should be made in the RACT number, not in the averaging time." J&S has made no demonstration that daily recordkeeping is an insurmountable problem. USEPA will consider rulemaking on alternative RACT for coatings for which a demonstration is made that no acceptable means of compliance is available. Further discussion of the type of demonstration required can be found in the Appendix to the notice of proposed rulemaking for Easco Aluminum published on November 9, 1988 at 53 FR 45285.

Conclusion

USEPA is disapproving this SIP revision for J&S because the deficiencies cited in the notice of proposed rulemaking were not corrected.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 4, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

Under Executive Order 12291, today's action is not "Major." It has been submitted to the Office of Management and Budget (OMB) for review. Any comments from OMB to USEPA, and any USEPA response, are available for public inspection at the USEPA Region V office listed above.

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Carbon monoxide, Hydrocarbon, Intergovernmental Offices.

Dated: December 27, 1988.

Lee M. Thomas,

Administrator.

[FR Doc. 89-2514 Filed 2-2-89; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 280

[FRL-UST-3513-1]

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency.

ACTION: Notice of modification of certification compliance date.

SUMMARY: EPA is modifying the compliance date by which owners and operators of underground storage tanks (USTs) containing petroleum must have certain documentation in order to meet recently promulgated financial responsibility requirements. In connection with these requirements, the Attorney(s) General of the state(s) in which USTs are located must have submitted a written statement to the implementing agency that a guarantee or surety bond executed as described in the regulations is a legally valid and enforceable instrument in that state before a guarantee or safety bond may be used by an owner or operator of an UST in that state to demonstrate financial responsibility. This notice modifies the date when such certifications must have been received from state Attorney(s) General from January 24, 1989, to July 24, 1989, and allows owners and operators to use a guarantee or surety bond to demonstrate financial responsibility during the period from January 24, 1989, to July 24, 1989, even if no state Attorney General's certification has yet been received by the implementing agency in that state.

EFFECTIVE DATE: January 24, 1989.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC.

SUPPLEMENTARY INFORMATION: Today's notice delays by six months the time when Attorney General certifications will be required before owners or operators of underground storage tanks containing petroleum may use a guarantee or surety bond to demonstrate financial responsibility. The Agency believes that six months is sufficient time to obtain Attorney General certifications. In addition, in the event that Attorney(s) General choose not to provide such certifications, owners and operators will have sufficient time to secure other mechanisms that do meet the provisions of the financial responsibility regulations.

On October 26, 1988, EPA published a final rule establishing financial responsibility requirements for all owners and operators of petroleum USTs (53 FR 43322). That rule requires that by January 24, 1989, all petroleum marketing firms owning 1,000 or more USTs and all other UST owners that report a tangible net worth of $20 million or more to the U.S. Securities and Exchange Commission (SEC), Dun and Bradstreet, the Energy Information Administration, or the Rural Electrification Administration are required to comply with the financial responsibility requirements of 40 CFR Part 280, Subpart H (40 CFR 280.91(a)). Subpart H provides that certain financial mechanisms, which are listed in that subpart, are allowable mechanisms to demonstrate financial responsibility. Section 280.94(b) provides, however, that an owner or operator may use a guarantee or surety bond to establish financial responsibility only if the Attorney(s) General of the state(s) in which the underground storage tanks are located has (have) submitted a written statement to the implementing agency that a guarantee or surety bond executed as described in this section is a legally valid and enforceable obligation in that state.

Therefore, those owners and operators required to demonstrate financial responsibility by January 24, 1989, would be precluded from using guarantees or surety bonds unless the necessary Attorney General certifications had been obtained. Once the Attorney General of a state has issued a certification, that certification is valid for all owners and operators using a guarantee or surety bond for USTs located in that state. There is no requirement that each individual owner or operator obtain a separate written statement from the Attorney General.

The Agency adopted the requirement for Attorney(s) General certification to ensure that the mechanisms satisfy necessary contractual formalities or requirements of a state's law (53 FR 43322, 43339, Oct. 26, 1988). EPA remains convinced that such review by state Attorney(s) General is desirable and will provide a valuable assessment of the validity and enforceability of the guarantee and surety bond mechanisms under the laws of particular states.

Since publication of the final rule, however, it has become apparent that additional time after January 24, 1989, will be necessary for state implementing agencies to contact their state Attorneys General and for the Attorneys General to conduct their review of the guarantee and surety bond mechanisms and respond in writing to the implementing agencies. EPA has taken steps to expedite and assist the Attorney General certification process by providing sample documents to the state implementing agencies. However, it appears that in fact the necessary reviews cannot reasonably be completed by January 24, 1989.

The Agency therefore is modifying the compliance date in § 280.91(a). Demonstration of financial responsibility by the category of owners subject to § 280.91(a) continues to be

required by January 24, 1989. However, EPA is modifying § 280.91(a) to specify that the compliance date for the certification in § 280.94(b) is July 24, 1989. Between January 24, 1989, and July 24, 1989, owners and operators will be allowed to demonstrate financial responsibility with guarantees or surety bonds even if the state Attorney(s) General of the state(s) in which the USTs are located have not provided written statements that the guarantee or surety bonds are valid and enforceable in that state. After July 24, 1989, such written statements will be necessary before the guarantee and surety bond may be used to demonstrate financial responsibility.

To the extent this is a "rule" under section 553 of the Administrative Procedure Act, EPA believes that there is "good cause" for making this technical modification of the recently promulgated financial responsibility rule without additional public comments. This modification is for a very short time period, does not change any substantive requirements under the rule, and is necessitated by the imminent compliance deadline which the Agency has only recently discovered may be unreasonable in lieu of the status of state Attorney General certifications.

List of Subjects in 40 CFR Part 280

Administrative practice and procedure, Environmental protection, Hazardous materials insurance, Surety bonds, Underground storage tanks.

Dated: January 26, 1989.

Jonathan Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

The following changes are made in FRL–UST–3, 3419–3, the Underground Storage Tanks Containing Petroleum—Financial Responsibility Requirements published in the **Federal Register** on October 26, 1988 (50 FR 43322).

PART 280—[AMENDED]

1. The authority citation for Part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), and 6991(h).

§ 280.91 [Amended]

2. Section 280.91(a) is amended by revising "24, 1989." to read "24, 1989, except that compliance with § 280.94(b) is required by: July 24, 1989."

[FR Doc. 89–2273 Filed 2–2–89; 8:45 am]

BILLING CODE 6560–50–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 433

[BQC–68–F]

Medicaid Program; Refunding of Federal Share of Overpayments Made to Medicaid Providers

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

ACTION: Final regulations.

SUMMARY: This rule amends the Medicaid regulations to specify the requirements and procedures under which States are allowed 60 days following the date of discovery of an overpayment to a Medicaid provider to recover or attempt to recover the overpayment before the Federal share must be credited to HCFA. The Federal Government will share in any overpayments that the State documents it is unable to recover because the debts of the provider have been discharged in bankruptcy or the provider is out of business.

The regulations implement section 9512 of the Consolidated Omnibus Budget Reconciliation Act of 1985.

DATE: These regulations are effective on April 4, 1989. States are not required to comply with the information collection and reporting requirements listed in the preamble under the heading "Paperwork Reduction Act" until the Office of Management and Budget approves them.

FOR FURTHER INFORMATION CONTACT: David Greenberg, (301) 966–3278.

SUPPLEMENTARY INFORMATION:

Background

Federal grants to the States are authorized under title XIX (Medicaid) of the Social Security Act (the Act) to provide financial sharing in medical assistance to certain needy individuals. Medicaid programs are financed jointly with Federal and State funds and are administered by the States. A State administers its Medicaid program in accordance with a State Medicaid plan approved by the Administrator of HCFA.

In carrying out the Medicaid program, the State Medicaid agency pays institutional providers of Services (e.g., hospitals and long-term care facilities) and noninstitutional providers of services (e.g., clinics, laboratories, and physicians) for medical assistance furnished to eligible Medicaid recipients. HCFA pays the Federal share of expenditures for the Medicaid program to the State on a quarterly basis according to the percentages described in section 1903 and the formula described in section 1905(b) of the Act. In general, the State estimates its funding requirements prior to the start of each quarter of a fiscal year. HCFA reviews this projection and grants the State a sum to cover the Federal share of estimated allowable payments to be made by the State to providers in accordance with the State plan. This sum is referred to as Federal financial participation (FFP).

Within 30 days after the end of each quarter, each State submits an accounting report (Form HCFA–64, Quarterly Statement of Expenditures) showing its actual expenditures during the quarter that has ended. After deferring the Federal share of questioned expenditures and disallowing the Federal share of unallowable expenditures, HCFA compares allowable FFP to the amount previously advanced to the State for that quarter. Any adjusting of amounts owed HCFA or the State is reflected in a subsequent grant award.

Improper payments occur from time to time in any large claims processing system. Under Medicaid, some improper State payments during a quarter may not be detected by the Federal Government or the State until after the State has submitted its expenditure report for that quarter to HCFA. Consequently, the Federal Government unknowingly participates in overpayments made by the State agency, as these amounts are included in the expenditures reported to HCFA prior to discovery of the overpayments.

Federal laws provide for the recovery of the Federal share of Medicaid overpayments. The Federal Claims Collection Act of 1966 (FCCA), 31 U.S.C. 3711, as amended by the Debt Collection Act of 1982, requires each Federal agency to attempt to collect money owed the Federal Government from claims generated through agency activities. This requirement of the FCCA is implemented in regulations at 45 CFR Parts 30 and 101 through 105. In addition, section 1903(d)(2)(A) of the Social Security Act specifically requires that FFP for Medicaid be reduced or increased to the extent of any overpayment or underpayment that the Secretary determines was made to a State in any prior quarter. Section 1903(d)(3) of the Act provides that the Secretary must consider the pro rata Federal share of the net amount recovered during any quarter by a State to be an overpayment, which must be adjusted under the provisions of section 1903(d)(2) of the Act. Under section

1903(d)(2) of the Act, HCFA adjusts FFP for the quarter in which any overpayment is reported. This offset is contingent upon a State notifying HCFA of an improper payment to a provider, or upon discovery of overpayments through HCFA, HHS, or GAO review and audit processes. Before enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985 (discussed in detail in the next section of this document), if a State reported an overpayment or if an overpayment was discovered in a Federal review, the Federal share of the overpayment amount was subject to immediate refund by the State through the grant award process under the provisions of section 1903 of the Act.

Legislative Changes

Section 9512 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. 99–272, enacted on April 7, 1986, amended section 1903(d) of the Social Security Act to change the refund requirements for overpayments made to Medicaid providers. Section 9512 added section 1903(d)(2)(C) to the Act to provide that a State has 60 days from discovery of an overpayment to a person or other entity to recover or attempt to recover that overpayment before the Federal share of the overpayment must be refunded to HCFA through an adjustment in its FFP payment. Sections 1903(d)(2) (C) and (D) of the Act further provide that an adjustment to the FFP payment to the State must be made at the end of the 60-day period, whether or not the overpayment has been recovered by the State, unless the State has been unable to recover the overpayment because the overpayment is a debt that has been discharged in bankruptcy or is otherwise uncollectable from a provider. (We have interpreted "otherwise uncollectable" to mean that the provider is out of business, as explained in detail later in this document.) Section 9512 of COBRA is effective for all overpayments identified for quarters beginning on or after October 1, 1985. These final regulations implement section 9512 of COBRA.

Notice of Proposed Rulemaking

On December 21, 1987, we published in the **Federal Register** a notice of proposed rulemaking (NPRM) to implement section 9512 of COBRA (52 FR 48290). We received six pieces of correspondence from State agencies commenting on the NPRM. A summary of the comments received, our responses, and any changes made in these final regulations as a result of the comments on the proposed regulations are presented later in this document.

Discussion and Provisions of the Regulations

Definition of Overpayment

For purposes of implementing section 9512 of COBRA, we have defined an overpayment in these regulations as the amount which is paid by the State Medicaid agency to a person or other entity in excess of the amount that is proper under section 1902 of the Act and which is required to be refunded to HCFA under section 1903 of the Act. (In this document, "person or other entity" is referred to as a "provider" in accordance with the definition at 42 CFR 400.203 of the Medicaid regulations.) Some examples of situations that may constitute overpayments are: Duplicate payments; payments for noncovered services; payments to the wrong provider; and payments at incorrect rates.

Situations involving excessive provider reimbursement attributable to rate-setting methods or aggregate payments that are higher than the Medicare upper payment limit also may be considered overpayments. However, determining whether an amount paid to an institutional provider under any rate-setting system is considered an overpayment for which the Federal share must be refunded according to these regulations depends on the manner in which the State pursues recovery of the excess amounts. If an overpayment to an institutional provider for a prior year's reported costs is discovered and the State recovers that overpayment solely through a reduction in the provider's per diem rate for a subsequent year, that overpayment is not subject to the requirements of these regulations. In this case, no refund of the Federal share explicitly related to the original overpayment is required. Because overpayments recovered solely by reducing a current year per diem rate are not subject to the refund requirements of these regulations, refund of the Federal share does not occur until the State claims expenditures at the reduced rate. However, if, in addition to or instead of reducing the current per diem rate, the State chooses to recover any excess amounts perviously paid by a lump sum repayment, by an installment repayment plan, or by withholding a portion of future payments to the provider, an overpayment subject to these regulations exists and the Federal share of that amount must be refunded according to the provisions of sections 1903(d) (2) and (3) of the Act. Therefore, we will consider excessive provider payments attributable to rate-setting systems as overpayments subject to these regulations only if recovery is pursued for discrete amounts (and not if recovery is pursued by reducing future per diem rates). We have established this policy because it would not be administratively feasible for States to adjust properly for unallowable costs under the provisions of the regulations where a State pursues recovery of those amounts solely through reductions in current per diem rates.

For purposes of these regulations, we will consider depreciation payments as overpayments if a State requires their recapture in a discrete amount(s) upon gain on the sale of assets. We consider depreciation payments as overpayments in this situation because they satisfy our definition of an overpayment in these regulations. They involve both costs found to be estimated incorrectly as well as an attempt to recover excessive payments from the provider (unless the buyer assumes the seller's debts).

Cases involving third party liability are not subject to these regulations since these situations do not constitute overpayments as defined in these regulations. They represent payments that would be allowable had another payer not been legally responsible for them. In fact, the statute clearly distinguishes third party liability situations from overpayments subject to section 1903(d)(2)(C) of the Act. Section 1903(d)(2)(B) of the Act provides that a refund to the Federal Government is not due until the State has been reimbursed by the liable third party. Section 1903(d)(2)(C) requires the State to refund the Federal share of a provider overpayment following a 60-day period, whether or not recovery has been made. Likewise, probate collections from the estates of deceased Medicaid recipients are not subject to these regulations, as they represent the recovery of payments properly made from resources later determined to be available to the State.

The Conference Report accompanying COBRA refers only to overpayments made to providers (H. Rep. No. 453, 99th Cong., 1st Sess., 548 (1985)). In view of this Congressional intent and our past practice not to consider overpayments due to recipient eligibility errors to be overpayments to providers, we have not made these regulations applicable to eligibility-related overpayments. The Federal share of overpayments involving recipients must be refunded immediately following discovery, as required under section 1903(d)(2)(A) of the Act, if the overpayment occurs during a period for which Medicaid

Quality Control (MQC) systems are not in effect. For periods during which these systems are in effect, the Federal Government recoups recipient overpayment dollars exclusively on the basis of MQC penalties and States are not required to refund these amounts in accordance with section 1903(d)(2)(A) of the Act. These regulations also do not apply to overpayments involving administrative costs. Therefore, the Federal share of all overpayments involving administrative costs must be refunded immediately following discovery, as required by section 1903(d)(2)(A) of the Act.

Discovery of Overpayments

Overpayments are discovered in various ways: The State or a provider may recognize upon a routine review that a payment error has occurred or a Federal review may discover an overpayment that a State should have discovered but has not.

Section 1903(d)(2)(C) of the Act allows a State 60 days from the date of discovery of an overpayment to recover or attempt to recover the overpayment from a provider before the State must refund the Federal share of the overpayment to HCFA. Since discovery signifies the date on which the 60-calendar day recovery period commences, it is necessary to establish rules of discovery.

In these regulations, we specify that discovery of overpayments resulting from situations other than fraud or abuse (including excessive depreciation payments defined as overpayments) occurs on the earliest of the following: (1) The date on which any State Medicaid agency official or other State official first notifies a provider in writing of an overpayment, according to State policies and procedures, and specifies a dollar amount that is subject to recovery; (2) the date on which a provider initially acknowledges a specific overpaid amount to the State in writing; or (3) the date any State official or fiscal agent of the State initiates a formal action to recoup a specific overpaid amount from a provider without having first notified the provider in writing.

In the definition of discovery, we specify that initiating a formal recoupment action substitutes for written notification by the State or provider indicating the existence of an overpayment. Some States or their fiscal agents maintain negative (credit) balance reports listing individual Medicaid providers and the amounts they owe the State (i.e., accounts receivable). Sometimes a State will initiate recoupment of an overpayment by reducing a future payment to a provider without having first given notice of its intent to do so, especially if the overpayment amount is small. The statutory purpose of discovery is to establish the starting date for an overpayment recovery period. Therefore, if an overpayment amount has been entered on a negative balance report for the purpose of initiating recoupment without prior notice to the provider, the 60-day recovery period may be said to have begun with the negative balance report entry.

Discovery of overpayments resulting from fraud or abuse situations occurs on the date of the final written notice of an overpayment that the State sends to the provider specifying a dollar amount subject to recovery. Fraud or abuse situations are distinguished from other overpayments because of the need to consider not only the appropriateness of the individual payment but also the intent or past billing practices of the provider. Discovery in fraud or abuse cases does not occur until final written notification to the provider in order to permit State officials adequate time to conduct the necessary investigations and to resolve the legal issues peculiar to these situations.

If a Federal review at any time reveals that a State has failed to discover an overpayment or has discovered an overpayment amount but failed to either (1) send written notice of the overpayment to the provider specifying a dollar amount subject to recovery under the applicable standard State policies and procedures, or (2) initiate a formal recoupment action against the provider without prior notice, under these regulations discovery is deemed to have occurred on the date the Federal official first notifies the State of the overpayment in writing and specifies a dollar amount that is subject to recovery. This provision reflects our belief that failure of the State, for any reason, to discover an overpayment and either notify the provider in writing of the overpayment or initiate a formal action to recoup a specific overpaid amount from a provider without such notice does not relieve the State of its liability to refund the Federal share of the overpayment. The State must refund the Federal share of the overpayment at the end of the 60-day period after discovery by the Federal official, unless the State notifies HCFA that the debt has been discharged in bankruptcy or the provider is out of business.

We are not prescribing the details of the form that the State's notice to the provider must take if the State notifies the provider in writing rather than initiates a formal recoupment action without prior notice. Written notification may indicate either a tentative or final overpayment amount to be recovered. This notification may or may not constitute a formal demand for repayment or mention any appeal rights. The mention or availability of appeal rights does not under any circumstances extend the date of discovery. However, regardless of the form of the State's notice, under these regulations written notification occurs at the point where the State documents its communication by giving the provider written notice regarding a specific dollar amount subject to recovery. Similarly, the form of the notice is not prescribed when the provider prompts discovery by initiating contact with the State agency. What is significant is that the State Medicaid agency has been notified in writing of the specific overpayment subject to recovery or the provider has acknowledged a specific overpaid amount.

We believe the changes to section 1903(d) of the Act made by section 9512 of COBRA support interpretation of the term "discovery" to mean the date on which any State official first specifies an overpayment amount for purposes of internal review and followup. However, under this interpretation, discovery could significantly pre-date written communication of the overpayment amount to the provider or initiation of a formal recoupment action without prior notice and might not afford the State sufficient time for the overpayment to be verified and the notice to be processed within the State agency or for a negative balance report entry to be made before the 60-day period begins.

A State's partial collection of an overpayment amount from a provider during the 60-day recovery period does not extend the 60-day time limit following discovery allowed the State for seeking to recover the total outstanding balance. The outstanding balance is still due to HCFA upon expiration of the 60-day recovery period.

Sometimes, during the 60-day recovery period, a State makes a downward or upward adjustment to the overpayment amount originally communicated between the State and the provider. If these adjustments are made in accordance with the approved State plan, Federal Medicaid law and regulations, and the appeals resolution processes specified in State administrative policies and procedures, these adjustments are subject to specific conditions: Downward adjustment to the original overpayment amount, while reducing the total dollar amount subject to State recovery, does not change the

60-day recovery period for the outstanding balance. Upward adjustment to the original overpayment amount also does not change the 60-day period for recovery of the original amount. However, the incremental amount is subject to its own 60-day recovery period beginning on the date of the State's written notice to the provider regarding the additional overpayment amount.

Adjustments to Federal Payment

Section 1903(d)(2)(C) of the Act, as added by section 9512 of COBRA, specifies that an adjustment in the FFP payment to the State reflecting the Federal share of the overpayment must be made at the end of the 60-day recovery period following discovery. In accordance with sections 1903(d)(2) (A) and (B) of the Act (which contain language unaffected by COBRA), States report their Medicaid expenditures quarterly (on the Form HCFA–64 Quarterly Statement of Expenditures) and FFP payments to States are adjusted through the HCFA grant award process. The HCFA–64 Quarterly Statement of Expenditures is due to HCFA 30 days after the end of each quarter. Consequently, we are requiring States to credit HCFA with the Federal share of overpayments on the Form HCFA–64 submitted for the quarter in which the 60-day period following discovery ends. However, we are not requiring States to refund the Federal share of overpayments in this manner if the State reports the Federal share of a collection or submits an expenditure claim reduced by a discrete amount to recover an overpayment prior to the end of the 60-day period following discovery.

The statute does not require States to credit HCFA with interest on the Federal share of overpayments due at the end of the 60-day period following discovery. However, if a State assesses the provider interest in recovering an overpayment, regulations under 45 CFR 74.47(a) require States to credit HCFA with the Federal share of that assessment at the time the refund of the Federal share of the overpayment amount collected is made.

Requiring the credit of the Federal share of overpayments on the expenditure statement submitted for the quarter in which the 60-day period ends, rather than requiring an immediate refund, assures consistent application of the statute and simplifies the administrative process. In some cases, it also results in allowing a State more than 60 days after discovery to pursue recovery and credit HCFA with the refund. For example, if the overpayment is discovered on April 1 (the first day of the third quarter of the Federal fiscal year), the 60-day period would end May 30. However, the Form HCFA–64 for the third quarter covers the period extending to June 30. In this instance, the State would actually have 90 days after discovery before crediting HCFA with the Federal share of the overpayment. If, for example, discovery is made on May 2, the 60-day period would end on July 2 and the Federal share of the overpayment amount would not have to be reported until the submission of the expenditure statement for the fourth quarter, which ends September 30, or nearly 150 days after discovery. (Since an expenditure statement is due to HCFA 30 days after the end of each quarter, the State would, in fact, have an additional 30 days beyond the timeframes cited in the examples before actually crediting HCFA with the Federal share of the overpayment amounts.) As stated earlier, we believe this procedure is the most administratively feasible alternative which remains consistent with the requirements of the Act for submittal of quarterly expenditure statements and subsequent adjustment of the FFP payment through the grant award process.

On occasion, it may be necessary for States to submit claims for FFP to adjust the Federal share of overpayment amounts previously credited to HCFA because of downward adjustments to the original overpayment amount based on the approved State plan, Federal Medicaid law and regulations, and the appeals resolution processes specified in State administrative policies and procedures. Under these regulations, we are requiring States to submit these retroactive claims for FFP on the Form HCFA–64. The normal 2-year filing limit for retroactive claims does not apply to these adjustments, as downward adjustments to overpayment amounts are not retroactive claims but merely reflect the reclaiming of costs previously claimed.

These regulations do not contemplate States refunding more than the amount due the Federal Government. Therefore, States should not report on the Form HCFA–64 any collections made on overpayment amounts for which the Federal share has been previously refunded. In addition, if a State has refunded the Federal share of an overpayment as required by these regulations and the State subsequently makes recovery by reducing future provider payments by a discrete amount, the State should not reflect that reduction in its claim of Federal financial participation.

For purposes of adjusting the FFP payment, the changes made to section 1903(d)(2) by section 9512 of COBRA do not require us to consider whether the State is able to recover the overpayment by the end of the 60-day period, except for uncollectible amounts discussed in the following section of this preamble. We recognize that the overpayment debt collection process followed by the State is sometimes prolonged and legally complicated. However, the plain wording of sections 1903(d)(2) (C) and (D) does not permit the Federal Government to delay adjustment to FFP by allowing the State a recovery period of more than 60 days while the State awaits the exhaustion of provider appeals or judicial review, or the execution of repayment plans. (Regulations under 45 CFR 201.66 do permit repayment of Federal funds by an installment plan in limited situations where the amount of the repayment exceeds 2½ percent of the estimated annual State share for the program. Our regulations in this document do not alter the provisions of § 201.66 and are compatible with that section.) In addition, as explained previously, States usually will have longer than the 60 days after discovery because of the additional 30 days allowed following the end of each quarter before the mandatory Form HCFA–64 expenditure statements are due.

It has been HCFA's longstanding position that the Federal Government's responsibility to participate financially in State Medicaid expenditures does not encompass FFP for excessive or erroneous State Medicaid expenditures. Consequently, the Federal share of overpayments must be returned to the Federal Government within the statutorily defined timeframe because the overpayments represent excessive claims for Federal reimbursement. The Medicaid statute does not contemplate that the Federal Government absorb or share in any loss resulting from payments not made in accordance with the approved State plan, except as provided under section 1903(d)(2)(D) in cases where the overpayment is a debt that cannot be collected because the provider has gone bankrupt or the debt is otherwise uncollectible because the provider is out of business.

Overpayments Involving Providers Who Are Bankrupt or Out of Business

Section 1903(d)(2)(D) of the Act, as added by section 9512 of COBRA, provides that a State is not required to refund the Federal share of overpayments that constitute debts that

have been discharged in bankruptcy or that are otherwise uncollectible.

Under Federal law, a debtor who files a bankruptcy petition receives an automatic stay from demands from creditors as of the day he or she files the bankruptcy petition in Federal court. Therefore, the State is prevented, as of the filing date of the bankruptcy petition, from any recovery unless the court at a later date denies the bankruptcy petition or some portion of the debt is recovered later through a court-approved discharge of bankruptcy. Because of this automatic stay and the State's inability to recover during the period between the filing of the provider's bankruptcy petition and the court's adjudication of that petition, we are not requiring States to refund the Federal share of overpayments made to a provider declaring bankruptcy as of the date the bankruptcy petition is filed with the Federal court, provided the State is also noted as a creditor on the bankruptcy petition in the amount of the Medicaid overpayment. However, States must credit HCFA with the Federal share of any overpayment amounts that they recover under a court-approved discharge of bankruptcy on the first Form HCFA–64 filed after receipt of those funds. Further, States are required to credit HCFA with the Federal share of any overpayments made to a provider whose petition for bankruptcy is denied in Federal court on the later of the next Form HCFA–64 submission following the date of the court decision or the Form HCFA–64 submission for the quarter in which the 60-day period following discovery of the overpayment ends.

On the basis of the explicit wording in the Conference Committee Report on COBRA (H.R. Rept. No. 453, 99th Cong., 1st Sess., 548 (1985)), we have defined debts as "otherwise being uncollectible" for purposes of these regulations strictly as debts of providers who are "out of business." A State would not be liable for the refund of the Federal share of an overpayment if the provider is out of business and the overpayment is not collectible under State law and administrative procedures. In asserting that a provider is out of business, the State must document its efforts to located the party and its assets. These efforts must be consistent with applicable State law, policies, and procedures and must include pursuit of the party and its assets across State lines in an attempt to recover the overpayment if this action is permitted under applicable State law and administrative procedures. The State also must provide an affidavit or certification from the appropriate State legal authority establishing that the provider is out of business and that the overpayment cannot be collected under State law and procedures and the effective date of that determination under State law. The provider then will be considered certifiably out of business. Transfer of ownership within the State does not exempt a State from the requirement to refund the Federal share of an overpayment, unless State law and procedures deem a provider who has transferred ownership to be out of business and preclude collection of the overpayment from the provider.

In situations in which a State is not liable for refunding the Federal share of an overpayment because the provider is either bankrupt or out of business, the State still is required to notify the provider that an overpayment exists. If the provider files a bankruptcy petition or is certifiably out of business before the 60-day recovery period following discovery ends, the State is not required to refund the Federal share of the overpayment on its subsequent Form HCFA–64 unless the court has denied the bankruptcy petitions. If the 60-day recovery period ends before the provider files the bankruptcy petition or is certifiably out of business, the State is required to credit HCFA with the Federal share of the overpayment on the next HCFA–64 submission. The State could reclaim FFP for any unrecovered amount, citing section 1903(d)(2)(D) of the Act as authority, if, at a later date, the provider files for bankruptcy or goes out of business and the State has not been able to make complete recovery. A State could reclaim overpayments credited to HCFA only if, prior to the date on which the provider files the bankruptcy petition or the date on which the provider is declared certifiably out of business, the State vigorously pursues recovery without complete success, according to its standard policy as prescribed in applicable State law and administrative procedures.

Effective Date of Legislative Provisions

COBRA was enacted on April 7, 1986. Nonetheless, section 9512 specifies that the provisions for the recovery of the Federal share of overpayments apply to overpayments that are identified for quarters beginning on or after October 1, 1985. Based on the language of the Conference Committee report, we have interpreted overpayments that are "identified for quarters" to mean overpayments that "occur and are discovered" during any quarter beginning on or after October 1, 1985. The date upon which an overpayment occurs is the date upon which a State, using its normal method of reimbursement for a particular class of provider (e.g., check, interfund transfer), makes the payment involving unallowable costs to a provider. Two time periods are involved in implementing the overpayment recovery policy:

The Federal share of overpayments that occurred in quarters before October 1, 1985 but are discovered after October 1, 1985, and for which the Federal share has not been refunded to HCFA, must be credited on the Form HCFA–64 submission that is due to HCFA immediately following discovery.

The Federal share of all overpayments that occur and are discovered in quarters beginning on or after October 1, 1985 must be credited to HCFA on the Form HCFA–64 for the quarter in which the 60-day period following discovery ends. For the period between October 1, 1985 (the effective date of section 9512 of COBRA) and April 4, 1989 (the effective date of these regulations), States have been instructed, through an issuance in section 2853 of the *State Medicaid Manual*, on this method of crediting HCFA with the Federal share of overpayments for which the 60-day recovery period has ended in accordance with section 1903(d)(2)(C) of the Social Security Act. A State may be found not liable for refund of the Federal share only if the provider is found to be bankrupt or certifiably out of business (provided that the State has pursued collection without complete success according to its standard policy and can document these efforts).

Regulation Changes

Except in three instance, we have adopted the proposed regulations issued on December 21, 1987, as final regulations. We have amended the Medicaid regulations to add a new Subpart F to 42 CFR Part 433, State Fiscal Administration, to incorporate the provisions of section 1903(d)(2) of the Act as added by section 9512 of COBRA. In addition, we have included a provision for recordkeeping requirements in accordance with established policy and procedures for the Medicaid program under 45 CFR Part 74, Subpart D. Specifically, the new subpart includes definitions and specifies the applicability of the requirements, when discovery of an overpayment occurs, the requirements for refunds to HCFA, the exceptions to the refund requirements for overpayments to providers who are bankrupt or are out of business, how adjustments to the FFP payment are to

be made, and recordkeeping requirements.

Changes to the regulation text of the NPRM include (1) incorporation of definitions of "fraud" and "abuse" that are consistent with definitions of these terms in the Medicaid program integrity regulations under Part 455 (§ 433.304); (2) clarification that appeal rights extended to providers do not extend the date of discovery (§ 433.316(h)); and clarification that transfer of ownership does not constitute an out-of-business situation unless State law provides otherwise (§ 433.318(d)(3)).

Summary of and Response to Public Comments on NPRM

As stated earlier, we received comments from six State agencies on the December 21, 1987 NPRM. Our responses to those comments are as follows:

Comment: Two States objected to our interpretation of the statutory language that the recovery provisions under COBRA are effective for all overpayments "identified for quarters beginning on or after October 1, 1985" to mean overpayments that "occur and are discovered" for quarters beginning on or after October 1, 1985. One State maintained that a plain reading of the statutory language suggests that only overpayments "identified" on or after October 1, 1985 are subject to these rules. The other State requested that the proposed regulations be revised to permit States to base the effective date on either date of service or date of discovery.

Response: The statute states that the amendments made by section 9512 of COBRA shall apply to overpayments identified for quarters beginning on or after October 1, 1985. The words "identified for quarters" indicate that the date of payment is the controlling factor in establishing the applicability of the regulations. We believe that the use of the word "identified" is incidental and that Congress was referring to overpayments made on or after October 1, 1985. This interpretation is supported by the Conference Committee Reports accompanying COBRA, which omits the word "identified" altogether in stating that the statute "applies to overpayments for quarters * * *." (H.R. Rep. No. 453, 99th Cong., 1st Sess. 548 (1985).)

Comment: One State suggested that recapture of depreciation on gain on sale of assets should not be considered an overpayment for purposes of these regulations because this action represents "recovery of portions of payments properly made from resources later determined to be available to the State Medicaid program." The commenter maintained that recapture of depreciation is analogous to the third party liability (TPL) and probate situations. The commenter suggested that, in all three situations, the payment to the provider is not excessive, erroneous, or inconsistent with the State plan when made; recovery is attempted only because resources are later found to be available to the State.

Response: In the preamble to the NPRM, we described overpayments as being improper payments which occur routinely in large claims processing systems and which are typically discovered at some point after the provider receives payment from the State. We included payments at incorrect rates in our examples of situations that may constitute overpayments.

When a facility is sold, the State performs a final cost settlement to determine the allowability of costs reported by the seller. All components of the facility's current per diem rate established on the basis of estimated costs, including depreciation costs, are compared against actual costs. The State then issues a final cost settlement report and pursues recovery of any excessive costs identified. We stated in the preamble of the NPRM that, to the extent the State pursues recovery of any unallowable costs in an institutional provider's per diem rate by a lump sum repayment or by withholding a portion of future State payments to the provider, an overpayment exists. Unallowable depreciation costs which are identified and for which recapture is attempted in the manner described by the commenter constitute an overpayment consistent with these scenarios.

We do not consider depreciation analogous to TPL or probate. In the NPRM, TPL and probate situations were distinguished from overpayments in that the former involve the attempt to recover correct payment amounts from resources other than the provider. Because depreciation payments involve costs found to be incorrectly estimated and an attempt to recover from the provider (unless the buyer assumes the seller's debts), we consider depreciation payments as overpayments for purposes of these regulations if a State requires their recapture in a discrete amount(s) upon gain on the sale of assets, and have clarified this in our discussion earlier of the definition of an overpayment. In Decision 969, the Grant Appeals Board upheld a HCFA disallowance on this issue in affirming that depreciation payments constitute overpayments subject to section 1903(d)(2) of the Act if the State determined them to be excessive and subject to recovery.

Recapture overpayments are particularly difficult for a State to collect because they normally will be due from the seller. For this reason, some State plans require advance notification of the intent to sell to provide time to determine if amounts are due from the seller. Under these plans, failure to provide advance notice could result in the liability being assumed by the new owner. Such a policy facilitates recovery from the provider in States which recapture depreciation.

Comment: Two States suggested that the date of discovery should be redefined to conform with State audit policies and procedures. They stated that defining discovery as the date of a State's first written notice to the provider is contrary to proper audit procedures. One State cited Departmental Grant Appeals Board Decision 810 as concluding that amounts cited in draft audit reports are only an interim step in the discovery process, and any amounts contained in these reports are not properly subject to recovery. Both States agreed that the date of discovery should be defined as the date of the final written notice to the provider of an overpayment determination. One State suggested that an alternative discovery point for sample-based audit findings would be the date upon which the pre-extrapolated audit overpayment amount is established; the pre-extrapolated sample would be considered the discovered amount.

Response: The establishment of a uniform definition of discovery is essential to implementing the statute because discovery is the event which begins the 60-day period after which the State must refund the Federal share of the overpayment. The statute contemplates that discovery be based on documented actions which specify an overpayment amount and indicate that the State is beginning its recovery efforts. We believe that the issuance of a draft audit report could establish initial discovery if the State notified a provider in writing of a specific amount subject to recovery. If discovery does occur through identification of an overpayment in a draft audit report, the regulations allow the State to reclaim the Federal share of the overpayment that was refunded to the extent that the State subsequently makes a downward adjustment based on the approved State plan, Federal Medicaid law and regulations, and the appeals resolution process specified in State administrative policies and procedures.

In Decision 810, the Grant Appeals Board cited Decision 448 in stating that "the Board has held that in instances where HCFA relies on State documentation, HCFA can recover the Federal share only when the State itself could act to recover the overpayment from a provider." In Decision 810, however, the Board also indicated that "HCFA could resolve by regulation the controversy over the use of State audit findings to identify overpayments." The Board said, further, that such a regulation could "clarify at what stage State determinations should be used as a basis for adjusting Federal financial participation." This regulation represents our efforts to define that stage.

With regard to sample-based audit findings, section 9512 of COBRA did not contemplate the establishment of different discovery dates for the pre-extrapolated sample amount and the post-extrapolated sample amount. The State that suggested this approach indicated that the State "after making an overpayment finding through an audit * * * mails the provider a Notice of Overpayment which states the amount of the overpayment and requires repayment of that amount." Even though this initial amount may be subsequently revised downward, repayment has been requested and it is, therefore, proper to consider issuance of the Notice of Overpayment as signifying discovery and initiating the 60-day recovery period.

Comment: One State maintained that our proposed definition of discovery was internally inconsistent in that it allows discovery for fraud or abuse situations to be established as of the date of the "final" written notice to the provider.

Response: Our discussions with State Medicaid officials in developing the proposed regulations established that fraud or abuse situations were unique because they require extensive coordination between State Medicaid staff and legal staff. Also, we believe that fraud or abuse situations are distinguished from other overpayments because of the need to consider not only the appropriateness of the individual payment but also the intent or past billing practices of the provider. The additional time allowed States in these situations to establish "discovery" recognizes the need for extensive legal investigation to establish the context of the overpayment.

Comment: One State suggested that an overpayment not be considered discovered until all administrative and judicial appeals are completed or waived. At this point, the existence and amount of the overpayment would be established definitively.

Response: Based on the statute, we have established that discovery occurs at the point at which the State agency or provider gives notice that an overpayment has been made and recovery is expected. Section 9512 of COBRA does not provide for postponing this date pending the exhaustion of appeals. However, we have indicated in the regulations that the Federal share of an overpayment that has been refunded to HCFA may be reclaimed based on legitimate downward adjustments to the overpayment amount.

Comment: One State suggested that States should not be required to refund the Federal share of an overpayment if the costs of collection exceed the amount the State alleges has been overpaid to the provider. The commenter suggested that requiring the Federal share to be refunded within 60 days of discovery is unnecessarily harsh and could be a disincentive to the State's pursuit of recovery. Further, the commenter maintained that States should not be required to refund the Federal share of discovered overpayments prior to recovery if good faith efforts have been made to pursue recovery.

Response: Section 9512 of COBRA does not provide for exempting States from refunding the Federal share of discovered overpayments based on the cost effectiveness of pursuing recovery. Section 9512 also does not provide for a delay in refunding the Federal share until recovery of the overpayment if there is a good faith effort by the State to recover. The length of the recovery period before a refund is due is fixed in the statute and may not be modified at our discretion. The administrative vehicle for refunding the Federal share is the HCFA–64 Quarterly Statement of Expenditures, which is due to HCFA 30 days after the end of the quarter, although, in practice, States are allowed at least 90 days before the share actually is refunded to HCFA, as explained earlier in this preamble.

Comment: One State suggested that HFCA permit downward adjustments to overpayment amounts in settled and litigated cases if adjustment is not inconsistent with the State Medicaid plan, Federal law, and State policies and procedures.

Response: The NPRM provided that the Federal share of an overpayment refunded by the State can be reclaimed based on downward adjustments after the Federal share has been refunded if the State subsequently determined that the original amount was incorrectly computed. Reclaiming the Federal share is not permitted if the State and provider simply negotiate a settlement to resolve a recovery effort. Such an arrangement between the State and a provider does not alter the amount of Federal funds originally claimed improperly.

Comment: One State maintained that our reliance on the Conference Committee Report to restrict the definition of "otherwise being uncollectable" debts to out-of-business providers was unfounded. The commenter suggested that, if the statute clearly expresses Congressional intent, extrinsic aids should not be consulted.

Response: In interpreting statutory provisions, we frequently refer to the history of the legislative provisions when there can be various meanings attached to a certain provision. The language of the Conference Committee report clarified the intended scope of the stautory phrase "otherwise being uncollectable". The substitution of the term "out of business" for the phrase "otherwise being uncollectable" is included twice in the Conference Committee's explanation of the statutory provision.

Comment: Two States described situations that might not involve providers who are technically out of business but that ought to be exempted from the refund requirements of the regulation. One State cited the example of a provider that exists only as a shell corporation as a situation in which the State cannot claim the out-of-business exemption but is effectively barred from recovery. Another cited several examples: State law protects the provider from recovery while the debt is under appeal; the State grants the provider an extended repayment schedule; no documentation exists to prove that the provider is out of business but the provider and its assets cannot be found and the provider no longer submits claims; the provider is not out of business but the debt has been discharged by the State Board of Control; recovery of the debt is precluded because the provider has transferred ownership; all of the provider's operations are out of State and it no longer participates in the State's Medicaid program or Medicare.

Response: With regard to the case of the shell corporation, the test of out-of-business status is the State's legal certification that the providr is out of business and documentation of the State's recovery efforts. Only to the extent that this test is met can an exemption be granted under the COBRA provision. Debts under appeal, discharged by a State Board, or being recovered through repayment schedules

represent administrative actions that do not involve providers that are bankrupt or out of business and, thus, are not exempt from the COBRA refund requirements. If State law considers a provider that cannot be located or that has transferred ownership to be out of business, exemptions from the refund requirements may be claimed. If a provider operates exclusively out of State, an exemption may be claimed if the provider is considered out of business under State law and the State is legally precluded from pursuing recovery across State lines. We believe that allowing States to define out-of-business situations using State law furnishes sufficient flexibility in applying the refund provision.

Comment: Two States considered unnecessary the requirement that the State legal authority provide an affidavit or certification to establish that a provider is out of business. They regarded documentation of State recovery efforts as sufficient evidence of the provider being out of business.

Response: The proposed regulations attempted to accommodate differing State definitions of out-of-business situations and barriers to recovery. However, a legal determination based on objective consideration of available evidence is necessary to establish that a provider is out of business under State law and to what extent the State agency's attempts to make recovery are constrained by State laws regarding pursuit across State lines and transfer of ownership.

Comment: One State requested that we clarify the out-of business exemption to indicate that the Federal share of an overpayment need not be refunded if the provider went out of business before the date of discovery. The commenter maintained that the NPRM only indicated an exemption would be granted if the provider was out of business on the date of discovery or went out of business during the 60-day period.

Response: For purposes of these regulations, States are not required to refund the Federal share of overypayments if recovery is precluded because the provider goes out of business before the 60-day period ends. Under this provision, States would be exempt from this refund requirement if the provider went out of business *before* or after an overpayment is identified (discovered), so long as the provider remains out of business through the end of the 60-day recovery period.

Comment: One State suggested that, if a provider files for bankruptcy after the Federal share of an overpayment is refunded, HFCA should be required to return the refunded amount pending resolution of the bankruptcy petition.

Response: We believe we have addressed the reclaiming of refunds adequately. The regulations state that, if a provider declares bankruptcy after the Federal share of an overypayment has been refunded, the State may reclaim the refund as long as the State has pursued recovery until the provider files the bankruptcy petition. If the bankruptcy petition is later denied, the State would again be required to refund the Federal share of HCFA.

Regulatory Impact Analysis

Executive Order 12291

Executive Order 12291 (E.O. 12291) requires us to prepare and publish an initial regulatory impact analysis for any regulations that are likely to meet the criteria for a "major rule." A major rule is one that would result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or any geographic regions; or (3) significant adverse effects on competiton, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

These regulations conform the Medicaid regulations to the amendments to section 1903(d)(2) of the Social Security Act made by section 9512 of COBRA, which are already in effect.

We have determined that these regulations are not a major rule. However, there will be minimal administrative costs to State Medicaid agencies in terms of developing a tracking system for identifying overpayments made to Medicaid providers and refunding the Federal share of those overpayments in a timely manner, in accordance with the provisions of the regulations.

Regulatory Flexibility Act

We prepare and publish an initial regulatory flexibility analysis, consistent with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 through 612) for rules unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. We have determined, and the Secretary certifies, that these regulations will not have a significant economic impact on a substantial number of small entities. The regulations will affect State agencies, which are not considered small entities, in that they are required to refund the Federal share of overpayments made to Medicaid providers. Medicaid providers will be affected indirectly by the regulations in that States will be vigorously pursuing them during the 60 days following discovery of overpayments to obtain refunds of overpaid amounts, the Federal share of which the State must refund to HCFA at the end of the 60 days. Therefore, a regulatory flexibility analysis has not been prepared.

Paperwork Reduction Act

Sections 433.316, 433.318, 433.320, and 433.322 of these regulations contain information collection and recordkeeping requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. We have submitted the regulations to OMB. A notice will be published in the Federal Register when approval is obtained.

List of Subjects in 42 CFR Part 433

Administrative practice and procedure, Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

PART 433—[AMENDED]

42 CFR Part 433 is amended as set forth below:

1. The authority citation for Part 433 is revised to read as follows:

Authority: Secs. 1102, 1902(a)(4), 1902(a)(18), 1902(a)(25), 1902(a)(45), 1903(a)(3), 1903(d)(2), 1903(d)(5), 1903(o), 1903(p), 1903(r), 1912, and 1917 of the Social Security Act (42 U.S.C. 1302, 1396a(a)(4), 1396a(a)(18), 1396a(a)(25), 1396a(a)(45), 1396b(a)(3), 1396b(d)(2), 1396b(d)(5), 1396b(o), 1396b(p), 1396b(r), 1396k, and 1396(p).

2. The authority statements preceding Subpart B and following §§ 433.112 and 433.116 are removed.

3. The table of contents for Part 433 is amended by adding a new Subpart F. consisting of § § 433.300 through 433.322, to read as follows:

PART 433—STATE FISCAL ADMINISTRATION

* * * * *

Subpart F—Refunding of Federal Share of Medicaid Overpayment to Providers

Sec.

Sec.
433.320 Procedures for refunds to HCFA.
433.322 Maintenance of records.
* * * * *

4. A new Subpart F, consisting of §§ 433.300 through 433.322, is added to read as follows:

Subpart F—Refunding of Federal Share of Medicaid Overpayments to Providers

§ 433.300 Basis.

This subpart implements—

(a) Section 1903(d)(2)(A) of the Act, which directs that quarterly Federal payments to the States under title XIX (Medicaid) of the Act are to be reduced or increased to make adjustment for prior overpayments or underpayments that the Secretary determines have been made.

(b) Section 1903(d)(2) (C) and (D) of the Act, which provides that a State has 60 days from discovery of an overpayment for Medicaid services to recover or attempt to recover the overpayment from the provider before adjustment in the Federal Medicaid payment to the State is made; and that adjustment will be made at the end of the 60 days, whether or not recovery is made, unless the State is unable to recover from a provider because the overpayment is a debt that has been discharged in bankruptcy or is otherwise uncollectable.

(c) Section 1903(d)(3) of the Act, which provides that the Secretary will consider the pro rata Federal share of the net amount recovered by a State during any quarter to be an overpayment.

§ 433.302 Scope of subpart.

This subpart sets forth the requirements and procedures under which States have 60 days following discovery of overpayments made to providers for Medicaid services to recover or attempt to recover that amount before the States must refund the Federal share of these overpayments to HCFA, with certain exceptions.

§ 433.304 Definitions.

As used in this subpart—

"Abuse" (in accordance with § 455.2) means provider practices that are inconsistent with sound fiscal, business, or medical practices, and result in an unnecessary cost to the Medicaid program, or in reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care.

"Discovery" (or "discovered") means identification by any State Medicaid agency official or other State official, the Federal Government, or the provider of an overpayment, and the communication of that overpayment finding or the initiation of a formal recoupment action without notice as described in § 433.316.

"Fraud" (in accordance with § 455.2) means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable Federal or State law.

"Overpayment" means the amount paid by a Medicaid agency to a provider which is in excess of the amount that is allowable for services furnished under section 1902 of the Act and which is required to be refunded under section 1903 of the Act.

"Provider" (in accordance with § 400.203) means any individual or entity furnishing Medicaid services under a provider agreement with the Medicaid agency.

"Recoupment" means any formal action by the State or its fiscal agent to initiate recovery of an overpayment without advance official notice by reducing future payments to a provider.

"Third party" (in accordance with § 433.136) means an individual entity, or program that is or may be liable to pay for all or part of the expenditures for medical assistance furnished under a State plan.

§ 433.310 Applicability of requirements.

(a) *General rule.* Except as provided in paragraphs (b) and (c) of this section, the provisions of this subpart apply to—

(1) Overpayments made to providers that are discovered by the State;

(2) Overpayments made to providers that are initially discovered by the provider and made known to the State agency; and

(3) Overpayments that are discovered through Federal reviews.

(b) *Third party payments and probate collections.* The requirements of this subpart do not apply to—

(1) Cases involving third party liability because, in these situations, recovery is sought for a Medicaid payment that would have been made had another party not been legally responsible for payment; and

(2) Probate collections from the estates of deceased Medicaid recipients, as they represent the recovery of payments properly made from resources later determined to be available to the State.

(c) *Unallowable costs paid under rate-setting systems.* (1) Unallowable costs for a prior year paid to an institutional provider under a rate-setting system that a State recovers through an adjustment to the per diem rate for a subsequent period do not constitute overpayments that are subject to the requirements of this subpart.

In such cases, the State is not required to refund the Federal share explicitly related to the original overpayment in accordance with the regulations in this subpart. Refund of the Federal share occurs when the State claims future expenditures made to the provider at a reduced rate.

(2) Unallowable costs for a prior year paid to an institutional provider under a rate-setting system that a State seeks to recover in a lump sum, by an installment repayment plan, or through reduction of future payments to which the provider would otherwise be entitled constitute overpayments that are subject to the requirements of this subpart.

(d) *Recapture of depreciation upon gain on the sale of assets.* Depreciation payments are considered overpayments for purposes of this subpart if a State requires their recapture in a discrete amount(s) upon gain on the sale of assets.

§ 433.312 Basic requirements for refunds.

(a) *Basic rules.* (1) Except as provided in paragraph (b) of this section, the Medicaid agency has 60 days from the date of discovery of an overpayment to a provider to recover or seek to recover the overpayment before the Federal share must be refunded to HCFA.

(2) The agency must refund the Federal share of overpayments at the end of the 60-day period following discovery in accordance with the requirements of this subpart, whether or not the State has recovered the overpayment from the provider.

(b) *Exception.* The agency is not required to refund the Federal share of an overpayment made to a provider when the State is unable to recover the overpayment amount because the provider has been determined bankrupt or out of business in accordance with § 433.318.

(c) *Applicability.* (1) The requirements of this subpart apply to overpayments made to Medicaid providers that occur and are discovered in any quarter that begins on or after October 1, 1985.

(2) The date upon which an overpayment occurs is the date upon which a State, using its normal method of reimbursement for a particular class of provider (e.g., check, interfund transfer), makes the payment involving unallowable costs to a provider.

§ 433.316 When discovery of overpayment occurs and its significance.

(a) *General rule.* The date on which an overpayment is discovered is the beginning date of the 60-calendar day period allowed a State to recover or seek to recover an overpayment before a refund of the Federal share of an overpayment must be made to HCFA.

(b) *Requirements for notification.* Unless a State official or fiscal agent of the State chooses to initiate a formal recoupment action against a provider without first giving written notification of its intent, a State Medicaid agency official or other State official must notify the provider in writing of any overpayment it discovers in accordance with State agency policies and procedures and must take reasonable actions to attempt to recover the overpayment in accordance with State law and procedures.

(c) *Overpayments resulting from situations other than fraud or abuse.* An overpayment resulting from a situation other than fraud or abuse is discovered on the earliest of—

(1) The date on which any Medicaid agency official or other State official first notifies a provider in writing of an overpayment and specifies a dollar amount that is subject to recovery;

(2) The date on which a provider initially acknowledges a specific overpaid amount in writing to the edicaid agency; or

(3) The date on which any State official of fiscal agent of the State initiates a formal action to recoup a specific overpaid amount from a provider without having first notified the provider in writing.

(d) *Overpayments resulting from fraud or abuse.* An overpayment that results from fraud or abuse is discovered on the date of the final written notice of the State's overpayment determination that a Medicaid agency official or other State official sends to the provider.

(e) *Overpayments identified through Federal reviews.* If a Federal review at any time indicates that a State has failed to identify an overpayment or a State has identified an overpayment but has failed to either send written notice of the overpayment to the provider that specified a dollar amount subject to recovery or initiate a formal recoupment from the provider without having first notified the provider in writing, HCFA will consider the overpayment as discovered on the date that the Federal official first notifies the State in writing of the overpayment and specifies a dollar amount subject to recovery.

(f) *Effect of changes in overpayment amount.* Any adjustment in the amount of an overpayment during the 60-day period following discovery (made in accordance with the approved State plan, Federal law and regulations governing Medicaid, and the appeals resolution process specified in State administrative policies and procedures) has the following effect on the 60-day recovery period:

(1) A downward adjustment in the amount of an overpayment subject to recovery that occurs after discovery does not change the original 60-day recovery period for the outstanding balance.

(2) An upward adjustment in the amount of an overpayment subject to recovery that occurs during the 60-day period following discovery does not change the 60-day recovery period for the original overpayment amount. A new 60-day period begins for the incremental amount only, beginning with the date of the State's written notification to the provider regarding the upward adjustment.

(g) *Effect of partial collection by State.* A partial collection of an overpayment amount by the State from a provider during the 60-day period following discovery does not change the 60-day recovery period for the original overpayment amount due to HCFA.

(h) *Effect of administrative or judicial appeals.* Any appeal rights extended to a provider do not extend the date of discovery.

§ 433.318 Overpayments involving providers who are bankrupt or out of business.

(a) *Basic rules.* (1) The agency is not required to refund the Federal share of an overpayment made to a provider as required by § 433.312(a) to the extent that the State is unable to recover the overpayment because the provider has been determined bankrupt or out of business in accordance with the provisions of this section.

(2) The agency must notify the provider that an overpayment exists in any case involving a bankrupt or out-of-business provider and, if the debt has not been determined uncollectable, take reasonable actions to recover the overpayment during the 60-day recovery period in accordance with policies prescribed by applicable State law and administrative procedures.

(b) *Overpayment debts that the State need not refund.* Overpayments are considered debts that the State is unable to recover within the 60-day period following discovery if the following criteria are met:

(1) The provider has filed for bankruptcy, as specified in paragraph (c) of this section; or

(2) The provider has gone out of business and the State is unable to locate the provider and its assets, as specified in paragraph (d) of this section.

(c) *Bankruptcy.* The agency is not required to refund to HCFA the Federal share of an overpayment at the end of the 60-day period following discovery, it—

(1) The provider has filed for bankruptcy in Federal court at the time of discovery of the overpayment or the provider files a bankruptcy petition in Federal court before the end of the 60-day period following discovery; and

(2) The State is on record with the court as a creditor of the petitioner in the amount of the Medicaid overpayment.

(d) *Out of business.* (1) The agency is not required to refund to HCFA the Federal share of an overpayment at the end of the 60-day period following discovery if the provider is out of business on the date of discovery of the overpayment or if the provider goes out of business before the end of the 60-day period following discovery.

(2) A provider is considered to be out of business on the effective date of a determination to that effect under State law. The agency must—

(i) Document its efforts to locate the party and its assets. These efforts must be consistent with applicable State policies and procedures; and

(ii) Make available an affidavit or certification from the appropriate State legal authority establishing that the provider is out of business and that the overpayment cannot be collected under State law and procedures and citing the effective date of that determination under State law.

(3) A provider is not out of business when ownershp is transferred within the State unless State law and procedures deem a provider that has transferred ownership to be out of business and preclude collection of the overpayment from the provider.

(e) *Circumstances requiring refunds.* If the 60-day recovery period has expired before an overpayment is found to be uncollectable under the provisions of this section, if the State recovers an overpayment amount under a court-approved discharge of bankruptcy, or if a bankruptcy petition is denied, the agency must refund the Federal share of the overpayment in accordance with the procedures specified in § 433.320.

§ 433.320 Procedures for refunds to HCFA.

(a) *Basic requirements.* (1) The agency must refund the Federal share of

overpayments that are subject to recovery to HCFA through a credit on its Quarterly Statement of Expenditures (Form HCFA–64).

(2) The Federal share of overpayments subject to recovery must be credited on the Form HCFA–64 report submitted for the quarter in which the 60-day period following discovery, established in accordance with § 433.316, ends.

(3) A credit on the Form HCFA–64 must be made whether or not the overpayment has been recovered by the State from the provider.

(b) *Effect of reporting collections and submitting reduced expenditure claims.* (1) The State is not required to refund the Federal share of an overpayment when the State reports a collection or submits an expenditure claim reduced by a discrete amount to recover an overpayment prior to the end of the 60-day period following discovery.

(2) The State is not required to report on the Form HCFA–64 any collections made on overpayment amounts for which the Federal share has been refunded previously.

(3) If a State has refunded the Federal share of an overpayment as required under this subpart and the State subsequently makes recovery by reducing future provider payments by a discrete amount, the State need not reflect that reduction in its claim for Federal financial participation.

(c) *Reclaiming overpayment amounts previously refunded to HCFA.* If the amount of an overpayment is adjusted downward after the agency has credited HCFA with the Federal share, the agency may reclaim the amount of the downward adjustment on the Form HCFA–64. Under this provision—

(1) Downward adjustment to an overpayment amount previously credited to HCFA is allowed only if it is properly based on the approved State plan, Federal law and regulations governing Medicaid, and the appeals resolution processes specified in State administrative policies and procedures.

(2) The 2-year filing limit for retroactive claims for Medicaid expenditures does not apply. A downward adjustment is not considered a retroactive claim but rather a reclaiming of costs previously claimed.

(d) *Expiration of 60-day recovery period.* If an overpayment has not been determined uncollectable in accordance with the requirements of § 433.318 at the end of the 60-day period following discovery of the overpayment, the agency must refund the Federal share of the overpayment to HCFA in accordance with the procedures specified in paragraph (a) of this section.

(e) *Court-approved discharge of bankruptcy.* If the State recovers any portion of an overpayment under a court-approved discharge of bankruptcy, the agency must refund to HCFA the Federal share of the overpayment amount collected on the next quarterly expenditure report that is due to HCFA for the period that includes the date on which the collection occurs.

(f) *Bankruptcy petition denied.* If a provider's petition for bankruptcy is denied in Federal court, the agency must credit HCFA with the Federal share of the overpayment on the later of—

(1) The Form HCFA–64 submission due to HCFA immediately following the date of the decision of the court; or

(2) The Form HCFA–64 submission for the quarter in which the 60-day period following discovery of the overpayment ends.

(g) *Reclaim of refunds.* (1) If a provider is determined bankrupt or out of business under this section after the 60-day period following discovery of the overpayment ends and the State has not been able to make complete recovery, the agency may reclaim the amount of the Federal share of any unrecovered overpayment amount previously refunded to HCFA. HCFA allows the reclaim of a refund by the agency if the agency submits to HCFA documentation that it has made reasonable efforts to obtain recovery.

(2) If the agency reclaims a refund of the Federal share of an overpayment—

(i) In bankruptcy cases, the agency must submit to HCFA a statement of its efforts to recover the overpayment during the period before the petition for bankruptcy was filed; and

(ii) In out-of-business cases, the agency must submit to HCFA a statement of its efforts to locate the provider and its assets and to recover the overpayment during any period before the provider is found to be out of business in accordance with § 433.318.

(h) *Supporting reports.* The agency must report the following information to support each Quarterly Statement of Expenditures Form HCFA–64:

(1) Amounts of overpayments not collected during the quarter but refunded because of the expiration of the 60-day period following discovery;

(2) Upward and downward adjustments to amounts credited in previous quarters;

(3) Amounts of overpayments collected under court-approved discharges of bankruptcy;

(4) Amounts of previously reported overpayments to providers certified as bankrupt or out of business during the quarter; and

(5) Amounts of overpayments previously credited and reclaimed by the State.

§ 433.322. Maintenance of records.

The Medicaid agency must maintain a separate record of all overpayment activities for each provider in a manner that satisfies the retention and access requirements of 45 CFR Part 74, Subpart D.

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

Dated: October 6, 1988.

William L. Roper,

Administrator, Health Care Financing Administration.

Approved: November 9, 1988.

Otis R. Bowen,

Secretary.

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FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 6823]

List of Communities Eligible for the Sale of Flood Insurance; Maryland et al.

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities were required to adopt floodplain management measures compliant with the NFIP revised regulations that became effective on October 1, 1986. If the communities did not do so by the specified date, they would be suspended from participation in the NFIP. The communities are now in compliance. This rule withdraws the suspension. The communities' continued participation in the program authorizes the sale of flood insurance.

EFFECTIVE DATE: As shown in last column.

ADDRESS: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the NFIP at: P.O. Box 457, Lanham, Maryland 20706, Phone: (800) 638–7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202)