

and any liability which may be found will be assessed against the government, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988.

§ 142.2 Policy.

(a) The Commission may indemnify its employees by the payment of available funds, in whole, or in part, for any verdict, judgment or other monetary award which is rendered against any employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his or her employment with the Commission and that such indemnification is in the interest of the United States, as determined by the Commission.

(b) The Commission may settle or compromise a personal damage claim against its employee by the payment of available funds, at any time, provided the alleged conduct giving rise to the personal damage claim was taken within the scope of employment and that such settlement is in the interest of the United States as determined by the Commission in its discretion.

(c) Absent exceptional circumstances, as determined by the Commission, the Commission will not entertain a request either to agree to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or monetary award.

(d) When an employee of the Commission becomes aware that an action may be or has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee should immediately notify the Commission's Office of General Counsel that such an action is pending or threatened.

(e) The employee may thereafter request either (1) indemnification to satisfy a verdict, judgment or award entered against the employee or (2) payment to satisfy the requirements of a settlement proposal. The employee shall submit a written request, with documentation including copies of the verdict, judgment, award or settlement proposal, as appropriate, to the head of his or her division or office, who thereupon shall submit to the General Counsel, in a timely manner, a recommended disposition of the request. The General Counsel shall also seek the views of the Department of Justice. The General Counsel shall forward the request, the division or office's recommendation and the General Counsel's recommendation to the Commission for decision.

(f) Any payment under this section either to indemnify a Commodity

Futures Trading Commission employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the Commodity Futures Trading Commission.

Issued in Washington, DC on June 7, 1989.

By the Commission.

Jean A. Webb,

Secretary of the Commission, Commodity Futures Trading Commission.

[FR Doc. 89-14053 Filed 6-13-89; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 154

[Docket No. RM89-13-000; Order No. 514]

Revision of Formula for Computing Monthly Carrying Charges in PGA Filings; Interim Rule

Issued June 8, 1989.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Interim Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an interim rule to revise the formula used to compute the monthly carrying charge rate for Account No. 191 carrying charges required in the Commission's Purchased Gas Adjustment (PGA) filings. Under the revised regulations, the daily interest rate to be determined in the second step of the carrying charges formula in § 154.305(h)(4) of the Commission's regulations must be expressed to the nearest one ten-thousandth of one percent (*i.e.*, rounded to the sixth decimal place). The Commission's regulations currently require the daily interest rate to be expressed to the nearest one one-hundredth of one percent (*i.e.*, rounded to the fourth decimal place). The Commission is amending its regulations in this interim rule while, at the same time, seeking comments on the change. The Commission will issue a final rule in this proceeding, after reviewing these comments.

DATES: The effective date of this interim rule is June 8, 1989. Comments must be filed on or before July 24, 1989.

ADDRESS: An original and 14 copies of all written comments on this interim rule must be filed in the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 and should

refer to Docket No. RM89-13-000 on the outside of the envelope and on all documents submitted to the Commission.

FOR FURTHER INFORMATION CONTACT:

Julia Lake White, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 357-8530.

SUPPLEMENTARY INFORMATION:

In addition to publishing the full text of this document in the *Federal Register*, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357-8997. To access CIPS, set your communications software to use 300, 1200 or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this interim rule will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street, NE., Washington, DC 20426.

Before Commissioner: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

Revision of Formula for Computing Monthly Carrying Charges in PGA Filings.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing an interim rule revising the formula used to compute the monthly carrying charge rate for Account No. 191 carrying charges required in the Commission's Purchased Gas Adjustment (PGA) filings.¹ Under the revised regulations, the daily interest rate to be determined in the second step of the carrying charges formula in § 154.305(h)(4) of the Commission's regulations must be expressed to the nearest one ten-thousandth of one percent (*i.e.*, rounded to the sixth decimal place). The Commission's regulations currently

¹ See 18 CFR 154.305(h) (1986).

require the daily interest rate to be expressed to the nearest one one-hundredth of one percent (*i.e.*, rounded to the fourth decimal place). The Commission is amending its regulations in this interim rule while, at the same time, seeking comments on the change. After reviewing the comments, the Commission will issue a final rule in this proceeding.

II. Background

The Commission permits natural gas pipeline companies to recover changes in the cost of purchased natural gas through a purchased gas adjustment clause proceeding as an alternative to recovering these costs in a general rate proceeding pursuant to section 4 of the Natural Gas Act.²

The Commission's current PGA regulations³ require a natural gas pipeline company to determine its overrecovered or underrecovered purchased gas costs each month and to either credit or debit these amounts to Account No. 191 of the Uniform System of Accounts.⁴ Additionally, the Commission's regulations require a pipeline to compute carrying charges on the pipeline's Account No. 191 balances.⁵ According to the Commission's regulations, a pipeline must compute the monthly carrying charge by multiplying the carrying charge rate specified in § 154.305(h)(4) by the carrying charge base specified in § 154.305(h)(3). The pipeline's carrying charge base is calculated for the refunds, revenue credits or billing adjustments subaccount and a separate carrying charge base is calculated for all other subaccounts in Account No. 191. Under § 154.305(h)(4), the pipeline's monthly carrying charge rate is calculated by dividing the annualized quarterly rate provided for in § 154.67(c)(2)(iii)(A) of the Commission's regulations by the number of days in the year, and then multiplying the result by

the number of days in the applicable month.

The Commission's current PGA regulations specifically require that each result in the formula for determining the carrying charge rate must be expressed to the nearest one one-hundredth of one percent, *i.e.*, rounded to the fourth decimal place.⁶ The Commission added this specific requirement in its current PGA regulations to ensure that pipelines compute their interest rate factors for carrying charges in the same manner.⁷

Recently, the Commission has granted several pipelines a limited waiver of the carrying charges formula in § 154.305(h)(4) to permit them to express the daily interest rate calculated under § 154.305(h)(4)(ii), the second step of the carrying charges formula, to the nearest one ten-thousandth of one percent.⁸ The Commission granted these waivers because a Commission staff study found that expressing the daily interest rate in the second step of the carrying charges formula to the nearest one one-hundredth of one percent creates variances between the de facto annual rate used to compute carrying charges on a pipeline's Account No. 191 balance and the annual rate used to calculate refunds for a general NGA section 4 rate proceeding according to § 154.67(c)(2)(iii)(A) of the Commission's regulations.⁹

III. Discussion

Commission staff studied the difference between the de facto annual interest rates obtained by using four different rounding factors for the second step of the carrying charges formula in § 154.305(h)(4) and the original annual interest rate calculated on refunds in accordance with § 154.67(c)(2)(iii)(A), while still rounding the final step in the carrying charges formula, the monthly interest rate, to one one-hundredth of one percent, *i.e.*, four decimal places.¹⁰

The Commission's study shows that calculations expressing the daily interest rate in the second step of the carrying charges formula in § 154.305(h)(4) to the sixth, eighth or float¹¹ decimal places does not create any significant variance with the annual rate used to calculate refunds in § 154.67(c)(2)(iii)(A) of the Commission's regulations, but that expressing it to the fourth decimal place does create a significant variance. In fact, the calculations for sixth, eighth or float decimal places result in similar final monthly interest rates.

Commission staff also prepared a worksheet highlighting the percentage of distortions or variances between the de facto annual rate used in the second step of the carrying charges formula on the Account No. 191 balance and the annual rate calculated for refunds in a pipeline's latest NGA section 4 rate filing pursuant to § 154.67(c)(2)(iii)(A) of the Commission's regulations.¹²

The distortion in the final carrying charge interest rate on a pipeline's Account No. 191 balance violates the principle underlying the PGA regulations that the carrying charges on Account No. 191 must equal the current interest rate on pipeline refunds prescribed by the Commission in § 154.67(c)(2)(iii)(A) of its regulations. The PGA regulations are designed to ensure that the pipelines and their customers are in the same financial position that they would have been in if there had been no delay in the recovery of the overcharges or undercharges held in a pipeline's Account No. 191.¹³

The Commission is revising § 154.305(h)(4)(ii) of its regulations to require that the daily interest rate must be expressed to the nearest one ten-thousandth of one percent (*i.e.*, rounded to the sixth decimal place). This will substantially eliminate the distortions in the calculations, so as to ensure that there is no significant variation between the interest rate determined under § 154.67(c)(2)(iii)(A) for refunds in a pipeline's NGA section 4 general rate proceeding and the carrying charge rate determined under § 154.305(h)(4) for Account No. 191 balances in a pipeline's PGA filing. Thus, the carrying charges

¹¹ *I.e.*, using no rounding factor at all.

¹² See Appendix B.

¹³ See Modification of Purchased Gas Cost Adjustment Clause Regulations, Order No. 13, 43 F.R. 50,167 (Oct. 27, 1978); FERC Stats. & Regs. [Regulations Preambles 1977-1981] § 30.020A (1978); and Natural Gas Policy and Procedures: Final Regulation and Request for Comments, Order No. 47, 44 F.R. 53,493 (Sept. 14, 1979); FERC Stats. & Regs. [Regulations Preambles 1977-1981] § 30.083 (Sept. 10, 1979).

² 15 U.S.C. 717(c) (1982). The procedures for recovering purchased gas costs in an NGA section 4 general rate proceedings are provided in § 154.63 of the Commission's regulations. See 18 CFR 154.63 (1988).

³ Revisions to the Purchased Gas Adjustment Regulations, Order No. 483, 52 FR 43,854 (Nov. 17, 1987); III FERC Stats. and Regs. § 30,778 (Nov. 10, 1987); 52 FR 48,407 (Dec. 22, 1987); III FERC Stats. and Regs. § 30,785 (Dec. 16, 1987); 53 FR 3364 (Feb. 5, 1988); III FERC Stats. and Regs. § 30,796 (Jan. 29, 1988); *reh'g*, 53 FR 7495 (Mar. 9, 1988); III FERC Stats. and Regs. § 30,798 (Mar. 2, 1988); 53 FR 11,991 (Apr. 12, 1988); III FERC Stats. and Regs. § 30,802 (Apr. 6, 1988); 53 FR 12,676 (Apr. 18, 1988); III FERC Stats. and Regs. § 30,803 (Apr. 12, 1988); 53 FR 13,254 (Apr. 22, 1988); III FERC Stats. and Regs. § 30,806 (Apr. 18, 1988).

⁴ 18 CFR Part 201 (1988).

⁵ 18 CFR 154.305(h) (1988).

⁶ See 18 CFR 154.305(h)(4) (ii) and (iii) (1988).

⁷ Prior to Order No. 483 establishing the Commission's current PGA regulations, pipelines would start with the average prime rate for each calendar quarter and then use their own computation to arrive at the monthly interest rate factor. For example, a pipeline might take the annual quarterly interest rate and divide it by either twelve or 365 to determine a daily interest rate. The pipeline would then round the daily interest rate to whatever decimal place the pipeline preferred. Finally, the pipeline would multiply the daily interest rate by the number of days in the month, expressed to one one-hundredth of one percent, to arrive at the monthly interest rate.

⁸ Algonquin Gas Transmission Co., Docket No. TA89-20-001, 46 FERC ¶ 61,397 at 62,268 (Mar. 23, 1989); Alabama-Tennessee Natural Gas Company, Docket No. TA89-11-000, 46 FERC ¶ 61,429 (Mar. 31, 1989).

⁹ 18 CFR 154.67(c)(2)(iii)(A) (1988).

¹⁰ The Commission's study is attached as Appendix A.

calculated in pipelines' PGA filings will more accurately reflect the financial position of the pipelines and their customers for overrecovery and underrecovery of certain accounts.

IV. Administrative Findings and Effective Date

The Commission is revising the carrying charge rate computation formula by amending § 154.305(h)(4)(ii) in an interim rule prior to providing a notice and obtaining comments, as generally required by the Administrative Procedure Act (APA) for any rulemaking proceeding.¹⁴ In addition to the reasons set forth above, the Commission is invoking exceptions to this requirement in order to provide an immediate generic remedy to pipelines, and to ensure uniform treatment of all pipelines at the earliest date possible. It also will render unnecessary the filing of further petitions by pipelines for limited waiver of the carrying charges formula in § 154.305(h)(4).

The Commission, therefore, finds good cause to issue this rule without prior notice and comment. The Commission believes the public interest is best served in this instance with the promulgation of an interim rule consistent with the Commission's underlying principle that the carrying charge rate on Account No. 191 balances must accurately represent the interest rate calculated for refunds in pipelines' NGA section 4 general rate filings.

This interim rule is effective June 8, 1989.

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act generally requires a description and analysis of rules that will have a significant economic impact on a substantial number of small entities.¹⁵ The pipelines affected by this rule are too large to be considered "small entities" within the meaning of the Act.¹⁶ Accordingly, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VI. National Environmental Policy Act Statement

Commission regulations require that an environmental assessment or an environmental impact statement must be prepared for any Commission action that may have a significant adverse effect on the human environment.¹⁷ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.¹⁸ This rule involves the review of natural gas rate filings and establishment of rates for the transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act. Pursuant to § 380.4(a)(25) of the Commission's regulations, the establishment of such rates is categorically excluded from these statements.¹⁹ The Commission, therefore, will not prepare an environmental assessment or an environmental impact statement for this rule.

VII. Paperwork Reduction Act Statement

The Paperwork Reduction Act²⁰ and the Office of Management and Budget (OMB)²¹ require that OMB approve certain information collection requirements imposed by agency rule. This final rule does not change the information collection requirements approved by OMB. The rule simply changes the decimal place that must be used in expressing the daily interest rate in § 154.305(h)(4)(ii), the second step of the carrying charges formula in § 154.305(h)(4) of the Commission's regulations. The Commission, therefore, is not required to notify OMB of this technical change.

VIII. Public Comment Procedures

Interested persons are invited to submit written comments on the interim rule to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20526. Comments should refer to Docket No. RM89-13-000 on the outside of the envelope and on all documents submitted to the Commission. Fourteen copies should be submitted with the original.

Comments must be filed on or before July 24, 1989. Copies of the written comments may be obtained from the Commission's Division of Public

Information, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. Comments are available for public inspection during business hours at the same location. Also, copies of comments will be available for purchase.

List of Subjects in 18 CFR Part 154

Alaska, Natural gas, Pipelines, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission amends Part 154, Chapter I, Title 18 of the Code of Federal Regulations as set forth below.

By the Commission.
Linwood A. Watson, Jr.,
Acting Secretary.

PART 154—RATE SCHEDULE AND TARIFFS

1. The authority citation for Part 154 continues to read as follows:

Authority: Natural Gas Act, 5 U.S.C. 717-717w (1982); Department of Energy Organization Act, 42 U.S.C. 7102-7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142; Independent Offices Appropriations Act, 31 U.S.C. 9701 (1982).

2. In § 154.305, paragraph (h)(4)(ii) is revised to read as follows:

§ 154.305 Annual PGA filing.

- (h) Carrying charges. * * *
- (4) Carrying charge rate. * * *
- (ii) Dividing the annual rate by 365 or 366, if a leap year, to compute a daily interest rate, expressed to the nearest one ten-thousandth of one percent; and

Note: These appendices will not be published in the Code of Federal Regulations

Appendix A—Study of Decimal Place Distortion in PGA Carrying Charges Computations

The following charts show the results of using different rounding factors or no rounding factor at all, i.e., allowing the decimal place to float, to compute the daily interest rate and the resulting monthly interest rates for PGA carrying charges pursuant to § 154.305(h)(4) (ii) and (iii) of the Commission's regulations. The Summary Sheets compare the results of using four different rounding factors for each month in the study. As can be seen from the Summary Sheets, the calculations using six, eight or floating decimal places result in like monthly interest rates.

Column (1) on the Summary Sheets gives the decimal place that was used for the second step of the monthly interest rate. The working papers which support these Summary Sheets and from which these figures are taken appear in Column (2). Likewise, the Line Number where the figure

¹⁴ 5 U.S.C. 553 (b) and (c) (1982).

¹⁵ 5 U.S.C. 601-612 (1982).

¹⁶ The act defines a "small entity" as a small business, a small not-for-profit enterprise or a small governmental jurisdiction. 5 U.S.C. 601(b) (1982). A "small business" is defined by reference to section 3 of the Small Business Act, as an enterprise which is "independently owned and operated and which is not dominant in its field of operation." 5 U.S.C. 6.32(a) (1982).

¹⁷ Regulations Implementing National Environmental Policy Act, 52 F.R. 47,897 (Dec. 17, 1987); III FERC Stats. & Regs. ¶ 30,783 (Dec. 10, 1987).

¹⁸ 18 CFR 380.4 (1989).

¹⁹ 18 CFR 380.4(a)(25) (1989).

²⁰ 44 U.S.C. 3501-3520 (1982).

²¹ 5 CFR 1320.13 (1989).

can be found is given in Column (3). Columns (4) (5) and (6) show the annual interest rate, the monthly interest rate and the de facto (effective) rate. Column (4) shows the monthly effective rate as computed on the various backup examples. Column (5) shows the effective annual rate obtained by reversing the calculations. That is, each monthly carrying charge factor calculated by the divers methods is annualized. As may be seen by the example for the month of January, on Line One, when four decimal places are used pursuant to § 154.305, the annual rate is 10.98 percent even though the published refund rate is 12 percent.

Likewise for April, the interest rate calculation using four decimal places again results in an annual rate of 10.98 percent instead of the 9.39 percent resulting from the

calculations which are expressed to the six and eight decimal places as well as the float (not rounded at all). The results in the summaries for July and November follow suit.

The second type of example shows the computations behind the interest rates in the Summary.

The amounts in Example A are computed using a rounding factor of four, i.e., in accordance with Order No. 483, the daily interest rate is expressed to four decimal places in the step to determine the daily interest rate for the computation to determine the monthly interest rate to be used to calculate carrying charges. As is shown, calculating the daily rate rounded to one one-hundredth of one percent results in an annual interest rate of 10.98 percent in three of the

four months for which the calculation occurred.

The amounts in Example B are computed using a rounding factor of six, i.e., the quotient is rounded to six decimal places in the second step to determine the daily interest rate for the computation to determine the monthly interest rate.

The amounts in Example C are computed using a rounding factor of eight, i.e., the quotient is rounded to eight decimal places in the second step to determine the monthly interest rate.

The amounts in Example D are computed using a floating decimal factor, i.e., the quotient is not rounded in the second step to determine the daily interest rate for the computation to determine the monthly interest rate.

EXAMPLE A.—CARRYING CHARGE RATES PER § 154.305(h)

Line No.	Month	(1) Annual rate	(2) No. days in year	(3) Daily rate (1)/(2)	(4) No. days in month	(5) Monthly rate (3)(4)	(6) Check (5)/(4)*(2)	(7) Difference (1)-(6)
1	Jan.....	0.12	366	0.0003	31	0.0093	0.1098	0.0102
2	Apr.....	0.0934	366	0.0003	30	0.009	0.1098	-0.0164
3	Jul.....	0.1054	366	0.0003	31	0.0093	0.1098	-0.0044
4	Nov.....	0.1428	366	0.0004	30	0.012	0.1464	-0.0036

EXAMPLE B.—CARRYING CHARGE COMPUTATIONS ROUNDED TO SIX DECIMAL PLACES

Line No.	Month	(1) Annual rate	(2) No. days in year	(3) Daily rate (1)/(2)	(4) No. days in month	(5) Monthly rate (3)(4)	(6) Check (5)/(4)*(2)	(7) Difference (1)-(6)
1	Jan.....	0.12	366	0.000328	31	0.0102	0.120426	-0.000426
2	Apr.....	0.0934	366	0.000255	30	0.0077	0.09394	-0.00054
3	Jul.....	0.1054	366	0.000288	31	0.0089	0.105077	0.000323
4	Nov.....	0.1428	366	0.00039	30	0.0117	0.14274	0.00006

EXAMPLE C.—CARRYING CHARGE COMPUTATIONS ROUNDED TO SIX DECIMAL PLACES

Line No.	Month	(1) Annual rate	(2) No. days in year	(3) Daily rate (1)/(2)	(4) No. days in month	(5) Monthly rate (3)(4)	(6) Check (5)/(4)*(2)	(7) Difference (1)-(6)
1	Jan.....	0.12	366	0.00032787	31	0.0102	0.12042581	-0.00042581
2	Apr.....	0.0934	366	0.00025519	30	0.0077	0.09394	-0.00054
3	Jul.....	0.1054	366	0.00028798	31	0.0089	0.10507742	0.00032258
4	Nov.....	0.1428	366	0.00039016	30	0.0117	0.14274	0.00006

EXAMPLE D.—CARRYING CHARGE COMPUTATIONS WITH FLOATING DECIMAL PLACES*

Line No.	Month	(1) Annual rate	(2) No. days in year	(3) Daily rate (1)/(2)	(4) No. days in month	(5) Monthly rate (3)(4)	(6) Check (5)/(4)*(2)	(7) Difference (1)-(6)
1	Jan.....	0.12	366	0.000327868	31	0.0102	0.1204258065	-0.0004258065
2	Apr.....	0.0934	366	0.00025519	30	0.0077	0.09394	-0.00054
3	Jul.....	0.1054	366	0.00028798	31	0.0089	0.105077	0.000323
4	Nov.....	0.1428	366	0.00039016	30	0.0117	0.14274	0.00006

* For display purposes, the number of decimal places is limited to 10 places.

SUMMARY SHEET I.—INTEREST RATE COMPUTATION COMPARISON

Line No. and carrying charge rate computation per (1)	From example (2)	Line number (3)	Refund interest rate from col. (1) (percent) (4)	Monthly rate from col. (5) (5)	Effective annual rate from col. (6) (percent) (6)
January					
1 Sec. 154.305.....	A	1	12.00	0.0093	10.98
2 Six Dec.....	B	1	12.00	0.0102	12.04
3 Eight Dec.....	C	1	12.00	0.0102	12.04
4 Float.....	D	1	12.00	0.0102	12.04
April					
1 Sec. 154.305.....	A	2	9.34	0.009	10.98
2 Six Dec.....	B	2	9.34	0.0077	9.39
3 Eight Dec.....	C	2	9.34	0.0077	9.39
4 Float.....	D	2	9.34	0.0077	9.39

SUMMARY SHEET II.—INTEREST RATE COMPUTATION COMPARISON

Line No. and carrying charge rate computation per (1)	From example (2)	Line number (3)	Refund interest rate from col. (1) (percent) (4)	Monthly rate from col. (5) (5)	Effective annual rate from col. (6) (percent) (6)
July					
1 Sec. 154.305.....	A	3	10.54	0.0093	10.98
2 Six Dec.....	B	3	10.54	0.0089	10.51
3 Eight Dec.....	C	3	10.54	0.0089	10.51
4 Float.....	D	3	10.54	0.0089	10.51
November					
1 Sec. 154.305.....	A	4	14.28	0.012	14.64
2 Six Dec.....	B	4	14.28	0.0117	14.27
3 Eight Dec.....	C	4	14.28	0.0117	14.27
4 Float.....	D	4	14.28	0.0117	14.27

Appendix B

This work sheet highlights the percentage of distortions. The

percentage of error that occurs for an annual interest rate of 5.48 percent is 33.33 percent and the percentage of error

for an annual interest rate of 9.12 percent is 20 percent.

An example of the distortion caused by rounding the intermediate step by four places.

	Interest Rate per 154.67 (percent) (a)	Daily Rate Col. (a)/365 (b)	De Facto Annual Rate Col (b) x 365 (percent) (c)
Calculation using four decimal places.....	5.48	0.0002	7.30
Calculation using six, eight or "float" decimal places.....	5.48	0.00015	5.48
Difference due to rounding.....			1.83
Percentage of error.....			33.33
Calculation using four decimal places.....	9.12	0.0002	7.30
Calculation using six, eight or "float" decimal places.....	9.12	0.00025	9.13
Difference due to rounding.....			-1.82
Percentage of error.....			-20.00

[FR Doc. 89-14062 Filed 6-13-89; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD 6010.8-R, Amdt. No. 22]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Administrative Remedies for Fraud, Abuse, and Conflict of Interest

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule amends Part 199 of Title 32, the regulation which implements CHAMPUS, by adding a new section that sets forth administrative remedies, including exclusion, suspension, and termination of CHAMPUS providers for fraud, abuse, or conflict of interest. The new section is designated as § 199.9 which was previously reserved. This amendment strengthens the Program's remedies when providers or beneficiaries violate laws pertaining to fraud or false claims. This amendment also strengthens the Program's remedies when providers or beneficiaries violate regulation provisions concerning Program fraud or abuse. The new section is responsive to the Administration's and DoD's concern with controlling and reducing fraud and abuse. The end result will be to minimize poor quality care and health risks for CHAMPUS beneficiaries and to reduce unnecessary costs to the Government.

EFFECTIVE DATE: July 14, 1989. For an administrative remedy on or after this date, CHAMPUS will follow the provisions of this final rule.

ADDRESS: Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045-6900.

For copies of the Federal Register containing this notice, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

The charge for the Federal Register is \$1.50 for each issue payable by check or money order to the Superintendent of Documents.

FOR FURTHER INFORMATION CONTACT: Tariq S. Shahid, Office of Program Development, OCHAMPUS, telephone (303) 361-3587.

To obtain copies of this document, see the "ADDRESS" section above.

SUPPLEMENTARY INFORMATION: In FR Doc. 77-7834, appearing in the Federal Register on April 4, 1977 (42 FR 17972),

the Office of the Secretary of Defense published its regulation, DoD 6010.8-R, "Implementation of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," as Part 199 of this title. Since 32 CFR Part 199 (DoD 6010.8-R) was reissued in the Federal Register on July 1, 1986 (51 FR 24008), with a new format, all references to section numbers in this final rule are in accordance with the new format.

I. Background/Analysis

Section 199.6(a)(4)(i) provided for denial of CHAMPUS payments for services of a provider found to have engaged in fraudulent activities against the Program and for disqualification of the provider from participation in CHAMPUS. In regard to unnecessary and poor quality care, the regulation provided for denial of CHAMPUS payments for services or supplies that are not medically necessary or that fail to meet professionally recognized standards for health care, but was silent on the administrative authority to exclude providers from the program for such abusive practices.

Section 199.6(a)(4)(ii) authorized denial of CHAMPUS reimbursements for services of any provider determined by the Secretary of the Department of Health and Human Services (DHHS) to have furnished supplies or services which were substantially in excess of the needs of individuals, or which were harmful to individuals, or which were of a grossly inferior quality, and where the Secretary, on the basis of such a determination, terminated the agreement of that provider for purposes of reimbursement under the Medicare and Medicaid programs. OCHAMPUS has remained dependent upon the DHHS determination as the basis for excluding those providers who engage in abusive practices. This weakness in the regulation has a potential for abuse under CHAMPUS since a provider could continue rendering poor quality or unnecessary services to beneficiaries of CHAMPUS while avoiding the termination by DHHS by not doing so under the Medicare and Medicaid programs. Also, CHAMPUS can be abused by a provider who could have avoided the termination by DHHS simply by electing not to participate in Medicare and Medicaid programs.

We believe that once a provider has been found to have a pattern of ordering or furnishing services or supplies for a CHAMPUS beneficiary that are medically unnecessary, inferior, or harmful, CHAMPUS should be able to exclude such a provider from the Program without having to rely on the DHHS. Such CHAMPUS authority is

needed to eliminate poor quality providers from the Program.

We believe the regulation should define fraud and abuse under the CHAMPUS and strengthen its authority. The criminal statutes defining fraud and abuse are enforced in courts of law. This final rule provides for provider exclusion when convictions or judgments involving fraud are entered in a court of law. In addition, it establishes what is fraud or abuse under the CHAMPUS by providing administrative definitions separate from any definitions found in criminal codes.

This amendment adds a new section in Part 199 that prescribes necessary definitions, more clearly expresses the administrative authority, and provides a range of administrative responses and remedies, including exclusion, suspension, and termination from the program for health care providers for fraud, abuse, or conflict of interest. Also, it authorizes CHAMPUS to exclude those providers who are sanctioned by other health care programs.

This final rule provides that for any CHAMPUS determination to exclude, suspend, or terminate a provider, the provider be given an opportunity to submit documentary evidence and written argument against the proposed adverse action or to submit a written request to present evidence or argument orally to a CHAMPUS official. It clarifies administrative appeal rights, provides criteria for reinstatement of a sanctioned provider, and provides other administrative guidelines.

Conforming changes to other sections of Part 199 have been made to insure consistency with the provisions of the new section.

This amendment is intended to facilitate administrative elimination of poor quality health care providers from CHAMPUS, protect the beneficiaries, deter program violators, and control fraud and abuse. The end result will be to minimize poor quality care and health risks for CHAMPUS beneficiaries and to reduce unnecessary costs to the Government. The strengthened regulation will allow more aggressive and more timely pursuit of suspected instances of fraud and abuse, and has a potential for positive impact on program costs. The direct value to CHAMPUS would include the fraud and abuse deterrent effect of the stepped-up actions against suspected and documented violators.

II. Proposed Rule and Comments

In FR Doc. 86-1443 appearing in the Federal Register on January 24, 1986, (51 FR 3210), the Office of the Secretary of

Defense published for public comment a proposed amendment regarding exclusion, suspension, and termination of CHAMPUS providers for fraud, abuse, and conflict of interest. We received comments from several government agencies, two national associations related to mental health institutions, and two law firms that represent mental health institutions. We express our appreciation to all the commenters for the time they took in providing their comments. The following summarizes the comments, suggestions, and the actions taken.

First, after additional review, we have concluded that the provisions defining fraud in the proposed rule appear to include a more rigorous standard for establishing fraud than is required by applicable case law. In civil cases involving false claims, it has generally been held that proof of intent is unnecessary, so long as the individual committing the fraudulent act knew (or with appropriate inquiry, would have known) that the claim was false. For example, see *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978) and *United States v. Cooperative Grain and Supply Co.*, 474 F.2d 47 (8th Cir. 1973). In addition, intent is not required in the majority of judicial circuits for proof of fraud under the Federal Civil False Claims Act (31 U.S.C. 3729) (a practice expected to be followed in enforcement of the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801) as it applies to CHAMPUS) or the Criminal False Claims or False Statements Acts (18 U.S.C. 287, 1001). Accordingly, we have eliminated the requirement to prove intent for fraud and have made necessary revisions in § 199.2(b) of this final rule.

Three commenters raised concerns regarding the definition of abuse. Essentially, two of them commented that the definition is too vague and broad and suggested that without provider pre-termination hearings, a more precise standard for abuse is needed. The third commenter suggested the regulations should at least require that OCHAMPUS make a finding that the participants in the alleged abuse knew or should have known either (1) that the alleged practice would result in excessive cost to CHAMPUS; (2) that the services or supplies were not medically necessary; or (3) the services or care failed to meet professionally recognized standards. These commenters suggested that isolated instances of providing medically unnecessary services or waiving patient cost-shares should not be construed as abuse.

The definition of abuse is reasonably similar to definitions of abuse established under other health care programs, including the definition used under Medicare. In addition, it is reasonable to expect providers of health care to be familiar with, and comply with, the recognized standards of care established for their profession; to be familiar with the requirements for being an authorized CHAMPUS provider and the criteria for CHAMPUS coverage of services and supplies furnished; and to be cognizant of acceptable sound fiscal business and medical practices or the reasonable financial consequences to CHAMPUS and CHAMPUS beneficiaries of the providers' practices. In view of these expectations, we do not believe the definition of abuse to be too vague or broad. In addition, specific examples of fraud and abuse were set forth in the amendment to provide further understanding of the types of practices which are considered abuse under CHAMPUS. Some revisions have been made in the examples of abuse in § 199.9. Therefore, we do not believe that OCHAMPUS should be required to find that a provider furnishing medically unnecessary services that result in excessive costs did so knowingly. Such a requirement could create a loophole permitting incompetent providers who are not knowledgeable of professional standards to continue rendering poor quality care to our beneficiaries. For these reasons we cannot add such a requirement.

It was not our intent that single, isolated incidents of abuse would, generally, result in the initiation of administrative remedies under this amendment. Unless a single, isolated incident is considered gross and flagrant, an improper pattern of practice will normally be the basis of a finding of abuse under CHAMPUS. We are clarifying this in the note that follows the definition of abuse in § 199.2(b).

We also have added a new provision in § 199.9(h)(2)(i)(D) that will, generally, give a provider an opportunity for a pre-sanction meeting to present evidence or argument to an OCHAMPUS official.

One commenter pointed out that the definition of abuse used in the proposed regulations adopts concepts from the Medicare program but does not provide for peer review organizations (PROs). The commenter noted that submitting claims for services that are not medically necessary is an abuse and this raises problems for residential treatment centers in that the distinction between what is and what is not medically necessary is open to more dispute in psychiatry than for treatment

in acute care facilities. This commenter raised concerns that these regulations would grant CHAMPUS extra powers over clinical issues.

OCHAMPUS will be utilizing Medicare PROs for review of inpatient hospital care paid for through the diagnosis related group (DRG) method. For this reason some clarifications have been included in this amendment to increase the similarities in certain selected CHAMPUS and Medicare provisions. For example, the CHAMPUS definition of appropriate medical care has been clarified by specific reference to services being economically furnished. This is considered only a clarification in that application of the CHAMPUS definition has always included the concept of economically furnished services.

Aside from the utilization of Medicare PROs, an effective CHAMPUS peer review mechanism currently exists. This involves medical reviewers of the CHAMPUS contractors and reviewers from national professional organizations. On medical issues, CHAMPUS relies on scientific studies, medical literature, national professional assessments, the general medical community and other appropriate sources for information. Providers and patient records are reviewed by professionals who are specialized in mental health care and, with adequate resources available, we do not believe that medical necessity determinations in such cases would be difficult. Further, with the submission of claims or appeals, providers are given the opportunity to submit any documentary evidence in support of their position. In addition, as noted above, a case of abuse will normally require a pattern of providing unnecessary services.

With reference to the records related requirements in § 199.2(b), § 199.9(b)(6), and § 199.10(a)(3), one commenter suggested that an adequate account of the importance of the physician-patient and psychotherapist-patient privileges be taken. The commenter suggested that OCHAMPUS should provide for protection of the confidentiality of records within OCHAMPUS.

OCHAMPUS must have adequate access to records in order to conduct audits and make determinations. Beneficiaries and providers do not have to provide medical records to CHAMPUS or its contractors; however, failure to provide access to medical records can result in the claim (or claims) being denied CHAMPUS cost-sharing. The burden is on the beneficiary and provider to establish entitlement to CHAMPUS cost-sharing.

OCHAMPUS procedures do account for privacy and confidentiality of records, and CHAMPUS records are maintained in accordance with the requirements of the Privacy Act.

With reference to the definitions of adequate medical documentation in § 199.2(b), a commenter suggested that no provider should be required to comply with "CHAMPUS issuances" unless notice of the issuance was sent to the provider.

In clarification, "CHAMPUS issuances" meant the CHAMPUS Policy Manual and the CHAMPUS operations manuals which provide interpretation of the CHAMPUS regulation, clarifying policy, and implementing procedures. However, in this final rule we have made some minor revisions in the definitions of adequate medical documentation in § 199.2(b) and have deleted the reference to "CHAMPUS issuances." In general, the source of this definition is the Joint Commission on Accreditation of Healthcare Organizations record keeping requirements, prior final decisions of the Assistant Secretary of Defense (Health Affairs), and the CHAMPUS regulation. Failure to produce adequate medical documentation of the care provided is a basis for denying CHAMPUS cost-sharing.

Several comments were received regarding the mandatory and discretionary periods of sanction set forth in the proposed rule. In order to simplify the sanction procedures and remedies, the pertinent subsections have been rewritten to consolidate the procedures and to eliminate mandatory sanction periods in most cases. The only mandatory sanction periods which remain are those which are adopted from sanctions imposed by other agencies of the federal government, state, or local licensing authority. Therefore, except for cases in which the CHAMPUS sanction is imposed *solely* on the basis of sanctions by other agencies, the period of CHAMPUS sanction may be appealed under CHAMPUS.

Two commenters raised concerns that the regulations defining conflict of interest in § 199.2(b) and § 199.9(d) are too broad. One of them suggested that an active duty member or a civilian Government employee should be deemed to have a conflict of interest in making a referral or influencing a referral only when they or a close relative have a financial interest in the referral. The other commenter suggested that the revisions be made to include language requiring personal gain or appearance of impropriety in influencing referrals to others. A third commenter

suggested that we also consider those situations as conflict of interest where service members and Government employees have the apparent opportunity to exert influence on the referrals.

The broader definition was intended to include all those situations as conflict of interest where an authorized CHAMPUS provider employs an active duty Uniformed Service member or civilian Government employee who has the opportunity to exert influence on the referral of CHAMPUS beneficiaries to the employing provider. However, we have made necessary revisions in the conflict of interest provisions in § 199.2(b) and § 199.9(d) where we have maintained the regulatory intent and have adopted some of the suggestions of the commenters.

Although no public comments were received on the "dual compensation" provisions of the proposed rule, we have recently received comments that the CHAMPUS regulation may be overly broad in its application of the dual compensation law to all civilian employees of the Government. We recognize that there are tests established by case law and decisions of the Comptroller General for determining whether the dual compensation provisions apply in each individual case. However, in administering a program in which millions of claims are processed annually, it is impracticable to apply the established tests to each individual claim to avoid expending appropriated funds in violation of law. Rather, it is necessary to have an easily administered policy which can be used in an automated claims processing system to exclude all cases in which a provider may be in violation of the law. In addition, all providers who fall within the general category covered by the "dual compensation" provisions (i.e., civilian employees of the Government) are subject to Government rules and policies regarding "conflicts of interest." Such rules and policies prohibit not only actual conflict of interest situations but also situations in which the appearance of conflict of interest may exist. Again, it is impossible to scrutinize each individual claim to ensure that no possible violation of the rules and policies regarding conflict of interest occur when adjudicating millions of claims each year in a highly automated claims processing system. The fact that an individual provider may not be able to include CHAMPUS beneficiaries within his or her medical practice is not a primary consideration and does not outweigh the government's interests in enforcing laws and policies intended to

maintain the public's confidence in the conduct of the Government and its employees.

The reason for the broad application of the dual compensation provisions to all Government employees under CHAMPUS, then, is simply one of administrative efficiency following a balancing of the interests involved. Considering that OCHAMPUS is faced with the adjudication of millions of health care claims each year and given the high degree of freedom among providers of health care to enter into or change their status of employment or associations of practice on a daily basis, it is deemed administratively impossible to apply the established tests to *each* provider on *each* claim to avoid expending appropriated funds in violation of law. The problem is further complicated given the numerous interagency arrangements (for example, resource sharing arrangements between the Department of Defense and the Veterans Administration in the provision of health care) and other unique arrangements existing at individual government health care facilities whereby civilian employees of one agency have *official duties and responsibilities* to provide health care to patients who are CHAMPUS eligible beneficiaries. This complication may be further aggravated if legislation currently pending before Congress is adopted and CHAMPUS funds are used directly to pay for care received by CHAMPUS beneficiaries in Veterans Administration facilities. Finally, in the administration of a health care program for Veterans Administration beneficiaries referred to as Civilian Health and Medical Program of the Veterans Administration (CHAMPVA), CHAMPUS authorized providers are deemed CHAMPVA providers. In view of the interagency arrangements between the Department of Defense and Veterans Administration, it is administratively impossible continually to screen providers who are civilian employees of the Veterans Administration to enforce the provisions of law and regulation relating to dual compensation and conflict of interest.

Therefore, we have changed § 199.6(a)(3) to clarify the agency's position on this issue. Specifically, to avoid the administrative nightmare of attempting to adjudicate each claim in relation to the multiple established tests, it is our position to exclude from authorization as a CHAMPUS provider (and, therefore, as a CHAMPVA provider) any active duty Uniformed Service member and any civilian employee of the Government. In

addition, a provider shall be required to certify on each CHAMPUS (CHAMPVA) claim that he/she is not an active duty Uniformed Service member or civilian employee of the Government. While an individual provider may be prevented from being an authorized CHAMPUS provider even though no dual compensation (or conflict of interest) situation exists in a specific claim, it is deemed essential for CHAMPUS to have an easily administered uniform rule which will ensure compliance with existing law and regulation.

It has also been suggested that we consider adopting regulatory provisions similar to authorities in use by the Department of Health and Human Services (DHHS) under section 1128(b) of the Social Security Act. Under section 1128(b), DHHS may exclude an entity from Medicare, and require the State agency to exclude the entity from Medicaid, whenever the entity is found to have a person, convicted of a Medicare or Medicaid related crime, with direct or indirect ownership or control interest of 5 percent or more of the entity. DHHS may also exclude an entity from both programs if such person is found to be an officer, director, agent or managing employee of such entity.

We have adopted the above suggestion by adding a note in § 199.9(f)(1)(i)(A) and the definitions of "entity" and "ownership or control interest" in § 199.2(b). While this provision allows CHAMPUS to suspend such entities, it also permits the entities to take proper action to divest themselves of any direct financial or controlling relationship with sanctioned individuals. The rule, then, provides reinstatement procedures for these entities.

With reference to § 199.9(f)(1)(iii), one commenter suggested that the provision be modified to apply only when the suspension from the other Federal program is for fraud or abuse as defined under CHAMPUS. We believe an authorized provider will be suspended from another Federal program based on a valid case of fraud or abuse, or lack of competence. It is the responsibility of a provider to comply with the requirements of the program under which he is seeking payment or reimbursement from the government; therefore, a violation of a requirement of any program of the government which rises to the level of fraud or abuse under that program's definition is a fraud against the government. It should not be necessary to establish that it would also have been a fraud or abuse under CHAMPUS.

Two commenters raised concerns that the proposed procedures for suspensions

and exclusions fail to meet due process requirements. They suggested that before OCHAMPUS excludes or suspends a provider, that the provider be given an opportunity for a hearing. Protection of the Government's program and its beneficiaries is traditionally a proper purpose for administrative action; therefore, it is precisely the function of the Director, OCHAMPUS, to protect the program and its beneficiaries from the practices that led to the administrative action of exclusion or suspension. To permit a provider to continue as an authorized CHAMPUS provider pending administrative appeal proceedings would not provide the program or its beneficiaries protection from further potential wrongdoing of a provider preliminarily found to be unfit to participate under CHAMPUS or protection from a provider who has been found unfit or unqualified to be a CHAMPUS provider. In addition, allowing the provider to remain in an authorized status during administrative proceedings gives the provider every incentive to delay the proceedings by taking advantage of any opportunity to prolong the administrative appeal proceedings. The fact that an individual provider may not be able to include CHAMPUS beneficiaries within his or her medical practice following a preliminary determination that the provider is unfit to participate under CHAMPUS is not a primary consideration and does not outweigh the Government's interests in protecting the program and its beneficiaries. As noted earlier, however, we have added a new provision in § 199.9(h)(2)(i)(D) that will, generally, give a provider an opportunity for a pre-sanction meeting to present evidence or argument to an OCHAMPUS official. On balance of the interests involved, the informal pre-sanction meeting and the post-sanction hearing adequately address any due process requirements.

One commenter objected that the rules governing claims processing suspensions, (e.g., § 199.9(h)(1)), provide for no pre-termination notice or hearings. This commenter also suggested that the sections regarding administrative penalties based on either civil or criminal judgments concerning fraud should make provision for revocation of the penalties if the court judgments are reversed on appeal.

The provisions for temporary suspension of claims processing in § 199.9(h)(1) is not a final or formal agency action. No notice will be given if it is considered detrimental to the criminal, civil, or administrative investigation. As noted in the rule, a temporary suspension only delays the

ultimate payment of appropriate claims; therefore, the decision to invoke the temporary suspension of claims processing is not an appealable issue under CHAMPUS.

With regard to the revocation of penalties, we have added a new provision as § 199.9(h)(4) that addresses reinstatement of a provider, including a provider whose conviction has been reversed or vacated on appeal. The previous § 199.9(e)(7) regarding the authority to enter into compromise settlements now applies to the entire § 199.9 and has been redesignated as § 199.9(1).

Finally, as specified in § 199.9(k), CHAMPUS also will notify DHHS of its exclusion, suspension, and termination actions.

III. Regulatory Procedures

Executive Order 12291 requires that a regulatory impact analysis be performed on any major rule. A "major rule" is defined as one which would:

Result in annual effect on the national economy of \$100 million or more;

Result in a major increase in costs or prices for consumers, any industries, any government agencies, or any geographic regions; or

Have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or import markets.

The Regulatory Flexibility Act requires that each federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues regulations which would have significant impact on a substantial number of small entities.

Under both the Executive Order and the Regulatory Flexibility Act, such analyses must, when prepared, examine regulatory alternatives which minimize unnecessary burden or otherwise assure that regulations are cost-effective.

The changes set forth in this final rule will facilitate administrative elimination of poor quality health care providers from CHAMPUS, protect the beneficiaries, deter program violators, and control fraud and abuse. The end result will be to minimize poor quality care and health risks for CHAMPUS beneficiaries and to reduce unnecessary costs to the Government.

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. Also, it is not a "major rule" under Executive Order 12291.

List of Subjects in 32 CFR Part 199

Claims, Handicapped, Health insurance, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

PART 199—[AMENDED]

1. The authority citation for Part 199 continues to read as follows:

Authority: 10 U.S.C. 1079, 1086; 5 U.S.C. 301.

2. Section 199.2, paragraph (b) is amended by adding or revising, in alphabetical order, the definitions for "Abuse," "Adequate Medical Documentation, Medical Treatment Records," "Adequate Medical Documentation, Mental Health Records," (paragraph (iii) of "Appropriate Medical Care," "Conflict of Interest," "Conviction," "Dual Compensation," "Entity," "Fraud," "Item, Service, or Supply," "Ownership or Control Interest," "Provider Exclusion and Suspension," "Provider Termination," "Sanction," and "Suspension of Claims Processing," to read as follows:

§ 199.2 Definitions.

(b) * * *

Abuse. For the purposes of this Part, abuse is defined as any practice that is inconsistent with accepted sound fiscal, business, or professional practice which results in a CHAMPUS claim, unnecessary cost, or CHAMPUS payment for services or supplies that are: (1) Not within the concepts of medically necessary and appropriate care, as defined in this part, or (2) that fail to meet professionally recognized standards for health care providers. The term "abuse" includes deception or misrepresentation by a provider, or any person or entity acting on behalf of a provider in relation to a CHAMPUS claim.

Note: Unless a specific action is deemed gross and flagrant, a pattern of inappropriate practice will normally be required to find that abuse has occurred. Also, any practice or action that constitutes fraud, as defined by this part, would also be abuse.

Adequate Medical Documentation, Medical Treatment Records. Adequate medical documentation contains sufficient information to justify the diagnosis, the treatment plan, and the services and supplies furnished. Under CHAMPUS, it is required that adequate and sufficient clinical records be kept by the health care provider(s) to substantiate that specific care was actually and appropriately furnished, was medically necessary and

appropriate (as defined by this part), and to identify the individual(s) who provided the care. All procedures billed must be documented in the records. In determining whether medical records are adequate, the records will be reviewed under the generally acceptable standards such as the applicable Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards, the Peer Review Organization (PRO) standards (and the provider's state or local licensing requirements) and other requirements specified by this part. In general, the documentation requirements for a professional provider are not less in the outpatient setting than the inpatient setting.

Adequate Medical Documentation, Mental Health Records. Adequate medical documentation provides the means for measuring the type, frequency, and duration of active treatment mechanisms employed and progress under the treatment plan. Under CHAMPUS, it is required that adequate and sufficient clinical records be kept by the provider to substantiate that specific care was actually and appropriately furnished, was medically or psychologically necessary (as defined by this part), and to identify the individual(s) who provided the care. Each service provided or billed must be documented in the records. In determining whether medical records are adequate, the records will be reviewed under the generally acceptable standards (e.g., the applicable JCAHO standards and the provider's state or local licensing requirements) and other requirements specified by this part. It must be noted that the psychiatric and psychological evaluations, physician orders, the treatment plan, integrated progress notes (and physician progress notes if separate from the integrated progress notes), and the discharge summary are the more critical elements of the mental health record. However, nursing and staff notes, no matter how complete, are not a substitute for the documentation of services by the individual professional provider who furnished treatment to the beneficiary. In general, the documentation requirements of a professional provider are not less in the outpatient setting than the inpatient setting. Furthermore, even though a hospital that provides psychiatric care may be accredited under the JCAHO manual for hospitals rather than the consolidated standards manual, the critical elements of the mental health record listed above are required for CHAMPUS claims.

Appropriate Medical Care

(iii) The services are furnished economically. For purposes of this part, "economically" means that the services are furnished in the least expensive level of care or medical environment adequate to provide the required medical care regardless of whether or not that level of care is covered by CHAMPUS.

Conflict of Interest. Includes any situation where an active duty member (including a reserve member while on active duty) or civilian employee of the United States Government, through an official federal position, has the apparent or actual opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries to himself or herself or others with some potential for personal gain or appearance of impropriety. For purposes of this part, individuals under contract to a Uniformed Service may be involved in a conflict of interest situation through the contract position.

Conviction. For purposes of this part, "conviction" or "convicted" means that (1) a judgment of conviction has been entered, or (2) there has been a finding of guilt by the trier of fact, or (3) a plea of guilty or a plea of *nolo contendere* has been accepted by a court of competent jurisdiction, regardless of whether an appeal is pending.

Dual Compensation. Federal Law (5 U.S.C. 5536) prohibits active duty members or civilian employees of the United States Government from receiving additional compensation from the government above their normal pay and allowances. This prohibition applies to CHAMPUS cost-sharing of medical care provided by active duty members or civilian government employees to CHAMPUS beneficiaries.

Entity. For purposes of § 199.9(f)(1), "entity" includes a corporation, trust, partnership, sole proprietorship or other kind of business enterprise that is or may be eligible to receive reimbursement either directly or indirectly from CHAMPUS.

Fraud. For purposes of this part, fraud is defined as (1) a deception or misrepresentation by a provider, beneficiary, sponsor, or any person acting on behalf of a provider, sponsor, or beneficiary with the knowledge (or who had reason to know or should have

known) that the deception or misrepresentation could result in some unauthorized CHAMPUS benefit to self or some other person, or some unauthorized CHAMPUS payment, or (2) a claim that is false or fictitious, or includes or is supported by any written statement which asserts a material fact which is false or fictitious, or includes or is supported by any written statement that (a) omits a material fact and (b) is false or fictitious as a result of such omission and (c) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact. It is presumed that, if a deception or misrepresentation is established and a CHAMPUS claim is filed, the person responsible for the claim had the requisite knowledge. This presumption is rebuttable only by substantial evidence. It is further presumed that the provider of the services is responsible for the actions of all individuals who file a claim on behalf of the provider (for example, billing clerks); this presumption may only be rebutted by clear and convincing evidence.

Item, Service, or Supply. Includes (1) any item, device, medical supply, or service claimed to have been provided to a beneficiary (patient) and listed in an itemized claim for CHAMPUS payment or a request for payment, or (2) in the case of a claim based on costs, any entry or omission in a cost report, books of account, or other documents supporting the claim.

Ownership or Control Interest. For purposes of § 199.9(f)(1), a "person with an ownership or control interest" is anyone who

(1) Has directly or indirectly a 5 percent or more ownership interest in the entity; or

(2) Is the owner of a whole or part interest in any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by the entity or any of the property or assets thereof, which whole or part interest is equal to or exceeds 5 percent of the total property and assets of the entity; or

(3) Is an officer or director of the entity if the entity is organized as a corporation; or

(4) Is a partner in the entity if the entity is organized as a partnership.

Provider Exclusion and Suspension. The terms "exclusion" and "suspension", when referring to a provider under CHAMPUS, both mean the denial of status as an authorized provider, resulting in items, services, or

supplies furnished by the provider not being reimbursed, directly or indirectly, under CHAMPUS. The terms may be used interchangeably to refer to a provider who has been denied status as an authorized CHAMPUS provider based on (1) a criminal conviction or civil judgment involving fraud, (2) an administrative finding of fraud or abuse under CHAMPUS, (3) an administrative finding that the provider has been excluded or suspended by another agency of the Federal Government, a state, or a local licensing authority, (4) an administrative finding that the provider has knowingly participated in a conflict of interest situation, or (5) an administrative finding that it is in the best interests of the CHAMPUS or CHAMPUS beneficiaries to exclude or suspend the provider.

Provider Termination. When a provider's status as an authorized CHAMPUS provider is ended, other than through exclusion or suspension, based on a finding that the provider does not meet the qualifications, as set forth in § 199.6 of this part, to be an authorized CHAMPUS provider.

Sanction. For purpose of § 199.9, "sanction" means a provider exclusion, suspension, or termination.

Suspension of Claims Processing. The temporary suspension of processing (to protect the government's interests) of claims for care furnished by a specific provider (whether the claims are submitted by the provider or beneficiary) or claims submitted by or on behalf of a specific CHAMPUS beneficiary pending action by the Director, OCHAMPUS, or a designee, in a case of suspected fraud or abuse. The action may include the administrative remedies provided for in § 199.9 or any other Department of Defense issuance (e.g. DoD issuances implementing the Program Fraud Civil Remedies Act), case development or investigation by OCHAMPUS, or referral to the Department of Defense-Inspector General or the Department of Justice for action within their cognizant jurisdictions.

3. Section 199.6 is amended by revising paragraphs (a), (a)(1), and (a)(3); by removing paragraph (a)(4); by redesignating paragraph (a)(5) as (a)(4); by redesignating paragraph (a)(6) as (a)(5) and revising it; by redesignating paragraphs (a)(7) as (a)(6), (a)(8) as (a)(7), and (a)(9) as (a)(8); by revising paragraph (b)(3)(iv) and removing paragraphs (b)(3)(iv)(A) through

(b)(3)(iv)(D); and by adding a new paragraph (f) to read as follows:

§ 199.6 Authorized providers.

(a) *General.* This section sets forth general policies and procedures that are the basis for the CHAMPUS cost-sharing of medical services and supplies provided by institutions, individuals, or other types of providers. Providers seeking payment from the Federal Government through programs such as CHAMPUS have a duty to familiarize themselves with, and comply with, the program requirements.

(1) *Listing of provider does not guarantee payment of benefits.* The fact that a type of provider is listed in this section is not to be construed to mean that CHAMPUS will automatically pay a claim for services or supplies provided by such a provider. The provider who actually furnishes the service(s) must, in fact, meet all licensing and other requirements established by this Part to be an authorized provider; the provider must not be the subject of sanction under § 199.9; and, cost-sharing of the services must not otherwise be prohibited by this part. In addition, the patient must in fact be an eligible beneficiary and the services or supplies billed must be authorized and medically necessary, regardless of the standing of the provider.

(3) *Dual Compensation/Conflict of Interest.* Title 5, United States Code, section 5536 prohibits medical personnel who are active duty Uniformed Service members or civilian employees of the Government from receiving additional Government compensation above their normal pay and allowances for medical care furnished. In addition, Uniformed Service members and civilian employees of the Government are generally prohibited by law and agency regulations and policies from participating in apparent or actual conflict of interest situations in which a potential for personal gain exists or in which there is an appearance of impropriety or incompatibility with the performance of their official duties or responsibilities. The Departments of Defense, Health and Human Services, and Transportation have a responsibility, when disbursing appropriated funds in the payment of CHAMPUS benefits, to ensure that the laws and regulations are not violated. Therefore, active duty Uniformed Service members (including a reserve member while on active duty and civilian employees of the United States Government shall not be authorized to be CHAMPUS providers. While

individual employees of the Government may be able to demonstrate that the furnishing of care to CHAMPUS beneficiaries may not be incompatible with their official duties and responsibilities, the processing of millions of CHAMPUS claims each year does not enable Program administrators to efficiently review the status of the provider on each claim to ensure that no conflict of interest or dual compensation situation exists. The problem is further complicated given the numerous interagency agreements (for example, resource sharing arrangements between the Department of Defense and the Veterans Administration in the provision of health care) and other unique arrangements which exist at individual treatment facilities around the country. While an individual provider may be prevented from being an authorized CHAMPUS provider even though no conflict of interest or dual compensation situation exists, it is essential for CHAMPUS to have an easily administered, uniform rule which will ensure compliance with the existing laws and regulations. Therefore, a provider who is an active duty Uniformed Service member or civilian employee of the Government shall not be an authorized CHAMPUS provider. In addition, a provider shall certify on each CHAMPUS claim that he/she is not an active duty Uniformed Service member or civilian employee of the Government.

(4) For-profit institutions excluded under PFTH. * * *

(5) Utilization review and quality assurance. Providers approved as authorized CHAMPUS providers have certain obligations to provide services and supplies under CHAMPUS which are (i) furnished at the appropriate level and only when and to the extent medically necessary under the criteria of this part; (ii) of a quality that meets professionally recognized standards of health care; and, (iii) supported by adequate medical documentation as may be reasonably required under this part by the Director, OCHAMPUS, or designee, to evidence the medical necessity and quality of services furnished, as well as the appropriateness of the level of care. Therefore, the authorization of CHAMPUS benefits is contingent upon the services and supplies furnished by any provider being subject to pre-payment or post-payment utilization and quality assurance review under professionally recognized standards, norms, and criteria, as well as any standards or criteria issued by the Director OCHAMPUS, or a designee,

pursuant to this part. (Refer to §§ 199.4, 199.5, and 199.7 of this part.)

(6) Provider required. * * *

(7) Participating provider. * * *

(8) Limitation to authorized institutional provider designation. * * *

(b) * * *

(3) * * *

(iv) Institutions not in compliance with CHAMPUS standards. If a determination is made that an institution is not in compliance with one or more of the standards applicable to its specific category of institution, CHAMPUS shall take immediate steps to bring about compliance or terminate the approval as an authorized institution in accordance with § 199.9(f)(2).

(f) Exclusion. Regardless of any provision in this section, a provider who is suspended, excluded, or terminated under § 199.9 of this part is specifically excluded as an authorized CHAMPUS provider.

4. Section 199.7 is amended by removing paragraph (i) in its entirety; and by redesignating paragraphs (j) as (i) and (k) as (j) to read as follows:

§ 199.7 Claims submission, review and payment.

*** * * * ***

(h) * * *

(i) Erroneous payments and recoupment. * * *

(j) General assignment of benefits not recognized. * * *

5. Section 199.9 is added to read as follows:

§ 199.9 Administrative remedies for fraud, abuse, and conflict of interest.

(a) General. (1) This section sets forth provisions for invoking administrative remedies under CHAMPUS in situations involving fraud, abuse, or conflict of interest. The remedies impact institutional providers, professional providers, and beneficiaries (including parents, guardians, or other representatives of beneficiaries), and cover situations involving criminal fraud, civil fraud, administrative determinations of conflicts of interest or dual compensation, and administrative determinations of fraud or abuse. The administrative actions, remedies, and procedures may differ based upon whether the initial findings were made by a court of law, another agency, or the Director, OCHAMPUS (or designee).

(2) This section also sets forth provisions for invoking administrative remedies in situations requiring administrative action to enforce provisions of law, regulation, and policy in the administration of CHAMPUS and to ensure quality of care for CHAMPUS

beneficiaries. Examples of such situations may include a case in which it is discovered that a provider fails to meet requirements under this part to be an authorized CHAMPUS provider; a case in which the provider ceases to be qualified as a CHAMPUS provider because of suspension or revocation of the provider's license by a local licensing authority; or a case in which a provider meets the minimum requirements under this part but, nonetheless, it is determined that it is in the best interest of the CHAMPUS or CHAMPUS beneficiaries that the provider should not be an authorized CHAMPUS provider.

(3) The administrative remedies set forth in this section are in addition to, and not in lieu of, any other remedies or sanctions authorized by law or regulation. For example, administrative action under this section may be taken in a particular case even if the same case will be or has been processed under the administrative procedures established by the Department of Defense to implement the Program Fraud Civil Remedies Act.

(4) Providers seeking payment from the Federal Government through programs such as CHAMPUS have a duty to familiarize themselves with, and comply with, the program requirements.

(5) CHAMPUS contractors and peer review organizations have a responsibility to apply provisions of this regulation in the discharge of their duties, and to report all known situations involving fraud, abuse, or conflict of interest. Failure to report known situations involving fraud, abuse, or conflict of interest will result in the withholding of administrative payments or other contractual remedies as determined by the Director, OCHAMPUS, or a designee.

(b) Abuse. The term "abuse" generally describes incidents and practices which may directly or indirectly cause financial loss to the Government under CHAMPUS or to CHAMPUS beneficiaries. For the definition of abuse, see § 199.2 of this part. The type of abuse to which CHAMPUS is most vulnerable is the CHAMPUS claim involving the overutilization of medical and health care services. To avoid abuse situations, providers have certain obligations to provide services and supplies under CHAMPUS which are: Furnished at the appropriate level and only when and to the extent medically necessary as determined under the provisions of this part; of a quality that meets professionally recognized standards of health care; and, supported by adequate medical documentation as

may reasonably be required under this Part by the Director, OCHAMPUS, or a designee, to evidence the medical necessity and quality of services furnished, as well as the appropriateness of the level of care. A provider's failure to comply with these obligations can result in sanctions being imposed by the Director, OCHAMPUS, or a designee, under this section. Even when administrative remedies are not initiated under this section, abuse situations under CHAMPUS are a sufficient basis for denying all or any part of CHAMPUS cost-sharing of individual claims. The types of abuse or possible abuse situations under CHAMPUS include, but are not limited, to the following:

(1) A pattern of waiver of beneficiary (patient) cost-share or deductible.

Note: In a case of a legitimate bad debt write-off of patient cost-share or deductible, the provider's record should include documentation as to what efforts were made to collect the debt, when the debt was written off, why the debt was written off, and the amount of the debt written off.

(2) Improper billing practices. Examples include, charging CHAMPUS beneficiaries rates for services and supplies that are in excess of those charges routinely charged by the provider to the general public, commercial health insurance carriers, or other federal health benefit entitlement programs for the same or similar services. (This includes dual fee schedules—one for CHAMPUS beneficiaries and one for other patients or third-party payers. This also includes billing other third-party payers the same as CHAMPUS is billed but accepting less than the billed amount as reimbursement. However, a formal discount arrangement such as through a preferred provider organization, may not necessarily constitute an improper billing practice.)

(3) A pattern of claims for services which are not medically necessary or, if medically necessary, not to the extent rendered. For example, a battery of diagnostic tests are given when, based on the diagnosis, fewer tests were needed.

(4) Care of inferior quality. For example, consistently furnishing medical or mental health services that do not meet accepted standards of care.

(5) Failure to maintain adequate medical or financial records.

(6) Refusal to furnish or allow the Government (for example, OCHAMPUS) or Government contractors access to records related to CHAMPUS claims.

(7) Billing substantially in excess of customary or reasonable charges unless it is determined by OCHAMPUS that the

excess charges are justified by unusual circumstances or medical complications requiring additional time, effort, or expense in localities when it is accepted medical practice to make an extra charge in such cases.

(8) Unauthorized use of the term "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)" in private business. While the use of the term "CHAMPUS" is not prohibited by federal statute, misrepresentation or deception by use of the term "CHAMPUS" to imply an official connection with the Government or to defraud CHAMPUS beneficiaries may be a violation of federal statute. Regardless of whether the actual use of the term "CHAMPUS" may be actionable under federal statute, the unauthorized or deceptive use of the term "CHAMPUS" in private business will be considered abuse for purposes of this Section.

(c) *Fraud.* For the definition of fraud, see § 199.2 of this part. Examples of situations which, for the purpose of this Part, are presumed to be fraud include, but are not limited to:

(1) Submitting CHAMPUS claims (including billings by providers when the claim is submitted by the beneficiary) for services, supplies, or equipment not furnished to, or used by, CHAMPUS beneficiaries. For example, billing or claiming services when the provider was on call (other than an authorized standby charge) and did not provide any specific medical care to the beneficiary; providing services to an ineligible person and billing or submitting a claim for the services in the name of an eligible CHAMPUS beneficiary; billing or submitting a CHAMPUS claim for an office visit for a missed appointment; or billing or submitting a CHAMPUS claim for individual psychotherapy when a medical visit was the only service provided.

(2) Billing or submitting a CHAMPUS claim for costs for noncovered or nonchargeable services, supplies, or equipment disguised as covered items. Some examples are: (i) Billings or CHAMPUS claims for services which would be covered except for the frequency or duration of the services, such as billing or submitting a claim for two one-hour psychotherapy sessions furnished on separate days when the actual service furnished was a two-hour therapy session on a single day, (ii) spreading the billing or claims for services over a time period that reduces the apparent frequency to a level that may be cost-shared by CHAMPUS, (iii) charging to CHAMPUS, directly or indirectly, costs not incurred or not

reasonably allowable to the services billed or claimed under CHAMPUS, for example, costs attributable to nonprogram activities, other enterprises, or the personal expenses of principals, or (iv) billing or submitting claim on a fee-for-service basis when in fact a personal service to a specific patient was not performed and the service rendered is part of the overall management of, for example, the laboratory or x-ray department.

(3) Breach of a provider participation agreement which results in the beneficiary (including parent, guardian, or other representative) being billed for amounts which exceed the CHAMPUS-determined allowable charge or cost.

(4) Billings or CHAMPUS claims for supplies or equipment which are clearly unsuitable for the patient's needs or are so lacking in quality or sufficiency for the purpose as to be virtually worthless.

(5) Billings or CHAMPUS claims which involve flagrant and persistent overutilization of services without proper regard for results, the patient's ailments, condition, medical needs, or the physician's orders.

(6) Misrepresentations of dates, frequency, duration, or description of services rendered, or of the identity of the recipient of the services or the individual who rendered the services.

(7) Submitting falsified or altered CHAMPUS claims or medical or mental health patient records which misrepresent the type, frequency, or duration of services or supplies or misrepresent the name(s) of the individual(s) who provided the services or supplies.

(8) Duplicate billings or CHAMPUS claims. This includes billing or submitting CHAMPUS claims more than once for the same services, billing or submitting claims both to CHAMPUS and the beneficiary for the same services, or billing or submitting claims both to CHAMPUS and other third-parties (such as other health insurance or government agencies) for the same services, without making full disclosure of material facts or immediate, voluntary repayment or notification to CHAMPUS upon receipt of payments which combined exceed the CHAMPUS-determined allowable charge of the services involved.

(9) Misrepresentation by a provider of his or her credentials or concealing information or business practices which bear on the provider's qualifications for authorized CHAMPUS provider status. For example, a provider representing that he or she has a qualifying doctorate in clinical psychology when the degree

is not from a regionally accredited university.

(10) Reciprocal billing. Billing or claiming services which were furnished by another provider or furnished by the billing provider in a capacity other than as billed or claimed. For example, practices such as the following: (i) One provider performing services for another provider and the latter bills as though he had actually performed the services (e.g., a weekend fill-in); (ii) providing service as an institutional employee and billing as a professional provider for the services; (iii) billing for professional services when the services were provided by another individual who was an institutional employee; (iv) billing for professional services at a higher provider profile than would be paid for the person actually furnishing the services, (for example, bills reflecting that an M.D. or Ph.D. performed the services when services were actually furnished by a licensed social worker, psychiatric nurse, or marriage and family counselor); or (v) an authorized provider billing for services which were actually furnished by an unauthorized or sanctioned provider.

(11) Submitting CHAMPUS claims at a rate higher than a rate established between CHAMPUS and the provider, if such a rate has been established. For example, billing or claiming a rate in excess of the provider's most favored rate limitation specified in a residential treatment center agreement.

(12) Arrangements by providers with employees, independent contractors, suppliers, or others which appear to be designed primarily to overcharge the CHAMPUS through various means (such as commissions, fee-splitting, and kickbacks) used to divert or conceal improper or unnecessary costs or profits.

(13) Agreements or arrangements between the supplier and recipient (recipient could be either a provider or beneficiary, including the parent, guardian, or other representative of the beneficiary) that result in billings or claims which include unnecessary costs or charges to CHAMPUS.

(d) *Conflict of Interest.* (1) Conflict of interest includes any situation where an active duty member of the Uniformed Services (including a reserve member while on active duty, active duty for training, or inactive duty training) or civilian employee of the United States Government, through an official federal position has the apparent or actual opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries to himself/herself or others with some potential for personal gain or the appearance of

impropriety. Although individuals under contract to the Uniformed Services are not considered "employees," such individuals are subject to conflict of interest provisions by express terms of their contracts and, for purposes of this Part, may be considered to be involved in conflict of interest situations as a result of their contract positions. In any situation involving potential conflict of interest of a Uniformed Service employee, the Director, OCHAMPUS, or a designee, may refer the case to the Uniformed Service concerned for appropriate review and action. If such a referral is made, a report of the results of findings and action taken shall be made to the Director, OCHAMPUS, by the Uniformed Service having jurisdiction within 90 days of receiving the referral.

(2) CHAMPUS cost-sharing shall be denied on any claim where a conflict of interest situation is found to exist. This denial of cost-sharing applies whether the claim is submitted by the individual who provided the care, the institutional provider in which the care was furnished, or the beneficiary.

(e) *Dual Compensation.* (1) Federal law (5 U.S.C. 5536) prohibits active duty members of the Uniformed Services or employees (including part-time or intermittent) appointed in the civil service of the United States Government from receiving additional compensation from the Government above their normal pay and allowances. This prohibition applies to CHAMPUS payments for care furnished to CHAMPUS beneficiaries by active duty members of the Uniformed Services or civilian employees of the Government.

(2) CHAMPUS cost-sharing of a claim shall be denied where the services or supplies were provided by an active duty member of the Uniformed Services or a civilian employee of the Government. This denial of CHAMPUS payment applies whether the claim for reimbursement is filed by the individual who provided the care, the institutional provider in which the care was furnished, or by the beneficiary.

Note: Physicians of the National Health Service Corps (NHSC) may be assigned to areas where there is a shortage of medical providers. Although these physicians would be prohibited from accepting CHAMPUS payments as individuals if they are employees of the United States Government, the private organizations to which they may be assigned may be eligible for payment, as determined by the Director, OCHAMPUS, or a designee.

(3) The prohibition against dual compensation does not apply to individuals under contract to the Uniformed Services or the Government.

(f) *Administrative Remedies.*

Administrative remedies available under CHAMPUS in this section are set forth below.

(1) *Provider exclusion or suspension.* The Director, OCHAMPUS, or a designee, shall have the authority to exclude or suspend an otherwise authorized CHAMPUS provider from the program based on any criminal conviction or civil judgment involving fraud by the provider; fraud or abuse under CHAMPUS by the provider; exclusion or suspension of the provider by another agency of the Federal Government, a state, or local licensing authority; participation in a conflict of interest situation by the provider; or, when it is in the best interests of the program or CHAMPUS beneficiaries to exclude or suspend a provider under CHAMPUS. In all cases, the exclusion or suspension of a provider shall be effective 15 calendar days from the date on the written initial determination issued under paragraph (h)(2) of this section.

(i) *Criminal conviction or civil judgment involving fraud by a provider.*—(A) *Criminal conviction involving CHAMPUS fraud.* A provider convicted by a Federal, state, foreign, or other court of competent jurisdiction of a crime involving CHAMPUS fraud, whether the crime is a felony or misdemeanor, shall be excluded or suspended from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee. The CHAMPUS exclusion or suspension applies whether or not the provider, as a result of the conviction, receives probation or the sentence is suspended or deferred, and whether or not the conviction or sentence is under appeal.

Note: Under the above paragraph (f)(1)(i)(A) of this section, an entity may be excluded or suspended from CHAMPUS whenever the entity is found to have a person, convicted of a crime involving CHAMPUS fraud, who has a direct or indirect ownership or control interest (see § 199.2) of 5 percent or more in the entity, or is an officer, director, agent or managing employee of the entity. The entity will have an opportunity to provide evidence to show that the ownership or control relationship has ceased. While an entity will not be excluded or suspended from CHAMPUS for employing a provider who has been sanctioned under this Section, the entity will be denied CHAMPUS payment for any services furnished by the sanctioned employee. As an authorized CHAMPUS provider, the entity is responsible for ensuring that all CHAMPUS claims involve services furnished to CHAMPUS beneficiaries by employees who meet all requirements under CHAMPUS for provider status.

(B) *Criminal conviction involving fraud of other Federal programs.* Any provider convicted by a Federal, state, or other court of competent jurisdiction of a crime involving another Federal health care or benefit program (such as plans administered under titles XVIII and XIX of the Social Security Act, Federal Workmen's Compensation, and the Federal Employees Program (FEP) for employee health insurance), whether the crime is a felony or misdemeanor, shall be excluded from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee. The CHAMPUS exclusion or suspension applies whether or not the provider, as a result of the conviction, receives probation or the sentence is suspended or deferred, and whether or not the conviction or sentence is under appeal.

(C) *Criminal conviction involving fraud of non-Federal programs.* Any provider convicted by a Federal, state, foreign, or other court of competent jurisdiction of a crime involving any non-Federal health benefit program or private insurance involving health benefits may be excluded or suspended from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee.

(D) *Civil fraud involving CHAMPUS.* If a judgment involving civil fraud has been entered (whether or not it is appealed) against a provider in a civil action involving CHAMPUS benefits (whether or not other Federal programs are involved), the provider shall be excluded or suspended from CHAMPUS for a period determined by the Director, OCHAMPUS, or a designee.

(E) *Civil fraud involving other programs.* If a judgment involving civil fraud has been entered against a provider (whether or not it has been appealed) in a civil action involving other public or private health care programs or health insurance, the provider may be excluded or suspended for a period of time determined by the Director, OCHAMPUS, or a designee.

(ii) *Administrative determination of fraud or abuse under CHAMPUS.* If the Director, OCHAMPUS, or a designee, determines that a provider has committed fraud or abuse as defined in this part, the provider shall be excluded or suspended from CHAMPUS for a period of time determined by the Director, OCHAMPUS, or a designee.

(iii) *Administrative determination that the provider has been excluded or suspended by another agency of the Federal Government, a state, or local licensing authority.* Any provider who is excluded or suspended by any other Federal health care program (for example, Medicare), shall be excluded

or suspended under CHAMPUS. A provider who has his/her credentials revoked through a Veterans Administration or Military Department credentials review process and who is excluded, suspended, terminated, retired, or separated, shall also be excluded or suspended under CHAMPUS. The period of time of exclusion or suspension shall be determined by the Director, OCHAMPUS, or a designee, pursuant to paragraph (g) of this section.

(iv) *Administrative determination that the provider has participated in a conflict of interest situation.* The Director, OCHAMPUS, or a designee, may exclude or suspend any provider who has knowingly been involved in a conflict of interest situation under CHAMPUS. The period of time of exclusion or suspension shall be determined by the Director, OCHAMPUS, or a designee, pursuant to paragraph (g) of this section. For purposes of this administrative determination, it will be presumed that a CHAMPUS provider knowingly participated in a conflict of interest situation if the provider employs, in the treatment of a CHAMPUS beneficiary (resulting in a CHAMPUS claim), any medical personnel who are active duty members of the Uniformed Services or civilian employees of the Government. The burden of proof to rebut this presumption rests with the CHAMPUS provider. Two exceptions will be recognized to the presumption that a conflict of interest exists. First, indirect CHAMPUS payments may be made to private organizations to which physicians of the National Health Service Corps (NHSC) are assigned. Second, any off-duty Government medical personnel employed in an emergency room of an acute care hospital will be presumed not to have had the opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries; therefore, CHAMPUS payments may be made to the employing hospital provided the medical care was not furnished directly by the off-duty Government medical personnel in violation of dual compensation provisions.

(v) *Administrative determination that it is in the best interests of the CHAMPUS or CHAMPUS beneficiaries to exclude or suspend a provider—(A) Unethical or improper practices or unprofessional conduct.* (1) In most instances, unethical or improper practices or unprofessional conduct by a provider will be program abuse and subject the provider to exclusion or suspension for abuse. However, in some cases such practices and conduct may

provide an independent basis for exclusion or suspension of the provider by the Director, OCHAMPUS, or a designee.

(2) Such exclusions or suspensions may be based on findings or recommendations of state licensure boards, boards of quality assurance, other regulatory agencies, state medical societies, peer review organizations, or other professional associations.

(B) *In any other case in which the Director, OCHAMPUS (or designee), determines that exclusion or suspension of a provider is in the best interests of CHAMPUS or CHAMPUS beneficiaries.* The Director, OCHAMPUS, or a designee, may exclude or suspend any provider if it is determined that the authorization of that particular provider under CHAMPUS poses an unreasonable potential for fraud, abuse, or professional misconduct. Any documented misconduct by the provider reflecting on the business or professional competence or integrity of the provider may be considered. Situations in which the Director, OCHAMPUS, or a designee, may take administrative action under this Section to protect CHAMPUS or CHAMPUS beneficiaries include, but are not limited to, a case in which it is determined that a provider poses an unreasonable potential cost to the Government to monitor the provider for fraud or abuse and to avoid the issuance of erroneous payments; or that the provider poses an unreasonable potential harm to the financial or health status of CHAMPUS beneficiaries; or that the provider poses any other unreasonable threat to the interests of CHAMPUS or CHAMPUS beneficiaries. One example of such circumstances involves a provider who, for his/her entire practice or for most of his/her practice, provides or bills for treatment that is not a CHAMPUS benefit, resulting in CHAMPUS frequently and repeatedly denying claims as non-covered services. This may occur when a professional provider furnishes sex therapy (a therapy which may be recognized by the provider's licensing authority but which is excluded from CHAMPUS coverage) and repeatedly submits CHAMPUS claims for the services.

(2) *Provider termination.* The Director, OCHAMPUS, or a designee, shall terminate the provider status of any provider determined not to meet the qualifications established by this part to be an authorized CHAMPUS provider.

(i) *Effective date of termination.* Except as provided in paragraph (g)(2)(ii) of this section, the termination shall be retroactive to the date on which

the provider did not meet the requirements of this Part.

(A) The retroactive effective date of termination shall not be limited due to the passage of time, erroneous payment of claims, or any other events which may be cited as a basis for CHAMPUS recognition of the provider notwithstanding the fact that the provider does not meet program qualifications. Unless specific provision is made in this part to "grandfather" or authorize a provider who does not otherwise meet the qualifications established by this part, all unqualified providers shall be terminated.

(B) Any claims cost-shared or paid under CHAMPUS for services or supplies furnished by the provider on or after the effective date of termination, even when the effective date is retroactive, shall be deemed an erroneous payment unless specific exception is provided in this Part. All erroneous payments are subject to collection under § 199.11 of this part.

(C) If an institution is terminated as an authorized CHAMPUS provider, the institution shall immediately give written notice of the termination to any CHAMPUS beneficiary (or their parent, guardian, or other representative) admitted to, or receiving care at, the institution on or after the effective date of the termination. In addition, when an institution is terminated with an effective date of termination after the date of the initial determination terminating the provider, any beneficiary admitted to the institution prior to the effective date of termination (or their parent, guardian, or other representative) shall be notified by the Director, OCHAMPUS, or a designee, by certified mail of the termination, and that CHAMPUS cost-sharing of the beneficiary's care in the institution will cease as of the effective date of the termination. However, any beneficiary admitted to the institution prior to any grace period extended to the institution under paragraph (f)(2)(ii)(A) of this section shall be advised that, if the beneficiary's care otherwise qualifies for CHAMPUS coverage, CHAMPUS cost-sharing of the care in the institution will continue in order to provide a reasonable period of transition of care; however the transitional period of CHAMPUS cost-sharing shall not exceed the last day of the month following the month in which the institution's status as a CHAMPUS provider is terminated. (This authorized CHAMPUS cost-sharing of the inpatient care received during the transition period is an exception to the general rule that CHAMPUS payment for care

furnished after the effective date of termination of the provider's status shall be deemed to be an erroneous payment.) If a major violation under paragraph (f)(2)(ii)(B) of this section is involved, in order to ensure immediate action is taken to transfer beneficiaries to an approved provider, CHAMPUS cost-sharing shall not be authorized after the effective date of termination of the provider's status.

(ii) *Institutions not in compliance with CHAMPUS standards.* If it is determined that an institution is not in compliance with one or more of the standards applicable to its specific category of institution under this Part, the Director, OCHAMPUS, or a designee, shall take immediate steps to bring about compliance or terminate the status of the provider as an authorized CHAMPUS provider.

(A) *Minor violations.* An institution determined to be in violation of one or more of the standards shall be advised by certified mail of the nature of the discrepancy or discrepancies and will be given a grace period of 30 days to effect appropriate corrections. The grace period may be extended at the discretion of the Director, OCHAMPUS, or a designee, but in no event shall the extension exceed 90 days.

(1) CHAMPUS will not cost-share a claim for any beneficiary admitted during the grace period.

(2) Any beneficiary admitted to the institution prior to the grace period (or the beneficiary's parent, guardian, or other representative) will be notified by the Director, OCHAMPUS, or a designee, in writing, of the minor violations and the grace period granted the institution to correct the violations. The beneficiary will also be advised that, if the beneficiary's care otherwise meets all requirements for CHAMPUS coverage, CHAMPUS cost-sharing will continue during the grace period.

(3) If the institution submits written notice before the end of the grace period that corrective action has been taken and if the Director, OCHAMPUS, or a designee, determines that the corrective action has eliminated the minor violations, the provider will be advised that the institution is restored to full status as an authorized CHAMPUS provider as of 12:01 a.m. on the day written notice of correction was received by the Director, OCHAMPUS, or a designee, or the day on which acceptable corrective action was completed in the judgment of the Director, OCHAMPUS, or a designee. Any beneficiary admitted to the institution prior to the grace period will be notified by the Director,

POCHAMPUS, or a designee, of the corrective action and that the provider continues to be an authorized CHAMPUS provider. CHAMPUS cost-sharing for any beneficiary admitted to the institution during the grace period shall be allowed only for care received after 12:01 a.m. on the day written notice of correction was received by the Director, OCHAMPUS, or a designee, or the day on which acceptable corrective action was completed in the judgment of the Director, OCHAMPUS, or a designee.

(4) If the institution has failed to give notification in writing before the end of the grace period that corrective action has been completed or, in the judgment of the Director, OCHAMPUS, or a designee, the institution has not completed acceptable corrective action during the grace period, the Director, OCHAMPUS, or a designee, may initiate action to terminate the provider as an authorized CHAMPUS provider.

(B) *Major violations.* If the Director, OCHAMPUS, or a designee, determines that an institution is in violation of standards detrimental to life, safety, or health, or substantially in violation of approved treatment programs, immediate action shall be taken to terminate the institution as an authorized CHAMPUS provider. The institution shall be notified by telegram, certified mail, or express mail of the termination under this subparagraph, effective on receipt of the notice. The notice shall include a brief statement of the nature of violations resulting in the termination and advise the institution that an initial determination formalizing the administrative action of termination will be issued pursuant to paragraph (h)(3)(ii) of this section within 15 days.

(3) *Beneficiary sanctions.* (i) With entitlement to CHAMPUS benefits based on public law, an eligible beneficiary will not be suspended or excluded from CHAMPUS. However, the Director, OCHAMPUS, or a designee, may take action deemed appropriate and reasonable to protect the Government from those beneficiaries (including sponsors, parents, guardians, or representatives of beneficiaries) who have submitted false claims.

(ii) Pursuant to § 199.11 of this part, the Director, OCHAMPUS, or a designee, may recover erroneous payments on claims involving fraud or false or misleading statements. Remedies for recovery of the erroneous payments include the use of offset against future CHAMPUS payments.

(iii) Under policies adopted by the Director, OCHAMPUS, or a designee,

individuals who, based on reliable information, have previously submitted fraudulent or false CHAMPUS claims, may be required to comply with any procedures (e.g., partial or total prepayment audit or review, restriction to a designated primary care provider, etc.) which the Director, OCHAMPUS, or a designee, deems appropriate to ensure that their future medical care and CHAMPUS claims (including the medical care and CHAMPUS claims submitted by or for members of their family) are valid.

(g) *Period of exclusion, suspension, or termination—(1) Exclusions or suspensions.* Except as otherwise required by paragraph (g)(1)(i) of this section, the Director, OCHAMPUS, or a designee, shall determine the period of exclusion or suspension for a provider using the factors set forth in paragraph (g)(1)(ii) of this section.

(i) *Exclusion or suspension of a provider based on the provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority.* If the administrative action under CHAMPUS is based solely on the provider's exclusion or suspension by another agency, state, or local licensing authority, the period of exclusion or suspension under CHAMPUS shall be for the same length of time of exclusion or suspension imposed by the other agency, state, or local licensing authority. The provider may request reinstatement as an authorized CHAMPUS provider if reinstatement is achieved under the other program prior to the end of the period of exclusion or suspension. If the administrative action under CHAMPUS is not based solely on the provider's exclusion or suspension by another agency, state, or local licensing authority, the minimum period of exclusion or suspension shall be for the same period of exclusion or suspension imposed by the other agency, state, or local licensing authority.

(ii) *Factors to be considered in determining the period of exclusion or suspension of providers under CHAMPUS.* In determining the period of exclusion or suspension of a provider, the Director, OCHAMPUS, or a designee, may consider any or all of the following:

(A) When the case concerns all or any part of the same issues which have been the subject of criminal conviction or civil judgment involving fraud by a provider:

(1) The period(s) of sentence, probation, and other sanction imposed by court order against the provider may be presumed reasonable and adopted as

the administrative period of exclusion or suspension under CHAMPUS, unless aggravating or mitigating factors exist.

(2) If any aggravating factors exist, then cause exists for the Director, OCHAMPUS, or a designee, to consider the factors set forth in paragraph (g)(1)(ii)(B) of this section, in imposing a period of administrative exclusion or suspension in excess of the period(s) of sentence, probation, and/or other sanctions imposed by court order. Examples of aggravating factors include, but are not limited to:

(i) An administrative determination by the Director, OCHAMPUS, or a designee, that the basis for administrative exclusion or suspension includes an act(s) of fraud or abuse under CHAMPUS in addition to, or unrelated to, an act(s) of fraud included in the court conviction or civil judgment.

(ii) The fraudulent act(s) involved in the criminal conviction or civil judgment, or similar acts, were committed over a significant period of time; that is, one year or more.

(iii) The act(s) of fraud or abuse had an adverse physical, mental, or financial impact on one or more CHAMPUS beneficiaries.

(iv) The loss or potential loss to CHAMPUS is over \$5,000. The entire amount of loss or potential loss to CHAMPUS due to acts of fraud and abuse will be considered, in addition to the amount of loss involved in the court conviction or civil judgment, regardless of whether full or partial restitution has been made to CHAMPUS.

(v) The provider has a prior court record, criminal or civil, or administrative record or finding of fraud or abuse.

(3) If any mitigating factors exist, then cause may exist for the Director, OCHAMPUS, or a designee, to reduce a period of administrative exclusion or suspension from any period(s) imposed by court conviction or civil judgment. Only the existence of either of the following two factors may be considered in mitigation:

(i) The criminal conviction or civil judgment only involved three or fewer misdemeanor offenses, and the total of the estimated losses incurred (including any loss from act(s) not involved in the conviction or judgment) is less than \$1,000, regardless of whether full or partial restitution has been made.

(ii) The criminal or civil court proceedings establish that the provider had a mental, emotional or physical condition, prior to or contemporaneous with the commission of the act(s), that reduced the provider's criminal or civil culpability.

(B) The Director, OCHAMPUS, or a designee, may consider the following factors in determining a reasonable period of exclusion or suspension of a provider under CHAMPUS:

(1) The nature of the claims and the circumstances under which they were presented;

(2) The degree of culpability;

(3) History of prior offenses (including whether claims were submitted while the provider was either excluded or suspended pursuant to prior administrative action);

(4) Number of claims involved;

(5) Dollar amount of claims involved;

(6) Whether, if a crime was involved, it was a felony or misdemeanor;

(7) If patients were injured financially, mentally, or physically; the number of patients; and the seriousness of the injury(ies);

(8) The previous record of the provider under CHAMPUS;

(9) Whether restitution has been made or arrangements for repayment accepted by the Government;

(10) Whether the provider has resolved the conflict of interest situations or implemented procedures acceptable to the Director, OCHAMPUS, or a designee, which will prevent conflict of interest in the future; and,

(11) Such other factors as may be deemed appropriate.

(2) *Terminations.* When a provider's status as an authorized CHAMPUS provider is ended, other than through exclusion or suspension, the termination is based on a finding that the provider does not meet the qualifications to be an authorized provider, as set forth in this part. Therefore, the period of termination in all cases will be indefinite and will end only after the provider has successfully met the established qualifications for authorized provider status under CHAMPUS and has been reinstated under CHAMPUS. Except as otherwise provided in this subparagraph, the following guidelines control the termination of authorized CHAMPUS provider status for a provider whose license to practice (or, in the case of an institutional provider, to operate) has been temporarily or permanently suspended or revoked by the jurisdiction issuing the license.

(i) Termination of the provider under CHAMPUS shall continue even if the provider obtains a license to practice in a second jurisdiction during the period of suspension or revocation of the provider's license by the original licensing jurisdiction. A provider who has licenses to practice in two or more jurisdictions and has one or more license(s) suspended or revoked will

also be terminated as a CHAMPUS provider.

(A) Professional providers shall remain terminated from the CHAMPUS until the jurisdiction(s) suspending or revoking the provider's license(s) to practice restores it or removes the impediment to restoration.

(B) Institutional providers shall remain terminated under CHAMPUS until their license is restored. In the event the facility is sold, transferred, or reorganized as a new legal entity, and a license issued under a new name or to a different legal entity, the new entity must submit an application to be an authorized CHAMPUS provider.

(ii) If the CHAMPUS provider status is terminated due to the loss of the provider's license, the effective date shall be retroactive to the date the provider lost the license; however, in the case of a professional provider who has licenses in two or more jurisdictions and submitted claims from a jurisdiction from which he/she had a valid license, the effective date of the termination will be 15 calendar days from the date of the written initial determination of termination for purposes of claims from the jurisdiction in which the provider still has a valid license.

(h) *Procedures for initiating and implementing the administrative remedies*—(1) *Temporary suspension of claims processing.* (i) In general, temporary suspension of claims processing may be invoked to protect the interests of the Government for a period reasonably necessary to complete investigation or appropriate criminal, civil, and administrative proceedings. The temporary suspension only delays the ultimate payment of otherwise appropriate claims. When claims processing involving a participating provider is temporarily suspended, the participation agreement remains in full force and the provider cannot repudiate the agreement because of the delay in the final disposition of the claim(s). Once it has been determined appropriate to end the temporary suspension of claims processing, CHAMPUS claims which were the subject of the suspension and which are otherwise determined to be in compliance with the requirements of law and regulation, will be processed to completion and payment unless such action is deemed inappropriate as a result of criminal, civil, or administrative remedies ultimately invoked in the case.

(ii) When adequate evidence exists to determine that a provider or beneficiary is submitting fraudulent or false claims or claims involving practices that may be fraud or abuse as defined by this

part, the Director, OCHAMPUS, or a designee, may suspend CHAMPUS claims processing (in whole or in part) for claims submitted by the beneficiary or any CHAMPUS claims involving care furnished by the provider. The temporary suspension of claims processing for care furnished by a provider may be invoked against all such claims, whether or not the claims are submitted by the beneficiary or by the provider as a participating CHAMPUS provider. In cases involving a provider, notice of the suspension of claims processing may also be given to the beneficiary community either directly or indirectly through notice to appropriate military facilities, health benefit advisors, and the information or news media.

(A) Adequate evidence is any information sufficient to support the reasonable belief that a particular act or omission has occurred.

(B) Indictment or any other initiation of criminal charges, filing of a complaint for civil fraud, issuance of an administrative complaint under the Program Fraud Civil Remedies Act, or issuance of an initial determination under this part for submitting fraudulent or false claims or claims involving practices that may be fraud or abuse as defined by this part, shall constitute adequate evidence for invoking temporary suspension of claims processing.

(iii) The Director, OCHAMPUS, or a designee, may suspend CHAMPUS claims processing without first notifying the provider or beneficiary of the intent to suspend payments. Following a decision to invoke a temporary suspension, however, the Director, OCHAMPUS, or a designee, shall issue written notice advising the provider or beneficiary that:

(A) A temporary suspension of claims processing has been ordered and a statement of the basis of the decision to suspend payment. Unless the suspension is based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section, the notice shall describe the suspected acts or omissions in terms sufficient to place the provider or beneficiary on notice without disclosing the Government's evidence.

(B) Within 30 days (or, upon written request received by OCHAMPUS during the 30 days and for good cause shown, within 60 days) from the date of the notice, the provider or beneficiary may:

(1) Submit to the Director, OCHAMPUS, or a designee, in writing, information (including documentary evidence) and argument in opposition to the suspension, provided the additional

specific information raises a genuine dispute over the material facts, or

(2) Submit a written request to present in person evidence or argument to the Director, OCHAMPUS, or a designee. All such presentations shall be made at the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) in Aurora, Colorado, at the provider's or beneficiary's own expense.

(C) Additional proceedings to determine disputed material facts may be conducted unless:

(1) The suspension is based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section, or,

(2) A determination is made, on the basis of the advice of the responsible Government official (e.g., an official of the Department of Justice, the designated Reviewing Official under the Program Fraud Civil Remedies Act, etc.), that the substantial interests of the Government in pending or contemplated legal or administrative proceedings based on the same facts as the suspension would be prejudiced.

(iv) If the beneficiary or provider submits, either in writing or in person, additional information or argument in opposition to the suspension, the Director, OCHAMPUS, or a designee, shall issue a suspending official's decision which modifies, terminates, or leaves in force the suspension of claims processing. However, a decision to terminate or modify the suspension shall be without prejudice to the subsequent imposition of suspension of claims processing, imposition of sanctions under this § 199.9, the recovery of erroneous payments under § 199.11 of this part, or any other administrative or legal action authorized by law or regulation. The suspending official's decision shall be in writing as follows:

(A) A written decision based on all the information in the administrative record, including any submission by the beneficiary or provider, shall be final in a case:

(1) Based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section,

(2) In which the beneficiary's or provider's submission does not raise a genuine dispute over material facts, or

(3) In which additional proceedings to determine disputed material facts have been denied on the basis of advice of a responsible Government official that the substantial interests of the Government in pending or contemplated legal or administrative proceedings would be prejudiced.

(B) In a case in which additional proceedings are necessary as to

disputed material facts, the suspending official's decision shall advise the beneficiary or provider that the case has been referred for handling as a hearing under § 199.10 of this part.

(v) A suspension of claims processing may be modified or terminated for reasons such as:

(A) Newly discovered evidence;

(B) Elimination of any of the causes for which the suspension was invoked; or

(C) Other reasons the Director, OCHAMPUS, or a designee, deems appropriate.

(vi) A suspension of claims processing shall be for a temporary period pending the completion of investigation and any ensuing legal or administrative proceedings, unless sooner terminated by the Director, OCHAMPUS, or a designee, or as provided in this subparagraph.

(A) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless the Government official responsible for initiation of the legal or administrative action requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal or administrative proceedings have been initiated during that period.

(B) The Director, OCHAMPUS, or a designee, shall notify the Government official responsible for initiation of the legal or administrative action of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give the official an opportunity to request an extension.

(2) *Notice of proposed administrative sanction.* (i) A provider shall be notified in writing of the proposed action to exclude, suspend, or terminate the provider's status as an authorized CHAMPUS provider.

(A) The notice shall state which sanction will be taken and the effective date of that sanction as determined in accordance with the provisions of this Part.

(B) The notice shall inform the provider of the situation(s), circumstance(s), or action(s) which form the basis for the proposed sanction and reference the paragraph of this Part under which the administrative action is being taken.

(C) The notice will be sent to the provider's last known business or office address (or home address if there is no known business address.)

(D) The notice shall offer the provider an opportunity to respond within 30 days (or, upon written request received

by OCHAMPUS during the 30 days and for good cause shown, within 60 days) from the date on the notice with either:

(1) Documentary evidence and written argument contesting the proposed action; or,

(2) A written request to present in person evidence or argument to the Director, OCHAMPUS, or a designee. All such presentations shall be made at the Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) in Aurora, Colorado, at the provider's own expense.

(3) *Initial determination.* (i) If, after the provider has exhausted, or failed to comply with, the procedures specified in paragraph (h)(2) of this section, the Director, OCHAMPUS, or a designee, decides to invoke an administrative remedy of exclusion, suspension, or termination of a provider under CHAMPUS, written notice of the decision will be sent to the provider by certified mail. Except in those cases where the sanction has a retroactive effective date, the written notice shall be dated no later than 15 days before the decision becomes effective. For terminations under paragraph (f)(2)(ii)(B) of this section, the initial determination may be issued without first implementing or exhausting the procedures specified in paragraph (h)(2) of this section.

(ii) The initial determination shall include:

(A) A statement of the sanction being invoked;

(B) A statement of the effective date of the sanction;

(C) A statement of the facts, circumstances, or actions which form the basis for the sanction and a discussion of any information submitted by the provider relevant to the sanction;

(D) A statement of the factors considered in determining the period of sanction;

(E) The earliest date on which a request for reinstatement under CHAMPUS will be accepted;

(F) The requirements and procedures for reinstatement; and,

(G) Notice of the available hearing upon request of the sanctioned provider.

(4) *Reinstatement procedures.*—(i) *Restitution.* (A) There is no entitlement under CHAMPUS for payment (cost-sharing) of any claim that involves either criminal or civil fraud as defined by law, or fraud or abuse or conflict of interest as defined by this part. In addition, except as specifically provided in this part, there is no entitlement under CHAMPUS for payment (cost-sharing) of any claim for services or supplies furnished by a provider who does not

meet the requirements to be an authorized CHAMPUS provider. In any of the situations described above, CHAMPUS payment shall be denied whether the claim is submitted by the provider as a participating claim or by the beneficiary for reimbursement. If an erroneous payment has been issued in any such case, collection of the payment will be processed under § 199.11 of this part.

(B) If the Government has made erroneous payments to a provider because of claims involving fraud, abuse, or conflicts of interest, restitution of the erroneous payments shall be made before a request for reinstatement as a CHAMPUS authorized provider will be considered. Without restitution or resolution of the debt under § 199.11 of this part, a provider shall not be reinstated as an authorized CHAMPUS provider. This is not an appealable issue under § 199.10 of this part.

(C) For purposes of authorization as a CHAMPUS provider, a provider who is excluded or suspended under this § 199.9 and who submits participating claims for services furnished on or after the effective date of the exclusion or suspension is considered to have forfeited or waived any right or entitlement to bill the beneficiary for the care involved in the claims. Similarly, because a provider is expected to know the CHAMPUS requirements for qualification as an authorized provider, any participating provider who fails to meet the qualification requirements for CHAMPUS is considered to have forfeited or waived any right or entitlement to bill the beneficiary for the care involved in the CHAMPUS claims. If, in either situation, the provider bills the beneficiary, restitution to the beneficiary may be required by the Director, OCHAMPUS, or a designee, as a condition for consideration of reinstatement as a CHAMPUS authorized provider.

(ii) *Terminated providers.* A terminated provider who subsequently achieves the minimum qualifications to be an authorized CHAMPUS provider or who has had his/her license reinstated or the impediment to reinstatement removed by the appropriate licensing jurisdiction may submit a written request for reinstatement under CHAMPUS to the Director, OCHAMPUS, or a designee. If restitution or proper reinstatement of license is not at issue, the Director, OCHAMPUS, or a designee, will process the request for reinstatement under the procedures established for initial requests for authorized CHAMPUS provider status.

(iii) *Providers (other than entities) excluded or suspended under*

CHAMPUS. (A) A provider excluded or suspended from CHAMPUS (other than an entity excluded under § 199.9(f)(1)(i)) may seek reinstatement by submitting a written request to the Director, OCHAMPUS, or a designee, any time after the date specified in the notice of exclusion or suspension or any earlier date specified in an appeal decision issued in the provider's appeal under § 199.10 of this part. The request for reinstatement shall include:

(1) Documentation sufficient to establish the provider's qualifications under this part to be a CHAMPUS authorized provider;

(2) A statement from the provider setting forth the reasons why the provider should be reinstated, accompanied by written statements from professional associates, peer review bodies, and/or probation officers (if appropriate), attesting to their belief that the violations that led to exclusion or suspension will not be repeated.

(B) A provider entity excluded from CHAMPUS under § 199.9(f)(1)(i) may seek reinstatement by submitting a written request to the Director, OCHAMPUS, or a designee, with documentation sufficient to establish the provider's qualifications under this Part to be a CHAMPUS authorized provider and either:

(1) Documentation showing the CHAMPUS reinstatement of the excluded individual provider whose conviction led to the CHAMPUS exclusion or suspension of the provider entity; or

(2) Documentation acceptable to the Director, OCHAMPUS, or a designee, that shows that the individual whose conviction led to the entity's exclusion:

(i) Has reduced his or her ownership or control interest in the entity below 5 percent; or

(ii) Is no longer an officer, director, agent or managing employee of the entity; or

(iii) Continues to maintain a 5 percent or more ownership or control interest in such entity, and that the entity due to circumstances beyond its control, is unable to obtain a divestiture.

Note: Under paragraph (h)(4)(iii)(B)(2) of this section, the request for reinstatement may be submitted any time prior to the date specified in the notice of exclusion or suspension or an earlier date specified in the appeal decision issued under § 199.10 of this part.

(iv) *Action on request for reinstatement.* In order to reinstate a provider as a CHAMPUS authorized provider, the Director, OCHAMPUS, or a designee, must determine that:

(A) The provider meets all requirements under this part to be an authorized CHAMPUS provider;

(B) No additional criminal, civil, or administrative action has been taken or is being considered which could subject the provider to exclusion, suspension, or termination under this section;

(C) In the case of a provider entity, verification has been made of the divestiture or termination of the owner, controlling party, officer, director, agent or managing employee whose conviction led to the entity's exclusion, or that the provider entity should be reinstated because the entity, due to circumstances beyond its control, cannot obtain a divestiture of the 5 percent or more ownership or controlling interest by the convicted party.

(v) *Notice of action on request for reinstatement—(A) Notice of approval of request.* If the Director, OCHAMPUS, or a designee, approves the request for reinstatement, he or she will:

(1) Give written notice to the sanctioned party specifying the date when the authorized provider status under CHAMPUS may resume; and

(2) Give notice to those agencies and groups that were originally notified, in accordance with § 199.9(k), of the imposition of the sanction. General notice may also be given to beneficiaries and other parties as deemed appropriate by the Director, OCHAMPUS, or a designee.

(B) *Notice of denial of request.* If the Director, OCHAMPUS, or a designee, does not approve the request for reinstatement, written notice will be given to the provider. If established procedures for processing initial requests for authorized provider status are used to review the request for reinstatement, the established procedures may be used to provide the notice that the provider does not meet requirements of this part for such status. If the provider continues to be excluded, suspended, or terminated under the provisions of this section, the procedures set forth in this paragraph (h) may be followed in denying the provider's request for reinstatement.

(5) *Reversed or vacated convictions or civil judgments involving CHAMPUS fraud.* (i) If a CHAMPUS provider is excluded or suspended solely on the basis of a criminal conviction or civil judgment involving a CHAMPUS fraud and the conviction or judgment is reversed or vacated on appeal,

CHAMPUS will void the exclusion of a provider. Such action will not preclude the initiation of additional independent administrative action under this section or any other administrative remedy based on the same facts or events which

were the subject of the criminal conviction or civil judgment.

(ii) If an exclusion is voided under paragraph (h)(5)(i) of this section, CHAMPUS will make payment, either to the provider or the beneficiary (if the claim was not a participating claim) for otherwise authorized services under CHAMPUS that are furnished or performed during the period of exclusion.

(iii) CHAMPUS will also void the exclusion of any entity that was excluded under § 199.9(f)(1)(i) based solely on an individual's conviction that has been reversed or vacated on appeal.

(iv) When CHAMPUS voids the exclusion of a provider or an entity, notice will be given to the agencies and others that were originally notified, in accordance with § 199.9(k).

(i) *Evidence required for determinations to invoke administrative remedies—(1) General.* Any relevant evidence may be used by the Director, OCHAMPUS, or a designee, if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal courts.

(2) *Types of evidence.* The types of evidence which the Director, OCHAMPUS, or a designee, may rely on in reaching a determination to invoke administrative remedies under this section include but are not limited to the following:

(i) Results of audits conducted by or on behalf of the Government. Such audits can include the results of 100 percent review of claims and related records or a statistically valid sample audit of the claims or records. A statistical sampling shall constitute *prima facie* evidence of the number and amount of claims and the instances of fraud, abuse, or conflict of interest.

(ii) Reports, including sanction reports, from various sources including a peer review organization (PRO) for the area served by the provider; state or local licensing or certification authorities; peer or medical review consultants of the Government, including consultants for Government contractors; state or local professional societies; or other sources deemed appropriate by the Director, OCHAMPUS, or a designee.

(iii) Orders or documents issued by Federal, state, foreign, or other courts of competent jurisdiction which issue findings and/or criminal convictions or civil judgments involving the provider, and administrative rulings, findings, or

determinations by any agency of the Federal Government, a state, or local licensing or certification authority regarding the provider's status with that agency or authority.

(j) *Suspending Administrative Action.*

(1) All or any administrative action may be suspended by the Director, OCHAMPUS, or a designee, pending action in the case by the Department of Defense—Inspector General, Defense Criminal Investigative Service, or the Department of Justice (including the responsible United States Attorney). However, action by the Department of Defense—Inspector General or the Department of Justice, including investigation, criminal prosecution, or civil litigation, does not preclude administrative action by OCHAMPUS.

(2) The normal OCHAMPUS procedure is to suspend action on the administrative process pending an investigation by the Department of Defense—Inspector General or final disposition by the Department of Justice.

(3) Though OCHAMPUS administrative action is taken independently of any action by the Department of Defense—Inspector General or by the Department of Justice, once a case is forwarded to the Department of Defense—Inspector General or the Department of Justice for legal action (criminal or civil), administrative action may be held in abeyance.

(4) In some instances there may be dual jurisdiction between agencies; as in, for example, the joint regulations issued by the Department of Justice and the Government Accounting Office regarding debt collection.

(k) *Notice to Other Agencies.* (1) When CHAMPUS excludes, suspends, or terminates a provider, the Director, OCHAMPUS, or a designee, will notify other appropriate agencies (for example, the Department of Health and Human Services and the state licensing agency that issued the provider's license to practice) that the individual has been excluded, suspended, or terminated as an authorized provider under CHAMPUS. An exclusion, suspension, or termination action is considered a public record. Such notice can include the notices and determinations sent to the suspended provider and other public documents such as testimony given at a hearing or exhibits or depositions given in a lawsuit or hearing. Notice may also be given to Uniformed Services Military Treatment Facilities, Health Benefit Advisors, beneficiaries and sponsors, the news media, and institutional providers if inpatient care was involved.

(2) If CHAMPUS has temporarily suspended claims processing, notice of

such action normally will be given to the affected provider and Uniformed Services Medical Treatment Facilities, Health Benefits Advisors, beneficiaries, and sponsors. Notice may also be given to any information or news media and any other individual, professional provider, or institutional provider, as deemed appropriate. However, since a "temporary suspension of claims processing" is by definition not a final or formal agency action, the basis for the action generally will not be disclosed. It is noted that the basis for the action can be a result of questions arising from routine audits to investigation of possible criminal violations.

(l) *Compromise, Settlement, and Resolution Authority.* (1) In lieu of invoking any remedy provided by this Section, the Director, OCHAMPUS, or a designee, may elect to enter into an agreement with the provider intended to correct the situation within an established time period and subject to any remedies deemed appropriate by the Director, OCHAMPUS, or a designee.

(2) When it is in the best interest of CHAMPUS, the Director, OCHAMPUS, has the discretionary authority to waive an action or enter into compromise or settlement of administrative actions taken under this § 199.9.

6. Section 199.10 is amended by revising paragraph (a), paragraphs (a)(1)(i)(A), (a)(1)(i)(B), (a)(1)(i)(C), and (a)(1)(ii); redesignating previous (a)(2)(i)(B) through (a)(2)(i)(D) as (a)(2)(i)(C) through (a)(2)(i)(E); adding new paragraph (a)(2)(i)(B); revising paragraph (a)(3); redesignating previous paragraphs (a)(4) through (a)(7) as paragraphs (a)(5) through (a)(8); adding new paragraph (a)(4); revising (a)(5), revising paragraphs (a)(6)(iv)(A) and (a)(6)(iv)(C); adding new paragraph (a)(6)(v); revising paragraphs (a)(7)(iii), (a)(7)(iv)(C), (a)(8)(i)(A), and (a)(8)(ii)(A); by adding a new paragraph (a)(9); by revising paragraphs (b), (b)(1)(i), (b)(1)(ii), (b)(1)(iv), (b)(2), (b)(3), (b)(4) introductory text, (c), (c)(2), (c)(5)(i) and (ii), (d), (d)(1)(i), (d)(1)(iii), (d)(2), (d)(9)(iii)(A), (d)(9)(iv)(C) and (d)(9)(iv)(D); by removing paragraphs (d)(10)(ii) and (d)(10)(iv); by adding a new paragraph (d)(10)(ii); by removing paragraph (d)(11)(iii); and by redesignating the previous paragraphs (d)(11)(iv), (d)(11)(v), (d)(11)(vi), (d)(11)(vii), (d)(11)(viii), (d)(11)(ix), (d)(11)(x), (d)(11)(xi), (d)(11)(xii), and (d)(11)(xiii) as subparagraphs (d)(11)(iii), (d)(11)(iv), (d)(11)(v), (d)(11)(vi), (d)(11)(vii), (d)(11)(viii), (d)(11)(ix),

(d)(11)(x) (revising paragraph (d)(11)(x)(A)), and the heading of (d)(11)(xi).

§ 199.10 Appeal and hearing procedures.

(a) *General.* This Section sets forth the policies and procedures for appealing decisions made by OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors adversely affecting the rights and liabilities of CHAMPUS beneficiaries, CHAMPUS participating providers, and providers denied the status of authorized provider under CHAMPUS. An appeal under CHAMPUS is an administrative review of program determinations made under the provisions of law and regulation. An appeal cannot challenge the propriety, equity, or legality of any provision of law or regulation.

(1) * * *

(i) * * *

(A) OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors shall mail notices of initial determinations to the affected provider or CHAMPUS beneficiary (or representative) at the last known address. For beneficiaries who are under 18 years of age or who are incompetent, a notice issued to the parent, guardian, or other representative, under established CHAMPUS procedures, constitutes notice to the beneficiary.

(B) CHAMPUS contractors and OCHAMPUSEUR shall notify a provider of an initial determination on a claim only if the provider participated in the claim. (See § 199.7 of this part.)

(C) Notice of an initial determination on a claim processed by a CHAMPUS contractor or OCHAMPUSEUR normally will be made on a CHAMPUS Explanation of Benefits (CEOB) form.

(D) * * *

(E) * * *

(ii) *Effect of initial determination.* The initial determination is final, unless appealed in accordance with this Section, or unless the initial determination is reopened by OCHAMPUS or the CHAMPUS contractor.

(2) * * *

(i) * * *

(B) A beneficiary who has an interest in receiving care or has received care from a particular provider cannot be an appealing party regarding the exclusion, suspension, or termination of the provider under § 199.9 of this part.

(3) *Burden of proof.* The burden of proof is on the appealing party to establish affirmatively by substantial evidence the appealing party's entitlement under law and this part to

the authorization of CHAMPUS benefits, approval of authorized CHAMPUS provider status, or removal of sanctions imposed under § 199.9 of this part. If a presumption exists under the provisions of this part or information constitutes *prima facie* evidence under the provisions of this part, the appealing party must produce evidence reasonably sufficient to rebut the presumption or *prima facie* evidence as part of the appealing party's burden of proof. CHAMPUS shall not pay any part of the cost or fee, including attorney fees, associated with producing or submitting evidence in support of an appeal.

(4) *Evidence in appeal and hearing cases.* Any relevant evidence may be used in the administrative appeal and hearing process if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal courts.

(5) *Late filing.* If a request for reconsideration, formal review, or hearings is filed after the time permitted in this section, written notice shall be issued denying the request. Late filing may be permitted only if the appealing party reasonably can demonstrate to the satisfaction of the Director, OCHAMPUS, or a designee, that the timely filing of the request was not feasible due to extraordinary circumstances over which the appealing party had no practical control. Each request for an exception to the filing requirement will be considered on its own merits. The decision of the Director, OCHAMPUS, or a designee, on the request for an exception to the filing requirement shall be final.

(6) *Appealable issue.* * * *

(i) * * *

(iv) * * *

(A) Determination of a person's eligibility as a CHAMPUS beneficiary is the responsibility of the appropriate Uniformed Service. Although OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors must make determinations concerning a beneficiary's eligibility in order to ensure proper disbursement of appropriated funds on each CHAMPUS claim processed, ultimate responsibility for resolving a beneficiary's eligibility rests with the Uniformed Services. Accordingly, disputed question of fact concerning a beneficiary's eligibility will not be considered an appealable issue under the provisions of this section, but

shall be resolved in accordance with § 199.3 of this part.

(C) Any sanction, including the period of the sanction, imposed under § 199.9 of this part which is based solely on a provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority is not appealable under this section. The provider must exhaust administrative appeal rights offered by the other agency that made the initial determination to exclude or suspend the provider. Similarly, any sanction imposed under § 199.9 which is based solely on a criminal conviction or civil judgment against the provider is not appealable under this section. If the sanction imposed under § 199.9 is not based solely on the provider's criminal conviction or civil judgment or on the provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority, that portion of the CHAMPUS administrative determination which is in addition to the criminal conviction/civil judgment or exclusion/suspension by the other agency may be appealed under this section.

(v) A decision by the Director, OCHAMPUS, or a designee, as a suspending official when the decision is final under the provisions of § 199.9(h)(1)(iv)(A).

(7) *Amount in dispute.* * * *

(iii) There is no requirement for an amount in dispute when the appealable issue involves a denial of a provider's request for approval as an authorized CHAMPUS provider or the determination to exclude, suspend, or terminate a provider's authorized CHAMPUS provider status.

(iv) * * *

(C) At least one of the claims so combined has had a reconsideration decision issued by OCHAMPUSEUR or a CHAMPUS contractor.

Note: A request for administrative review under this appeal process which involves a dispute regarding a requirement of law or regulation (paragraph (a)(6)(i) of this section) or does not involve a sufficient amount in dispute (paragraph (a)(7) of this section) may not be rejected at the reconsideration level of appeal. However, an appeal shall involve an appealable issue and sufficient amount in dispute under these paragraphs to be granted a formal review or hearing.

(8) *Levels of appeal.* The sequence and procedures of a CHAMPUS appeal vary, depending on whether the initial determination was made by OCHAMPUS, OCHAMPUSEUR, or a CHAMPUS contractor.

(i) *Appeal levels for initial determination made by*

OCHAMPUSEUR or CHAMPUS contractor.

(A) Reconsideration by OCHAMPUSEUR or CHAMPUS contractor.

(C) * * *

(ii) * * *

(A) Formal review by OCHAMPUS except (1) initial determinations involving the suspension of claims processing where the Director, OCHAMPUS, or a designee, determines that additional proceedings are necessary as to disputed material facts and the suspending official's decision is not final under the provisions of § 199.9(h)(1)(iv)(A) or (2) initial determinations involving the sanctioning (exclusion, suspension, or termination) of CHAMPUS providers. Initial determinations involving these matters shall be appealed directly to the hearing level.

(B) Hearing.

(9) *Appeal decision.* An appeal decision at any level may address all pertinent issues which arise under the appeal or are otherwise presented by the information in the case record (for example, the entire episode of care in the appeal), and shall not be limited to addressing the specific issue appealed by a party. In the case of sanctions imposed under § 199.9, the final decision may affirm, increase or reduce the sanction period imposed by CHAMPUS, or otherwise modify or reverse the imposition of the sanction.

(b) *Reconsideration.* Any party to the initial determination made by OCHAMPUSEUR or the CHAMPUS contractor may request a reconsideration.

(1) * * *

(i) *Written request required.* The request must be in writing, shall state the specific matter in dispute, and shall include a copy of the notice of initial determination made by OCHAMPUSEUR or the CHAMPUS contractor such as the CEOB form.

(ii) *Where to file.* The request shall be submitted to the office that made the initial determination (i.e., OCHAMPUSEUR or the CHAMPUS contractor) or any other CHAMPUS contractor designated in the notice of initial determination.

* * *

(iv) *Official filing date.* A request for a reconsideration shall be deemed filed on the date it is mailed and postmarked. If the request does not have a postmark, it shall be deemed filed on the date received by OCHAMPUSEUR or the CHAMPUS contractor.

(2) *The reconsideration process.* The purpose of the reconsideration is to determine whether the initial determination was made in accordance with law, regulation, policies, and guidelines in effect at the time the care was provided or requested, or at the time of the initial determination and/or reconsideration decision involving a provider request for approval as an authorized provider under CHAMPUS. The reconsideration is performed by a member of the OCHAMPUSEUR or CHAMPUS contractor staff who was not involved in making the initial determination and is a thorough and independent review of the case. The reconsideration is based on the information submitted that led to the initial determination, plus any additional information that the appealing party may submit or OCHAMPUSEUR or the CHAMPUS contractor may obtain.

(3) *Timeliness of reconsideration determination.* OCHAMPUSEUR or the CHAMPUS contractor normally shall issue its reconsideration determination no later than 60 days from the date of receipt of the request for reconsideration by OCHAMPUSEUR or the CHAMPUS contractor.

(4) *Notice of reconsideration determination.* OCHAMPUSEUR or the CHAMPUS contractor shall issue a written notice of the reconsideration determination to the appealing party at his or her last known address. The notice of the reconsideration determination must contain the following elements:

(v) * * *

(5) * * *

(c) *Formal Review.* Any party to the initial determination may request a formal review by OCHAMPUS if the party is dissatisfied with the reconsideration determination and the reconsideration determination is not final under the provisions of paragraph (b)(5) of this section. Any party to the initial determination made by OCHAMPUS may request a formal review by OCHAMPUS if the party is dissatisfied with the initial determination *except* for a party to an initial determination involving the exclusion, suspension, or termination of authorized CHAMPUS provider status, and a written decision issued pursuant to § 199.9(h)(1)(iv)(A) involving the temporary suspension of claims processing. A hearing, but not a formal review level of appeal, may be available to a party to an initial determination involving the sanctioning of a provider or to a party to a written decision

involving a temporary suspension of claims processing.

(2) *The formal review process.* The purpose of the formal review is to determine whether the initial determination or reconsideration determination was made in accordance with law, regulation, policies, and guidelines in effect at the time the care was provided or requested or at the time of the initial determination, reconsideration, or formal review decision involving a provider request for approval as an authorized CHAMPUS provider. The formal review is performed by the Chief, Appeals and Hearings, OCHAMPUS, or a designee, and is a thorough review of the case. The formal review determination shall be based on the information upon which the initial determination or reconsideration determination was based, and any additional information the appealing party may submit or OCHAMPUS may obtain.

(5) * * *

(i) The issue is not appealable. (See paragraph (a)(6) of this section).

(ii) The amount in dispute is less than \$300. (See paragraph (a)(7) of this section).

(iii) * * *

(d) *Hearing.* Any party to the initial determination may request a hearing if the party is dissatisfied with the formal review determination and the formal review determination is not final under the provisions of paragraph (c)(5), of this section, or the initial determination involves the sanctioning of a provider under § 199.9 of this part and involves an appealable issue.

(1) * * *

(i) *Written request required.* The request shall be in writing, state the specific matter in dispute, include a copy of the appropriate initial determination or formal review determination being appealed, and include any additional information or documents not submitted previously.

(iii) *Allowed time to file.* The request shall be mailed within 60 days after the date of the notice of the initial determination or formal review determination being appealed.

(2) *Hearing process.* A hearing is an administrative proceeding in which facts relevant to the appealable issue(s) in the case are presented and evaluated in relation to applicable law, regulation, policies, and guidelines in effect at the time the care in dispute was provided or requested; at the time of the initial

determination, formal review determination, or hearing decision involving a provider request for approval under CHAMPUS as an authorized provider; or at the time of the act or event which is the basis for the imposition of sanctions under this part. A hearing, except for an appeal involving a provider sanction, generally shall be conducted as a nonadversary, administrative proceeding. However, an authorized party to any hearing, including CHAMPUS, may submit additional evidence or testimony relevant to the appealable issue(s) and may appoint a representative, including legal counsel, to participate in the hearing process.

(9) * * *

(iii) * * *

(A) An appealing party shall be deemed to have abandoned a request for hearing, other than when personal appearance is waived in accordance with § 199.10(d)(11)(xii), if neither the appealing party nor an appointed representative appears at the time and place fixed for the hearing and if, within 10 days after the mailing of a notice by certified mail to the appealing party by the hearing officer to show cause, such party does not show good and sufficient cause for such failure to appear and failure to notify the hearing officer before the time fixed for hearing that an appearance could not be made.

(iv) * * *

(C) When the issue is not appealable (see § 199.10(a)(6)).

(D) When the amount in dispute is less than \$300 (see § 199.10(a)(7)).

(10) *Preparation for hearing.* * * *

(ii) *Discovery.* Upon the written request of a party to the initial determination (including OCHAMPUS) and for good cause shown, the hearing officer will allow that party to inspect and copy all documents, unless privileged, relevant to issues in the proceeding that are in the possession or control of the other party participating in the appeal. The written request shall state clearly what information and documents are required for inspection and the relevance of the documents to the issues in the proceeding. Depositions, interrogatories, requests for admissions, and other forms of prehearing discovery are generally not authorized and the Department of Defense does not have subpoena authority for purposes of administrative hearings under this Section. If the hearing officer finds that good cause

exists for taking a deposition or interrogatory, the expense shall be assessed to the requesting party, with copies furnished to the hearing officer and the other party or parties to the hearing.

- (11) *Conduct of hearing.* * * *
 - (iii) *Taking of evidence.* * * *
 - (iv) *Questioning and admission of evidence.* * * *
 - (v) *Relevant evidence.* * * *
 - (vi) *CHAMPUS determination first.* * * *
 - (vii) *Testimony.* * * *
 - (viii) *Oral argument and briefs.* * * *
 - (ix) *Continuance of hearing.* * * *
 - (x) *Continuance for additional evidence.* * * *
- (A) *Continue hearing.* The hearing may be continued to a later date in accordance with § 199.10(d)(11)(ix), above.

- (xi) *Transcript of hearing.* * * *
 - (xii) *Waiver of right to appear and present evidence.* * * *

L.M. Bynum,

Alternate OSD Federal Register Liaison
Officer, Department of Defense.

June 1, 1989.

[FR Doc. 89-13438 Filed 6-13-89; 8:45 am]

BILLING CODE 3810-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52, 65, and 67

[FRL-3451-8]

Air Program; Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document removes outdated compliance data, reserved space, and reference material available from the Agency contained in 40 CFR Parts 52, 65, and 67. Removal of this material from the air program regulations is nonsubstantive in nature, and is designed to improve the cost effectiveness and useability of the regulations under these designated Parts.

EFFECTIVE DATE: June 14, 1989.

FOR FURTHER INFORMATION CONTACT: John B. Rasnic, Office of Air Quality Planning and Standards, Environmental Protection Agency, Room 3202, 401 M St., SW., Washington, DC 20460, Telephone: (202) 382-2826.

SUPPLEMENTARY INFORMATION: EPA, in an effort to improve the effectiveness and useability of regulations currently

contained in 40 CFR Parts 52, 65, and 67, is removing certain material contained in these parts.

Under 40 CFR Part 52, outdated compliance entries are being removed from the compliance schedules under each State. The entries being removed remain listed in the State Implementation Plan; however, only compliance dates since January 1, 1982, remain in the listings in these sections.

Under 40 CFR Part 65, all reserved subparts and sections containing regulatory text in the State listings, that do not currently apply to a specific firm, are being removed. This will provide easier access to the actual regulations in force.

Under 40 CFR Part 67, the Appendices which are guidance documents that no longer need to appear in the Code of Federal Regulations, are being removed, and the regulatory text is being amended to provide availability information for those who may wish copies in the future.

This action is non-substantive in nature, therefore no notice and comment is necessary.

Regulatory Review Requirements

A. Executive Order 12291

Under E.O. 12291, issued February 17, 1981, EPA must judge whether a rule is a major rule and, therefore, subject to the requirement that a Regulatory Impact Analysis be prepared. EPA has determined that this rule is not a major rule as the term is defined in section 1(b) of E.O. 12291.

B. Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act, the Administrator may certify that a rule will not, if promulgated, have a significant impact on a substantial number of small entities, and therefore does not require a regulatory flexibility analysis. Since no negative economic effect is expected upon any business entity from the promulgation of this rule, I certify that this rule will not have a significant economic impact on small entities.

C. Paperwork Reduction Act

EPA has determined that the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., does not apply to this final rule since no information collection or recordkeeping requirements are involved.

List of Subjects in 40 CFR Parts 52, 65, and 67

Air pollution controls, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Penalties, Reporting and recordkeeping

requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 31, 1989.

William K. Reilly,
Administrator.

Therefore, 40 CFR Chapter I is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

§§ 52.55, 52.429, 52.1023, 52.1080, 52.1125, 52.1274, 52.1383, 52.1830, 52.2036, 52.2077, 52.2123 and 52.2376 [Removed]

2. Sections 52.55, 52.429, 52.1023, 52.1080, 52.1125, 52.1274, 52.1383, 52.1830, 52.2036, 52.2077, 52.2123, and 52.2376 are removed.

§§ 52.84, 52.134, 52.240, 52.524, 52.576, 52.626, 52.677, 52.730, 52.778, 52.876, 52.927, 52.980, 52.1482, 52.1577, 52.1975, 52.2223, 52.2435, 52.2481, 52.2524 and 52.2578 [Amended]

3. Sections 52.84(b), 52.134(b), 52.240 (e) and (f)(1), 52.524(c), 52.576(a), 52.626(a), 52.677(b), 52.730(c), 52.778(c), 52.876(c)(1), 52.927(c), 52.980 (a) and (b), 52.1482(b), 52.1577(e), 52.1975(b), 52.2223(c), 52.2435(a), 52.2481(b), 52.2524 (c) and 52.2578(d) are removed and reserved where appropriate.

§ 52.825 [Amended]

4. Section 52.825 is amended in the table by removing all but the last two entries in the table.

§ 52.1175 [Amended]

5. Section 52.1175(e) is amended in the table as follows:

a. Remove the entries for Allegan, Alpena, Baraga, Eaton, Emmet, Huron, Ingham, Ionia, Marquette, Oakland, Otsego, Ottawa and St. Clair Counties.

b. Under Charlevoix County remove the entries for the "East Jordan Iron Works, Inc." and the "Medusa Cement Co."

c. Under Genesee County remove both entries for "GMC".

d. Under Macomb County remove the entry for "Ford Motor Co."

e. Under Midland County remove the first entry for "Dow Chemical" and the entry for "Dow Building 830".

f. Under Monroe County remove the entries for "Consolidated Packing Corp. Boiler 8," "Detroit Edison (Monroe Plant) Units 1-4," and the second entry for the "Dundee Cement Company".

g. Under Muskegon County remove the entry for "Tech-Cast, Inc."