alaska, American Samoa, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, the Commonwealth of the Northern Mariana Islands, and Washington: Western Regional Office, FNS, U.S. Department of Agriculture, 550 Kearny Street, Room 400, San Francisco, California 94108.

(f) In the States of Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Puerto Rico, Virginia, Virgin Islands, and West Virginia: Mid-Atlantic Regional Office, FNS, U.S. Department of Agriculture, Mercer

Corporate Park, Corporate Boulevard,
CN 02150, Trenton, New Jersey 08650.

(g) In the States of Colorado, Iowa,
Kansas, Missouri, Montana, Nebraska,
North Dakota, South Dakota, Utah, and
Wyoming: Mountain Plains Regional
Office, FNS, U.S. Department of
Agriculture, 1244 Speer Boulevard, Suite
903, Denver, Colorado 80204.

§ 210.29 OMB control numbers.

The following control numbers have
been assigned to the information
collection requirements in 7 CFR Part
210 by the Office of Management and
Budget pursuant to the Paperwork
Reduction Act of 1980, Pub. L. 96-511.

7 CFR section where requirements are described	Current OMB control No.
210.3(b).....	0584-0327
210.5(d).....	0584-0006
210.5(d)(1).....	0584-0002
210.5(d)(2).....	0584-0341
210.5(d)(3).....	0584-0341
210.6(b).....	0584-0006
210.8.....	0584-0006
	0584-0284
210.9.....	0584-0006
	0584-0026
	0584-0329
210.10(b).....	0584-0006

7 CFR section where requirements are described	Current OMB control No.
210.10(i)(1).....	0584-0006
210.14(c).....	0584-0006
210.16.....	0584-0006
210.17.....	0584-0006
210.17(g).....	0584-0075
210.18.....	0584-0006
210.19.....	0584-0006
210.22.....	0584-0006
210.23(c).....	0584-0006
210.24.....	0584-0006
210.27.....	0584-0006

2. In Part 210, Appendix A thru C as
published on September 30, 1986 (51 FR
4864), are adopted as final with the
following changes:

a. In Appendix A—Alternate Food For
Meals—Enriched Macaroni Products
With Fortified Protein, paragraph
3.(b)(1) is amended by removing the
word "thiamin" and adding, in its place,
"thiamine".

b. In Appendix A—Alternate Food For
Meals—Cheese Alternate Products, in
the chart contained in paragraph 3.(c),
the word "Thiamin" in the Nutrient
column is removed and "Thiamine" is
added.

c. In Appendix A—Alternate Food For
Meals—Vegetable Protein Products,
paragraph 1. introductory text,
paragraph 1.(d), paragraph 1.(e) and
paragraph 3., is amended by removing
the citations "§ 225.10 or § 226.21" and
adding, in their place, "§ 225.20 or
§ 226.20".

d. In Appendix A—Alternate Food For
Meals—Vegetable Protein Products,
paragraph 2.(b)(1) is amended by
removing the word "flour," and adding,
in its place "— flour,".

e. In Appendix A—Alternate Food For
Meals—Vegetable Protein Products, in
the chart contained in paragraph 2.(e)(3),
"1.5" in the Amount column
corresponding to Magnesium is removed
and "1.15" is added.

f. In Appendix C—Child Nutrition
Labeling Program, paragraph 2.(a),
paragraph 3.(c)(2) and paragraph 6., is
amended by removing the citation
"§ 225.21" and adding, in its place,
"§ 225.20".

Dated: July 26, 1988.

Anna Kondratas,
Administrator, Food and Nutrition Service.
[FR Doc. 88-17196 Filed 8-1-88; 8:45 am]
BILLING CODE 3410-30-M