

temporarily or permanently discontinue the repurchase of Units at the redemption price if the supply of Units exceeds the demand (or for any other business reason). On such occasions, Unitholders may redeem their Units through the Trustee, although the Sponsor shall have the right to repurchase such tendered Units at a price not less than the price the Unitholder would receive from the Trustee upon such tender.

Applicant's Legal Conclusions

8. Applicants contend that, since each Trust will have an initial net worth of \$100,000 invested in Securities prior to the date on which effectiveness is requested for the Trust under the 1933 Act, Applicants will comply fully with section 14(a) of the 1940 Act. Applicants recognize, however, that by withdrawing certificates representing the entire beneficial ownership interest of a Trust the Sponsor may be deemed to be reducing each Trust's net worth requirements of section 14(a). Applicants request an exemption to the extent that section 14(a) would require the Sponsor to take for its own account or place with others \$100,000 worth of Units under an investment letter, on the ground that such exemption is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act. Applicants will comply in all respects with the requirements of rule 14a-3, which provides an exemption from section 14(a) under the 1940 Act, except that the Trusts will not restrict their portfolio investments to "eligible trust securities."

9. In connection with the requested exemption from section 14(a), the Sponsor agrees to direct the Trustee to distribute to each investor his or her pro rata share of the net worth of the applicable Trust and to refund on demand and without deduction the sales load to purchasers of Units, if, within 90 days after the registration of a Trust Series under the 1933 Act becomes effective, the net worth of that Trust is reduced to \$100,000 or the Trust is terminated. In addition, the Sponsor agrees to instruct the Trustee of each Trust that if, as the result of the redemption by the Sponsor of unsold Units, the net worth of a Trust will be less than 40% of the market value of the Securities originally deposited in such Trust, the Trustee shall terminate the Trust in the manner provided in the Indenture. Following such termination, the Sponsor will distribute to Unitholders any Securities or other assets deposited with the Trustee on a

pro rata basis pursuant to the Indenture, and will refund any sales load on demand and without any deduction to any purchaser of Units.

10. With respect to the requested exemption from section 19(b) of the 1940 Act and rule 19b-1 thereunder, Applicants acknowledge that the purpose of these provisions is to ensure that no registered investment company can make a distribution of realized capital gains to shareholders in a manner that would indicate that they are part of regular dividends from investment income, and that distributions of capital gains other than at fiscal year ends, or soon thereafter, could have such an effect.

11. Rule 19b-1 contains an exception in subparagraph (b) which would enable a unit investment trust to distribute capital gain dividends received from a "regulated investment company" within a reasonable time after receipt. A further exception to rule 19b-1 is found in subparagraph (c) which, under certain circumstances, does not impose the requirements of rule 19b-1 on a unit investment trust investing in "eligible trust securities" as defined by rule 14a-3(b) of the 1940 Act. The Trust does not qualify for either exception to rule 19b-1 set forth in subparagraphs (b) or (c), however, because it may receive capital gains from other than a "regulated investment company" and because it does not intend to invest in "eligible trust securities."

12. Applicants submit that the dangers of manipulation of capital gains and confusion between capital gains and regular income distribution, which rule 19b-1 is designed to prevent, do not exist in the Trust because neither the Sponsor nor the Trust, like a Trust consisting of "eligible trust securities," has control over events, other than the selection of the Portfolio, which might trigger capital gains (i.e., the tendering of Units for redemption or credit factors affecting the Securities). Also, because distributions of capital are clearly identified in accompanying reports to Unitholders as a return of capital, and are relatively small in comparison to normal dividend distributions, the danger of confusion is not present in the operation of the Trust. For these reasons, applicants contend the granting of the exemption requested would be both consistent with the purposes and policies of the 1940 Act and in the best interest of the Unitholders.

Applicants' Condition

If the requested order is granted, the Applicants agree to the following conditions:

With respect to the relief sought by the Trusts not yet in existence, such relief shall be availed of only under the same or substantially similar facts and circumstances set forth in the application.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-30467 Filed 12-27-90; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Security of Aircraft and Safety of Passengers Transiting Lima, Peru

Pursuant to section 1115(d) of the Federal Aviation Act, on September 25, 1990, I notified the Government of Peru that I had determined that Jorge Chavez International Airport, Lima, Peru, did not maintain and administer effective security measures. On December 24, 1990, ninety days elapsed since my determination, and I have found that Jorge Chavez International Airport still does not maintain and administer effective security measures. My determination is based on Federal Aviation Administration assessments which reveal that security measures used at the airport do not meet the standards established by the International Civil Aviation Organization.

Pursuant to section 1115 of the Federal Aviation Act, (49 U.S.C. 1515), I have directed that a copy of this notice be published in the Federal Register, that my determination be displayed prominently in all U.S. airports regularly being served by scheduled air carrier operations, and that the news media be notified of my determination. In addition, as a result of this determination, all air carriers and foreign air carriers (and their agents) providing service between the United States and Jorge Chavez International Airport must provide notice of my determination to any passenger purchasing a ticket for transportation between the United States and the Lima Airport, with such notice to be made by written material included on or with such ticket.

Dated: December 24, 1990.

Samuel K. Skinner,

Secretary of Transportation.

[FR Doc. 90-30488 Filed 12-24-90; 12:36 pm]

BILLING CODE 4910-62-M

Federal Highway Administration**Environmental Impact Statement;
Dodge and Steele Counties, MN**

AGENCY: Federal Highway Administration (FHWA); DOT.

ACTION: Notice of Intent (NOI).

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway reconstruction project on US 14 in Dodge and Steele Counties, Minnesota.

FOR FURTHER INFORMATION CONTACT: Alan J. Friesen, Program Operations Engineer, Federal Highway Administration, Suite 490 Metro Square Building, 7th and Robert Streets, St. Paul, Minnesota, 55101. Telephone: (612) 290-3236.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Minnesota Department of Transportation (MnDOT), will prepare an Environmental Impact Statement (EIS) on a proposal to reconstruct US Highway 14 (US 14) to a divided four-lane roadway from the current four-lane section near Kasson to the current four-lane section of US 14 approximately 1.3 miles west of the junction of TH 218 in Steele County; a distance of about 22 miles.

Improvements to the roadway are considered warranted to enhance safety of travel for existing and projected traffic. Alternatives under consideration include: (1) Taking no action; (2) constructing a four-lane divided roadway utilizing the existing corridor; (3) constructing a four-lane divided roadway using a new location; and (4) constructing a four-lane roadway using a combination of existing and new alignments. Incorporated into the studies of the build alternatives will be design variations of grade and alignment.

Letters describing the proposed action and soliciting comments will be sent to appropriate federal, state and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. The initial scoping process began in early 1990 with the first public scoping meeting held in May 1990. As a result of that meeting and review of the draft scoping document, the project limits were expanded. The scoping process is being extended to accommodate an additional public scoping meeting which will be held in the City of Claremont, Dodge County, MN on January 3, 1991. Meetings with public officials will be held in Olmsted, Dodge and Steele Counties between

November 1990 and early 1992. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and that all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernment consultation on Federal programs and activities apply to this program.)

Issued on: December 18, 1990.

Charles E. Foslien,

Division Administrator FHWA Division Administrator.

[FR Doc. 90-30451 Filed 12-27-90; 8:45 am]

BILLING CODE 4910-22-M

**UNITED STATES INFORMATION
AGENCY****Program of Exchange with the Soviet
Union**

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: Subject to the availability of funds, the United States Information Agency (USIA) invites applications from U.S. educational and other not-for-profit institutions to conduct exchanges with the Soviet Union of undergraduate college and university students.

DATES: Deadlines for proposals: Must be received by COB February 15, 1991; Duration: The duration of the grant should be from six to eighteen months. Programs may begin no earlier than September 1, 1991. No funds may be expended until the grant agreement is signed.

ADDRESSES: Fifteen copies of the completed application, including required forms, should be submitted to the office below.

U.S. Information Agency, Office of the Executive Director, E/X, Room 336, 301 4th Street, Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: Interested U.S. organizations should write or call Mr. Merrill Miller or Ms. Debbie Trent at: USIA, 301 4th Street,

European Exchanges Branch, E/AEE, Room 208, Washington, DC 20547 Tel. (202) 619-4420.

SUPPLEMENTARY INFORMATION: These exchanges are to be conducted in accordance with the Agreement between the United States of America and the Union of Soviet Socialist Republics on Expansion of Undergraduate Exchanges, signed in Washington, DC on June 1, 1990 and in accordance with the protocol for the Program of Expanded Undergraduate Exchange between the United States of America and the Union of Soviet Socialist Republics. The purpose of this program is to increase undergraduate exchanges between the United States and the Soviet Union. For the academic year 1991-92 the intention is to increase the level by 250 students in each direction. Students in all academic fields are eligible; students of agriculture are to be especially encouraged to apply. Proposals should be reciprocal in nature, providing for an approximately equal number of American and Soviet students.

Overall authority for these exchanges is contained in the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87-256 (Fulbright-Hays Act). The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and people of other countries; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." Programs and projects must conform with all Agency requirements and guidelines and are subject to final review by the USIA contracting officer. Applications for substantive, undergraduate, academic exchange will be accepted from accredited, degree-granting U.S. universities or colleges, consortia of such universities and colleges, university systems, and not-for-profit organizations engaged in international educational exchange programs. Support is offered for exchanges of undergraduate students for academic programs of from eight weeks to an academic year's duration, including those lasting an academic quarter, trimester, or semester. Participants must be citizens either of the U.S. or of the Soviet Union.

Students should not have received their baccalaureates prior to

participation in this program. Proposals should be study programs for which academic credit is given. Applying institutions are expected to make their own direct arrangements with appropriate Soviet institutions.

Language Qualifications: It is expected that undergraduate students have sufficient fluency in the language of the country (or of the republic) to be able to pursue university study in that language and to be able to converse with citizens of the country without the aid of interpreters. In order to give added encouragement to the participation of students of agriculture as provided for in the Agreement, language standards may be modified for participating students of agriculture.

Allowable Costs

Projects: Project awards will be made in a range of amounts but will not exceed \$75,000 except for consortia of three or more member colleges or universities, state university systems, or for organizations holding open, national competitions. For organizations with less than four years of experience in international exchange activities, grants will be limited to a maximum of \$60,000. Grant-funded items of expenditure will be limited to the following categories:

- International travel
- Domestic travel
- Maintenance and per diem
- Academic program costs, e.g. tuition, university fees
- Books
- Insurance
- Transportation costs and partial maintenance for accompanying faculty or resident directors.
- Administration (salaries, benefits, other direct and indirect costs) may not exceed 20 percent of the total requested; administrative expenses should be cost-shared.

Orientation programs for participating students are encouraged, but funds for this purpose are not allowable from this grant award in this program.

Applications should demonstrate substantial cost sharing, including tuition waivers.

Interested U.S. organizations should write or call the office previously indicated to request detailed application packets, which include all necessary forms, formats, and guidelines for preparing proposals. Included in the guidelines when available will be the Protocol between the United States of America and the Union of Soviet Socialist Republics, currently being negotiated, which covers this exchange program.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Eligible proposals will be forwarded to panels of USIA officers for advisory review in conformity with the criteria set forth herein and with the guidelines for preparing proposals prior to funding decisions by delegated officials. All proposals will also be reviewed by the Agency's Office of the General Counsel, the appropriate geographic area office, and budget and contract offices. Completed applications will be reviewed according to the following criteria:

a. Adherence of proposed activities to the conditions described above and in the "Protocol for the Program of Expanded Undergraduate Exchange" between the United States of America and the Union of Soviet Socialist Republics.

b. Feasibility of the program plan and the capacity of the organization to conduct the exchange.

c. Track record—relevant Agency and outside assessments of the organization's experience with exchanges.

d. Multiplier effect/impact—the impact of the exchange activity on the wider community and on the development of continuing ties.

e. Value of U.S.-partner country relations—the assessment by USIA's geographic area office of the need, potential impact, and significance of the project in the partner country.

f. Cost effectiveness—greatest return on each grant dollar; degree of cost-sharing exhibited.

g. Diversity and pluralism—preference will be given to proposals that demonstrate efforts to provide for the participation of students with different major disciplines, from different regions, and of different socio-economic and ethnic backgrounds, to the extent feasible for the applicant institutions.

h. Preference will be given to full academic year programs.

Notification

All applicants will be notified of the results of the review process on or about May 15, 1991. Funded proposals will be subject to periodic reporting and evaluation requirements.

Dated: December 21, 1990.

Warren J. Obluck,

Deputy Associate Director, Bureau of Educational and Cultural Affairs.

FR Doc. 90-30398 Filed 12-27-90; 8:45 am

BILLING CODE 8230-01-M

FY 91 Summer Institute for African Teachers of English-as-a Foreign-Language from French and Portuguese Speaking Countries of Africa

AGENCY: United States Information Agency.

ACTION: Notice of request for proposals.

SUMMARY: The Bureau of Educational and Cultural Affairs of the United States Information Agency (USIA) solicits proposals for a Summer Institute for African secondary school teachers, trainers of secondary school teachers and supervisors/inspectors for English-as-a-Foreign-Language/English-as-a-Second-Language (EFL/ESL). Participants will be individuals who teach, administer, or supervise secondary school level programs in EFL/ESL. USIA asks for detailed proposals from U.S. institutions of higher education which have an acknowledged reputation in the field of teaching EFL/ESL, special expertise in handling cross-cultural programs, and expertise with African educators.

DATES: The deadline for submission of proposals is February 14, 1991. The Institute should be programmed to encompass about 45 days beginning on or about Friday, July 12, 1991, and ending on or about Saturday, August 24, 1991.

ADDRESSES: The proposal should be submitted to: U.S. Information Agency, Office of the Executive Director, E/X—room 336, 301 4th St. SW., Washington, DC 20547.

FOR FURTHER INFORMATION CONTACT: U.S. Information Agency, Office of Academic Programs, African Programs Branch, E/AEA; Attn: Ann J. Martin, room 232, 301 4th St. SW., Washington, DC 20547, telephone (202) 619-5355.

SUPPLEMENTARY INFORMATION:

Bureau of Educational and Cultural Affairs; Grant Programs; Summer Institute for Teachers of English as a Foreign Language From French and Portuguese-speaking Countries of Africa

Overview

The Bureau of Educational and Cultural Affairs of the United States Information Agency (USIA) solicits proposals for a Summer Institute for African secondary school teachers, trainers of secondary school teachers and supervisors/inspectors for English-as-a-Foreign-Language/English-as-a-Second-Language (EFL/ESL). Approximately 22 teachers selected from French and Portuguese speaking African countries will participate in the

Institute. Participants will be individuals who teach, administer, or supervise secondary school level programs in EFL/ESL.

Minimum qualifications for all participants will be a two-year teacher training diploma beyond secondary school. USIA asks for detailed proposals from U.S. institutions of higher education which have an acknowledged reputation in the field of teaching English-as-a-Foreign Language (EFL)/English-as-a-Second-Language (ESL), special expertise in handling cross-cultural programs, and experience with African educators.

The general objective of the Institute is to support and encourage the upgrading of the teaching of English at the secondary school level in French and Portuguese speaking African countries. To meet the needs of the various participants, two concurrent academic components within the same Institute should be designed: one for secondary level classroom teachers with responsibilities in curriculum planning and course material development; and one for teacher trainers with responsibilities in supervision and staff training. All grant activities must be consistent with and authorized by the Mutual Educational and Cultural Exchange Act, as amended (Pub. L. 87-256).

Time Frame and General Description

The Institute should be programmed to encompass about 45 days beginning on or about Friday, July 12, 1991, and ending on or about Saturday, August 24, 1991. The African participants will arrive directly at the campus site from their home countries. Actual arrival dates may be spread out a four-day period, from Wednesday to Saturday, depending upon airlines flight schedules from each country. It is expected that the university program staff will make arrangements to have participants met upon arrival at the airport nearest the university campus. Plans for receiving and housing participants will need to take the variation in arrival dates into account. Few participants will have visited the United States previously. In view of this, an initial orientation to the university community and a brief introduction to U.S. society and education should be considered an integral part of the Institute and should be held on the first two to three days of the program.

The applicant is asked to design a two part program:

(a) A five-week academic program at the university with emphasis on methodology and teaching techniques in EFL/ESL which will meet the special

needs of secondary school teachers and teacher trainers from Africa. The program should include a variety of formats such as discussion sessions, lectures, workshops, and practicums. Lengthy lectures should be kept at a minimum.

(b) A one-week escorted cultural and educational tour of Washington, DC, planned, arranged, and conducted by the Program Director and principal university staff. The tour should be seen as an integral part of the program, complementing and reinforcing the academic material. Programming in Washington should include a half-day briefing session at the U.S. Information Agency.

The academic program should provide time for interaction with American students, faculty, and administrators, and the local community to promote mutual understanding between people of the United States and people of African countries. In this regard, the Institute should incorporate cultural features such as community and cultural activities, field trips to places of local interest, home stays with families in the area (with other secondary educators if possible), and events which will bring the participants into contact with Americans from a variety of backgrounds.

Program Objectives

Although eventual program objectives will be based to some extent on preprogram needs assessment to be carried out by the U.S. institution selected, some specific areas to address in the Institute are:

1. EFL/ESL teaching methodology in theory and practice.
2. Improvement of pedagogical skills, including classroom management and discipline, with particular attention to the management of large classes of 50 or more students.
3. Development of curriculum materials during the Institute which can be used in the participants' respective countries. To the extent possible, Institute materials should be chosen and/or designed to be useful upon returning to Africa.
4. For teacher trainers: Enhancement of teacher training skills; evaluation and observation of classroom teachers; development of in-service training programs for teachers; designing and conducting workshops to train EFL/ESL teachers.
5. Language improvement in the areas of listening, speaking, writing, and reading and an enhanced understanding of English syntax, pronunciation and semantics, as necessary, based on preprogram needs assessment. For

instance, specialized discussions of the nuances and idiomatic expressions common to American English, as well as particular difficulties of grammar and pronunciation for speakers of EFL/ESL should be incorporated throughout the program.

6. Introduction to computer based word processing with emphasis on hands-on experience. Participants should learn how to improve their writing and editing skills through the flexibility provided by common word processing programs.

7. Visits to on-going EFL/ESL classes in local educational or community centers, providing participants with opportunities to practice EFL/ESL skills.

8. Involvement of participants in American culture through community/cultural activities. This should include interaction with Americans from a variety of backgrounds.

9. On-going evaluation and adjustment of programs components accordingly, as well as evaluation of the entire Institute.

10. Program design should exhibit evidence of adaptability to the different needs of the two groups; that is, to teachers and to teacher trainers.

Program Administration

All Institute programming and administrative logistics, management of the academic program and the cultural tour, local travel, and on-site university arrangements, including enrolling participants in Teachers of English to Speakers of other Languages (TESOL) will be the responsibility of the Institute grantee. USIA will be responsible for all communications to and from the U.S. Information Service posts in Africa, which submit nominations to the Academic Exchange Programs Division and are responsible for all international travel. USIA will provide the university with participants' curriculum vitae and itineraries and be available to offer any advice or guidance the university might find useful. Proposals should provide a detailed plan in response to the needs and priorities outlined above. Applicants should draw imaginatively on the full range of resources offered by their universities but may involve outstanding professionals from other universities or organizations.

The proposal must clearly demonstrate high quality on-site management capabilities for the academic and cross-cultural components of the Institute. The overall quality and effectiveness of the Institute hinges upon good administrative and organizational competence to manage

interactions between African educators and Americans.

All proposals should include the following:

1. A detailed plan in response to the needs and objectives outlined above. The detailed narrative should outline the structure and organization of the Institute including day-by-day agenda. It should also include a proposed list of preparatory and orientation materials to be distributed to participants before their arrival. The Institute grantee should also identify appropriate books and readings to be distributed to participants on arrival or to be sent to them upon their return home as follow-up to Institute themes.

2. Current curriculum vitae of proposed faculty and consultants.

3. A specific and detailed line-item budget for both administrative and programs costs. The budget should include any in-kind and cash contributions to the program from the university, contributions, cost-sharing, or the private sector. Included in the budget worksheet for each budget line-item should be an explanation detailing how costs were computed (in parentheses), i.e., salaries should include position title, role in the Institute, annual salary, and percent of effort used for this program.

The budget should include and elaborate on each of the following areas.

Provide information with derivational cost figures such as unit costs and number per unit whenever possible in parentheses:

A. Administrative Costs

(1) Salaries, benefits, and services (including support staff) for the Institute program.

(2) Administrative costs, office expenses and other costs covering the academic activities during the university program.

B. Program Costs

(1) Tuition, honoraria, film rentals, certificates, educational support materials on campus, as appropriate.

(2) Tour costs for university escort staff including per diem and ground transportation, if necessary.

(3) Group ground transportation and educational program costs on campus and during the cultural tour.

C. Indirect Costs

Indirect costs should be held to a minimum. Universities which were awarded grants to conduct the Institute

in the past have accepted a level of 8% indirect cost.

Universities have considered cost-sharing the amount in excess of 8%. A copy of the indirect cost rate of the cognizant agency should be included.

D. Domestic Air Travel for Escorts Only

Cost of the domestic program tour and return to campus at the end of the program for the escorts only.

E. Per Capita Participant Costs Based on 22 Participants

(1) Lodging and Meals: Campus housing and meals for the 5-week program should be shown as separate items. Include a \$10/day incidental allowance. Housing may be in graduate dormitories, faculty residences, or other, if necessary.

(2) Supplemental book allowance of \$150 and TESOL membership fee for each participant.

(3) Lodging and meals during Washington stay. The rate may not exceed published U.S. government allowance rates.

(4) Estimated domestic program air fare (from Institute site to Washington, DC, for participants).

For your guidance, our experience with similar Institutes indicates that the cost to USIA for this Institute should probably not exceed \$115,000.

Organizations should demonstrate a proved record (at least four years) of successful evaluations of work in international exchange, including responsible fiscal management and full compliance with all reporting requirements for grants. Pilot grants not to exceed \$60,000 (total USIA funding) may be awarded to otherwise eligible organizations with less experience in international exchange. Evaluation Criteria.

An advisory panel of senior USIA officers experienced in EFL/ESL, the exchange of international educators, and African affairs will use the following criteria when evaluating proposals prior to the final decision:

1. Quality and creative design of the Institute;

2. Quality, rigor, and appropriateness of proposed syllabus to goals of the Institute;

3. Evidence of the ability to be somewhat flexible in final program design in response to a pre-program needs assessment of the specific program participants.

4. Clear evidence of the ability to deliver a substantive academic and

pedagogical EFL/ESL program; access to EFL/ESL professionals and programs from various universities;

5. Demonstrated experience in administration of high quality EFL/ESL programs—experience with African countries is desirable;

6. A qualitative evaluation at the conclusion of the Institute;

7. Evidence of strong on-site administrative and managerial capabilities for international visitors with specific discussion of how managerial and logistical arrangements will be undertaken;

8. The experience of professional staff assigned to the Institute, especially in a cross-cultural context;

9. The availability of local and state resources for the orientation and Institute;

10. A well-thought out and comprehensive cultural tour to complement the academic program; and

11. Cost-effectiveness.

Submission of the Proposal

Applicants should submit 15 copies each of a 500 word summary and a detailed proposal not to exceed 20 typed, double-spaced pages addressing the points outlined above and following the detailed budget guidelines.

The application must also include the following forms required by USIA: a completed and signed USIA grant application cover sheet; an Assurance of Compliance form; Certification Regarding Drug-free Workplace Requirements; Certification Regarding Debarment, Suspension, and Other Responsibility Matters; and Certification for Contracts, Grants and Cooperative Agreements. (Required forms may be obtained from USIA.) Evaluative reports of projects similar to the proposed Institute program carried out by the applicant and germane letters of endorsement may be included in appendices. Final proposal must be received in the Agency by close of business February 14, 1991. The proposal should be submitted to: U.S. Information Agency, Office of the Executive Director, room 336, 301 4th St SW., Washington, DC 20547.

Dated: December 21, 1990.

Thomas E. E. Spooner,

Deputy Director, Office of Academic Programs, Bureau of Educational and Cultural Affairs.

[FR Doc. 90-30489 Filed 12-27-90; 8:45 am]

BILLING CODE 0230-01-M

Friday
December 28, 1990

Part II

General Services Administration

41 CFR Chapter 201
Implementation of the FIRM
Improvement Project; Final Rule,
Republication of Chapter

GENERAL SERVICES ADMINISTRATION

41 CFR Chapter 201

Implementation of the FIRMR Improvement Project

AGENCY: Information Resources Management Service, GSA.

ACTION: Final rule; republication of chapter.

SUMMARY: This amendment replaces the existing Federal Information Resources Management Regulation (FIRMR), 41 CFR chapter 201, including existing FIRMR Temporary Regulations, Interim Rules, and most Bulletins. The intent of this amendment is to simplify regulations and procedures about information management by Federal agencies and to present regulatory policy coverage concerning the acquisition, management, and use of automatic data processing (ADP) and telecommunications resources in a life cycle format. The amendment will also enable Federal contracting personnel to more easily use the FIRMR in conjunction with the Federal Acquisition Regulation (FAR) by consolidating all FIRMR contracting policies into a single subchapter that is organized for consistency with the FAR structure.

This regulation uses the umbrella term, Federal information processing (FIP) resources, to identify ADP and telecommunications resources that are subject to GSA's exclusive procurement authority.

EFFECTIVE DATE: This rule is effective April 29, 1991, but may be observed earlier. This rule is applicable to solicitations issued on or after the effective date.

FOR FURTHER INFORMATION: Contact Paul Whitson, GSA, Office of Information Resources Management Policy, telephone (202) 501-3194 or FTS 241-3194 (v) or (202) 501-0657 or FTS 241-0657 (tdd).

SUPPLEMENTARY INFORMATION: (1) In the January 11, 1988, Federal Register (53 FR 620), GSA announced the FIRMR Improvement Project, including a proposed new FIRMR structure.

(2) The initial phase of the FIRMR Improvement Project consolidated FIRMR contracting policies and procedures in a new subchapter D (part 201-39), "Acquisition of Federal Information Processing Resources by Contracting," issued as a proposed rule February 6, 1989 (54 FR 5905).

(3) The second phase announced a new FIRMR subchapter C, "Management and Use of Federal

Information Processing Resources," issued as a proposed rule October 12, 1989 (54 FR 41850).

(4) The third phase announced a new FIRMR subchapter A, "General" and subchapter B, "Management and Use of Information and Records," issued as a proposed rule February 7, 1990 (55 FR 4204).

(5) The new FIRMR, chapter 201, consists of the following subchapters and parts:

(a) Subchapter A, General. This subchapter consists of five parts, one of which is reserved (part 201-5).

Part 201-1, "Applicability and Authority," prescribes how the FIRMR applies to the management, acquisition, and use of FIP resources, records, and radio equipment by Federal agencies. It also discusses the basic authority for the FIRMR.

Part 201-2, "Designated Senior Officials (DSO)," provides a description of the authorities and responsibilities of the agency DSO.

Part 201-3, "The FIRMR System," describes the purpose, issuance, structure, and maintenance of the FIRMR.

Part 201-4, "Definitions and Acronyms," defines words, terms, and acronyms used in the FIRMR.

Part 201-5 is reserved.

Note: Subchapter A has associated with it a new FIRMR bulletin that clarifies FIRMR applicability to contracting actions for FIP resources. FIRMR bulletins are not regulatory; they provide guidance or detailed coverage of a subject and appear in the looseleaf version of the FIRMR.

(b) Subchapter B, Management and Use of Information and Records. This subchapter consists of 11 parts, seven of which are reserved (parts 201-8, 201-10, and 201-12 through 201-16).

Part 201-6, "Predominant Considerations," describes the legislative basis and goals of information management and provides an overview of the policies that must be addressed by senior agency IRM officials.

Part 201-7, "Planning," prescribes policies for information planning by Federal agencies.

Part 201-8 is reserved.

Part 201-9, "Creation, Maintenance, and Use of Records," prescribes policies and procedures for both agency records management programs and GSA Governmentwide records programs.

Part 201-10 is reserved.

Part 201-11, "Review and Evaluation," prescribes policies and procedures for the Federal Information Resources Management Review Program and the Information Resources Procurement and Management Review Program as they

relate to the management and use of information.

Parts 201-12 through 201-16 are reserved.

Note: Subchapter B has associated with it four new FIRMR bulletins that supersede one current bulletin and contain guidance and procedures transferred from the current FIRMR.

(c) Subchapter C, Management and Use of Federal Information Processing Resources. This subchapter consists of 22 parts, 15 of which are reserved (parts 201-19 and 201-25 through 201-38).

Part 201-17, "Predominant Considerations," provides an overview of policies that must be addressed by senior-level officials responsible for the management of agency information resources.

Part 201-18, "Planning and Budgeting," prescribes policies for developing a 5-year plan for meeting an agency's information technology needs. It describes how GSA uses agency planning in the delegation process and includes a requirement for agencies to submit copies of their planning documents to GSA annually.

Part 201-19 is reserved.

Part 201-20, "Acquisition," prescribes policies and procedures key to the acquisition of FIP resources. It covers requirements analysis, analysis of alternatives and activities associated with implementing the selected alternative, such as delegation of procurement authority and implementation of standards. (Acquisition by contracting is covered in part 201-39.)

Part 201-21, "Operations," prescribes policies for the operation of FIP resources, including policies regarding security, sharing, personal telephone calls, and restrictions on listening-in to or recording telephone conversations.

Part 201-22, "Review and Evaluation," prescribes each Federal agency's responsibility for the continuous evaluation of its information resources management program and addresses GSA's two Governmentwide review programs: The Federal Information Resources Management Review Program and The Information Resources Procurement and Management Review Program.

Part 201-23, "Disposition," contains policies for the disposition of FIP equipment and software, including procedures for reporting excess equipment to GSA for interagency screening.

Part 201-24, "GSA Services and Assistance," describes policies and procedure for using GSA mandatory

programs including the use of FTS2000 services.

Parts 201-25 through 201-38 are reserved.

Note: Subchapter C has associated with it 26 new FIRMR bulletins that supersede 38 existing bulletins and also contain guidance and procedures transferred from the FIRMR. A list of all current bulletins will be included in appendix C of the looseleaf version of the FIRMR.

(d) Subchapter D, Acquisition of Federal Information Processing Resources by Contracting. This subchapter consists of one part.

Part 201-39, "Acquisition of Federal Information Processing Resources by Contracting," consolidates all policies and procedures unique to acquiring Government ADP and telecommunications resources by contracting.

(e) The new FIRMR includes a subject index following the text of part 201-39. The index obviates the need for transition tables which are no longer included in the FIRMR.

(6) The General Services Administration (GSA) has determined that this rule is not a major rule for purposes of Executive Order 12291 of February 17, 1981. GSA decisions are based on adequate information concerning the need for, and the consequences of the rule. The rule is written to ensure maximum benefits to Federal agencies. This is a Governmentwide regulation that will have little or no net cost effect on society. The rule is not likely to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

List of Subjects 41 CFR Chapter 201

Archives and records, Computer technology, Telecommunications, Government procurement, property management, records management, and Federal Information Processing Resources activities.

Chapter 201 of title 41 of the Code of Federal Regulations is revised to read as follows:

CHAPTER 201—FEDERAL INFORMATION RESOURCES MANAGEMENT REGULATION

SUBCHAPTER A—GENERAL

Part

- 201-1 Applicability and Authority.
- 201-2 Designated Senior Officials.
- 201-3 The FIRMR System.
- 201-4 Definitions and Acronyms.
- 201-5 [Reserved]

SUBCHAPTER B—MANAGEMENT AND USE OF INFORMATION AND RECORDS

- 201-6 Predominant Considerations.
- 201-7 Planning.

- 201-8 [Reserved]
- 201-9 Creation, Maintenance, and Use of Records.
- 201-10 [Reserved]
- 201-11 Review and Evaluation.
- 201-12—201-16 [Reserved]

SUBCHAPTER C—MANAGEMENT AND USE OF FEDERAL INFORMATION PROCESSING RESOURCES

- 201-17 Predominant Considerations.
- 201-18 Planning and Budgeting.
- 201-19 [Reserved]
- 201-20 Acquisition.
- 201-21 Operations.
- 201-22 Review and Evaluation.
- 201-23 Disposition.
- 201-24 GSA Services and Assistance.
- 201-25—201-38 [Reserved]

SUBCHAPTER D—ACQUISITION OF FEDERAL INFORMATION PROCESSING RESOURCES BY CONTRACTING

- 201-39 Acquisition of Federal Information Processing Resources by Contracting.

FIRMR Index

SUBCHAPTER A—GENERAL

PART 201-1—APPLICABILITY AND AUTHORITY

Sec.

- 201-1.000 Scope of part.
- 201-1.001 [Reserved]
- 201-1.002 Applicability.
- 201-1.002-1 Policy.
- 201-1.002-2 Exceptions.
- 201-1.003 Authority.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-1.000 Scope of part.

This part prescribes the extent to which the Federal Information Resources Management Regulation (FIRMR) applies to the creation, maintenance, and use of Federal records and the acquisition, management, and use of Federal information processing (FIP) resources by Federal agencies. It also discusses the basic authority for the FIRMR.

§ 201-1.001 [Reserved]

§ 201-1.002 Applicability.

§ 201-1.002-1 Policy.

The FIRMR applies to—

(a) The acquisition, management, and use of FIP resources by Federal agencies.

(b) Any Federal agency solicitation or contract when either paragraph (b)(1), (b)(2), or (b)(3) applies:

(1) The solicitation or contract requires the delivery of FIP resources for use by a Federal agency or users designated by the agency.

(2) The solicitation or contract explicitly requires the use by the contractor of FIP resources that are not incidental to the performance of the contract. FIP resources acquired by a

contractor are incidental to the performance of a contract when:

(i) None of the principal tasks of the contract depend directly on the use of the FIP resources; or

(ii) The requirements of the contract do not have the effect of substantially restricting the contractor's discretion in the acquisition and management of FIP resources, whether the use of FIP resources is or is not specifically stated in the contract.

(3) The solicitation or contract requires the performance of a service or the furnishing of a product that is performed or produced making significant use of FIP resources that are not incidental to the performance of the contract. Significant use of FIP resources means:

(i) The service or product of the contract could not reasonably be produced or performed without the use of FIP resources; and

(ii) The dollar value of FIP resources expended by the contractor to perform the service or furnish the product is expected to exceed \$500,000 or 20 percent of the estimated cost of the contract, whichever amount is lower.

(c) The creation, maintenance, and use of records by Federal agencies.

§ 201-1.002-2 Exceptions.

(a) The FIRMR does not apply to the procurement of FIP resources—

(1) By the Central Intelligence Agency.

(2) By the Department of Defense when the function, operation or use of such resources—

(i) Involves intelligence activities, cryptologic activities related to national security, the command and control of military forces, or equipment that is an integral part of a weapon or weapons system; or

(ii) Is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include FIP resources used for routine administrative and business applications such as payroll, finance, logistics, and personnel management.

(b) The FIRMR does not apply to radar, sonar, radio or television equipment, except that the FIRMR is used by GSA to implement Federal Telecommunications Standards for radio equipment.

(c) When both FIP and other resources are being acquired under the same solicitation or contract and the FIRMR applies to the solicitation or contract, the FIRMR applies only to the FIP resources.

(d) While the FIRMR may require an agency to include in Federal solicitations and contracts provisions

and clauses that control the contractor's acquisition of FIP resources, the FIRM does not apply to FIP resources acquired by a Federal contractor that are incidental to the performance of a contract.

(e) The FIRM does not apply to the acquisition, management, and use of products containing embedded FIP equipment when:

(1) The embedded FIP equipment would need to be substantially modified to be used other than as an integral part of the product; or

(2) The dollar value of the embedded FIP equipment is less than \$500,000 or less than 20 percent of the value of the product, whichever amount is lower. Embedded FIP equipment is FIP equipment that is an integral part of the product, where the principal function of the product is not the "automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information."

§ 201-1.003 Authority.

(a) The FIRM is prepared, issued, and maintained, and the FIRM system is prescribed, by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress (63 Stat. 377), as amended (the "Property Act"), particularly sec. 205(c) (40 U.S.C. 486(c)), sec. 101(f) (40 U.S.C. 751(f)), and other authorities cited.

(b) The authority conferred upon the Administrator of General Services by 40 U.S.C. 759 shall not be construed as to impair or interfere with the determination by agencies of their individual FIP resources requirements, including the development of specifications for and the selection of the types and configurations of resources needed.

(c) The General Services Administration's (GSA's) records management authorities and responsibilities are defined under 44 U.S.C. 2901 et seq., which requires the Administrator to, among other things, provide guidance and assistance to Federal agencies to ensure economical and effective records management by agencies.

(d) The Archivist of the United States is responsible for providing guidance and assistance to Federal agencies to ensure adequate and proper documentation of the policies and transactions of the Federal Government and to ensure proper records disposition. Records management policies and guidance established by the Archivist are contained in regulations in

36 CFR chapter XII and in bulletins and handbooks issued by the National Archives and Records Administration.

PART 201-2—DESIGNATED SENIOR OFFICIALS

Sec.

201-2.000 Scope of part.

201-2.001 General.

201-2.002 Policies.

201-2.003 Procedures.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-2.000 Scope of part.

This part discusses the role of the agency designated senior official (DSO) which includes both—

(a) The senior official designated by executive agencies pursuant to the Paperwork Reduction Act (PRA), as amended, (44 U.S.C. 3501, et seq.) to be responsible for carrying out the agency's information resources management (IRM) functions; and

(b) The senior IRM official designated by the agency head for Federal agencies not subject to the PRA to be responsible for acquisitions of FIP resources made pursuant to a delegation of procurement authority (DPA).

§ 201-2.001 General.

(a) The PRA requires that the head of each executive agency designate a senior official who shall report directly to the agency head. The designated official is responsible for carrying out the IRM functions assigned to the agency by the PRA. These include the responsibility to—

(1) Systematically inventory the agency's major information systems;

(2) Periodically review the agency's IRM activities;

(3) Ensure the agency's information systems do not overlap each other or duplicate the systems of other agencies;

(4) Implement applicable Governmentwide and agency information policies, principles, standards, and guidelines with respect to information collection, paperwork reduction, statistical activities, records management activities, privacy and security of records, sharing and dissemination of information, acquisition and use of information technology, and other IRM functions;

(5) Periodically evaluate and, as needed, improve the accuracy, completeness, and reliability of data and records contained within Federal information systems; and

(6) Develop and annually revise a 5-year plan, in accordance with appropriate guidance provided by the Office of Management and Budget (OMB), for meeting the agency's information technology needs.

(b) The PRA also assigns to the designated official the responsibility for the conduct of and accountability for acquisitions of FIP resources made under a DPA from GSA. Therefore, when GSA delegates its procurement authority to executive agencies, it grants those delegations to the designated official when GSA determines that such officials are sufficiently independent of program responsibility and have sufficient experience, resources, and ability to fairly and effectively carry out procurements under GSA's authority as provided by 40 U.S.C. 759(b)(3). For Federal agencies not subject to the PRA, these delegations are given to the agency's senior IRM official designated by the agency head to be responsible for acquisitions of FIP resources made pursuant to a DPA.

§ 201-2.002 Policies.

(a) The heads of Federal agencies not subject to the PRA shall designate a senior IRM official to be responsible for acquisitions of FIP resources made pursuant to a DPA.

(b) The DSO shall be responsible for implementing the policies contained in the FIRM.

(c) The DSO may redelegate GSA's exclusive authorities for FIP resources to qualified officials. Such redelegations shall not relieve the DSO of the responsibility for conduct of and accountability for acquisitions of FIP resources made under a DPA from GSA.

§ 201-2.003 Procedures.

(a) Each Federal agency head shall advise GSA in writing of the position title and organizational identity of the DSO. The address is: GSA, Assistant Commissioner for Federal Information Resources Management (KA), 18th and F Streets, NW., Washington, DC 20405.

(b) The policies and procedures on delegation of GSA's exclusive procurement authority are contained in § 201-20.305.

(c) The DSO's relationship to agency contracting officials is discussed in § 201-39.106.

PART 201-3—THE FIRM SYSTEM

Sec.

201-3.000 Scope of part.

201-3.001 General.

Subpart 201-3.1—Purpose

201-3.100 Scope of subpart.

201-3.101 Purpose.

201-3.102 Relationship to the Federal Acquisition Regulation (FAR).

Subpart 201-3.2—Administration of the FIRM

201-3.200 Scope of subpart.

- 201-3.201 Issuance.
- 201-3.202 Structure.
- 201-3.203 Maintenance.
- 201-3.204 Copies.

Subpart 201-3.3—Agency Regulations

- 201-3.300 Scope of subpart.
- 201-3.301 Policy.
- 201-3.302 Limitations.

Subpart 201-3.4—Deviations from the FIRM

- 201-3.400 Scope of subpart.
- 201-3.401 Policy.
- 201-3.402 Exception.
- 201-3.403 Procedures.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-3.000 Scope of part.

This part describes the Federal Information Resources Management Regulations System.

§ 201-3.001 General.

(a) The Federal Information Resources Management Regulations System consists of the Federal Information Resources Management Regulation (FIRM), which is the primary document; and agency regulations that implement or supplement the FIRM. The FIRM includes interim rules which are published when time or exceptional circumstances do not permit the participation by agencies or the public before promulgation of an amendment for codification in the Code of Federal Regulations (CFR). FIRM interim rules are usually followed by a final rule which confirms that the interim rule is final and may include further amendments. FIRM interim rules have the same force and effect as codified material.

(b) From time to time, the General Services Administration (GSA) will issue nonregulatory publications to provide guidance and information. FIRM bulletins, handbooks, and reports are the documents most frequently used to issue this guidance material.

(1) FIRM bulletins contain guidance and information on various information resources management areas. FIRM bulletins are published in appendix B of the looseleaf edition of the FIRM.

(2) Handbooks and reports address specific program or technical areas where the audience generally will be defined by the subject matter.

(3) Appendix C of the looseleaf edition of the FIRM contains a listing of current bulletins, handbooks, and reports and information on how to obtain them.

Subpart 201-3.1—Purpose

§ 201-3.100 Scope of subpart.

This subpart describes the purpose of the FIRM and its relationship to the Federal Acquisition Regulation (FAR).

§ 201-3.101 Purpose.

The FIRM system is established to publish and codify uniform policies and procedures pertaining to information resources management activities by Federal agencies.

§ 201-3.102 Relationship to the Federal Acquisition Regulation (FAR).

(a) Part 201-39 contains Governmentwide policies and procedures unique to the acquisition of FIP resources by contracting. The FIRM relies on the FAR for general policies and procedures to be used in acquiring these resources. The policies and procedures of part 201-39 are in addition to, not in lieu of, the FAR policies and procedures, except when the FIRM specifically requires its policies and procedures, and not those of the FAR, to be followed.

(b) Notwithstanding the fact that the FAR is for the use of executive agencies in the acquisition of supplies and services, Federal agencies not otherwise subject to the FAR shall use the FAR in conjunction with the FIRM when acquiring FIP resources.

Subpart 201-3.2—Administration of the FIRM

§ 201-3.200 Scope of subpart.

This subpart describes the issuance, structure, and maintenance of the FIRM. It also describes how to obtain copies of the FIRM.

§ 201-3.201 Issuance.

(a) The FIRM is published in—

- (1) The Federal Register;
- (2) The CFR (cumulative form); and
- (3) A separate looseleaf edition available by subscription.

(b) Amendments and interim rules are published in the Federal Register, the CFR, and in looseleaf form. Bulletins are published in looseleaf form only.

(c) Handbooks and reports are published as separate stand-alone documents.

(d) The FIRM is issued as chapter 201 of title 41, CFR. Subsequent chapters in subtitle E of title 41 are reserved for agency regulations that implement or supplement the FIRM. The CFR staff will assign FIRM chapter numbers to requesting agencies.

§ 201-3.202 Structure.

(a) *Numbering.* The FIRM is divided into subchapters, parts, subparts,

sections, and subsections within chapter 201 of title 41 of the CFR. Subsection 201-9.202-1 is identified as follows:

Chapter	Part	Subpart	Section	Subsection
201—	9	2	02	—1

(b) References and citations.

(1) This regulation may be referred to as the Federal Information Resources Management Regulation or the FIRM.

(2) This regulation is cited as "41 CFR 201—" followed by the appropriate subordinate division numbers.

§ 201-3.203 Maintenance.

(a) The Commissioner, Information Resources Management Service, GSA is responsible for—

(1) Preparing proposed changes to the FIRM;

(2) Soliciting comments on proposed changes to the FIRM;

(3) Considering all comments received in response to notices of proposed changes;

(4) Arranging for agency and public meetings regarding FIRM changes;

(5) Preparing any final change in the appropriate FIRM format and language;

(6) Submitting any final change to the Federal Register Liaison Officer for publication in the Federal Register and printing for distribution; and

(7) Performing miscellaneous administrative tasks pertaining to the maintenance of the FIRM.

(b) The Administrator of General Services is responsible for signing all FIRM amendments and interim rules.

(c) The Administrator of General Services may issue a temporary change to the FIRM where solicitation of comments is impractical due to urgent and compelling circumstances (e.g., when a new statute must be implemented in a relatively short period of time). However, the temporary change will make provision for a public comment period of at least 30 days for consideration in the formulation of the final change to the FIRM.

§ 201-3.204 Copies.

(a) Copies of the FIRM in Federal Register (daily) and CFR (cumulative form, annually updated) form may be purchased from the Government Printing Office (GPO) Bookstore, Washington, DC 20402, telephone: (202) 275-2091.

(b) Copies of the FIRM in looseleaf edition (cumulative reprint plus amendments, interim rules, and bulletins) may be purchased by subscription from GPO.

Subpart 201-3.3—Agency Regulations**§ 201-3.300 Scope of subpart.**

This subpart prescribes the policy regarding the issuance of agency regulations to implement or supplement the FIRM.

§ 201-3.301 Policy.

(a) An agency head may issue or authorize the issuance of agency regulations that implement or supplement the FIRM.

(b) Agency regulations that are published in the *Federal Register* shall be codified under an assigned chapter in title 41, Code of Federal Regulations, and shall parallel the FIRM in format, arrangement, and numbering systems.

(c) Agency regulations that implement or supplement the FIRM and pertain solely to the acquisition of Federal information processing resources by contracting may be published in agency acquisition regulations.

§ 201-3.302 Limitations.

(a) Unless otherwise specified by law, agency regulations that implement or supplement the FIRM shall be limited to—

(1) Those necessary to implement FIRM policies and procedures within the agency; and

(2) Additional policies and procedures that supplement the FIRM to satisfy the specific needs of the agency.

(b) Agency regulations shall not—

(1) Unnecessarily repeat, paraphrase, or otherwise restate material contained in the FIRM or higher-level agency regulations; or

(2) Conflict or be inconsistent with the FIRM, except as required by law or as provided in FIRM subpart 201-3.4.

Subpart 201-3.4—Deviations from the FIRM**§ 201-3.400 Scope of subpart.**

This subpart prescribes the policies and procedures for authorizing deviations from the FIRM.

§ 201-3.401 Policy.

Deviations from the FIRM shall be kept to a minimum consistent with the specific needs and statutory authorities of each agency. Individual and class deviations may be authorized by GSA's Commissioner, Information Resources Management Service, or the officials designated by the Commissioner for this purpose.

§ 201-3.402 Exception.

(a) For an acquisition limited solely to providing electronic office equipment accessibility for employees with disabilities, an individual deviation from

the FIRM may be authorized by the agency's DSO or the DSO's authorized representative. This deviation authority is limited to those FIRM provisions that—

(1) Are not specifically prescribed by statute or executive order;

(2) Do not change the level of procurement authority delegated from GSA to the agency; and

(3) Impede or obstruct the acquisition of technology for employees with disabilities.

(b) A deviation authorized under paragraph (a) of this section may be granted immediately upon a written determination by the agency, identifying those FIRM provisions impeding or obstructing the acquisition of technology for employees with disabilities.

Agencies shall promptly provide a copy of each determination and deviation to: General Services Administration, Policy and Regulations Division (KMP), 18th & F Streets, NW., Washington, DC 20405.

§ 201-3.403 Procedures.

(a) The agency head or designee shall prescribe an agency procedure for the control of requests for deviations from the FIRM. The procedure should include coordination with the agency DSO as appropriate. Agencies shall provide a copy of this procedure upon request to the address in § 201-3.402(b).

(b) Each request shall explain the nature of and the reasons for the deviation.

(c) Agencies shall forward requests for deviations to the address in § 201-3.402(b).

PART 201-4—DEFINITIONS AND ACRONYMS

Sec.

201-4.000 Scope of part.

201-4.001 Definitions.

201-4.002 Acronyms.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-4.000 Scope of part.

This part defines words, terms, and acronyms used in the FIRM.

§ 201-4.001 Definitions.

Agency means Federal agency.

Agency procurement request (APR) means a request by a Federal agency for GSA to acquire Federal information processing (FIP) resources or for GSA to delegate the authority to acquire FIP resources.

Augmentation means adding to or upgrading existing FIP hardware or software to increase its productivity or prolong its useful life.

Automatic data processing equipment/data system (ADPE/DS) means a specific automated system

maintained by GSA to provide an inventory of the Federal Government's computer systems.

Capability validation means the technical verification of the ability of a proposed FIP system configuration, replacement component, or the features or functions of its software, to satisfy functional requirements. The intent is to ensure that the proposed FIP resource can provide the required functions. FIP performance requirements are not implied or measured in the validation. Examples of capability validation include—

(a) Operational capability demonstrations (OCD's) of the functions of the hardware, operating system, or support software;

(b) Verification of conformance with information processing standards;

(c) Expert examination of the technical literature supplied with the offer;

(d) Contacts with other users of the proposed information processing resource; and

(e) Vendor certification of conformance with the functional requirements.

Compatibility-limited requirement means a statement of FIP resources requirements expressed in terms that require the items to be compatible with existing FIP resources.

COMSEC means communications security systems, services, and concepts that constitute protective measures taken to deny unauthorized persons information derived from telecommunications of the United States Government related to national security and to ensure the authenticity of any such communications.

Consolidated local telecommunications service means local communications service provided by GSA to all Federal agencies located in a building, complex, or geographical area.

Copy means a duplicate of a document previously created.

Correspondence means letters, form letters, telegrams, memoranda, endorsements, summary sheets, postal cards, memo routing slips, and other written or electronic communications.

Customer premises equipment (CPE) means all telecommunications equipment and inside wiring located on the customer side of the demarcation point (demark). The demark is a point established in a building or complex to separate customer equipment from telephone company equipment.

Designated senior official (DSO) means—

(a) The senior official designated by executive agencies pursuant to the

Paperwork Reduction Act to be responsible for carrying out the agency's IRM functions (see 44 U.S.C. 3506); or

(b) The senior IRM official designated by the agency head for Federal agencies not subject to the Paperwork Reduction Act to be responsible for acquisitions of FIP resources made pursuant to a DPA.

Deviation means any one or combination of the following:

(a) The issuance or use of a policy, procedure, practice, solicitation provision, contract clause, or method pertaining to the acquisition, management, or use of Federal information processing resources that is inconsistent with the FIRM.

(b) The omission or modification of any policy, procedure, practice, solicitation provision or contract clause required by the FIRM.

(c) The authorization of lesser or greater limitations on the delegation, use, or application of any policy, procedure, solicitation provision, or contract clause prescribed by the FIRM, except that this does not preclude an agency from setting delegation thresholds at more restrictive levels than those established by the FIRM.

Directive means a written communication that initiates or governs action, conduct, or procedure. Directives are often issued as circulars, notices, regulations, orders, and handbooks, and include materials usually issued to multiple addressees in multiple copies for insertion in policy, administrative, or operations manuals. News releases, program announcements, catalogs, price lists, training materials, and correspondence are not included.

Excess FIP equipment means FIP equipment controlled by a Federal agency but no longer required for its needs.

Executive agency means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation (see 40 U.S.C. 472(a)).

Federal agency means any executive agency or any establishment in the legislative or judicial branch of the Government, except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction (see 40 U.S.C. 472(b)).

Federal information processing (FIP) resources means automatic data processing equipment (ADPE) as defined in Public Law 99-500 (40 U.S.C. 759(a)(2)), and set out in paragraphs (a) and (b) of this definition.

(a) Any equipment or interconnected system or subsystems of equipment that

is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception, of data or information—

(1) by a Federal agency, or
(2) under a contract with a Federal agency which—
(i) requires the use of such equipment, or
(ii) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

(b) Such term includes—
(1) computers;
(2) ancillary equipment;
(3) software, firmware, and similar procedures;
(4) services, including support services; and
(5) related resources as defined by regulations issued by the Administrator for General Services.

(c) The term, FIP resources, includes FIP equipment, software, services, support services, maintenance, related supplies, and systems (specific examples of what the term FIP resources includes and excludes are provided in FIRM Bulletin A-1). These terms are limited by paragraphs (a) and (b) of the definition of FIP resources and are defined as follows:

(d) *FIP equipment* means any equipment or interconnected system or subsystems of equipment used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.

(e) *FIP maintenance* means those examination, testing, repair, or part replacement functions performed on FIP equipment or software.

(f) *FIP related supplies* means any consumable item designed specifically for use with FIP equipment, software, services, or support services.

(g) *FIP services* means any service, other than FIP support services, performed or furnished by using FIP equipment or software.

(h) *FIP software* means any software, including firmware, specifically designed to make use of and extend the capabilities of FIP equipment.

(i) *FIP support services* means any commercial nonpersonal services, including FIP maintenance, used in support of FIP equipment, software, or services.

(j) *FIP system* means any organized combination of FIP equipment, software, services, support services, or related supplies.

Federal Telecommunications System (FTS) means the umbrella of local and

long distance telecommunications services, including FTS2000 long distance services, provided, operated, managed, or maintained by GSA for the common use of all Federal agencies and other authorized users.

File means an arrangement of records. The term is used to denote papers, photographs, photographic copies, maps, machine-readable information, or other recorded information regardless of physical form or characteristics, accumulated or maintained in filing equipment, boxes, or machine-readable media, or on shelves, and occupying office or storage space.

Form means a fixed arrangement of captioned spaces designed for entering and extracting prescribed information, including FIP systems forms, regardless of media.

Implementation plan means a document identifying the tasks that must be accomplished in order to place FIP resources into service. The plan also describes the management, contracting, technical, and operating assignments and responsibilities of systems operations.

Information resources management means the planning, budgeting, organizing, directing, training, promoting, controlling, and management activities associated with the burden, collection, creation, use, and dissemination of information by agencies, and includes the management of information and related resources, such as Federal information processing resources (see 44 U.S.C. 3502(13)).

Information Systems Security (INFOSEC) means a composite of factors necessary to protect FIP systems and the information they process to prevent exploitation through interception, unauthorized electronic access, or related technical intelligence threats, and to ensure authenticity. This protection results from the application of security measures; including cryptosecurity, transmission security, emission security, and computer security; to systems that generate, store, process transfer or communicate information of use to an adversary, and also includes the physical protection of sensitive material and sensitive technical security.

Interoperability means the ability of FIP resources to provide services to and accept services from other FIP resources and to use the services so exchanged to enable them to operate effectively together.

Long distance telephone service means any service or facility purchased with Government funds for completing

telephone calls outside of the local service area.

Lowest overall cost means the least expenditure of funds over the system life, price and other factors considered, including, but not necessarily limited to—

- (a) Prices for the FIP resources;
- (b) The present value adjustment, if used; and
- (c) The identifiable and quantifiable costs—
 - (1) Directly related to the acquisition and use of the FIP resources;
 - (2) Of conducting the contract action; and
 - (3) Of other administrative efforts directly related to the acquisition process.

Mail means letters, telecommunications, memoranda, post cards, documents, packages, publications, and other communications received for distribution or dispatch.

Most advantageous alternative means the alternative that provides the greatest value to the Government over the system life in terms of price or cost, quality, performance, and any other relevant factors.

National security and emergency preparedness (NSEP) means those physical, technical, and administrative characteristics of FIP systems that will ensure a prescribed level of survivability in times of national or other emergencies up to and including nuclear attack. Government common-use telecommunications systems are designed, built, tested, and maintained to meet the defined emergency mission needs of the Government entities that use them.

Obsolescence means the state of FIP hardware or software that is either in a degenerative condition which if not corrected will render the resource useless, or becoming technologically outmoded compared to other hardware or software being sold.

Optional form means a form developed by a Federal agency for use in two or more agencies and approved by GSA for nonmandatory Governmentwide use.

Outdated FIP equipment means any FIP equipment over eight years old, based on the initial commercial installation date of that model of equipment, and that is no longer in current production.

Overprinting means the printing of pertinent identical entries (e.g., agency name and address) in a captioned area on a Standard or Optional form.

Performance validation means the technical verification of the ability of a proposed FIP system configuration or replacement component to handle

agency-specific workload volumes (present and expected) within agency-determined performance time constraints. Examples of performance validation techniques include—

- (a) Timed execution of the existing agency programs, transactions, and data files on the proposed configuration;
- (b) Execution with synthetically generated workloads;
- (c) Remote terminal emulation with simulated on-line workloads;
- (d) Acceptance testing with present operational software, data files, and workloads;
- (e) "Stress testing" with exaggerated workload volumes;
- (f) Modeling of the interaction of the new information processing system and its workload;
- (g) Benchmarking as defined in applicable FIPS PUBS; and
- (h) Simulation modeling of FIP system performance, defined to mean the development and use of computer models for the study of actual or postulated workloads on simulated FIP systems.

Radar equipment means any radio detection device that provides information on range, azimuth, or elevation of objects.

Radio equipment means any equipment or interconnected system or subsystem of equipment (both transmission and reception) that is used to communicate over a distance by modulating and radiating electromagnetic waves in space without artificial guide. This does not include such items as microwave, satellite, or cellular telephone equipment.

Reassignment means the transfer of other-than-excess FIP equipment or the transfer of FIP software, within an agency.

Records means all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

Records creation means the production or reproduction of any record.

Records disposition means any activity with respect to disposal of temporary records no longer necessary for the conduct of business by destruction or donation; transfer of records to Federal agency storage facilities or records centers; transfer to the National Archives of the United States of records determined to have sufficient historical or other value to warrant continued preservation; or transfer of records from one Federal agency to any other Federal agency.

Records maintenance and use means any activity involving location of records of a Federal agency; storage, retrieval, and handling of records kept at office file locations by or for a Federal agency; processing of mail by a Federal agency; or selection and utilization of equipment and supplies associated with records and copying.

Report means data or information which is transmitted for use in determining policy; planning, controlling, and evaluating operations and performance; making administrative decisions; or preparing other reports. The data or information may be in narrative, statistical, graphic, or other form and may be on paper, magnetic tape, or other media.

Reuse means the subsequent use of FIP equipment after it is no longer needed for the purpose for which it was originally acquired.

Sensitive information means any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of Federal programs, or the privacy to which individuals are entitled under section 552a of title 5, United States Code (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

Software

Application software means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations necessary to process requirements. Application software may be either machine-dependent or machine-independent and may be general-purpose or designed to satisfy the requirements of a specialized process or a particular user.

Common-use software means software that deals with applications

common to many agencies, that would be useful to other agencies, and is written in such a way that minor variations in requirements can be accommodated without significant programming effort.

Sonar equipment means an apparatus that detects the presence and location of a submerged object by means of sonic, subsonic, or supersonic waves reflected back to it from the object.

Specific make and model specification means a description of the Government's requirement for FIP resources that is so restrictive that only a particular manufacturer's products will satisfy the Government's needs, regardless of the number of suppliers that may be able to furnish that manufacturer's products.

Standard form means a form prescribed by a Federal agency, pursuant to its authority, and approved by GSA for mandatory Governmentwide use.

Surplus means any excess Government-owned FIP equipment not required for the needs of Federal agencies as determined by the Administrator of General Services.

System life means a projection of the time period that begins with the installation of the FIP resource and ends when the agency's need for that resource has terminated.

Telecommunications Device for the Deaf (TDD) means a machine that uses typed input and output, usually with a visual text display, to enable individuals with hearing or speech impairments to communicate over a telecommunications network.

Telecommunications facilities means equipment used for such modes of transmission as telephone, data, facsimile, video, radio, audio, and such corollary items as switches, wire, cable, access arrangements, and communications security facilities.

Telecommunications resources means telecommunications equipment, facilities, and services.

Telecommunications services means the transmission, emission, or reception of signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means. The term includes the telecommunications facilities necessary to provide such services.

Telecommunications switching function means any service or equipment that has a primary function to switch telephone calls at a location. This term excludes service or equipment necessary to meet agency requirements

that cannot be met by an existing switching function.

Television equipment means any equipment (both transmission and reception) used for the conversion of transient visual images into electrical signals that can be transmitted by radio or wire to distant receivers where the signals can be reconverted to the original visual images. This does not include such items as monitors for computers or computer terminals or video conferencing equipment.

Toll-free telephone service means any incoming circuit arrangement that allows the public to make long distance telephone calls to authorized locations at Government expense. Toll-free telephone service is used for providing or obtaining information concerning Government programs, such as social welfare, disaster aid, veterans affairs, and income tax assistance.

§ 201-4.002 Acronyms.

ANSI means American National Standards Institute.

ADP means automatic data processing.

ADPE means automatic data processing equipment.

ADPE/DS means automatic data processing equipment/data system.

CFR means Code of Federal Regulations.

DPA means delegation of procurement authority.

DSO means designated senior official.

FAR means Federal Acquisition Regulation.

FIP means Federal information processing.

FIPS means Federal Information Processing Standards.

FIPS PUBS means Federal Information Processing Standards Publications.

FIRMR means Federal Information Resources Management Regulation.

FMSS means financial management systems software.

FPMR means Federal Property Management Regulations.

FR means Federal Register.

GSA means General Services Administration.

GPO means Government Printing Office.

ICMR means Interagency Committee on Medical Records.

IRM means information resources management.

LOI means letter of interest.

MAS means multiple awards schedule.

NARA means National Archives and Records Administration.

OMB means Office of Management and Budget.

PRA means Paperwork Reduction Act of 1980, as amended.

U.S.C. means United States Code.

USPS means United States Postal Service.

PART 201-5—[RESERVED]

SUBCHAPTER B—MANAGEMENT AND USE OF INFORMATION AND RECORDS

PART 201-6—PREDOMINANT CONSIDERATIONS

Sec.

201-6.000 Scope of part.

201-6.001 General.

201-6.002 Predominant considerations.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-6.000 Scope of part.

This part describes the legislative basis and goals of information management and provides a brief overview of the predominant policies of subchapter B.

§ 201-6.001 General.

(a) The Paperwork Reduction Act of 1980, as amended, (44 U.S.C. 3501, et seq.) legally introduced into the Federal Government the concept that information is a valuable asset and should be managed as such. The Act requires that the head of each executive agency designate a senior official who shall report to the agency head and be responsible for carrying out the agency's information resources management (IRM) responsibilities. The Paperwork Reduction Act is administered by the Office of Management and Budget (OMB) and is primarily implemented in OMB Circular No. A-130. The information management goals of the Paperwork Reduction Act are to—

(1) Reduce the paperwork burden the Federal Government imposes on the public and on State and local governments;

(2) Minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;

(3) Maximize the usefulness of information collected by the Federal Government;

(4) Coordinate, integrate, and where practical, make uniform, Federal information policies and practices; and

(5) Ensure that the collection, maintenance, use, and dissemination of information by the Federal Government is consistent with applicable laws and executive orders.

(b) GSA's Governmentwide role in information management stems from its records management authorities and responsibilities under the National Archives and Records Administration Act of 1984 (Pub. L. 98-497, 44 U.S.C. Ch. 29), and its responsibilities under section 111 of the Federal Property and Administrative Services Act of 1949, as

amended (40 U.S.C. 759), to provide for economic and efficient acquisition of Federal information processing (FIP) resources.

§ 201-6.002 Predominant considerations.

The policies prescribed in subchapter B are designed to promote the economic and efficient management and use of information by emphasizing the importance for agencies to—

(a) Manage information as a valuable asset throughout its life cycle, from collection or creation through disposition;

(b) Plan for the steps in the information life cycle;

(c) Understand their information requirements before determining their requirements for FIP resources;

(d) Establish an active and continuing program for economical and efficient management of the agency's records, as required by 44 U.S.C. 3102;

(e) Manage agency records, irrespective of the medium (paper, electronic, or other) on which the record is created, used, or filed;

(f) Ensure that individuals responsible for implementing the agency's records management programs participate in the agency's strategic planning process and in the determination of the agency's information needs and FIP resources requirements;

(g) Ensure that individuals responsible for information management have proven records and information management competencies through a combination of IRM training, work experience, and IRM related certification programs;

(h) Ensure that the agency's records can be accessed quickly and reliably;

(i) Keep the agency's mailing, copying, and filing costs at a minimum, consistent with program requirements;

(j) Control the creation of correspondence to ensure that the agency creates timely, responsive correspondence that is properly coordinated and consistent in tone, style, and presentation;

(k) Control the creation and distribution of agency directives to eliminate duplicative, conflicting, or confusing instructions to agency personnel, and to ensure proper documentation of agency policies and procedures;

(l) Control the creation and use of forms and reports to ensure that they are well designed, used efficiently, and do not proliferate unnecessarily; and

(m) Comply with GSA-managed Governmentwide programs for Standard and Optional Forms and Interagency Reports.

PART 201-7—PLANNING

Sec.

201-7.000 Scope of part.

201-7.001 General.

201-7.002 Policies.

201-7.003 Procedures.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-7.000 Scope of part.

This part prescribes policies and procedures regarding information planning by Federal agencies.

§ 201-7.001 General.

(a) Information needs are the foundation on which agencies determine their information processing requirements. An agency cannot determine its requirements for FIP resources unless it adequately plans for and understands its information requirements.

(b) The Paperwork Reduction Act, (44 U.S.C. chapter 35) OMB Circulars No. A-3, No. A-11, and No. A-130, and the Computer Security Act of 1987 (Pub. L. 100-235) require agencies to conduct various information resources management (IRM) planning activities. OMB Circular No. A-130 (appendix IV) states that executive agencies must plan for how they will process and transmit information, how they will use it, what provisions they will make for access to it, whether and how they will disseminate it, how they will store it, and finally, how they will dispose of the information.

(c) The General Services Administration (GSA) and the National Archives and Records Administration (NARA) help agencies with their IRM planning by issuing handbooks and other guidance documents. Comprehensive IRM strategic, program, and information planning services are available, on a cost-reimbursable basis, through GSA's Office of Technical Assistance.

§ 201-7.002 Policies.

Federal agencies shall establish strategic planning processes to—

(a) Plan for the creation, collection, processing, transmission, use, storage, dissemination, and disposition of information;

(b) Ensure that program officials and information resources management officials (including records managers) participate in the development and annual revision of a 5-year plan for meeting the agency's information technology needs; and

(c) Ensure that the agency's information needs are determined before conducting a requirements analysis for FIP resources.

§ 201-7.003 Procedures.

To determine information requirements and to help determine requirements for FIP resources, agencies shall consider the following factors:

(a) Essential records and information required to support current and future program and mission needs.

(b) Available sources of information.

(c) Public access requirements, including Freedom of Information Act requirements (5 U.S.C. 552).

(d) The need to provide information to and obtain information from other agencies.

(e) Information security (40 U.S.C. 759 Note) and Privacy Act requirements (5 U.S.C. 552a).

(f) Requirements to disseminate and store information and to carry out its authorized disposition.

(g) Information format, medium, quantity, integrity, and timeliness requirements.

(h) The integration of electronic records with other agency records. (See FIRM Bulletin B-1.)

PART 201-8—[RESERVED]

PART 201-9—CREATION, MAINTENANCE, AND USE OF RECORDS

Sec.

201-9.000 Scope of part.

201-9.001 General.

Subpart 201-9.1—Agency Programs

201-9.100 Scope of subpart.

201-9.101 General.

201-9.102 Policy.

201-9.103 Procedures.

Subpart 201-9.2—GSA Governmentwide Programs

201-9.200 Scope of subpart.

201-9.201 General.

201-9.202 Governmentwide programs.

201-9.202-1 Standard and Optional Forms Management Program.

201-9.202-2 Interagency Reports Management Program.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-9.000 Scope of part.

This part prescribes policies and procedures for the creation, maintenance, and use of Federal agencies' records. Unless otherwise noted, the policies and procedures of this part apply to all records, regardless of medium (i.e., paper, electronic, or other).

§ 201-9.001 General.

(a) Chapters 29 and 31 of title 44, U.S.C., require the establishment of standards and procedures to ensure efficient and effective records management by Federal agencies. The

statutory goals of these standards and procedures include—

(1) Accurate and complete documentation of the policies and transactions of the Federal Government;

(2) Control of the quantity and quality of records produced by the Federal Government;

(3) Establishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency;

(4) Simplification of the activities, systems, and processes of records creation, maintenance, and use;

(5) Judicious preservation and disposal of records; and

(6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork.

(b) The law assigns records management responsibilities to the Administrator of General Services (the Administrator), the Archivist of the United States (the Archivist), and the heads of Federal agencies.

(1) The Administrator is responsible for providing guidance and assistance to Federal agencies to ensure economical and effective records management. Records management policies and guidance established by GSA are contained in FIRMIR subchapter B and in FIRMIR bulletins, records management handbooks, and other publications issued by GSA.

(2) The Archivist is responsible for providing guidance and assistance to Federal agencies to ensure adequate and proper documentation of the policies and transactions of the Federal Government and to ensure proper records disposition. Records management policies and guidance established by the Archivist are contained in regulations in 36 CFR chapter XII and in bulletins and handbooks issued by the National Archives and Records Administration (NARA).

(3) The heads of Federal agencies are responsible for complying with the policies and guidance provided by the Administrator and the Archivist.

Subpart 201-9.1—Agency Programs

§ 201-9.100 Scope of subpart.

This subpart prescribes policies and procedures for establishing and maintaining an agency records management program.

§ 201-9.101 General.

Section 3102 of title 44 of the U.S.C. requires each Federal agency to establish an active and continuing records management program.

§ 201-9.102 Policy.

Each Federal agency shall establish and maintain an active, continuing program for managing agency records, commensurate with agency size, organization, mission, and recordkeeping activity.

§ 201-9.103 Procedures.

Each Federal agency shall take the following actions to establish and maintain the agency's records management program:

(a) Assign specific responsibility for the development and implementation of agencywide records management programs to an office of the agency and to a qualified records manager.

(b) Consider the guidance contained in GSA and NARA handbooks and bulletins when establishing and implementing agency records management programs.

(c) Issue a directive establishing program objectives, responsibilities, authorities, standards, guidelines, and instructions for its records management program.

(d) Apply appropriate records management practices to all records, irrespective of the medium (e.g., paper, electronic, or other) on which the record resides.

(e) Control the creation, maintenance, and use of agency records and the collection and dissemination of information to ensure that the agency—

(1) Does not accumulate unnecessary records;

(2) Does not create forms and reports that collect information inefficiently or unnecessarily;

(3) Periodically reviews all existing forms and reports (both those originated by the agency and those responded to by the agency but originated by another agency or branch of Government) to determine if they need to be improved or cancelled;

(4) Maintains its records cost effectively and in a manner that allows them to be retrieved quickly and reliably; and

(5) Keeps its mailing and copying costs to a minimum.

(f) Standardize stationery in terms of size, letterhead design, color (of originals, record copies, and envelopes), markings that are permitted on envelopes and postcards, and number of stationery styles permitted.

(g) Consider the voluntary standards contained in the Table of Standard

Specifications in FIRMIR Bulletin B-4, when developing agency stationery standards.

(h) Establish agency standards regarding the types of correspondence to be used in official agency communications, and the number and kind of copies required and their distribution and purpose.

(i) Strive to—

(1) Improve the quality, tone, clarity, and responsiveness of correspondence, and provide for its creation in a timely, economical, and efficient manner;

(2) Design forms that are easy to fill-in, read, transmit, process, and retrieve; and reduce forms reproduction costs;

(3) Provide agency managers with the means to convey written instructions to users and document agency policies and procedures through effective directives management;

(4) Provide agency personnel with the information needed in the right place, at the right time, and in a useful format;

(5) Eliminate unnecessary reports and design necessary reports for ease of use;

(6) Provide rapid handling and accurate delivery of mail at minimum cost; and

(7) Organize agency files (i) so that needed records can be found rapidly (ii) to ensure that records are complete and (iii) to facilitate the identification and retention of permanent records and the prompt disposal of temporary records.

Subpart 201-9.2—GSA Governmentwide Programs

§ 201-9.200 Scope of subpart.

This part contains policies and procedures prescribed for the following GSA-managed programs:

(a) The Standard and Optional Forms Management Program.

(b) The Interagency Reports Management Program.

§ 201-9.201 General.

(a) The Standard and Optional Forms Management Program was developed and operated by OMB consistent with the authorities prescribed by the Budget and Accounting Act of 1921. GSA assumed responsibility for the program on May 29, 1967, through agreement with OMB.

(b) The Interagency Reports Management Program implements 44 U.S.C. chapters 29 and 31, recognizing OMB functions under 44 U.S.C. 3504(e) and OMB implementation under 5 CFR 1320.16.

§ 201-9.202 Governmentwide programs.**§ 201-9.202-1 Standard and Optional Forms Management Program.**

(a) *General.* (1) GSA manages the Standard and Optional Forms Management Program to provide improved communications and reduced operating costs through the use of standardized practices and procedures for creating, printing, stocking, distributing, and using Standard and Optional Forms.

(2) When a Standard or Optional Form is also a public report, requiring OMB clearance under 5 CFR part 1320, agencies shall obtain clearance from both OMB and GSA. Requests for extensions of OMB clearance for Standard and Optional Forms shall be handled in the same manner. However, if the extension results in no changes to the affected form, GSA approval is not required.

(3) FIRM Bulletin B-3 contains additional guidance on the Standard and Optional Forms Management Program.

(b) *Procedures.* Each Federal agency shall—

(1) Establish and issue in the Federal Register, Governmentwide procedures prescribing the use and availability of all Standard and Optional Forms which it promulgates or sponsors (revisions may be announced in the appropriate directive or regulatory system);

(2) Obtain GSA approval for each new, revised, or canceled Standard and Optional form, and exceptions thereto, prior to implementation;

(3) Designate an agency-level Standard and Optional forms liaison representative and alternate, and notify GSA in writing of such designees' names, titles, mailing addresses, and telephone numbers within 30 days of the designation or redesignation;

(4) Use Standard Form 152, Request for Clearance or Cancellation of a Standard or Optional Form or Exception, to obtain GSA approval for each new, revised, and canceled Standard and Optional form, and exceptions thereto;

(5) Perform an annual review, to include all existing Standard and Optional forms which the agency has promulgated, or sponsored, as well as all approved exceptions, to determine and implement forms improvement, consolidation, or cancellation;

(6) Obtain GSA clearance under both the Standard and Optional Forms Management Program and the Interagency Reports Management Program when a standard or optional form is also an interagency report;

(7) As directed by GSA and OMB, submit a summary of the Standard and

Optional Forms used for collection of information covered by 5 CFR part 1320 to: General Services Administration, Standards Branch (KMPS), 18th & F Streets NW., Washington, DC 20405;

(8) Send requests for GSA approval and the notifications to GSA required by this section to the address in paragraph (b)(7) of this section.

(9) Request approval to overprint forms by contacting: General Services Administration, Inventory and Requisition Management Division (FCNI), 1941 Jefferson Davis Highway, Crystal Mall, Building 4, Washington, DC 20406; and

(10) Coordinate all matters concerning health-care-related Standard Forms through the Interagency Committee on Medical Records (ICMR). For additional information on the ICMR, contact: General Services Administration, Forms Management Branch (CARM), 18th & F Streets NW., Washington, DC 20405.

§ 201-9.202-2 Interagency Reports Management Program.

(a) *General.* (1) GSA manages the Interagency Reports Management Program to ensure that interagency reports and recordkeeping requirements are based on need, are cost-effective, and comply with applicable laws and regulations.

(2) FIRM Bulletin B-2 contains additional guidance on the Interagency Reports Management Program.

(b) *Procedures.* (1) Each agency shall—

(i) Obtain GSA approval for each new, revised, or extended interagency report, prior to implementing the report;

(ii) Designate an agency-level interagency reports liaison representative and alternate, and notify GSA in writing of such designees' names, titles, mailing addresses, and telephone numbers within 30 days of the designation or redesignation;

(iii) Use Standard Form 360, Request to Approve an Interagency Reporting Requirement, to obtain GSA approval for each new, revised, or extended interagency report;

(iv) Attach to each Standard Form 360, a justification statement (signed by the official who requested the report) describing the need for the report;

(v) Explain how the reporting costs shown on Standard Form 360 were derived;

(vi) Make supporting documentation for cost estimates available for GSA review;

(vii) Submit to GSA and OMB (see 5 CFR part 1320) simultaneously for approval, interagency reports that collect information from Federal

agencies and from either the public or State or local governments;

(viii) Notify GSA and responding agencies when an interagency report is no longer needed; and

(ix) Send requests for GSA approval and notifications regarding interagency reports to: General Services Administration, Authorizations Branch (KMAS), 18th & F Streets NW., Washington, DC 20405.

(2) This section does not apply to the following interagency reports: (However, interagency reports required by Federal agencies to respond to these reports are subject to this section.)

(i) Legislative branch reports.

(ii) Office of Management and Budget (OMB) and other Executive Office of the President reports.

(iii) Judicial branch reports required by court order or decree.

(iv) Reporting requirements for security classified information. However, interagency reporting requirements for non-sensitive or unclassified sensitive information are not exempt, even if such information is later given a security classification by the requesting agency.

PART 201-10—[RESERVED]**PART 201-11—REVIEW AND EVALUATION****Sec.**

201-11.000	Scope of part.
201-11.001	General.
201-11.002	Federal Information Resources Management Review Program.
201-11.003	Information Resources Procurement and Management Review Program.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-11.000 Scope of part.

This part discusses the two programs that the General Services Administration (GSA) administers regarding GSA-conducted and agency-conducted evaluation programs to help agencies ensure that the collection, maintenance, use, and dissemination of information and records are consistent with applicable laws and regulations.

§ 201-11.001 General.

(a) GSA's responsibilities for the review and evaluation of agencies' information and records management activities stem from the Paperwork Reduction Act of 1980 and the National Archives and Records Administration Act of 1984. GSA carries out these responsibilities under the Federal Information Resources Management Review Program and the Information

Resources Procurement and Management Review Program.

(b) The information and records management aspects of these programs are discussed in this part. However, part 201-22 more fully describes the objectives, policies, and procedures governing these programs.

§ 201-11.002 Federal Information Resources Management Review Program.

(a) GSA administers this program under a delegation from the Office of Management and Budget (OMB). GSA has delegated much of its review responsibilities under this program to each executive agency and serves as the focal agency for collecting, assessing, and reporting on review results to OMB.

(b) As part of these reviews, agencies shall review their information and records activities to ensure that the creation, maintenance, and use of the information and records that support agency programs are consistent with applicable laws and regulations. GSA has issued a series of IRM self inspection guides to help agencies review their information and records management programs.

§ 201-11.003 Information Resources Procurement and Management Review Program.

Under this program, GSA conducts reviews of major agency programs and related significant FIP resources acquisitions. As part of these reviews, GSA reviews agency programs for controlling the creation, maintenance, and use of information and records to—

- (a) Determine agency compliance with regulations; and
- (b) Evaluate the effectiveness of agency information and records management programs and practices.

PARTS 201-12 through 201-16—[RESERVED]

SUBCHAPTER C—MANAGEMENT AND USE OF FEDERAL INFORMATION PROCESSING (FIP) RESOURCES

PART 201-17—PREDOMINANT CONSIDERATIONS

Sec.

201-17.000 Scope of part.

201-17.001 Predominant considerations.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-17.000 Scope of part.

This part provides a brief overview of the predominant policies of subchapter C.

§ 201-17.001 Predominant considerations.

The policies prescribed in subchapter C are designed to promote success in the acquisition, management, and use of

Federal information processing (FIP) resources by emphasizing the importance for agencies to—

(a) Develop and annually revise, in coordination with budget activities, a 5-year plan to meet the agency's information technology needs;

(b) Base requirements for FIP resources on agency mission, programs, and related information needs;

(c) Consider the potential for deploying projected technological advances of FIP resources to enhance future performance of programs and operations in support of the agency mission;

(d) Acquire FIP resources that result in the most advantageous alternative to the Government after consideration of—

(1) Sharing and reuse of existing FIP resources,

(2) Use of General Services Administration (GSA) services, and

(3) Acquisition of agency resources by contracting;

(e) Establish responsibility through a designated senior official (DSO) when contracting for FIP resources under a delegation of GSA's exclusive procurement authority;

(f) Assign an individual (such as a Trail Boss) responsible for coordinating programmatic, technical, and contracting functions when acquiring FIP resources;

(g) Achieve full and open competition to the maximum extent practicable;

(h) Acquire resources that comply with Federal standards;

(i) Provide for security of resources, protection of information about individuals, continuity of operations, and national security and emergency preparedness;

(j) Provide individuals with disabilities (employees and others who use the agency's electronic office equipment) equivalent access to electronic office equipment;

(k) Provide telecommunications access to hearing and speech impaired individuals;

(l) Review and evaluate existing resources and related management and acquisition activities on an ongoing basis; and

(m) Replace outdated resources that are no longer the most advantageous alternative for satisfying the agency's requirements.

PART 201-18—PLANNING AND BUDGETING

Sec.

201-18.000 Scope of part.

201-18.001 General.

201-18.002 Policies.

201-18.003 Procedure.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-18.000 Scope of part.

This part prescribes policies and procedures regarding planning and budgeting for Federal information processing (FIP) resources.

§ 201-18.001 General.

(a) 44 U.S.C. 3506(c)(8) (the Paperwork Reduction Reauthorization Act of 1986) requires executive agencies to develop and annually revise a 5-year plan for meeting the agency's information technology needs.

(b) Office of Management and Budget (OMB) Circular No. A-130 requires executive agencies to establish multiyear strategic planning processes for acquiring and operating information technology that meet program and mission needs, reflect budget constraints, and form the basis for their budget requests.

(c) OMB Circular No. A-11 requires executive agencies to prepare and submit annual agency-wide "Major Information Technology Acquisition Plans."

(d) The Computer Security Act of 1987 (Pub. L. 100-235, 40 U.S.C. 759 Note) requires agencies to identify each FIP system that contains sensitive information and prepare a plan for the security and privacy of each such system.

(e) Section 508 of the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506) requires the Federal Government to adopt guidelines for electronic equipment accessibility designed to ensure that individuals with disabilities may use electronic office equipment. This Act requires that agencies comply with such guidelines. FIRM Bulletin C-8 provides guidance on planning for the FIP resources accommodation needs of individuals with disabilities.

(f) The General Services Administration (GSA) helps agencies with their IRM planning by issuing handbooks, bulletins, and other guidance documents. IRM planning services are available, on a cost-reimbursable basis, through GSA's Office of Technical Assistance.

(g) GSA reviews agency IRM plans and the planning process as part of the Information Resources Procurement and Management Review Program described in part 201-22. Agencies' IRM planning is a factor in delegating procurement authority for FIP resources.

§ 201-18.002 Policies.

(a) Agencies shall develop a 5-year plan for meeting the agency's information technology needs. This plan shall—

(1) Reflect current and future program and mission needs;

(2) Consider the potential for deploying projected technological advances of FIP resources to enhance future performance of programs and operations in support of the agency mission;

(3) Consider FIP resources needed to meet the national security and emergency preparedness needs of the agency;

(4) Reflect budget constraints;

(5) Form the basis for the agency's budget requests to OMB;

(6) Serve as the foundation for requirements analyses; and

(7) Be updated as needed, but at least annually.

(b) Agencies shall ensure that the IRM planning process includes the participation of each of the agency's program areas, as well as those organizations responsible for IRM (including records management), contracting, and budget preparation.

(c) Agencies shall adopt electronic equipment accessibility guidelines similar to those described in FIRM Bulletin C-8 in their planning process.

(d) Agencies shall ensure that acquisition of FIP resources is in accordance with the updated 5-year plan.

§ 201-18.003. Procedure.

Each agency shall send a copy of its annually revised 5-year plan, within 30 days after its preparation, to: General Services Administration, Authorizations and Management Reviews Division (KMA), 18th & F Streets, NW., Washington, DC 20405.

PART 201-19—[RESERVED]

PART 201-20—ACQUISITION

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201-20.000 Scope of part.

201-20.001 General.

Subpart 201-20.1—Requirements Analysis

201-20.100 Scope of subpart.

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201-20.102 Policy.

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201-20.103-4 Compatibility-limited requirements.

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201-20.304 Capability and performance validation.

201-20.305 Delegation of GSA's exclusive procurement authority.

201-20.305-1 Regulatory delegations.

201-20.305-2 Specific agency delegations.

201-20.305-3 Specific acquisition delegations.

201-20.306 Delegation of GSA's multiyear contracting authority for telecommunications resources.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-20.000 Scope of part.

This part prescribes policies and procedures for acquisition of Federal information processing (FIP) resources by agencies.

§ 201-20.001 General.

(a) *Acquisition*, as used in this part—

(1) Consists of a series of steps beginning with the requirements analysis and ending with the implementation of the most advantageous alternative to satisfy the requirement; and

(2) Includes obtaining FIP resources both from sources external to the agency and through in-house sources or development.

(b) Acquisition by contracting is addressed in part 201-39.

(c) Technical assistance in support of acquisitions is available, on a cost reimbursable basis, through GSA's Office of Technical Assistance.

(d) Guidance on conducting a requirements analysis and an analysis of alternatives is contained in the GSA Acquisition Guide series.

Subpart 201-20.1—Requirements Analysis

§ 201-20.100 Scope of subpart.

This subpart prescribes policies and procedures for determining requirements for FIP resources.

§ 201-20.101 General.

The requirements analysis is used to determine and document requirements for FIP resources. It provides the basis

on which the alternatives for meeting the requirements can be analyzed.

§ 201-20.102 Policy.

Agencies shall establish and document requirements for FIP resources by conducting a requirements analysis commensurate with the size and complexity of the need.

§ 201-20.103 Procedures.

The requirements analysis shall include, at a minimum, consideration of the following factors:

§ 201-20.103-1 Information needs.

Agencies shall determine their information needs by considering—

(a) Their need to provide information to and obtain information from the public and other agencies;

(b) Available sources of information;

(c) Information format, media, quantity, integrity, security, and timeliness requirements;

(d) Essential records and information required to support current and future program and mission needs;

(e) Agency records retention and disposition requirements and the need to assure archival acceptability of permanent or long-term records;

(f) The integration of electronic records with other agency records; and

(g) Existing or planned intra or interagency interoperability requirements.

§ 201-20.103-2 System life.

Agencies shall establish a system life as a part of the requirements analysis. If the acquiring activity can predict reuse of the FIP resource by another component within the agency after it no longer meets the acquiring activity's needs, the reuse period shall be included in the system life.

§ 201-20.103-3 Description of requirements.

Agencies shall—

(a) Base requirements on mission needs expressed in the form of opportunities for increased economy and efficiency, new or changed program requirements, or deficiencies in existing capabilities;

(b) Describe requirements in terms of functions to be performed and performance to be achieved, unless a more restrictive statement of requirements is necessary to satisfy the needs of the agency;

(c) Describe requirements in a manner that will attain full and open competition when contracting for FIP resources unless other than full and open competition is justified in

accordance with subpart 201-39.6 and FAR part 6;

(d) Document in the requirements analysis the quantitative or qualitative requirements that must be met and why those requirements are necessary to meet the mission needs; and

(e) Consider aggregating requirements on organizational or functional bases and conducting a requirements analysis on the basis of the aggregated requirements.

§ 201-20.103-4 Compatibility-limited requirements.

(a) Agencies shall establish compatibility-limited requirements for FIP resources only to the extent necessary to satisfy the needs of the agency.

(b) Agencies shall justify compatibility-limited requirements for FIP resources on the basis of at least one of the following:

(1) The agency has technical or operational requirements for compatibility when adding resources to, or replacing a portion of, an installed base of resources, and the agency determines that replacing additional portions of the installed base to avoid compatibility-limited requirements is not advantageous to the Government; or

(2) The agency determines that the risk and impact of a conversion failure on agency critical mission needs would be so great that acquiring non-compatible resources is not a feasible alternative.

§ 201-20.103-5 Justification for specific make and model.

Technical and requirements personnel shall justify a requirement that can only be met by specific make and model resources in accordance with subpart 201-39.6.

§ 201-20.103-6 Security requirements.

Agencies shall—

(a) Identify security and privacy requirements in the requirements analysis;

(b) Identify security requirements necessary to protect classified and sensitive information by listing the potential threats and hazards and describing the measures needed to provide protection; and

(c) Identify physical and environmental security safeguards.

§ 201-20.103-7 Accessibility requirements for individuals with disabilities.

(a) Agencies shall provide equivalent access to electronic office equipment for individuals with disabilities (employees and others who use the agency's electronic office equipment) to the extent both present and future needs for

such access are determined by the agency.

(b) Agencies shall provide telecommunications access to hearing and speech-impaired individuals to the extent both present and future needs for such access are identified in the requirements analysis.

Telecommunications access for hearing and speech-impaired individuals shall include education and training on the services and features of the GSA relay service.

(1) Agencies shall publish access numbers for TDD and TDD-related devices in telephone directories and provide such agency numbers to GSA for inclusion in the Federal TDD Directory.

(2) Agencies shall display in their buildings or offices the standard logo specified by GSA for indicating the presence of TDD or TDD-related equipment.

(c) Agencies shall consider the guidance contained in FIRM Bulletin C-8 on the subject of accessibility requirements for individuals with disabilities.

§ 201-20.103-8 Space and environmental requirements.

Agencies shall consider space and environmental factors when conducting the requirements analysis.

§ 201-20.103-9 Workload and related requirements.

As a minimum, agencies shall document in the requirements analysis the following factors, as applicable:

(a) Projected processing, storage, data entry, communications, and support services workload requirements over the system life and how best to address workload uncertainties.

(b) Expandability requirements.

(c) A performance evaluation of currently installed FIP resources.

(d) Contingency requirements for FIP resources whose loss or failure would prevent the agency from performing its mission, or have an adverse effect on the nation.

(e) Other requirements that must be met or constraints that must be considered.

§ 201-20.103-10 Records management requirements.

Agencies shall include records management factors in the requirements analysis.

Subpart 201-20.2—Analysis of Alternatives

§ 201-20.200 Scope of subpart.

This subpart prescribes policies and procedures for identifying and analyzing

feasible alternatives that satisfy requirements for FIP resources.

§ 201-20.201 General.

(a) The statement of requirements resulting from the requirements analysis is the basis on which the analysis of alternatives is conducted. The purpose of the analysis of alternatives is to compare and evaluate various alternatives for meeting the requirements and to determine which alternative is the most advantageous alternative to the Government.

(b) The FIRM Bulletin series provides guidance on GSA programs for meeting agencies' requirements and potential sources of FIP resources sharing.

§ 201-20.202 Policy.

Using the results of the requirements analysis as the basis, agencies shall conduct an analysis of alternatives, commensurate with the size and complexity of the requirement, to identify the most advantageous alternative to the Government.

§ 201-20.203 Procedures.

The General Services Administration (GSA) has established various programs to satisfy agencies' requirements for FIP resources. Part 201-24 describes these programs and the extent to which their use or consideration is mandatory.

§ 201-20.203-1 Consideration of alternatives.

(a) Agencies shall—

(1) Conduct market research to determine the availability of technology to meet their requirements and to assist in identifying feasible alternatives;

(2) Use GSA's mandatory-for-use programs described in subpart 201-24.1 when their requirements can be met by these programs, unless they have requested and received an exception to the use of these programs from GSA;

(3) Use GSA's mandatory-for-consideration programs described in subpart 201-24.2 when their requirements can be met by those programs and using them is the most advantageous alternative to the Government;

(4) Consider using FIP resources available for reuse within the agency and from other agencies to satisfy their requirements;

(5) Consider using existing FIP resources on a shared basis to satisfy their requirements; and

(6) Consider acquiring FIP resources by contracting.

(b) Agencies should also consider using GSA nonmandatory programs to meet their requirements.

§ 201-20.203-2 Cost for each alternative.

(a) In the analysis of alternatives, agencies shall calculate the total estimated cost, using the present value of money, for each feasible alternative unless the anticipated cost of the acquisition is \$50,000 or less. The total estimated cost for each alternative shall include system life cost for that alternative and any other costs, that can be identified with the alternative, incurred either before or after the system life period.

(b) When the anticipated cost of the acquisition is \$50,000 or less, the total estimated cost may be limited to an analysis demonstrating that the benefits of the acquisition will outweigh the costs.

(c) Agencies shall follow guidance in OMB Circular No. A-94, "Discount Rates to be Used in Evaluating Time-Distributed Costs and Benefits," when calculating the cost of each alternative.

§ 201-20.203-3 [Reserved]**§ 201-20.203-4 Conversion.**

(a) When evaluating alternatives, it is important for the Government to consider its investment in FIP resources that may have to be converted, replaced, or disposed of, as a result of the alternative selected. Therefore, as part of the analysis of alternatives, agencies shall consider the costs, risk, and magnitude of conversion from installed FIP resources to augmentation or replacement resources.

(b) To achieve the above, agencies shall perform a conversion study, commensurate with the size and complexity of the requirement, for all acquisitions of FIP resources, except for—

(1) Initial acquisitions where no FIP resources exist;

(2) Acquisitions of FIP equipment peripherals only; or

(3) The exercise of a purchase option under a leasing agreement.

(c) In determining conversion costs, agencies shall include any cost of conversion that can be stated in dollars, as well as other expenses directly related to the conversion. However, the costs associated with the following shall not be included:

(1) Conversion of existing FIP software and data bases that would be redesigned regardless of whether or not augmentation or replacement FIP resources are acquired.

(2) Purging duplicate or obsolete FIP software, data bases, and files.

(3) Development of documentation for existing FIP application software.

(4) Improvements in management and operating procedures.

(d) In performing a conversion study, agencies shall consider the guidance contained in FIRM Bulletin C-14 on this subject.

§ 201-20.203-5 Obsolescence.

As part of the analysis of alternatives, agencies shall determine strategies for maintaining up-to-date FIP resources and avoiding outdated FIP resources over the system life.

Subpart 201-20.3—Implementation**§ 201-20.300 Scope of subpart.**

This subpart prescribes the policies and procedures for implementing the most advantageous alternative selected as a result of the analysis of alternatives.

§ 201-20.301 General.

Implementation includes the activities in the acquisition phase, following the analysis of alternatives and selection of the most advantageous alternative, that are necessary to prepare the selected alternative for operation.

§ 201-20.302 Implementation plan.

(a) *Policy.* Agencies shall develop an implementation plan, commensurate with the size and complexity of the selected alternative, for implementing FIP resources.

(b) *Procedures.*—(1) The agency shall designate an individual to be responsible for executing each implementation plan.

(2) The plan shall describe tasks, responsibilities, resources, and schedules needed to ensure successful implementation.

§ 201-20.303 Standards.

(a) *Scope.* This section prescribes policies and procedures for the use of Federal Information Processing Standards (FIPS), Federal Telecommunications Standards (FED-STDS), interim standards, and agency-unique standards.

(b) *General.*—(1) GSA publishes a handbook titled "Federal ADP and Telecommunications Standards Index" that lists Federal standards. The index contains information about applicability for each standard and terminology for including standards in solicitations. Copies can be purchased from: U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402. FIRM Bulletin C-3 contains additional information about the index.

(2) *Types of Federal standards.*—(i) *Federal Information Processing Standards (FIPS).*

(A) FIPS are automatic data processing standards developed and

issued by the National Institute of Standards and Technology (NIST) after approval by the Secretary of Commerce, as part of the Federal Information Processing Standards Publications (FIPS PUBS) series.

(B) Public Law 99-500 Title VIII, the "Paperwork Reduction Reauthorization Act of 1986," modified the definition of automatic data processing equipment (ADPE) to include most telecommunications equipment and services. Public Law 100-235, the "Computer Security Act of 1987," expressly provided the Secretary of Commerce authority for promulgating NIST developed Federal computer system standards, which were defined to encompass all ADPE standards. All such ADPE standards are called FIPS.

(ii) *Federal Telecommunications Standards (FED-STDS).*

(A) FED-STDS are official Federal Government publications relating to standards developed by the National Communications System under delegation from GSA. FED-STDS include those categories in the Federal Supply Class (FSC) of "Telecommunications" of the Federal Standards Program not redefined as ADPE by Public Law 99-500.

(B) FED-STDS relating to ADPE that were in existence when Public Law 99-500 was enacted are covered by the modified definition of ADPE in Public Law 99-500 and therefore fall under the authority of NIST. These standards were redesignated by NIST as FIPS.

(3) *Categories of Federal standards.*—

(i) Hardware standards (FIPS).

(ii) Software standards (FIPS).

(iii) Application standards (FIPS).

(iv) Data standards (FIPS).

(v) Operations standards (FIPS).

(vi) Telecommunications standards (i.e., FED-STDS) including those FSC telecommunications items not redefined as ADPE by Public Law 99-500. These standards are developed by the National Communication System and managed by GSA.

(vii) Computer-related telecommunications standards including those FSC telecommunications items redefined as ADPE by Public Law 99-500. These standards are issued by NIST as FIPS.

(c) *Policies.*—(1) Technical and requirements personnel shall—

(i) Review each standard to determine its applicability to each requirement; and

(ii) Work with contracting officials to ensure that all applicable Federal standards are specified in any resulting solicitation.

(2) Agencies are encouraged to apply interim Federal standards when acquiring and using FIP resources. Agencies shall develop appropriate terminology for use in solicitations that is consistent with the intended use of the interim standard.

(3) When Federal standards do not exist for FIP resources being acquired, agencies should consider the use of voluntary standards, both domestic and international.

(4) In cases where no Federal, National, or International Standards exist, agencies shall consider the development and use of agency-unique standards, provided such use is not in violation of the full and open competition requirements of Public Law 98-369, title VII, the "Competition in Contracting Act." The use of agency-unique standards shall be coordinated with NIST.

(5) The agency head may allow the use of alternate standards for the acquisition and use of computer security items. Such standards must be more stringent than the applicable Federal standards and contain, at a minimum, the functional provisions of the applicable Federal standard.

(d) *Procedures.*—(1) *Waivers.* The Secretary of Commerce has delegated to the heads of executive departments and agencies, the authority to waive FIPS that are compulsory for agency use in the acquisition and management of FIP resources. Such waivers by agency heads shall be in accordance with the conditions and notification procedures specified by the Secretary of Commerce. If an individual FIPS is waived, a deviation from the FIRM is not required.

(2) *Exceptions.* GSA may grant exceptions to the mandatory use of a FED-STD upon submission of adequate documentation from the requesting agency. If GSA grants an exception to the use of an individual FED-STD, a deviation from the FIRM is not required. Requests for exceptions should be addressed to: General Services Administration, Policy and Regulations Division, (KMP), 18th & F Streets, NW, Washington, DC 20405.

§ 201-20.304 Capability and performance validation.

(a) *Policy.* When acquiring FIP resources, agencies shall use the capability and performance validation techniques that the agency determines are necessary to ensure that requirements are satisfied.

(b) *Procedures.*—(1) When a benchmark is used as part of performance validation, agencies shall ensure that the FIP software selected for

the benchmark is representative of actual requirements and requires the minimum amount of reprogramming or conversion.

(2) In determining the capability and performance validation techniques to be used, agencies should consider the guidance contained in FIRM bulletins. (For complex acquisitions agencies should also consider the guidance in GSA handbooks.) The provisions of FIRM bulletins and GSA handbooks are not mandatory for use by agencies.

§ 201-20.305 Delegation of GSA's exclusive procurement authority.

(a) *General.*—(1) GSA either authorizes agencies to contract for FIP resources under a delegation of GSA's exclusive procurement authority (DPA) or contracts for these resources on behalf of agencies. GSA authorizes agencies to contract for FIP resources by the following methods for granting a DPA:

- (i) Regulatory delegations as provided by this section.
- (ii) A specific agency delegation.
- (iii) A specific acquisition delegation.

(2) The DPAs discussed in this section are given to the agency's DSO, when GSA determines that such officials are sufficiently independent of program responsibility and have sufficient experience, resources, and ability to fairly and effectively carry out procurements under GSA's authority as provided by 40 U.S.C. 759(b)(3).

(3) The agency's DSO may redelegate GSA's exclusive authorities for FIP resources to qualified officials.

(4) Such redelegate shall not relieve the agency's DSO of the responsibility for conduct of and accountability for acquisitions of FIP resources made under a DPA from GSA.

(b) *Policies.*—(1) Agencies shall procure FIP resources under GSA's exclusive procurement authority.

(2) Agencies shall not fragment requirements for FIP resources in order to circumvent established delegations of procurement authority thresholds.

(3) Agencies shall consider severing requirements for FIP resources from requirements for other resources and contracting for FIP resources under a delegation when—

(i) The requirement for FIP resources can be clearly identified and explicitly stated in a solicitation;

(ii) The technical and operational needs can be satisfied by severing requirements for FIP resources from requirements for other resources;

(iii) The items can be acquired by the Government and delivered to the contractor as required by the production schedule;

(iv) Adequate price competition can be achieved on the FIP resources portion of the requirements;

(v) The expected cost reduction will exceed the added costs of the additional acquisition by contracting;

(vi) Severing will not affect the contractor's ability and responsibility to perform as required by the contract; and

(vii) The estimated dollar value of FIP resources explicitly required by the agency in the solicitation exceeds the thresholds for regulatory delegations specified in § 201-20.305-1.

(4) GSA retains the right to revoke or suspend any delegation when GSA determines that circumstances warrant such action.

§ 201-20.305-1 Regulatory delegations.

The following regulatory delegations are hereby granted to agencies:

(a) Agencies may contract for the following FIP resources without prior approval of GSA:

(1) FIP equipment, software, services, and support services¹ when the dollar value of any individual type resource including all optional quantities and periods over the life of the contract, does not exceed \$2,500,000 (\$250,000 for a specific make and model specification or for requirements available from only one responsible source) and either paragraph (a)(1)(i), (a)(1)(ii), or (a)(1)(iii) the following applies:

(i) The acquisition does not include telecommunications requirements within the scope of FTS2000 services or GSA's Consolidated Local Telecommunications Services Program; or requirements for telecommunications facilities or services at a location where the contract would result in more than one agency acquiring a telecommunications switching function at that location.

(ii) The agency has an exception to the use of FTS2000 services or GSA's Consolidated Local Telecommunications Services Program.

(iii) The acquisition includes telecommunications requirements within the scope of FTS2000 services or GSA's Consolidated Local Telecommunications Services Program, and the telecommunications facilities or services are acquired through the use of FTS2000 or GSA's Consolidated Local Telecommunications Services Program.

¹ For transition purposes, solicitations for support services, regardless of cost, released prior to (insert publication date here) may be awarded without obtaining a specific DPA from GSA and solicitations for support services released after (insert publication date here) that are not awarded prior to (insert effective date here) require a specific DPA if they exceed the applicable dollar threshold in this § 201-20.305-1.

(2) FIP related supplies regardless of cost.

(3) Financial management systems software and services and support related to the implementation of such software through the use of the GSA Financial Management Systems Software (FMSS) mandatory multiple awards schedule (MAS) contracts program.

(b) When FIP equipment, software, services, and support services (or any combination thereof) are combined and acquired under a single contract action, a specific acquisition delegation shall be required when the dollar value of either the equipment, software, services, or support services exceeds the applicable dollar threshold in § 201-20.305-1(a)(1).

(c) Agencies may acquire telecommunications services through the use of FTS2000 or GSA's Consolidated Local Telecommunications Services Program without obtaining a DPA from GSA.

§ 201-20.305-2 Specific agency delegations.

The Commissioner, Information Resources Management Service, GSA, or a designee may authorize a DPA for FIP resources for individual agencies or their components that modifies the conditions of regulatory delegations. A specific agency DPA is based on the results of an Information Resources Procurement and Management Review conducted by GSA and on the agency's ability to acquire, manage, and use FIP resources in accordance with FIRM policies and procedures.

§ 201-20.305-3 Specific acquisition delegations.

Agencies shall submit an agency procurement request (APR) to GSA and receive a specific acquisition DPA if the acquisition is not covered by a regulatory or specific agency DPA. Procedures for requesting a DPA for a specific acquisition are provided in FIRM Bulletin C-5. A description of the Trail Boss program and procedures for requesting a specific acquisition DPA under the Trail Boss Program are provided in FIRM Bulletin C-7. Participation in the Trail Boss Program is optional. However, a Trail Boss request shall be submitted in accordance with FIRM Bulletin C-7.

§ 201-20.306 Delegation of GSA's multiyear contracting authority for telecommunications resources.

Executive agencies are authorized to enter into multiyear contracts for telecommunications resources subject to the following conditions:

(a) The agency shall have a delegation of GSA exclusive procurement authority for FIP resources.

(b) The contract life including options, shall not exceed 10 years.

(c) Agencies shall comply with OMB budget and accounting procedures relating to appropriated funds.

PART 201-21—OPERATIONS

Sec.
201-21.000 Scope of part.

Subpart 201-21.1—[Reserved]

Subpart 201-21.2—Inventories

201-21.200 Scope of subpart.
201-21.201 General.
201-21.202 Policy.
201-21.203 Procedures.

Subpart 201-21.3—Security and Privacy

201-21.300 Scope of subpart.
201-21.301 General.
201-21.302 Policy.
201-21.303 Procedures.

Subpart 201-21.4—Resource Sharing

201-21.400 Scope of subpart.
201-21.401 General.
201-21.402 Policy.
201-21.403 Procedures.

Subpart 201-21.5—Conversion

201-21.500 Scope of subpart.
201-21.501 General.
201-21.502 Policy.

Subpart 201-21.6—Use Of Government Telephone Systems

201-21.600 Scope of subpart.
201-21.601 Authorized use of long distance telephone services.
201-21.602 Collection for unauthorized use.
201-21.603 Listening-in to or recording telephone conversations.
201-21.604 Toll-free telephone service.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-21.000 Scope of part.

This part prescribes policies and procedures for operating Federal information processing (FIP) resources.

Subpart 201-21.1—[Reserved]

Subpart 201-21.2—Inventories

§ 201-21.200 Scope of subpart.

This subpart contains policies and procedures for maintaining inventories of FIP resources, including requirements for agencies to submit inventory reports to the General Services Administration (GSA).

§ 201-21.201 General.

(a) GSA facilitates the Governmentwide management of FIP resources by requiring agencies to submit periodic and special inventory reports of certain FIP resources. The periodic report is a submission to GSA's Automatic Data Processing Equipment/Data System (ADPE/DS). Procedures for making reports and submissions are contained in the "GSA ADPE/DS Reporting Procedures and Users Manual."

(b) The manual specifies the items that shall be reported, the frequency and format of the report, and other reporting procedures. Copies are available from: General Services Administration, Federal Equipment Data Center (WKHE), National Capital Region, 7th & D Streets, SW., Washington, DC 20407.

(c) From time to time, GSA also requires agencies to submit special inventory reports of items not covered by the ADPE/DS periodic report.

§ 201-21.202 Policy.

Agencies shall maintain inventories of their FIP resources to the extent necessary to—

(a) Ensure adequate and appropriate FIP resources to support the agency mission;

(b) Identify FIP resources that are outdated or no longer needed;

(c) Serve as the basis for the 5-year plan for meeting the agency's information technology needs and to help determine requirements for replacement of FIP resources;

(d) Ensure that the agency is paying for only those resources that it is using, and cancels leases for underutilized resources;

(e) Ensure accountability for Government property; and

(f) Meet GSA requests for periodic or special inventory reports.

§ 201-21.203 Procedures.

(a) Each agency shall submit a periodic inventory report of certain of its FIP resources to GSA in accordance with procedures in the GSA ADPE/DS manual. ADPE/DS is assigned report control number 0312-GSA-QU.

(b) Each agency shall periodically survey its FIP resources (excluding FIP supplies). The agency shall survey annually those FIP resources for which the agency is paying a recurring charge, such as customer premises equipment and software licenses. The agency may conduct such surveys by using sampling techniques, but shall conduct a complete survey at least once every 3 years and in any year in which sampling shows significant discrepancies.

(c) Each agency shall comply with GSA requests for special inventory reports.

Subpart 201-21.3—Security and Privacy

§ 201-21.300 Scope of subpart.

This subpart prescribes policies and procedures regarding security of FIP resources, including privacy safeguards for those FIP resources that process information about individuals.

§ 201-21.301 General.

(a) The Office of Management and Budget (OMB), the Office of Personnel Management (OPM), the Department of Commerce (DOC), and GSA are responsible for issuing Governmentwide policies, procedures, standards, and guidance regarding the privacy of individuals and the security of systems and services that process sensitive information. Appendix III to OMB Circular No. A-130 explains the specific responsibilities of these central management agencies and describes the minimum controls and requirements agencies shall follow when implementing and operating a security program.

(b) The Computer Security Act of 1987 (Pub. L. 100-235) requires agencies to identify each FIP system that contains sensitive information and to prepare a plan for the security and privacy of these systems. The Act also requires mandatory periodic training for all persons involved in the management, use, and operation of FIP systems that contain sensitive information.

§ 201-21.302 Policy.

Each agency shall ensure that—

(a) A proper level of security is maintained for all FIP resources, including those maintained or provided by contractors, or State or local governments;

(b) FIP resources are operated and maintained to safeguard the confidentiality, integrity, and availability of information, including prevention of loss from natural hazards, fire, and accidents; and

(c) FIP resources are operated and maintained in a manner that protects the personal privacy of individuals.

§ 201-21.303 Procedures.

Agencies shall—

(a) Continually review operations to ensure security and privacy safeguards are implemented, operated, and maintained as intended, and that these safeguards continue to be effective;

(b) Continually monitor FIP systems that support Privacy Act "systems of

records" or sensitive information to ensure protection is not compromised;

(c) Modify operations to counter changes in threats and hazards; and

(d) Consider the security and privacy guidance contained in FIRM Bulletin C-22, OMB Circular No. A-130 Appendix III, regulations of OPM, and publications issued by NIST.

Subpart 201-21.4—Resource Sharing

§ 201-21.400 Scope of subpart.

This subpart describes policies and procedures for sharing of FIP resources.

§ 201-21.401 General.

(a) FIRM bulletins describe agency FIP facilities and services available for sharing.

(b) The sharing of software is managed under the Federal Software Exchange Program. FIRM Bulletin C-12 provides guidance on this program.

(c) Appendix II of OMB Circular No. A-130, *Management of Federal Information Resources*, establishes Governmentwide procedures for cost accounting and recovery for shared resources.

§ 201-21.402 Policy.

Agencies shall determine the extent to which they will make their excess capacity of FIP resources available to other agencies on a shared basis.

§ 201-21.403 Procedures.

(a) *FIP Services.*—(1) Agencies shall contact GSA if they wish to include their excess capacity of FIP resources available for sharing in those FIRM bulletins describing sharing opportunities.

(2) Each FIP resources facility shall report the total dollar amount charged to users (except those whom the facility has a primary responsibility to support) for the sharing of its resources during the preceding fiscal year if the total dollar amount charged to users exceeds \$100,000 during the fiscal year.

(i) Agencies may elect to submit reports on a summarized basis at any organizational level desired.

(ii) Agencies shall submit annual reports, no later than November 30, on GSA Form 2068A to: General Services Administration, Authorizations Branch (KMAS), 18th & F Streets, NW, Washington, DC 20405. Interagency reports control number 1106-GSA-AN has been assigned to this reporting requirement.

(b) *FIP software.* Agencies shall review their general purpose FIP software to identify software that may be of use to other agencies, and make such software available to the Federal Software Exchange Center (FSEC) in

accordance with procedures specified in FIRM Bulletin C-12.

Subpart 201-21.5—Conversion

§ 201-21.500 Scope of subpart.

This subpart addresses operating considerations that facilitate conversion of FIP resources.

§ 201-21.501 General.

(a) Management of an agency's software inventory and planning for future conversions will reduce the risk and cost of conversion, enhance competition, and improve the efficiency of operations.

(b) FIRM Bulletin C-14 provides guidance on conversion and conversion studies.

§ 201-21.502 Policy.

Agencies shall operate and maintain FIP resources in a manner that will—

(a) Reduce the risk and minimize the cost of conversion of FIP systems,

(b) Foster competition when contracting for replacement or augmentation of FIP resources,

(c) Ensure portability to facilities designated to meet the agency's contingency operating needs, and

(d) Enhance opportunities for sharing.

Subpart 201-21.6—Use of Government Telephone Systems

§ 201-21.600 Scope of subpart.

This subpart discusses authorized use of telephone systems and facilities provided, paid for, or reimbursed by the Federal Government.

§ 201-21.601 Authorized use of long distance telephone services.

(a) *Scope.* This section describes policies and procedures for the use of Government-provided and commercial long distance telephone service paid for by the Government.

(b) *General.* (1) Agencies should be familiar with the Office of Management and Budget (OMB) "Guidance on the Privacy Act Implications of Call Detail Programs to Manage Employees' Use of the Government's Telecommunications Systems" (52 FR 12990, April 20, 1987).

(2) Commercial long distance telephone bills must be certified in accordance with 31 U.S.C. 1348.

(3) FIRM Bulletin C-13 provides guidance on the management and control of long distance telephone costs.

(c) *Policy.* (1) Telephone calls placed over Government-provided and commercial long distance systems that will be paid for or reimbursed by the Government, shall be used to conduct official business only.

(2) To the maximum extent practicable, Federal employees shall place calls on Government-provided long distance telephone systems and services instead of using commercial toll services.

(3) In accordance with 5 CFR 735.205, the following practices are prohibited and a willful violation may result in criminal, civil, or administrative action, including suspension or dismissal:

(i) Use of any Government system or service, or any other telephone service, where the Government pays the cost of the long distance call, for other than official business, except emergency calls and calls the agency determines are necessary in the interest of the Government.

(ii) Making an unauthorized long distance telephone call with the intent to later reimburse the Government.

(iii) Listening-in to or recording telephone conversations except as specified in § 201-21.603.

(iv) Unauthorized use of telephone call detail data.

(d) *Procedures.* Official business calls may include emergency calls and other calls the agency determines are necessary in the interest of the Government. FIRM Bulletin C-13 provides examples of calls that may be considered necessary in the interest of the Government.

(1) Telephone calls may properly be authorized when they—

(i) Do not adversely affect the performance of official duties by the employee or the employee's organization;

(ii) Are of reasonable duration and frequency; and

(iii) Could not reasonably have been made at another time; or

(iv) Are provided for in a collective bargaining agreement that is consistent with these regulations.

(2) Personal long distance calls that must be made during working hours may be made over the commercial long distance network if consistent with the criteria in paragraph (d)(1) of this section and are—

(i) Charged to the employee's home phone number or other non-Government number (third-number call);

(ii) Made to an 800 toll-free number;

(iii) Charged to the called party if a non-Government number (collect call); or

(iv) Charged to a personal telephone credit card.

(3) Agencies shall issue directives on using telephone facilities and services. Agencies' contractor-operated facilities shall be covered by these directives. The directives may provide further definition of calls necessary in the interest of the

Government and shall include procedures for collection and reimbursement for unauthorized calls.

§ 201-21.602 Collection for unauthorized use.

(a) Agencies shall collect for any unauthorized calls if it is cost-effective to do so. Reimbursing the Government for unauthorized calls does not exempt an employee from appropriate administrative, civil, or criminal action.

(b) Agency collections shall include—
(1) The value of the call, computed on the basis of commercial long distance rates rounded to the nearest dollar; and

(2) An additional amount rounded to the nearest dollar to cover the administrative costs of determining that the call was unauthorized and processing the collection.

§ 201-21.603 Listening-in to or recording telephone conversations.

(a) *Scope.* This section describes the limited circumstances under which agencies are authorized to listen-in to or record telephone conversations.

(b) *General.* This section applies only to consensual listening-in or recording that takes place when at least one party to a telephone conversation knows it is happening or has given prior consent. It does not apply to listening-in or recording done without the knowledge of any of the parties to the conversation. Such activity is governed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510 et seq.), the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), United States Intelligence Activities, Executive Order 12333, or any successor order.

(c) *Policy.* Agencies shall not listen-in to or record conversations on any GSA-provided telephone system, any telephone system acquired under a delegation of GSA procurement authority, or any telecommunications system approved in accordance with the Federal Property and Administrative Services Act of 1949, as amended, except under the following conditions:

(1) *Law enforcement-national security.* When performed for law enforcement, foreign intelligence, counterintelligence, or communications security purposes in accordance with procedures established by the agency head. These procedures shall be in conformance with applicable laws, regulations, and Executive orders governing such activities.

Communications security monitoring shall be conducted following notice to a user of any system covered by this regulation pursuant to procedures approved by the Attorney General. Line

identification equipment may be installed on telecommunications systems to assist Federal law enforcement officials in investigating threatening telephone calls, bomb threats, and other criminal activities. No invasion of privacy is involved, and such equipment does not violate the Privacy Act of 1974 or any Federal or State wiretap laws.

(2) *Public safety.* When performed by a Federal employee for public safety purposes and when documented by a written determination by the agency head or a designee citing the public safety needs. The determination shall identify the segment of the public needing protection and cite examples of the possible harm from which the public requires protection.

(3) *Employee with a disability.* When performed by a Federal employee with a disability, and when the head of the agency or a designee determines that the use of a listening-in or recording device is required for full performance of the duties of the employee's position description. The equipment shall be for the exclusive use of the employee with a disability. Conversations recorded or relayed by operators of telecommunications devices for the deaf (TDD) relay systems shall be held in confidence.

(4) *Public service monitoring.* When performed by an agency official to determine the quality of service, but only after an analysis of alternatives and a written determination by the agency head or a designee that telephone conversation monitoring is required to perform the agency mission.

(5) *All-party consent.* When performed by any Federal employee with the consent of all parties for each specific instance. This includes telephone conferences, secretarial recording, and other acceptable administrative practices. Strict supervisory controls shall be maintained to eliminate any possible abuse of this privilege.

(d) *Procedures.* (1) Agencies that plan to listen-in to or record telephone conversations under § 201-21.603(c) (2), (3), or (4) shall notify GSA in writing at least 30 days before the operational date. The agency shall include in the notification current copies of agency documentation, determinations, policies, and procedures supporting the application, and the name and telephone number of the agency contact. The agency shall forward the notification to: General Services Administration, Regulations Branch (KMPR), 18th & F Streets, NW., Washington, DC 20405.

(2) A determination as used in this section means a written justification signed by the agency head or the agency head's designee, that specifies the operational need for listening-in to or recording telephone conversations, indicates the specific system and location where monitoring is to be performed, lists the number of telephones or recorders involved, and establishes operating times and an expiration date for the monitoring.

(3) Agencies shall review, at least every 2 years, the need for each determination authorizing listening-in or recording. Agency documentation to continue or terminate the program shall be forwarded to: General Services Administration, Regulations Branch (KMPR), 18th & F Streets, NW., Washington, DC 20405.

(4) Each agency that conducts listening-in or recording associated with public service monitoring shall establish controls and issue written policies and procedures that provide for—

(i) The agency head or designee to name in writing those agency officials authorized to listen-in to or record telephone conversations;

(ii) Continuous positive action to inform the public of monitoring;

(iii) No recording or identification of public callers;

(iv) Keeping the number of monitored calls to the minimum necessary to obtain a statistically valid sample;

(v) Conspicuous labeling of telephone instruments subject to monitoring;

(vi) No use of the information obtained by monitoring against the public party; and

(vii) Calling-party consent for calls that are recorded.

(5) The recordings and records pertaining to listening-in to or recording of any conversations covered by this regulation shall be used, safeguarded, and destroyed in accordance with the agency records management program.

(6) GSA will periodically review agency listening-in activities conducted under the public service monitoring exception to ensure compliance with the intent of this section.

(e) *Use of recording devices.* When recording as permitted by § 201-21.603(c) (2) and (3) of this section, agencies shall follow Federal Communications Commission rules on obtaining consent for recording telephone conversations on the nation's public networks (47 CFR 64.501). Proof of consent is the responsibility of the recording party. Agencies that authorize employees to record telephone conversations may obtain consent by—

(1) Prior mutual consent (oral or written) of all parties to the conversation;

(2) An oral notification recorded at the beginning, as a part of the call, by the recording party; or

(3) The automatic superimposing of a distinct signal (e.g., beep tone) at regular intervals during the conversation.

(f) *Emergency calls.* Agencies need not apply the beep tone or obtain all-party consent before recording calls made to telephone numbers publicized for emergencies or outgoing calls made in immediate response to such incoming calls.

§ 201-21.604 Toll-free telephone service.

(a) Each agency shall promptly forward a copy of each agency order for toll-free telephone service to: General Services Administration, Authorizations Branch (KMAS), 18th & F Streets, NW., Washington, DC 20405.

(b) Each submission shall include—

(1) A description of the requirement;

(2) The program to be supported;

(3) The type of service ordered (INWATS, FX, dial 800, etc.);

(4) The origination and termination points for the service ordered;

(5) The expected number of calls by day, week, or month;

(6) The estimated monthly cost and expected service commencement date; and

(7) The title and date of the regulatory document, if the service has been directed by a statute, Executive order, or other regulation; or the certification of compliance with 31 U.S.C. 1348, unless otherwise authorized by statute.

PART 201-22—REVIEW AND EVALUATION

Sec.

201-22.000 Scope of part.

Subpart 201-22.1—Federal Information Resources Management (IRM) Review Program

201-22.100 Scope of subpart.

201-22.101 General.

201-22.102 Policies.

201-22.103 Procedures.

Subpart 201-22.2—Information Resources Procurement and Management Review (IRPMR) Program

201-22.200 Scope of subpart.

201-22.201 General.

201-22.202 Policies.

201-22.203 Procedures.

Subpart 201-22.3—Obsolescence Review

201-22.300 Scope of subpart.

201-22.301 General.

201-22.302 Policy.

201-22.303 Procedures.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-22.000 Scope of part.

This part prescribes policies and procedures for General Services Administration (GSA) or agency-conducted evaluation programs to help agencies ensure that the acquisition, management, and use of Federal information processing (FIP) resources are consistent with applicable laws and regulations.

Subpart 201-22.1—Federal Information Resources Management (IRM) Review Program

§ 201-22.100 Scope of subpart.

This subpart prescribes policies and procedures for the Federal Information Resources Management (IRM) Review Program as it relates to the management and use of information and to the acquisition, management, and use of FIP resources.

§ 201-22.101 General.

(a) The Paperwork Reduction Act, as amended (44 U.S.C. 3501 et seq.) requires the Administrator of GSA to assist the Director of the Office of Management and Budget (OMB) in reviewing, at least once every 3 years, the information management activities of each executive agency. GSA has delegated much of its IRM review responsibilities under the Paperwork Reduction Act to each agency and serves as the focal agency for collecting, assessing, and reporting on IRM review results to OMB. GSA has additional review and oversight responsibilities under the Federal Property and Administrative Services Act and the National Archives and Records Administration (NARA) Act.

(b) The main objectives of the Federal IRM Review Program are to determine if agencies are—

(1) Carrying out their information management activities efficiently and effectively;

(2) Complying with established IRM policies, procedures, standards, and guidelines; and

(3) Complying with the responsibilities assigned by the Paperwork Reduction Act.

(c) Additional information on the Federal IRM Review Program is contained in the following GSA-issued documents:

(1) Federal IRM Review Program—An Executive Guide.

(2) IRM Review Handbook.

(3) FIRM Bulletin C-6.

§ 201-22.102 Policies.

Each agency shall designate an organization to be responsible for

reviewing the agency's IRM activities. The agency's review organization shall—

- (a) Have the authority to review programs, functions, and activities within the objectives and scope of IRM;
- (b) Be responsive to established Governmentwide and agency-specific priorities; and
- (c) Be responsible for meeting the reporting requirements of the Federal IRM Review Program.

§ 201-22.103 Procedures.

- (a) Each agency shall establish an IRM review capability commensurate with the scope and complexity of the agency mission and program objectives.
- (b) Each agency shall develop for its own use, an IRM review plan that addresses, at a minimum, review priorities, objectives, compliance with 44 U.S.C. 3506, and planned reviews for the coming year.
- (c) Each agency shall submit a report titled "Annual Executive Summary," to GSA by November 1st of each year in accordance with procedures established in FIRMR Bulletin C-6. The report shall—
 - (1) Provide an overview and synopsis of the agency's previous year's IRM reviews;
 - (2) Evaluate how well the reviews met overall review objectives;
 - (3) Assess the benefits of the review effort to the agency;
 - (4) Demonstrate how the agency is complying with 44 U.S.C. 3506; and
 - (5) Describe planned review activities for the coming year.
- (d) GSA may conduct separate reviews of agencies' IRM activities to complement and supplement agency efforts. Prior to a GSA-conducted review, the DSO will be informed of its scope and the manner in which it will be conducted.

Subpart 201-22.2—Information Resources Procurement and Management Review (IRPMR) Program

§ 201-22.200 Scope of subpart.

This subpart prescribes policies and procedures for the Information Resources Procurement and Management Review (IRPMR) Program as it relates to the acquisition, management, and use of FIP resources.

§ 201-22.201 General.

- (a) The IRPMR focuses on major agency programs and any related significant FIP resource acquisitions.
- (b) GSA may use the results of an IRPMR to determine the level of procurement authority for FIP resources for an agency or its subagency components.

§ 201-22.202 Policies.

GSA will conduct periodic reviews of agency acquisitions of FIP resources to—

- (a) Verify agency compliance with regulations and delegation of procurement authority (DPA) conditions or limitations;
- (b) Assess GSA policies and procedures given to agencies; and
- (c) Assess the agency's planning and control mechanisms regarding the use of the delegated authority to accomplish economical and efficient acquisition, management, and use of FIP resources.

§ 201-22.203 Procedures.

- (a) *Agency action.* (1) An agency shall submit comments to GSA on the factual content of a draft IRPMR evaluation report within 30 calendar days of receiving the report from GSA.
- (2) Not later than 90 calendar days after the date GSA sends the final report to the agency, the agency shall submit an action plan to: General Services Administration, Office of Federal IRM (KA), 18th & F Streets, NW., Washington, DC 20405.
- (3) The action plan shall include the following items:
 - (i) Specific actions the agency plans to take on each evaluation report recommendation. If an agency does not plan to implement a recommendation, the agency shall document the reasons for not acting.
 - (ii) The proposed month and year for completing each planned action.
- (4) The agency shall submit a progress report every 6 months to the address shown in paragraph (a)(2) of this section, until the action plan is implemented. Interagency report control number 0153-GSA-AR has been assigned to this report.
- (b) *GSA action.* GSA will—
 - (1) Analyze the adequacy of the action plan;
 - (2) Provide comments to the agency on the plan within 60 calendar days after its transmittal;
 - (3) Notify the agency when progress reports are no longer required;
 - (4) Take appropriate action when findings show the agency failed to comply with regulations or the conditions of a DPA; and
 - (5) Provide the broadest possible delegation of GSA's exclusive procurement authority for FIP resources to the agency, based on the agency's ability to carry out acquisitions in accordance with the policies and procedures in the FIRMR.

Subpart 201-22.3—Obsolescence Review

§ 201-22.300 Scope of subpart.

This subpart prescribes policies for reviewing installed FIP resources for obsolescence.

§ 201-22.301 General.

An obsolescence review is an analysis to determine whether system life cost savings are obtainable by acquiring newer technology resources relative to continued operation of existing outdated resources.

§ 201-22.302 Policy.

Agencies shall replace existing outdated FIP resources that are no longer the most advantageous alternative for meeting their requirements.

§ 201-22.303 Procedures.

- (a) Agencies shall evaluate their existing outdated FIP resources to determine whether the cost of operating them is greater than the cost of acquiring and operating technologically newer resources.
- (b) When the cost of operating existing outdated resources is greater than the cost of acquiring and operating technologically newer resources, agencies shall replace the existing outdated resources.

PART 201-23—DISPOSITION

Sec.

- 201-23.000 Scope of part.
- 201-23.001 General.
- 201-23.002 Policies.
- 201-23.003 Procedures.

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-23.000 Scope of part.

(a) This part prescribes policies and procedures to be followed by agencies for disposing of Government-owned Federal information processing (FIP) equipment that is no longer needed for the purpose for which it was acquired.

(b) This part notifies agencies that exchange/sale transactions of Government-owned FIP equipment are to be conducted in accordance with 41 CFR part 101-46.

(c) This part describes the circumstances under which the policies and procedures for disposing of FIP equipment apply to Government-owned FIP equipment used by grantees and contractors.

(d) This part prescribes the policy for screening of FIP software that is no longer needed for the purpose for which it was acquired.

§ 201-23.001 General.

(a) Government-owned FIP equipment that is no longer needed for the purpose for which it was acquired is either—

- (1) Reassigned within the agency;
- (2) Declared excess to the agency's needs and made available for interagency screening and transfer to another agency under the GSA Excess FIP Equipment Program;
- (3) Exchanged or sold as part of a transaction to acquire replacement FIP equipment;
- (4) Declared excess and transferred to another agency outside of the GSA Excess FIP Equipment Program; or
- (5) Declared surplus and made available for donation.

(b) Detailed procedures for using the GSA Excess FIP Equipment Program are contained in FIRMR Bulletin C-2.

(c) FIP software that is no longer needed for the purpose for which it was acquired is either—

- (1) Reassigned within the agency consistent with the limitations of any applicable license; or
- (2) Otherwise disposed of consistent with the limitations of any applicable license. (GSA does not require interagency screening of FIP software.)

§ 201-23.002 Policies.

Agencies shall—

(a) Use FIP equipment or FIP software that is available for reassignment within the agency or by transfer from another agency when such use is the most advantageous alternative to satisfy the agency's requirements.

(b) Make available for reassignment within the agency FIP equipment that is not outdated and that is no longer needed for the purpose for which it was acquired.

(c) Make available for interagency screening and transfer to another agency, excess FIP equipment that is not outdated and has an original acquisition cost (OAC) per component of \$1 million or more. Interagency transfer of FIP equipment that is not outdated with an OAC per component of less than \$1 million, is permitted if the holding agency learns of a potential user outside of the screening process.

(d) Make available for surplus donation or subsequent sale, excess FIP equipment not exchanged, sold, reassigned or transferred.

(e) Consistent with the limitations of any applicable license—

- (1) Make available for reassignment within the agency FIP software that is no longer needed for the purpose for which it was acquired;
- (2) Make available for interagency transfer, excess FIP software not exchanged or sold, if the holding agency

learns of a potential user outside of the screening process;

(3) For excess FIP software not reassigned, transferred, exchanged, or sold, either:

- (i) Return it to the licensor, or
- (ii) Destroy it after a duly authorized agency official determines in writing that destruction is the most cost-effective disposal approach.

§ 201-23.003 Procedures.

(a) Each agency head shall designate an agency point of contact for managing the disposition of FIP equipment and software. Each agency shall submit the name, address, and phone number of this individual to: General Services Administration, Authorizations Branch (KMAS), 18th & F Streets NW., Washington, DC 20405.

(b) Agencies shall—

(1) Establish internal procedures for the reassignment of FIP equipment or software; and

(2) Obtain approval from the agency DSO before reassigning outdated FIP equipment.

(c) Agencies shall report to GSA for interagency screening and transfer to another agency, excess FIP equipment that is not outdated and has an OAC per component of \$1 million or more. Agencies may explain any special circumstances and request that GSA offer FIP equipment with an OAC per component less than \$1 million through the GSA Excess FIP Equipment Program. Agency reports for the GSA Excess FIP Equipment Program shall be sent to: General Services Administration, Authorizations Branch (KMAS), 18th & F Streets, NW., Washington, DC 20405.

(d) Regardless of dollar amount, agencies may conduct exchange/sale transactions of FIP equipment not transferred to another agency, or FIP software, without further GSA/IRMS approval under the FIRMR. (Exchange/sale transactions for FIP equipment may be initiated in parallel with interagency screening, but screening shall be completed prior to concluding an exchange/sale transaction.) When an agency determines that FIP equipment will be replaced by exchanging or selling it, the agency shall follow the contracting policies and procedures in part 201-39 and the Federal Acquisition Regulation (FAR) and the policies and procedures on exchange/sale contained in 41 CFR part 101-46. FIP software transactions must be consistent with the limitations of any applicable license.

(e) Agencies shall make available for surplus donation or subsequent sale, in accordance with 41 CFR parts 101-44 and 101-45, excess FIP equipment not

exchanged, sold, reassigned, or transferred.

(f) Agencies shall apply the policies and procedures of this part 201-23 to FIP equipment used by grantees and contractors when FIP equipment is—

(1) Acquired by the contractor or grantee under a contract or grant and the terms vest title in the Government or the Government is obligated or has the option to take over title;

(2) Furnished to the grantee or contractor by the Government (Transfer of excess FIP equipment to agency project grantees shall be conducted in accordance with 41 CFR 101-43.314.); or

(3) Operated by the grantee or contractor as part of a Government-owned or Government-controlled facility.

PART 201-24—GSA SERVICES AND ASSISTANCE

Sec.

201-24.000 Scope of part.

201-24.001 General.

Subpart 201-24.1—GSA Mandatory-for-Use Programs

201-24.100 Scope of subpart.

201-24.101 The mandatory FTS2000 network.

201-24.101-1 General.

201-24.101-2 Policies.

201-24.101-3 Procedures.

201-24.102 Consolidated local telecommunications service.

201-24.103 [Reserved]

201-24.104 Purchase of Telephones and Services (POTS) program.

201-24.105 [Reserved]

201-24.106 National security and emergency preparedness (NSEP).

201-24.107 Financial Management Systems Software (FMSS).

Subpart 201-24.2—GSA Mandatory-for-Consideration Programs

201-24.200 Scope of subpart.

201-24.201 Federal Software Exchange Program.

201-24.202 Excess FIP Equipment Program.

201-24.203 Telecommunications assistance programs and services.

201-24.203-1 Federal Secure Telephone Service (FSTS).

201-24.203-2 Information systems security (INFOSEC).

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-24.000 Scope of part.

This part describes mandatory-for-use and mandatory-for-consideration services and assistance programs operated or managed by the General Services Administration (GSA) to meet agencies' needs. Section 201-24.101 implements the mandatory-for-use requirements of the FTS2000 contracts.

§ 201-24.001 General.

(a) In accordance with § 201-20.203-1(a)(2), agencies shall use GSA's mandatory-for-use programs when their requirements can be met by these programs, unless they have requested and received an exception to the use of these programs from GSA.

(b) In accordance with § 201-20.203-1(a)(3), agencies shall use GSA's mandatory-for-consideration programs when their requirements can be met by these programs and using them is the most advantageous alternative to the Government.

(c) The GSA programs and services discussed in this part are described more fully in FIRMR bulletins, handbooks, and other GSA publications. Appendix B to the FIRMR contains current FIRMR bulletins and appendix C lists bulletins, handbooks, and other guides.

(d) GSA, Federal Supply Service (FSS) manages a Federal Supply Schedules program that provides some resources that fall within the definition of FIP resources. When acquiring FIP resources from Federal Supply Schedules, agencies are responsible for determining FIRMR applicability in accordance with FIRMR 201-1.002.

(e) GSA also provides nonmandatory services and assistance programs to help agencies meet their FIP resources requirements. These programs are discussed in FIRMR Bulletin C-9.

(f) GSA manages a nonmandatory schedule contracts program that provides a wide selection of FIP resources. Schedule 58 contains telecommunications resources and Schedule 70 contains ADP resources.

(g) GSA publishes an acquisition guide series that provides guidance to agencies on various subjects related to the acquisition of FIP resources.

Subpart 201-24.1—GSA Mandatory-for-Use Programs**§ 201-24.100 Scope of subpart.**

This subpart describes GSA programs and contracts that are mandatory-for-use by agencies including policies and procedures regarding mandatory agency use of contracts known as FTS2000.

§ 201-24.101 The mandatory FTS2000 network.**§ 201-24.101-1 General.**

(a) Federal agencies must use the FTS2000 network for procurements subject to Section 111 of the Federal Property and Administrative Services Act (40 U.S.C. 759).

(b) GSA will grant exceptions to the use of the FTS2000 network when—

(1) The agency's procurement requirements are unique and cannot be satisfied by the FTS2000 network; and

(2) The agency procurement would be cost-effective and would not adversely affect the cost-effectiveness of the FTS2000 network.

(c) The FTS2000 network will provide Federal agencies modern up-to-date intercity telecommunications services over the life of the program. GSA will enhance existing services and add features to the FTS2000 network to maintain technologically current services and to improve services to user agencies. GSA will make service improvements in accordance with agencies' needs, contract provisions, governing regulations and statutes.

(d) Specific information concerning FTS2000 services and procedures for obtaining FTS2000 network prices is provided in FIRMR Bulletin C-18.

(e) As referenced in the FIRMR the terms intercity and long distance have the same meaning.

§ 201-24.101-2 Policies.

(a) Federal agencies shall use the FTS2000 network to satisfy long distance telecommunications procurement requirements which are within the scope of FTS2000 network voice, data, and video services as such services become available unless:

(1) The agency requests and obtains from GSA an exception to the use of the FTS2000 network based on a GSA determination that—

(i) The agency's procurement requirements are unique and cannot be satisfied by the FTS2000 network, and

(ii) The agency procurement would be cost-effective and would not adversely affect the cost-effectiveness of the FTS2000 network;

(2) The agency requests and obtains from GSA an interim exception to the use of the FTS2000 network based on an established date for transition to the FTS2000 network; or

(3) An exception to the use of the FTS2000 network for the agency is otherwise provided by law.

(b) Unless any of the exceptions listed in paragraph (a) of this section apply to the procurement, and when overall procurement requirements include any agency long distance telecommunications requirements which are within the scope of FTS2000 services, Federal agencies shall require offerors in new awards subject to 40 U.S.C. 759 to satisfy those requirements by using the Government furnished services of the FTS2000 network as such services become available.

(c) For ease of determining and evaluating Government costs, Federal

agencies also shall require offerors to unbundle FTS2000 services in their offers by separately describing and pricing the FTS2000 services that satisfy Government requirements. However, the agency solicitation may prescribe an expected solution for the use of FTS2000. Offerors would then be required to separately price the Government-furnished services of FTS2000 only if their offers show a different use of FTS2000 than the Government's expected solution.

(d) Notwithstanding paragraphs (a) and (b) of this section, agencies may continue to use intercity telecommunications services and facilities provided under contracts previously authorized and awarded under prior FIRMR provisions without obtaining an exception to the use of the FTS2000 network. However, agencies shall use available FTS2000 services that can satisfy their procurement requirements upon expiration of such contracts. Before exercising renewal options under existing contracts that will result in the provision of intercity telecommunications services after September 30, 1991, agencies shall obtain an interim exception to the use of the FTS2000 network. This interim exception will allow GSA and the agencies to plan an orderly transition to the FTS2000 network.

(e) In planning for transition to the FTS2000 network, agencies shall be responsible for determining customer premises equipment requirements to achieve efficient interfaces with the type of FTS2000 services needed. However, agencies shall avoid duplicating FTS2000 services. Agencies shall avoid incorporating inherently intercity features (i.e., features that can be provided only as part of an intercity network) of the FTS2000 network in agency networks. An exception to the use of the FTS2000 network is hereby provided to agencies with requirements for non-inherently intercity features to satisfy such features within a local network.

§ 201-24.101-3 Procedures.

(a) FIRMR Bulletin C-18 describes the scope and availability of FTS2000 services, including procedures for ordering services. GSA will provide assistance in understanding and pricing the services available from the FTS2000 network and in developing plans for transition to the FTS2000 network. For assistance and information concerning the FTS2000 network, agencies should contact the General Services Administration, Information Resources Management Service, Office of Network

Services (KN), Customer Services Branch. See FIRM Bulletin C-18 for addresses and telephone numbers.

(b) FTS2000 services may be ordered without obtaining a specific delegation of procurement authority from GSA. Agencies seeking an exception to the use of the FTS2000 network are responsible for documenting their case. A complete agency request for an exception to the use of the FTS2000 network shall establish to the satisfaction of GSA that:

- (1) The agency's procurement requirements are unique and cannot be satisfied by the FTS2000 network;
- (2) The agency's procurement would be cost-effective in accordance with the provisions of part 201-20; and
- (3) The agency's procurement would not adversely affect the cost-effectiveness of the FTS2000 network. (The rebuttable presumption is that, if an agency procurement requirement is unique and the resultant procurement would be cost-effective, the agency procurement would not adversely affect the cost-effectiveness of the FTS2000 network.)

(c) An agency request for an interim exception to the use of the FTS2000 network shall be based on a GSA established date for transition of agency requirements to the FTS2000 network.

(d) Any agency exception request shall be sent to the General Services Administration, Information Resources Management Service, Authorizations Branch (KMA), 18th & F Streets, NW., Washington, DC 20405. Decisions by GSA will be made on a case-by-case basis. GSA will respond to agencies within 20 working days.

(e) Agencies may conduct procurements for long distance telecommunications services and facilities without prior approval of GSA when:

- (1) The agency's requirements are within the scope of an exception to the use of the FTS2000 network provided by GSA; and
- (2) The total dollar value of the procurement, including the long distance telecommunications, is within the limits prescribed in § 201-20.305-1.

(f) An agency may appeal a GSA denial of a request for an exception to the Office of Management and Budget (OMB) under procedures in 40 U.S.C. 759(e).

§ 201-24.102 Consolidated local telecommunications service.

(a) *General.* Consolidated local telecommunications service is available in most buildings occupied by concentrations of Federal employees. This service includes the major serving

switch or service, universal features and applications, and the wire and cable to the designated point of connection.

FIRM Bulletin C-15 describes consolidated local telecommunications service, how to order it, and how to obtain a current listing of service locations.

(b) *Policy.* Agencies shall use available consolidated local telecommunications service to meet their local telecommunications requirements.

(c) *Exceptions.* Agencies at a location where GSA provides consolidated local telecommunications service may request an exception to the mandatory use of such service for unique requirements.

(1) If an exception is granted, agencies may need to obtain a specific DPA in accordance with § 201-20.305.

(2) Agencies shall submit requests for exceptions to the use of consolidated local telecommunications service to: General Services Administration, Authorizations and Management Reviews Division (KMA), 18th & F Streets NW., Washington, DC 20405.

(d) *Procedures.* FIRM Bulletin C-15 describes procedures for using consolidated local telecommunications service. GSA charges to agencies for consolidated local telecommunications service will cover expenses for installation, changes in service, a common distributable charge, and termination.

§ 201-24.103 [Reserved]

§ 201-24.104 Purchase of Telephones and Services (POTS) program.

(a) POTS contracts provide for the purchase, installation, maintenance, repair, removal, and relocation of telephone equipment.

(b) POTS contracts are mandatory sources of supply at most locations where GSA provides consolidated local telecommunications service. These contracts are available for optional use at other locations.

(c) Subpart 201-39.8 provides contracting policies and procedures for using POTS contracts. FIRM Bulletin C-21 contains guidance on using POTS contracts and on how to obtain an exception to their use.

§ 201-24.105 [Reserved]

§ 201-24.106 National security and emergency preparedness (NSEP).

(a) *General.* Executive Order 12472, April 3, 1984, requires that GSA ensure that the NSEP requirements of agencies are met. GSA incorporates NSEP safeguards and support features in networks and services it provides for agencies. GSA also provides emergency

telecommunications for the special needs of agencies and helps agencies plan, obtain, and maintain continuity of telecommunications during wartime and non-wartime emergencies.

(b) *Policy.* Agencies shall use available GSA telecommunications systems and services to meet their NSEP requirements.

(c) *Procedures.* Before acquiring services or facilities to meet special NSEP requirements, agencies shall review GSA-provided services described in FIRM Bulletin C-20. Agencies shall coordinate their special NSEP requirements with: General Services Administration, NSEP Division (KVN), 18th & F Streets NW., Washington, DC 20405.

§ 201-24.107 Financial Management Systems Software (FMSS)

(a) The Office of Management and Budget (OMB) has established a Governmentwide FMSS program. To help agencies implement this program, GSA has established the mandatory FMSS multiple award schedule (MAS) Contracts Program.

(b) The FMSS MAS contracts program is mandatory-for-use by executive agencies for the acquisition of commercial software for primary accounting systems and for the acquisition of services and support related to the implementation of such software.

(c) Subpart 201-39.8 provides policies and procedures for using the FMSS MAS contracts program.

Subpart 201-24.2—GSA Mandatory-for-Consideration Programs

§ 201-24.200 Scope of subpart.

This subpart describes GSA programs that are mandatory-for-consideration by agencies.

§ 201-24.201 Federal Software Exchange Program.

(a) *General.*—(1) The Federal Software Exchange Program (FSEP) is administered by the National Technical Information Service of the Department of Commerce under an interagency agreement with GSA's Office of Technical Assistance. The program promotes the sharing of common-use software and related documentation.

(2) Part 201-21 requires agencies to report common-use software to the Federal Software Exchange Center (FSEC); FIRM Bulletin C-12 contains additional information on the use of the FSEP.

(b) *Policy.* Before contracting for common-use software, agencies shall contact the FSEC or review the Federal

Software Exchange Catalog to determine whether common-use software available from other agencies would be the most advantageous alternative for meeting the agency's requirements.

§ 201-24.202 Excess FIP Equipment Program.

(a) *General.* The GSA Excess FIP Equipment Program facilitates the reuse of excess FIP equipment components that are not outdated and that have an original acquisition cost (OAC) of \$1 million or more. Part 201-23 and FIRM Bulletin C-2 contain procedures for disposition and reuse of excess FIP equipment.

(b) *Policy.* Before contracting for FIP equipment, agencies shall review GSA's current Excess Equipment Availability Letter to determine whether the GSA Excess FIP Equipment Program has FIP equipment that would satisfy their requirements as the most advantageous alternative to the Government.

§ 201-24.203 Telecommunications assistance programs and services.

§ 201-24.203-1 Federal Secure Telephone Service (FSTS).

(a) *General.* FSTS is a worldwide secure voice service designed to protect sensitive and classified voice transmission.

(b) *Policy.* Agencies shall consider the use of FSTS to meet requirements for the transmission of sensitive or classified voice information.

(c) *Procedures.* Information, assistance, and guidance concerning the use of FSTS, including access key arrangements, are discussed in FIRM Bulletin C-19.

§ 201-24.203-2 Information systems security (INFOSEC).

(a) *General.* GSA offers worldwide services in support of agencies' sensitive and classified information requirements. Services cover installation, maintenance, key distribution, design, engineering, and INFOSEC consulting. GSA also operates and maintains communications security (COMSEC) systems and services to meet the requirements of agencies.

(b) *Policy.* Agencies shall consider the use of GSA-provided INFOSEC services and programs and COMSEC support services to meet their requirements.

(c) *Procedures.* Procedures for obtaining security services are contained in FIRM Bulletin C-19.

PARTS 201-25 through 201-38—[RESERVED]

SUBCHAPTER D—ACQUISITION OF FEDERAL INFORMATION PROCESSING (FIP) RESOURCES BY CONTRACTING

PART 201-39—ACQUISITION OF FEDERAL INFORMATION PROCESSING (FIP) RESOURCES BY CONTRACTING

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- 201-39.1701-8 Solicitation provision and contract clauses.

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- 201-39.3300 Scope of subpart.
- 201-39.3301 General.
- 201-39.3302 Applicability.
- 201-39.3303 Policy.
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- 201-39.4400 Scope of subpart.
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- 201-39.4501-1 General.
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- 201-39.4600 Scope of subpart.
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- 201-39.5200 Scope of subpart.
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- 201-39.5202-4 Evaluation of Options—FIP Resources.
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Subpart 201-39.53—[Reserved]

Authority: 40 U.S.C. 486(c) and 751(f).

§ 201-39.000 Scope of part.

This part sets forth the unique rules that apply Government-wide to the acquisition of Federal information processing (FIP) resources by contracting.

§ 201-39.001 General.

(a) In addition to this part 201-39, contracting officers should review and be familiar with the policies and procedures contained in the complete FIRMAR.

(b) To assist Federal agencies in preparing solicitations for FIP resources,

the General Services Administration (GSA) makes available standard solicitations and other guidance. Federal agencies can obtain copies of these materials by contacting: General Services Administration, Regulations Branch (KMPR), 18th and F Streets, NW, Washington, DC 20405.

Subpart 201-39.1—Federal Information Resources Management Regulation (FIRMAR) System

§ 201-39.100 Scope of subpart.

This subpart sets forth basic policies and general information pertaining to part 201-39 of the Federal Information Resources Management Regulation (FIRMAR).

§ 201-39.101 Purpose, authority, applicability, and issuance.

§ 201-39.101-1 Purpose.

This part 201-39 sets forth FIRMAR contracting policies and procedures in a single part organized for consistency with the Federal Acquisition Regulation (FAR). This part contains only those contracting policies and procedures that are unique to FIP resources.

§ 201-39.101-2 Authority.

This part 201-39 is prepared, issued, and maintained by the Administrator of General Services under the Federal Property and Administrative Services Act of 1949, as amended.

§ 201-39.101-3 Applicability.

(a) *Policies.* The FIRMAR applies to—
(1) The acquisition, management, and use of FIP resources by Federal agencies.

(2) Any Federal agency solicitation or contract when either paragraph (a)(2)(i), (a)(2)(ii), or (a)(2)(iii) applies:

(i) The solicitation or contract requires the delivery of FIP resources for use by a Federal agency or users designated by the agency.

(ii) The solicitation or contract explicitly requires the use by the contractor of FIP resources that are not incidental to the performance of the contract. FIP resources acquired by a contractor are incidental to the performance of a contract when:

(A) None of the principal tasks of the contract depend directly on the use of the FIP resources; or

(B) The requirements of the contract do not have the effect of substantially restricting the contractor's discretion in the acquisition and management of FIP resources, whether the use of FIP resources is or is not specifically stated in the contract.

(iii) The solicitation or contract requires the performance of a service or the furnishing of a product that is

performed or produced making significant use of FIP resources that are not incidental to the performance of the contract. Significant use of FIP resources means:

(A) The service or product of the contract could not reasonably be produced or performed without the use of FIP resources; and

(B) The dollar value of FIP resources expended by the contractor to perform the service or furnish the product is expected to exceed \$500,000 or 20 percent of the estimated cost of the contract, whichever amount is lower.

(3) The creation, maintenance, and use of records by Federal agencies.

(b) *Exceptions.* (1) The FIRMAR does not apply to the procurement of FIP resources—

(i) By the Central Intelligence Agency (CIA).

(ii) By the Department of Defense when the function, operation, or use of such resources—

(A) Involves intelligence activities, cryptologic activities related to national security, the command and control of military forces, or equipment that is an integral part of a weapon or weapons system; or

(B) Is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include FIP resources used for routine administrative and business applications such as payroll, finance, logistics, and personnel management.

(2) The FIRMAR does not apply to radar, sonar, radio, or television equipment, except that the FIRMAR is used by GSA to implement Federal Telecommunications Standards for radio equipment.

(3) When both FIP and other resources are being acquired under the same solicitation or contract and the FIRMAR applies to the solicitation or contract, the FIRMAR applies only to the FIP resources.

(4) While the FIRMAR may require an agency to include in Federal solicitations and contracts provisions and clauses that control the contractor's acquisition of FIP resources, the FIRMAR does not apply to FIP resources acquired by a Federal contractor that are incidental to the performance of a contract.

(5) The FIRMAR does not apply to the acquisition, management, and use of products containing embedded FIP equipment when:

(i) The embedded FIP equipment would need to be substantially modified to be used other than as an integral part of the product; or

(ii) The dollar value of the embedded FIP equipment is less than \$500,000 or less than 20 percent of the value of the product, whichever amount is lower. Embedded FIP equipment is FIP equipment that is an integral part of the product, where the principal function of the product is not the "automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information."

(c) *Contract clause.* The contracting officer should consider inserting a clause in solicitations and contracts substantially the same as the clause at § 201-39.5202-1, FIRM Applicable, when the agency determines that part 201-39 does not apply to an acquisition for FIP resources.

§ 201-39.101-4 [Reserved]

§ 201-39.101-5 Arrangement of part.

For consistency with the FAR, part 201-39 is divided into 53 subparts consisting of sections and subsections. In the same manner in which each FAR part deals with a separate aspect of acquisition, the corresponding subpart of part 201-39 deals with that aspect of acquisition as it relates to FIP resources. For example, since FAR part 6 deals with general competition requirements, FIRM subpart 201-39.6 sets forth unique policies and procedures applicable to competition requirements for FIP resources. If there is no need to supplement a particular FAR part, the corresponding subpart of part 201-39 is reserved.

§ 201-39.101-6 Copies.

(a) Copies of the complete FIRM in looseleaf or annual bound versions may be purchased from: Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

(b) Contracting officers should contact the GPO, their agency liaison officer, or GSA (KMPR) for ordering information.

§ 201-39.102 Relationship of acquisition regulations.

(a) This part 201-39 sets forth Governmentwide policies and procedures unique to the acquisition of FIP resources by contracting. It relies on the FAR for general policies and procedures to be used in acquiring these resources. The policies and procedures of this part 201-39 are in addition to, not in lieu of, the FAR policies and procedures, except when the FIRM specifically requires its policies and procedures, and not those of the FAR, to be followed.

(b) Notwithstanding the fact that the FAR is for the use of executive agencies

in the acquisition of supplies and services, Federal agencies not otherwise subject to the FAR shall use the FAR in conjunction with the FIRM when acquiring FIP resources.

§ 201-39.103 [Reserved]

§ 201-39.104 Deviations.

§ 201-39.104-1 Deviations from the FIRM.

(a) *Policy.* Unless precluded by law, executive order, or regulation, GSA may grant deviations, as defined in subpart 201-39.2, from part 201-39 when necessary to meet the specific needs and requirements of each agency. Class deviations (affecting more than one contract action) and individual deviations (affecting only one contract action) may be authorized by—

(1) The Commissioner, Information Resources Management Service, or

(2) The officials designated by the Commissioner for that purpose.

(b) *Procedures.* (1) The agency head (or a designee) shall prescribe procedures for processing deviation requests.

(2) Each request for deviation shall explain the nature of and the reasons for the deviation.

(3) Agencies shall forward requests for deviations to: General Services Administration, Policy and Regulations Division (KMP), 18th & F Streets, NW., Washington, DC 20405.

§ 201-39.104-2 Deviations from the FAR.

Deviations from the FAR shall be accomplished in accordance with FAR subpart 1.4.

§ 201-39.105 [Reserved]

§ 201-39.106 Contracting authority and responsibilities.

§ 201-39.106-1 General.

(a) Notwithstanding FAR 1.601, authority and responsibility to contract for FIP resources is vested in the Administrator of General Services unless an exception in 40 U.S.C. 759(a)(3) applies. The Administrator of General Services, or a designee, authorizes agencies to contract for FIP resources by granting a delegation of procurement authority (DPA) to the agency designated senior official (DSO) when GSA determines that the DSO is sufficiently independent of program responsibility and has sufficient experience, resources, and ability to fairly and effectively carry out procurements under GSA's authority. Such delegations are granted by one of the following methods:

(1) The regulatory delegation of GSA's exclusive procurement authority which

allows Federal agencies to contract for certain types of FIP resources up to specified dollar amounts without obtaining a specific DPA;

(2) A specific agency delegation of GSA's exclusive procurement authority whereby the GSA Commissioner for Information Resources Management or a designee may authorize changes in the regulatory DPA for individual Federal agencies (or components thereof) on the basis of their ability to acquire, manage, and use FIP resources in accordance with FIRM policies and procedures; or

(3) A specific acquisition delegation of GSA's exclusive procurement authority provided to the agency as a result of the submission of an agency procurement request (APR) to GSA when acquisitions are not covered by either the regulatory or a specific agency DPA.

(b) The agency's DSO may redelegate GSA's exclusive authorities for FIP resources to qualified officials. However, such redelegation does not relieve the DSO of the responsibilities under 44 U.S.C. 3506 for the conduct of and accountability for acquisitions of FIP resources made under a DPA from GSA.

(c) Only a contracting officer may enter into and sign a contract on behalf of the Government. A DPA from GSA does not make the DSO a contracting officer. Contracting officers are appointed under procedures established by agency heads under FAR subpart 1.6.

(d) Additional policies and procedures related to delegations of procurement authority are addressed in part 201-20.

§ 201-39.106-2 Policy.

Before contracting for FIP resources, the contracting officer shall ensure that the agency's DSO has redelegated GSA's procurement authority to the contracting officer.

§ 201-39.106-3 Procedures.

The contracting officer shall consider this § 201-39.106, agency directives, and written instructions to the contracting officer issued under FAR 1.602-1 to ensure that the contracting officer is authorized to make the award.

§ 201-39.106-4 Contract clause.

(a) All solicitations and contracts for FIP resources subject to the FIRM shall contain a clause identifying whether the contracting action is being conducted under the regulatory DPA, a specific agency DPA, or a specific acquisition DPA.

(b) If the contracting action is being conducted under a specific agency or specific acquisition DPA, the contract

clause shall also include the GSA case number of the specific DPA.

(c) Accordingly, the contracting officer shall—

(1) Insert a clause substantially the same as the clause at § 201-39.5202-3, Procurement Authority, in each solicitation and contract for FIP resources; and

(2) Promptly issue an amendment to the solicitation modifying this clause when any of the facts set forth in it change prior to contract award.

Subpart 201-39.2—Definitions of Words and Terms

§ 201-39.200 Scope of subpart.

This subpart defines words and terms used in part 201-39.

§ 201-39.201 Definitions.

Designated senior official (DSO) means—

(a) The senior official designated by executive agencies pursuant to the Paperwork Reduction Act to be responsible for carrying out the agency's IRM functions (see 44 U.S.C. 3506); or

(b) The senior IRM official designated by the agency head for Federal agencies not subject to the Paperwork Reduction Act to be responsible for acquisitions of FIP resources made pursuant to a DPA.

Deviation means any one or a combination of the following:

(a) The issuance or use of a policy, procedure, practice, solicitation provision, contract clause, or method pertaining to the acquisition, management or use of Federal information processing resources that is inconsistent with the FIRMR.

(b) The omission or modification of any policy, procedure, practice, solicitation provision or contract clause required by the FIRMR.

(c) The authorization of lesser or greater limitations on the delegation, use, or application of any policy, procedure, solicitation provision, or contract clause prescribed by the FIRMR, except that this does not preclude an agency from setting delegation thresholds at more restrictive levels than those established by the FIRMR.

Federal information processing (FIP) resources means automatic data processing equipment (ADPE) as defined in Public Law 99-500 (40 U.S.C. 759(a)(2)), and set out in paragraphs (a) and (b) of this definition.

(a) Any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching,

interchange, transmission, or reception, of data or information—

(1) By a Federal agency, or
(2) Under a contract with a Federal agency which—

(i) Requires the use of such equipment, or

(ii) Requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

(b) Such term includes—

(1) Computers;
(2) Ancillary equipment;
(3) Software, firmware, and similar procedures;

(4) Services, including support services; and

(5) Related resources as defined by regulations issued by the Administrator for General Services.

(c) The term, FIP resources, includes FIP equipment, software, services, support services, maintenance, related supplies, and systems. These terms are limited by paragraphs (a) and (b) of the definition of FIP resources and are defined as follows:

(d) *FIP equipment* means any equipment or interconnected system or subsystems of equipment used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.

(e) *FIP maintenance* means those examination, testing, repair, or part replacement functions performed on FIP equipment or software.

(f) *FIP related supplies* means any consumable item designed specifically for use with FIP equipment, software, services, or support services.

(g) *FIP services* means any service, other than FIP support services, performed or furnished by using FIP equipment or software.

(h) *FIP software* means any software, including firmware, specifically designed to make use of and extend the capabilities of FIP equipment.

(i) *FIP support services* means any commercial nonpersonal services, including FIP maintenance, used in support of FIP equipment, software, or services.

(j) *FIP system* means any organized combination of FIP equipment, software, services, support services, or related supplies.

Lowest overall cost means the least expenditure of funds over the system life, price and other factors considered, including, but not necessarily limited to—

(a) Prices for the FIP resources;
(b) The present value adjustment, if used; and

(c) The identifiable and quantifiable costs—

(1) Directly related to the acquisition and use of the FIP resources;

(2) Of conducting the contract action; and

(3) Of other administrative efforts directly related to the acquisition process.

Most advantageous alternative means the alternative that provides the greatest value to the Government over the system life in terms of price or cost, quality, performance, and any other relevant factors.

Outdated FIP equipment means any FIP equipment over eight years old, based on the initial commercial installation date of that model of equipment, and that is no longer in current production.

Radar equipment means any radio detection device that provides information on range, azimuth, or elevation of objects.

Radio equipment means any equipment or interconnected system or subsystem of equipment (both transmission and reception) that is used to communicate over a distance by modulating and radiating electromagnetic waves in space without artificial guide. This does not include such items as microwave, satellite, or cellular telephone equipment.

Sonar equipment means an apparatus that detects the presence and location of a submerged object by means of sonic, subsonic, or supersonic waves reflected back to it from the object.

Specific make and model specification means a description of the Government's requirement for FIP resources that is so restrictive that only a particular manufacturer's products will satisfy the Government's needs, regardless of the number of suppliers that may be able to furnish that manufacturer's products.

System life means a projection of the time period that begins with the installation of the FIP resource and ends when the agency's need for that resource has terminated.

Television equipment means any equipment (both transmission and reception) used for the conversion of transient visual images into electrical signals that can be transmitted by radio or wire to distant receivers where the signals can be reconverted to the original visual images. This does not include such items as monitors for computers or computer terminals or video conferencing equipment.

Subparts 201-39.3 and 201-39.4—[Reserved]**Subpart 201-39.5—Publicizing Contract Actions****§ 201-39.500 Scope of subpart.**

This subpart prescribes the unique policies and procedures for publicizing contract actions when acquiring FIP resources using the GSA nonmandatory schedule contracts.

§ 201-39.501 Synopses of proposed contract actions.**§ 201-39.501-1 Policies.**

(a) The contracting officer shall publicize the intent to place an order against a GSA nonmandatory contract by following the procedures of § 201-39.501-3 and FAR subpart 5.2.

(b) The contracting officer shall not use the exception to synopsisizing set forth at FAR 5.202(a)(11) when using GSA nonmandatory schedule contracts to acquire FIP resources.

§ 201-39.501-2 Exceptions.

(a) The contracting officer need not publicize the intent to place an order against a GSA nonmandatory contract when—

(1) The total value of the order is \$50,000 or less; or

(2) The order is for FIP resources that were previously specifically synopsisized on a system life basis in a Commerce Business Daily (CBD) notice of intent in accordance with § 201-39.501-3 and FAR subpart 5.2.

(b) The contracting officer is not required to publish a second notice of a proposed contract action in accordance with FAR 5.203(a) when—

(1) A solicitation is being issued in accordance with § 201-39.803-3(b)(2)(iii); and

(2) The requirement was the subject of a previous CBD synopsis of intent accomplished in accordance with the procedures set forth in § 201-39.501-3 and FAR subpart 5.2.

§ 201-39.501-3 Procedures.

The contracting officer shall use the following procedures when publicizing the intent to place an order against a GSA nonmandatory schedule contract:

(a) Before placing an order for FIP resources against a GSA nonmandatory schedule contract, the contracting officer shall furnish a synopsis to the CBD in accordance with FAR 5.207 and this § 201-39.501.

(b) Notwithstanding FAR 5.203(c), the synopsis shall be published in the CBD at least 15 calendar days before placing the order. In calculating the 15 calendar days for synopsisizing, the first day shall

be the actual date the synopsis appears in the CBD.

(c) Format Item 17 (Description) of the standard synopsis format in FAR 5.207 shall contain a description of the intended contract action to the extent necessary to obtain information to permit the analysis required by § 201-39.803. As a minimum, Format Item 17 shall contain the following information:

(1) An identification of the specific nonmandatory schedule contract intended to be used.

(2) A description of the resources to be ordered, including, as applicable—

(i) The make and model of any FIP equipment to be ordered or maintained;

(ii) The name, functional description, and operating environment of any FIP software to be ordered;

(iii) The quantities, dates required, and period of performance;

(iv) The system life; and

(v) The type of support to be ordered.

(3) A request for pricing data.

(4) The following statement:

All responses from responsible sources will be fully considered. As a result of analyzing responses to this synopsis of intent, the contracting officer may determine that a solicitation will be issued. If a solicitation is issued, no additional synopsis will be published. Any such solicitation will be issued to the intended schedule vendor and all firms that respond to this synopsis of intent or otherwise request a copy of the solicitation.

Subpart 201-39.6—Competition Requirements**§ 201-39.600 Scope of subpart.**

This subpart prescribes policies and procedures applicable to—

(a) The acquisition of FIP resources using specific make and model specifications; and

(b) The use of follow-on contracts to perpetuate outdated FIP equipment.

§ 201-39.601 Specific make and model specifications.**§ 201-39.601-1 Policy.**

An acquisition that uses a specific make and model specification does not provide for full and open competition and must be justified and approved in accordance with FAR 6.303 and 6.304.

§ 201-39.601-2 Exception.

Subsection 201-39.601-1 does not apply when an order for FIP resources is placed against a GSA nonmandatory schedule contract and—

(a) The statement of work or requirements documentation prepared by the technical and requirements personnel describes the requirements with other than a specific make and model specification, notwithstanding the

fact that when the synopsis appears in the Commerce Business Daily (CBD) and the order is placed, a specific make and model is cited; and

(b) The procedures of § 201-39.803 regarding use of GSA nonmandatory schedule contracts are followed.

§ 201-39.601-3 Authority.

When the FIP resources required to meet the needs of an agency can be satisfied only through the use of a specific make and model specification, the statutory authority to be cited in FAR 6.303-2(a)(4), in lieu of any statutory authority cited in accordance with FAR 6.302, is: 40 U.S.C. 759(g), as amended.

§ 201-39.602 Outdated FIP equipment.**§ 201-39.602-1 Policy.**

The justification requirements of FAR 6.302-1(a)(2)(ii) shall not be used to perpetuate any contract for outdated FIP equipment or for FIP equipment to be used with FIP software that requires general redesign to satisfy mission needs.

§ 201-39.602-2 Exception.

An exception to § 201-39.602-1 may be invoked if the agency's DSO determines that such action will be in the Government's best interest.

Subpart 201-39.7—[Reserved]**Subpart 201-39.8—Required Sources of Supplies and Services****§ 201-39.800 Scope of subpart.**

This subpart prescribes the policies and procedures applicable to the acquisition of FIP resources using GSA mandatory and nonmandatory sources of supply.

§ 201-39.801 Ordering FIP resources from Federal Supply Schedules.**§ 201-39.801-1 General.**

GSA directs and manages both the Federal Supply Schedules program and the GSA nonmandatory schedule contracts for FIP resources. While most FIP resources available under these programs are covered by the GSA nonmandatory schedule contracts for FIP resources, the Federal Supply Schedules also contain some resources that fall within the definition of FIP resources. Use of the Federal Supply Schedules program is covered by FAR 8.4 and use of the GSA nonmandatory schedule contracts for FIP resources is covered by this subpart 201-39.8.

§ 201-39.801-2 Policy.

The procedures of FAR 8.4 shall be followed when an order for FIP resources is placed against a GSA Federal Supply Schedule.

§ 201-39.802 Purchase of telephones and services (POTS) contracts.**§ 201-39.802-1 General.**

(a) GSA has established POTS contracts to provide telecommunications supplies and services, including purchase, installation, maintenance, repair, deinstallation, and relocation of both contractor-provided and Government-owned telephone equipment, at locations throughout the country.

(b) Use of the POTS contracts is mandatory for supplies and services within the scope of the POTS contract at some locations (buildings or building complexes) where GSA operates or manages the telecommunications system or service.

(c) Federal agencies may obtain information and assistance concerning the use of POTS contracts from: General Services Administration, Technical Contract Management Division (KVT), 18th and F Streets, NW, Washington, DC 20405.

§ 201-39.802-2 Policies.

(a) Federal agencies at locations where a POTS contract is mandatory shall use the POTS contract to acquire supplies and services that are within the scope of the contract.

(b) Federal agencies at locations where POTS contracts are not mandatory may use POTS contracts to satisfy requirements when—

- (1) The requirements are within the scope of the POTS contract; and
- (2) The contracting officer determines that placing an order under the POTS contract is the most advantageous alternative.

(c) Use of the POTS contracts is a competitive procedure when—

- (1) It results in the most advantageous alternative to meet the needs of the Government; and
- (2) The procedures of this section are followed.

§ 201-39.802-3 Procedures.

(a) The contracting officer shall determine whether mandatory use of the POTS contracts applies by contacting GSA at the address shown in § 201-39.802-1(c).

(b) The contracting officer's determination required by § 201-39.802-2(b) shall, as a minimum, be supported by an analysis of prices or an examination of the market. The GSA nonmandatory schedule contracts for

FIP resources should be included in this analysis process.

(c) The requirements of subpart 201-39.5 and FAR part 5 do not apply when an order is issued under a POTS contract and the procedures of this section are followed.

§ 201-39.803 GSA nonmandatory schedule contracts for FIP resources.**§ 201-39.803-1 General.**

(a) GSA nonmandatory schedule contracts for FIP resources, managed by GSA's Information Resources Management Service, provide Federal agencies with a simplified process for obtaining these resources. GSA awards such contracts to many different vendors and each contract establishes terms, conditions, and prices for stated periods of time. These contracts are not part of the Federal Supply Service (FSS) Schedule program covered in FAR subpart 8.4 and they are not mandatory sources of supply.

(b) Agencies should use GSA nonmandatory schedule contracts for FIP resources when the contracting officer determines that placing an order under a GSA nonmandatory schedule contract would result in a lower overall cost than other contracting methods, such as issuing a solicitation, using small purchase procedures, using a nonmandatory agency contract, or using other nonmandatory GSA programs.

§ 201-39.803-2 Policy.

Use of GSA nonmandatory schedule contracts is a competitive procedure when—

- (a) It results in the lowest overall cost alternative to meet the needs of the Government; and
- (b) The procedures of this section are followed.

§ 201-39.803-3 Procedures.

(a) Prior to selecting a GSA nonmandatory schedule contract and placing an order or, if applicable, publishing a synopsis of intent to place an order, the agency shall—

- (1) Justify any restrictive requirement (e.g., an "all or none" requirement or a requirement for "only new" equipment); and
- (2) Consider the offerings of a reasonable number of nonmandatory schedule contractors.

(b) The contracting officer shall consider all responses received as a result of the CBD notice and then determine whether to order from a GSA nonmandatory schedule contract or issue a solicitation. Accordingly, the contracting officer shall take one of the following actions:

(1) When no responses are received, document the contract file with the results of the CBD synopsis and an analysis indicating that an order placed against the synopsis nonmandatory schedule contract provides the lowest overall cost alternative to meet the Government's needs.

(2) When a response to the CBD notice is received from either a responsible vendor that does not have a GSA nonmandatory schedule contract or a GSA nonmandatory schedule contractor (expressing an interest either on or off schedule) for items that may meet the user's requirement, the contracting officer shall take one of the following actions:

(i) Document the contract file with an analysis indicating that the respondent's items would not meet the requirement or that the synopsis nonmandatory schedule contract items provides the lowest overall cost alternative to meet the Government's needs and place an order against the synopsis GSA nonmandatory schedule contract;

(ii) Document the contract file with an analysis indicating that a responding contractor's GSA nonmandatory schedule contract offering provides the lowest overall cost alternative to meet the Government's needs and place an order against that GSA nonmandatory schedule contract; or

(iii) Document the contract file with an analysis indicating that ordering from a GSA nonmandatory schedule contract may not result in the lowest overall cost alternative to meet the Government's needs. In this case, the contracting officer may elect to issue a solicitation. In such cases, the contracting officer shall take the following actions:

(A) Ensure that the solicitation contains terms and conditions substantially the same as those of the GSA solicitation for nonmandatory schedule contracts that resulted in the synopsis schedule contract; and

(B) Provide the solicitation to those potential offerors responding to the CBD synopsis of intent; the vendor whose GSA nonmandatory schedule contract was the subject of the synopsis; and any other potential offerors that specifically express an interest.

(c) If the contracting officer places an order in accordance with § 201-39.803-3(b)(2)(i) or (b)(2)(ii), the contracting officer shall promptly provide written notification of award to the synopsis schedule vendor and to all parties responding in writing to the CBD notice.

(d) Requirements or orders shall not be fragmented in order to circumvent the applicable MOL.

§ 201-39.804 Financial Management Systems Software (FMSS) Mandatory Multiple Award Schedule (MAS) Contracts Program.

§ 201-39.804-1 General.

(a) The Office of Management and Budget (OMB) has established a Governmentwide financial management systems software program. To help agencies implement this program, GSA has established the mandatory FMSS MAS contracts program.

(b) Federal agencies may obtain information and assistance concerning the use of the FMSS MAS contracts program from: General Services Administration, ADP Systems Procurement Branch (KECP), FMSS Contracting Officer, 18th and F Streets, NW., Washington, DC 20405.

(c) OMB Circular No. A-127, "Financial Management Systems," provides further policy direction regarding the FMSS program.

§ 201-39.804-2 Policy.

Executive agencies shall use the FMSS MAS contracts program for the acquisition of commercial software for primary accounting systems and for the acquisition of services and support related to the implementation of such software.

§ 201-39.804-3 Exceptions.

(a) If an executive agency holds a licensing agreement for a software package that is available on the FMSS MAS contracts, and the package was obtained under a contract awarded before the award of the FMSS MAS contracts, the agency's use of the FMSS MAS contracts program is optional for the acquisition of services and support related to the implementation of that package until the previous non-MAS contract expires.

(b) Use of the FMSS MAS contracts program by Federal agencies that are not executive agencies is optional and is subject to the FMSS contractor accepting the order.

(c) An executive agency shall obtain a waiver from GSA if it determines that its requirements for financial management systems software cannot be satisfied through use of the FMSS MAS contracts program.

(1) The request for a waiver shall contain the following information:

(i) A description of the agency's requirements;

(ii) The reasons the FMSS MAS contracts program does not satisfy the requirements; and

(iii) A description of how the agency proposes to satisfy its needs for financial management system software.

(2) Agencies shall send waiver requests to GSA at the address in § 201-39.804-1(b).

(3) If a waiver is obtained from GSA, a deviation from the FIRM is not required.

§ 201-39.804-4 Procedures.

(a) The contracting officer shall announce the agency's requirements in a letter of interest (LOI) to all contractors participating in the FMSS MAS contracts program.

(b) At the time of issuance, the contracting officer shall provide a copy of the LOI to GSA at the address in § 201-39.804-1(b) and to OMB at the following address: Office of Management and Budget, Chief Financial Officer, 725 17th Street, NW., room 10235, Washington, DC 20503.

(c) The LOI shall—

(1) Contain sufficient information to enable a competitive acquisition under the FMSS MAS contracts program;

(2) Include instructions to the FMSS MAS contractors for responding to the LOI; and

(3) Include evaluation and award factors.

(d) The agency shall conduct an analysis of the offerings of the FMSS MAS contractors and issue a delivery order to the contractor that provides the most advantageous alternative to the Government.

(e) The contracting officer may issue single or multiple delivery orders to satisfy the total requirement.

(f) The contracting officer shall provide a copy of each delivery order, or modification thereto, to OMB at the address shown in subparagraph (b) of this section and to GSA at the address in § 201-39.804-1(b).

Subpart 201-39.9—[Reserved]

Subpart 201-39.10—Specifications, Standards, and other Purchase Descriptions

§ 201-39.1000 Scope of subpart.

This subpart prescribes policies and procedures for using specifications, standards, and other purchase descriptions in acquiring FIP resources.

§ 201-39.1001 Security and privacy specifications.

§ 201-39.1001-1 Security specifications.

Specifications for security of FIP resources shall include, as appropriate:

(a) Agency rules of conduct that a contractor shall be required to follow.

(b) A list of the anticipated threats and hazards that the contractor must guard against.

(c) A description of the safeguards that the contractor must specifically provide.

(d) The security standards applicable to the contract.

(e) A description of the test methods, procedures, criteria, and inspection system necessary to verify and monitor the operation of the safeguards during contract performance and to discover and counter any new threats or hazards.

(f) A description of the procedures for periodically assessing the security risks involved.

(g) A description of the personnel security requirements.

(h) Consistent with the guidelines for Federal computer security training issued by the National Institute of Standards and Technology (NIST) and regulations issued by the Office of Personnel Management (OPM), a description of the security training that the contractor is required to provide to its employees.

(i) Consistent with the guidelines issued by the Office of Management and Budget (OMB) in OMB Bulletin 88-16, a description of the plan the contractor must develop or follow to provide for the security and privacy of FIP resources the contractor is required to operate.

§ 201-39.1001-2 Privacy specifications.

(a) *Applicability.* This subsection is applicable to executive agencies that are subject to the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Procedures.* Specifications for the design, development, or operation of a system of records using commercial FIP services or support services shall include the following:

(1) Agency rules of conduct that the contractor and the contractor's employees shall be required to follow.

(2) A list of the anticipated threats and hazards that the contractor must guard against.

(3) A description of the safeguards that the contractor must specifically provide.

(4) Requirements for a program of Government inspection during performance of the contract that will ensure the continued efficacy and efficiency of safeguards and the discovery and countering of new threats and hazards.

§ 201-39.1001-3 Contract clause.

The contracting officer shall insert a clause substantially the same as the clause at § 201-39.5202-5, Privacy or Security Safeguards, in solicitations and contracts—

(a) Requiring security of FIP resources.

(b) For the design, development, or operation of a system of records using commercial FIP services or support services.

§ 201-39.1002 Federal standards.

§ 201-39.1002-1 General.

GSA publishes a handbook titled "Federal ADP and Telecommunications Standards Index" providing guidance to agencies on the use of Federal standards. The index also provides optional terminology that may be used to incorporate standards in solicitations and a "Standards Checklist" that can be included in the solicitation to incorporate applicable Federal standards. Copies of the index can be purchased from: U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402.

§ 201-39.1002-2 Policy.

The contracting officer shall include in solicitations terminology to incorporate each standard that is applicable to the FIP resources being acquired.

§ 201-39.1002-3 Procedures.

The contracting officer shall use one or a combination of the following methods to implement standards in solicitations:

(a) Include in the solicitation the full text of the terminology contained in the index for each applicable standard.

(b) Incorporate in the solicitation the applicable terminology by reference to the index.

(c) For each applicable standard, include the full text of the terminology as developed by the agency.

§ 201-39.1002-4 Solicitation provision.

If any of the terminology to incorporate standards in solicitations is incorporated by reference, the contracting officer shall insert in the solicitation the provision at § 201-39.5202-2, Availability of the "Federal ADP and Telecommunications Standards Index."

§ 201-39.1003 Specifications for outdated FIP equipment.

The contracting officer shall not include specifications for outdated FIP equipment in a solicitation unless—

(a) The agency's DSO determines that such action will be in the Government's best interest; or

(b) A determination has been made in accordance with § 201-39.602.

Subparts 201-39.11 and 201-39.12—[Reserved]

Subpart 201-39.13—Small Purchase and Other Simplified Purchase Procedures

§ 201-39.1300 Scope of subpart.

This subpart prescribes policies and procedures for acquiring from commercial sources FIP resources whose aggregate amount does not exceed the small purchase threshold of FAR part 13.

§ 201-39.1301 Policy.

When requirements for FIP resources are to be satisfied through the use of GSA sources of supply as set forth in subpart 201-39.8, the policies and procedures of FAR part 13 do not apply.

Subpart 201-39.14—Sealed Bidding

§ 201-39.1400 Scope of subpart.

This subpart prescribes policies and procedures governing contracting for FIP resources by sealed bidding.

§ 201-39.1401 General.

This subpart requires the contracting officer to select the bid that is most advantageous to the Government considering options, acquisition methods, present value discount factors, and other price-related factors. Therefore, contracting officers should consider the factors associated with each acquisition of FIP resources in order to select the method of contracting that will best accommodate this requirement.

§ 201-39.1402 Price-related factors.

§ 201-39.1402-1 Policies.

(a) In addition to the bid price for the basic and all optional quantities and contract periods and optional FIP resources; and the price-related factors set forth in FAR 14.201-8, sealed bid solicitations for FIP resources shall be structured to require consideration of the following factors, as applicable, in order to determine which bid is most advantageous to the Government.

(1) Support and in-house costs over the system life for installing, operating, and disposing, where quantifiable and when these costs may differ based on offers received.

(2) Any costs of conversion that can be stated in dollars, as well as other costs directly related to converting from installed to augmentation or replacement FIP resources. However, the costs associated with the following shall not be included:

(i) Conversion of existing software and data bases that are to be redesigned

regardless of whether or not augmentation or replacement FIP resources are acquired.

(ii) Purging duplicate or obsolete software, data bases, and files.

(iii) Development of documentation for existing application software.

(iv) Improvements in management and operating procedures.

(b) When the timing of payments is expected to vary among the alternatives being considered, all prices and costs shall be adjusted to present value, and the results shall be applied in determining the bid most advantageous to the Government. Agencies should follow the guidance in OMB Circular A-104 regarding present value calculations.

§ 201-39.1402-2 Exception.

Agencies are permitted to award on the basis of the lowest offered purchase price when—

(a) The only acquisition method to be used is purchase;

(b) The purchase price of each item being acquired does not exceed \$25,000; and

(c) The total purchase price of all the FIP resources to be included in the contract does not exceed \$300,000.

§ 201-39.1403 Solicitation.

(a) The solicitation shall state the means of evaluating all acquisition methods included in the solicitation.

(b) If a present-value adjustment is to be used, the solicitation shall state the methodology and discount rate that will be applied in the evaluation process.

§ 201-39.1404 Award.

The contracting officer shall not award a contract providing for the delivery of outdated FIP equipment unless—

(a) The agency's DSO determines that such action will be in the Government's best interest; or

(b) A determination has been made in accordance with § 201-39.602 or § 201-39.1003.

Subpart 201-39.15—Contracting By Negotiation

§ 201-39.1500 Scope of subpart.

This subpart prescribes policies and procedures governing contracting for FIP resources by negotiation.

§ 201-39.1501 Evaluation factors.

§ 201-39.1501-1 Policies.

(a) In addition to the factors set forth in FAR 15.605, the contracting officer shall evaluate total cost, including the following factors:

(1) All prices for FIP resources including the basic and all optional quantities and contract periods.

(2) Other support and in-house costs over the system life for installing, operating, and disposing, where quantifiable and when these costs may differ based on offers received.

(3) Any costs of conversion that can be stated in dollars, as well as other costs directly related to converting from installed to augmentation or replacement FIP resources. However, the costs associated with the following shall not be included:

(i) Conversion of existing software and data bases that are to be redesigned regardless of whether or not augmentation or replacement FIP resources are acquired.

(ii) Purging duplicate or obsolete software, data bases, and files.

(iii) Development of documentation for existing application software.

(iv) Improvements in management and operating procedures.

(b) When the timing of payments is expected to vary among the alternatives being considered, agencies shall adjust all prices and costs to present value and apply the results in source selection. Agencies should follow the guidance in OMB Circular A-104 regarding present value calculations.

§ 201-39.1501-2 Exception.

Agencies are permitted to award on the basis of the lowest offered purchase price when—

(a) The only acquisition method being solicited is purchase;

(b) The purchase price of each item being acquired does not exceed \$25,000; and

(c) The total purchase price of all of the FIP resources to be included in the contract does not exceed \$300,000.

§ 201-39.1502 Solicitation.

(a) The solicitation shall state the means of evaluating all acquisition methods included in the solicitation.

(b) If a present-value adjustment is to be used, the solicitation shall state the methodology and discount rate that will be applied in the evaluation process.

§ 201-39.1503 Award.

The contracting officer shall not award a contract providing for the delivery of outdated FIP equipment unless—

(a) The agency's DSO determines that such action will be in the Government's best interest; or

(b) A determination has been made in accordance with § 201-39.602 or § 201-39.1003.

Subpart 201-39.16—[Reserved]

Subpart 201-39.17—Special Contracting Methods

§ 201-39.1700 Scope of subpart.

This subpart prescribes policies and procedures for using options in acquiring FIP resources.

§ 201-39.1701 Options.

§ 201-39.1701-1 General.

The use of options may be appropriate in FIP resources acquisitions because—

(a) The FIRM requires agencies to determine a system life for each FIP resource requirement and to evaluate costs over the system life;

(b) Funding is normally not available at the time of award for the entire system life; and

(c) Soliciting and evaluating optional quantities and periods can be an effective method to achieve competition for the option years and to prevent the possibility of a contractor "buying-in."

§ 201-39.1701-2 Applicability.

Except as set forth below, the policies and procedures of FAR subpart 17.2 shall apply to the acquisition of FIP resources, notwithstanding the language in FAR 17.200.

§ 201-39.1701-3 Policy.

Notwithstanding the language in FAR 17.202, a contract for FIP resources with options to extend the contract period of performance or to acquire additional quantities may be used when—

(a) The Government has requirements for the acquisition of FIP resources extending beyond the basic contract period;

(b) Funds are not available for the entire system life, but a reasonable certainty exists that they will be available in the future; or

(c) Competition for the additional periods or quantities is impracticable once the contract is awarded.

§ 201-39.1701-4 Contracts.

Notwithstanding the language in FAR 17.204(e), the total of the basic and option periods for contracts not subject to the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), as amended, may exceed 5 years (see FAR 22.10). However, statutes applicable to various classes of contracts may place additional restrictions on the length of contracts.

§ 201-39.1701-5 Documentation.

Any justifications and approvals or determinations and findings required by subpart 201-39.6 or FAR part 6 shall

specify both the basic requirement and all options.

§ 201-39.1701-6 Evaluation

Notwithstanding the language in FAR 17.206, the contracting officer shall consider all options in the award evaluation.

§ 201-39.1701-7 [Reserved]

§ 201-39.1701-8 Solicitation provisions and contract clauses.

In lieu of the solicitation provisions and contract clauses prescriptions set forth in FAR 17.203, the contracting officer shall insert the following in solicitations and contracts for FIP resources that contain options—

(a) A provision substantially the same as the provision at § 201-39.5202-4, Evaluation of Options—FIP Resources, in the solicitation;

(b) A clause substantially the same as the clause at FAR 52.217-6, Option for Increased Quantity, in the solicitation and contract; and

(c) A clause substantially the same as the clause at FAR 52.217-9, Option to Extend the Term of the Contract, in the solicitation and contract.

Subparts 201-39.18 through 201-39.32—[Reserved]

Subpart 201-39.33—Protests, Disputes, and Appeals

§ 201-39.3300 Scope of subpart.

This subpart prescribes policies and procedures applicable to protests concerning FIP resource acquisitions filed with the GSA Board of Contract Appeals (GSBCA).

§ 201-39.3301 General.

Under Public Law 98-369, as amended (40 U.S.C. 759(f)), the GSBCA is authorized to hear and decide protests by interested parties involving acquisitions of FIP resources by Federal agencies subject to section 111 of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 759), including acquisitions subject to GSA delegations of procurement authority.

§ 201-39.3302 Applicability.

This subpart is applicable to all Federal agencies.

§ 201-39.3303 Policy.

All Federal agencies shall follow the GSBCA "Rules of Procedure" in 48 CFR chapter 61.

§ 201-39.3304 Procedures.**§ 201-39.3304-1 Protest notice.**

Within 1 working day after receiving a copy of the protest, the contracting officer shall give oral or written notice of the protest to: General Services Administration, Acquisition Evaluation and Analysis Branch (KMAD), 18th and F Streets, NW., Washington, DC 20405, telephone (202) 501-4305 or FTS 241-4305.

§ 201-39.3304-2 GSA participation.

In delegating procurement authority for FIP resources to Federal agencies, GSA has the right to intervention in any protest case involving any Federal agency.

Subparts 201-39.34 through 201-39.43—[Reserved]**Subpart 201-39.44—Subcontracting Policies and Procedures****§ 201-39.4400 Scope of subpart.**

This subpart prescribes policies and procedures applicable when subcontracting includes FIP resources.

§ 201-39.4401 Policy.

In addition to the policies and procedures set forth in FAR 44.202-2, the contracting officer responsible for consent shall make a written determination for the file that competition was obtained for FIP resources or that the absence of competition is properly justified.

Subpart 201-39.45—Government Property**§ 201-39.4500 Scope of subpart.**

This subpart prescribes policies and procedures for providing Government FIP resources to contractors.

§ 201-39.4501 Dedicated FIP equipment or software in FIP services contracts.**§ 201-39.4501-1 General.**

When an offeror proposes the dedicated use of FIP equipment or software in performing a FIP service, it means that the offeror is proposing to use that resource exclusively in providing that service. When this is the case, it can sometimes be more advantageous to the Government to provide the FIP equipment or software to the offeror as Government-furnished property.

§ 201-39.4501-2 Policy.

When a solicitation requires or allows an offeror to propose the dedicated use of FIP equipment or software in performing a FIP service, the contracting

officer shall ensure that the solicitation—

(a) Reserves the right for the Government to furnish the dedicated items to the offeror;

(b) Requires the offeror to price the use of the dedicated items on a specific line-item basis; and

(c) Requires the offeror to specify the interface requirements between the offeror's system and the dedicated items.

Subpart 201-39.46—Quality Assurance**§ 201-39.4600 Scope of subpart.**

This subpart prescribes the use of a contract clause for limiting contractor liability for loss of or damage to property of the Government.

§ 201-39.4601 Contract clause.

The contracting officer shall insert the clause at § 201-39.5202-6, Warranty Exclusion and Limitation of Damages, in solicitations and contracts for FIP resources, unless the contracting officer determines that a higher degree of protection is in the best interest of the Government.

Subparts 201-39.47 through 201-39.51—[Reserved]**Subpart 201-39.52—Solicitation Provisions and Contract Clauses****§ 201-39.5200 Scope of subpart.**

This subpart—

(a) Gives instructions for using provisions and clauses in solicitations and contracts for FIP resources; and

(b) Sets forth the solicitation provisions and contract clauses prescribed by this part 201-39.

§ 201-39.5201 [Reserved]**§ 201-39.5202 Texts of provisions and clauses.****§ 201-39.5202-1 FIRM Applicability.**

As prescribed in § 201-39.101-3(c), insert a clause substantially the same as the following in solicitations and contracts:

FIRM Applicability (Oct 89 FIRM)

This solicitation/contract requires the use or delivery of Federal information processing resources but the agency has determined that FIRM part 201-39 does not apply based on the exception set forth in § 201-39.101-3(b) *.

(End of clause)

* Insert the specific sub-paragraph number(s) of the applicable exception.

§ 201-39.5202-2 Availability of the "Federal ADP and Telecommunications Standards Index."

As prescribed in § 201-39.1002-4, insert the following provision in the solicitation:

Availability of the "Federal ADP and Telecommunications Standards Index" (Oct 89 FIRM)

Copies of the "Federal ADP and Telecommunications Standards Index" can be purchased from the U.S. Government Printing Office, Superintendent of Documents, Washington, DC 20402.

(End of provision)

§ 201-39.5202-3 Procurement authority.

As prescribed in § 201-39.106-4, insert a clause substantially the same as the following in solicitations and contracts:

Procurement Authority (Oct 89 FIRM)

This acquisition is being conducted under * delegation of GSA's exclusive procurement authority for FIP resources. The specific GSA DPA case number is **.

(End of provision)

* Insert one of the following phrases:

- (1) "the regulatory;"
- (2) "a specific agency;" or
- (3) "a specific acquisition."

** Insert one of the following:

(1) If the acquisition is being conducted under the regulatory delegation, insert "not applicable."

(2) If the acquisition is being conducted under a specific agency delegation or a specific acquisition delegation, insert the case number as provided in GSA's letter delegating the specific procurement authority (e.g., KMA-88-9999).

§ 201-39.5202-4 Evaluation of options—FIP resources.

As prescribed in § 201-39.1701-8(a), insert a provision substantially the same as the following in the solicitation:

Evaluation of Options—FIP Resources (Oct 89 FIRM)

(a) The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. These prices will be adjusted by the applicable discount factors shown in * of the solicitation. Evaluation of options will not obligate the Government to exercise the options. Offers containing any charges for failure to exercise any option will be rejected.

(b) Selection of an offer will be made on the basis of the most advantageous alternative to the Government provided that the contract prices reasonably represent the value of bona fide requirements for each fiscal year. This determination with respect to contract prices will be made after consideration of such factors as commercial or catalog prices for short-term leases, offeror system startup expenses, multiyear price protection, assured system life availability of equipment, software, and vendor support. If a

determination is made that an offer does not meet these criteria, that offer cannot be accepted for award.

(End of provision)

* Insert one of the following:

(1) If a present-value adjustment is being used, indicate the location in the solicitation where any applicable discount factors and contemplated payment schedule are specified; or

(2) If a present-value adjustment is not being used, insert "Not Applicable."

§ 201-39.5202-5 Privacy or security safeguards.

As prescribed in § 201-39.1001-3, insert a clause substantially the same as the following clause in solicitations and contracts:

Privacy or Security Safeguards (Oct 89 FIRMR)

(a) The details of any safeguards the contractor may design or develop under this contract are the property of the Government and shall not be published or disclosed in any manner without the contracting officer's express written consent.

(b) The details of any safeguards that may be revealed to the contractor by the Government in the course of performance under this contract shall not be published or disclosed in any manner without the contracting officer's express written consent.

(c) The Government shall be afforded full, free, and uninhibited access to all facilities, installations, technical capabilities, operations, documentation, records, and data bases for the purpose of carrying out a program of inspection to ensure continued efficacy and efficiency of safeguards against threats and hazards to data security, integrity, and confidentiality.

(d) If new or unanticipated threats or hazards are discovered by either the Government or the contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party. Mutual agreement shall then be reached on changes or corrections to existing safeguards or institution of new safeguards, with final determination of appropriateness being made by the Government. The Government's liability is limited to an equitable adjustment of cost for such changes or corrections, and the Government shall not be liable for claims of loss of business, damage to reputation, or damages of any other kind arising from discovery of new or unanticipated threats or hazards, or any public or private disclosure thereof.

(End of clause)

§ 201-39.5202-6 Warranty exclusion and limitation of damages.

As prescribed in § 201-39.4601, insert the following clause in the solicitations and contracts.

Warranty Exclusion and Limitation of Damages (Oct 89 FIRMR)

Except as expressly set forth in writing in this agreement and except for the implied warranty of merchantability, there are no warranties expressed or implied.

In no event will the Contractor be liable to the Government for consequential damages as defined in the Uniform Commercial Code, section 2-715, in effect in the District of Columbia as of January 1, 1973, i.e.—

Consequential damages resulting from the seller's breach include—

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

(End of clause)

Subpart 201-39.53—[Reserved]

Dated: October 18, 1990.

Richard G. Austin,
Administrator of General Services.

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30 CFR Part 44

Friday
December 28, 1990

Part III

Department of Labor

Mine Safety and Health Administration

30 CFR Part 44

Rules of Practice for Petitions for Modification of Mandatory Safety Standards; Final Rule

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 44

RIN 1219-AA45

Rules of Practice for Petitions for Modification of Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This final rule revises the Mine Safety and Health Administration's (MSHA) rules of practice for petitions for modification of mandatory safety standards. The final rule adds time frames for consideration of petitions. The final rule also includes a revision of the Agency's existing procedures for evaluating applications for interim relief, conforming them to a 1987 decision of the United States Court of Appeals.

EFFECTIVE DATE: The final rule is effective February 1, 1991.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, room 631, 4015 Wilson Boulevard, Arlington, Virginia 22203; phone (703) 235-1910.

SUPPLEMENTARY INFORMATION:

I. Background

On May 5, 1989, MSHA published a proposed rule to revise its existing rules of practice for petitions for modification in 30 CFR part 44 (54 FR 19492). Under section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) and part 44, the Secretary of Labor is authorized to grant petitions for modification of mandatory safety standards. Such petitions, however, may not be granted except after notice, an opportunity for a hearing, and upon a finding that an alternative method of achieving the result of the standard exists which will at all times guarantee to the miners at the mine at least the same measure of protection as the standard. Petitions may also be granted upon a finding that application of the standard to the mine will result in a diminution of safety to the miners at the mine.

MSHA decided to revise its rules of practice for petitions for modification following a 1987 decision of the United States Court of Appeals. *International Union, United Mine Workers of America (UMWA) v. Mine Safety and Health Administration (MSHA)*, 823 F.2d 608 (D.C. Cir. 1987). In that case, the Court invalidated as violating section

101(c) the existing procedures in part 44 for granting interim relief. A subsequent decision by the Deputy Assistant Secretary on August 14, 1987, which interpreted the *UMWA v. MSHA* opinion of the Court of Appeals, included a commitment to revise the Agency's interim relief regulations.

On June 14, 1988, the Agency also received a petition for rulemaking from the National Coal Association (NCA). The NCA petition asked MSHA to establish a framework for expedited consideration of petitions for modification. In developing the proposed rule, MSHA decided to incorporate time schedules for the various stages of the review of petitions in lieu of the expedited consideration procedures outlined in the NCA petition.

Following publication of the proposed rule, MSHA held public hearings on November 1, 1989, in Pittsburgh, Pennsylvania, and on November 8, 1989, in Denver Colorado. A transcript of each proceeding was made available for public inspection. Following the hearings MSHA allowed commenters to submit supplementary statements and data until the record closed on December 22, 1989.

A. General Discussion

The final rule reflects a balance between the concerns raised in written comments and testimony regarding the length of time necessary for final disposition of some petition for modification cases and the need for the Agency to carefully evaluate the health and safety issues raised by all petitions for modification. New provisions include revised procedures for granting temporary relief prior to a proposed decision and order (PDO) of the Administrator for Coal Mine Safety and Health of the Administrator for Metal Nonmetal Mine Safety and Health, as appropriate; a procedure for partial appeals of the Administrator's PDO; and a mechanism for amending granted modifications. Unlike the proposal, the final rule also retains final authority with the Assistant Secretary for deciding petitions for modification cases and provides a 120 day time frame within which the Assistant Secretary must issue a decision.

Some commenters requested adoption of strict time frames for each stage of the petition for modification process. These commenters expressed frustration with the length of time necessary to resolve some contested petition for modification cases, as well as the time usually taken by the Administrator to investigate petitions and to issue PDOs. They suggested time frames which included 30 days for investigation of the

petition, a hearing and decision by an administrative law judge within 140 days of the filing of the petition, or 75 days from the date of assignment to the administrative law judge, whichever date is earlier, and 10 days from the receipt of the trial record for the Assistant Secretary to decide an appeal. The final rule does not adopt the approach recommended by these commenters.

MSHA agrees that improvements can be made in the time needed to reach final decisions in many petition for modification cases. MSHA's current revision of part 44 was undertaken, in part, to achieve such improvements. However, MSHA considers the time periods outlined above as unworkable in most instances, and agrees with other commenters who stated that the health and safety issues involved in petition for modification cases must be weighed carefully and not undertaken with undue haste.

Currently, most PDOs are issued within approximately 6 months of filing. Although MSHA agrees that improvements can be made in this time period and will continue its attempts to issue PDOs as quickly as possible, the Agency does not believe that 6 months is excessive given the number of petitions considered by MSHA annually, and given that a petition involves a mine-specific modification of a mandatory safety standard. Also, the Agency believes that the times specified in the final rule, described below, will greatly facilitate the early resolution of most contested petition cases.

Under the final rule, the appropriate Administrator will be required to issue a proposed decision and order as soon as practicable after an investigation of a petition for modification is made. If a hearing is requested on the PDO, the case file is required to be referred within 5 days to the Chief Administrative Law Judge for the Department of Labor. A new provision will require the Chief Judge to designate an administrative law judge to preside over the hearing within 5 days after receipt of the case file. Forty-five days will then be afforded for discovery, after which a hearing must be scheduled by the judge as soon as is practicable. Following the hearing, parties will have 30 days to submit proposed findings and briefs to the judge. Within 60 days after briefs are filed, the judge will be required to render a decision.

As stated above, the final rule retains the existing procedure requiring objections to the judge's decision to be filed with the Assistant Secretary. Within 120 days of the time permitted in

existing § 44.33 for filing responding statements, the Assistant Secretary is required to issue a final decision.

Section-by-Section Discussion

Section 44.6 Service

The final rule modifies paragraph (f) of the existing rule to allow 5 days to be added to prescribed time periods when parties perform service by mail. The existing rule, which is otherwise retained in its current form, allows 3 days to be added. This aspect of the final rule conforms part 44 to similar provisions in other federal practice rules of procedure, such as the procedural rules of the Federal Mine Safety and Health Review Commission.

In the proposal, MSHA requested comments regarding whether filing and service of documents should be permitted under the final rule to be made electronically or by other means consistent with current technology. While one commenter supported the concept of electronic filing and service, another commenter indicated that the final rule should continue to require service on other parties to be made by mail. According to the commenter, the lack of routine procedures for stamping in and sorting electronically-received documents could lead to confusion and delay. The commenter had no objection to the Labor Department accepting documents by electronic means.

After consideration of these comments, the Agency has decided to revise paragraph (b) of this section to allow documents to be served by telecopiers or other electronic means. MSHA believes that, at this time, the use of electronic communication devices such as telecopiers is sufficiently widespread and accepted so that service by these devices can facilitate the petition for modification process. In order to avoid any of the confusion and delay identified by the commenter, the final rule also revises paragraph (e) to specify that service by electronic means is complete upon receipt. Additionally, the final rule does not revise that portion of existing § 44.10 which addresses service of petitions. Thus, under the existing rule, filed petitions must continue to be served on other parties personally or by certified mail.

Section 44.7 Filing

The final rule defines filing for purposes of part 44. Under the final rule, a petition, request for hearing, notice of appeal, or other document will be considered to be filed when received. Alternatively, the final rule will enable filing to be accomplished by mailing, provided that neutral evidence of the

mailing is available in the form of a certified mail return receipt.

Under the existing rule, filing is not defined, and MSHA has generally considered filing to occur when a document is received. The final rule, which modifies this approach, is consistent with the definition of filing in the current rules of practice and procedure of the Federal Mine Safety and Health Review Commission. See 29 CFR 2700.6(d).

The final rule also includes a provision like the new paragraphs in § 44.6, discussed above, which permit documents to be served electronically. Thus, under the final rule, a petition, request for hearing, notice of appeal, or other document may be filed by telecopier or other electronic means.

Section 44.8 Ex Parte Communication

The final rule revises the existing provision to prohibit ex parte communication regarding the merits of any pending petition for modification case between the Assistant Secretary, as well as any employee or agent of the Assistant Secretary, and any of the parties, intervenors, representatives, or other interested parties. The final rule retains that portion of the existing rule which addresses ex parte contacts while the petition proceeding is pending before the presiding administrative law judge.

MSHA believes that adding reference to the Assistant Secretary in § 44.8 conforms part 44 to the Administrative Procedure Act (APA). The Agency has always interpreted the APA to prohibit ex parte contacts with the Assistant Secretary regarding the merits of petitions, especially with the MSHA staff who participated in the investigation of the petition.

A commenter stated that § 44.8 should be revised to prohibit ex parte contacts at all stages of the review of petitions, including the Administrator-level. The final rule does not include this suggestion. MSHA does not believe that a rule prohibiting ex parte contacts with the Administrator before a PDO is issued is necessary, and may restrict the Administrator's ability to fully investigate petitions. Before a PDO is issued, no adjudicatory process has begun. After adjudication is initiated by the filing of a contest of the PDO, the Administrator participates as a party, and thus is subject to the ex parte contact provisions of part 44 and the APA. Also, MSHA expects that, consistent with current practice, the Administrators will continue to require other parties to be notified and be afforded the opportunity to participate if meetings or other forms of contact are requested before a PDO is issued.

Section 44.10 Filing of Petition: Service

The final rule retains existing § 44.10, except that it specifies that petitions must be filed with the Agency's Director of the Office of Standards, Regulations and Variances (OSRV). Under current practice, petitions are required to be filed with the Assistant Secretary, who refers the petitions to the Director of OSRV. The Director then assigns petitions to the appropriate Administrator for investigation and decision.

Section 44.12 Procedure for Public Notice of Petition Received

The final rule modifies paragraphs (a) and (b) of existing § 44.12. Paragraph (c) is retained in its current form.

Several commenters recommended that the final rule should designate a specific period after a petition is filed within which the Agency must give notice of the petition to each known representative of miners or the mine operator, as appropriate, and publish notice of the petition in the Federal Register. In light of these comments, the final rule specifies 15 days after filing for these tasks to be completed by MSHA.

Consistent with current practice, the Agency believes that the 15-day time frame will be met unless additional information is needed from the petitioner. For example, in some cases petitions are filed which lack some of the information required in existing § 44.11. In these situations it is MSHA's practice to delay proceeding with the petition until the missing information is provided by the petitioner. Under the final rule, MSHA anticipates that this practice will continue, and thus will begin counting the 15-day period from the time all of the required information is provided by the petitioner.

Paragraph (b) of the final rule removes the requirement that the Federal Register notice of a filed petition include a summary of the facts claimed by the petitioner to support the requested modification. As stated in the proposal, all parties to a petition must receive notice of the petition and it must be available to them. Thus, a Federal Register notice serves primarily to inform non-parties of the petition. As such, the Agency believes that including a summary of the facts claimed by the petitioner to support the petition has little practical utility and can add time to the preparation of the Federal Register notice, especially in cases where the petition involves complex issues. A concise description of the requested modification in the Federal

Register will serve as adequate notice. The final rule includes this requirement, and also retains the existing requirements that the notice include a statement that the petition has been filed, the name of the petitioner and the mine or mines to which the petition relates, and the mandatory safety standard for which modification is sought.

Section 44.13 Proposed Decision

The final rule retains existing § 44.13 in its current form, except that any party may request that the Administrator's investigation of the petition be expedited or extended. Under the final rule, any such request may be granted at the Administrator's discretion.

Some commenters objected to expediting MSHA investigation of petitions. While other commenters complained that some MSHA investigations are unduly lengthy, those objecting indicated that the complexity of the health and safety issues involved in some petitions require thorough evaluation by MSHA. They stated that a rule permitting investigations to be expedited might lead to hasty final decisions in some cases.

As proposed, the final rule permits the filing of requests to expedite investigations. In the Agency's view, expedited investigations may be appropriate in some cases where petitions are filed at mines where petitions were granted in the past involving the same or similar issues. For example, some commenters stated that investigations should be expedited in cases involving mines where prior petitions were granted for certain areas of the mine or for finite periods. In those cases, commenters stated that petitions to extend the modifications to other areas or for additional periods should not require extensive re-investigation. Another commenter stated that the Agency should be permitted to take official notice of established scientific facts in a case, rather than be required to investigate all aspects of a proposed modification in each case.

The Agency does not believe that expedited investigations are appropriate for all situations described by the commenters. Under section 101(c) of the Mine Act, each petition must be evaluated on its own merits. However, although section 101(c) requires each petition to be investigated, it also states that the investigation shall be such as the Secretary "deems appropriate." The Agency therefore anticipates that in some cases the Administrators will give favorable consideration to requests to expedite investigations for petitions involving facts or issues which are the

same or very similar to previously granted petitions. Conversely, where the issues involved are novel or complex, the final rule reflects that for these petitions requests to extend the investigation period may be granted at the Administrator's discretion. As to the commenter's suggestion that MSHA should take official notice of established scientific facts, MSHA believes that in practice this does occur. The purpose of an investigation of a petition is not to establish scientific principles which are already beyond dispute, but rather to evaluate the application of such principles given the variety of mining conditions. Thus, MSHA believes that official notice is already within the scope of the Agency's investigation authority, and a specific provision in the final rule addressing this concept will not further the commenter's goal of more rapid investigation of petitions.

A commenter questioned whether requests to expedite or extend the investigation must be made at the time the petition for modification is filed. If so, the commenter indicated that the Federal Register notice of the petition should state that such a request has been submitted to MSHA.

As proposed, the final rule does not specify when a request to expedite or extend an investigation can be made. MSHA believes that most requests will be made at or near the time the petition is filed. If the request is made before the Federal Register notice is published, MSHA anticipates that it will be Agency practice to include this information in the notice. However, MSHA envisions that circumstances may arise during its investigation of petitions which may warrant a shorter or longer time for the investigation. To accommodate the variety of situations which might lead to expediting or extending an investigation, the final rule will allow such requests to be filed at any time before the PDO is issued. Also, based on the suggestion of a commenter, the final rule specifies that the Administrator's decision to expedite or extend an investigation must be based upon "good cause shown."

Many commenters addressed the scope of MSHA's investigation and consideration of petitions. Some commenters stated that MSHA's investigations are sometimes narrowly focused, and that investigations should consider all health and safety aspects of a proposed modification. Other commenters stated that MSHA must take steps to avoid consideration of irrelevant issues, and suggested a provision in the final rule to ensure that the issues raised by a petition focus squarely on the safety standard for

which the modification is proposed and not upon other safety standards.

MSHA agrees that the primary focus of a petition for modification proceeding must be on the issues relevant to the safety standard for which the modification was requested. For example, in an alternative method case, the alternative method proposed must provide protection to miners from the hazard against which the standard was designed to protect. The Agency does not agree, however, that relevant inquiry in a petition proceeding ends at this point.

The legislative history of section 101(c) indicates that no petition for modification may be granted unless the petitioner clearly demonstrates that miners will not be exposed to greater health and safety risks if the petition is granted. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 25 (1977), reprinted in "Legislative History of the Federal Mine Safety and Health Act of 1977," Subcomm. on Labor of the Comm. on Human Resources, 95th Cong., 2nd Sess. 613 (1978). This includes both "alternative method," and "diminution of safety" petitions. Accordingly, MSHA should consider health and safety aspects of a proposed modification that are beyond those directly related to the hazard which is addressed by the standard. For example, if compliance with the terms of the modification make it unlikely that an operator-petitioner can comply with another safety or health standard, this may be an appropriate basis for denying the modification.

Also, on the scope of petitions, a commenter stated that the final rule should limit the application of granted modifications by time or to specific areas of a mine. For example, the commenter indicated that petitions should only be granted for one or two years at a time, or only in areas where conditions supporting the modification are present in the mine. Another commenter, however, indicated that if modifications are to be limited in these ways, a procedure should be included in the final rule permitting such modifications to be renewed.

As illustrated above, MSHA has limited granted modifications in appropriate cases to finite periods or to specific areas. In some cases, these limitations are included to allow a trial period at the mine for the evaluation of safer mining methods or technology. However, MSHA does not believe that limiting the scope of modifications as suggested by the commenter is appropriate in all cases. Under most circumstances, conditions which support

granting a modification in one area of a mine also support granting the modification for the rest of the mine. Also, the investment of time and resources involved for all parties, especially when a petition is contested, argue against a piecemeal approach to modifying standards when the legal and factual issues can be consolidated into one proceeding.

In the future, MSHA will continue to limit the scope of modifications based upon time or other factors in appropriate cases. However, MSHA does not anticipate broader application of such limitations under the final rule than under the existing rule. Under the final rule, the need for such limitations may in fact be minimized by new procedures for reviewing and amending modifications which are discussed more fully below. Regarding suggested procedures for renewal of petitions in cases where such limitations are imposed by the Agency, the final rule does not include these procedures. MSHA believes that the procedure for expedited investigation of petitions discussed above will adequately address those situations where the petition truly represents an extension of an existing modification.

Commenters stated that the final rule should include a specific provision requiring the MSHA investigators to consult with the representative of miners at the mine during the investigation of a petition filed by the mine operator. Although the final rule does not incorporate this suggestion, consulting with the miners' representative is a standard practice during petition investigations. In many cases, the investigators are accompanied by the miners' representative during the investigation, and the miners frequently offer written comments on the petition. Under the final rule, MSHA will continue to involve miners' representatives in the investigation of petitions.

Commenters also questioned the proposed provision regarding issuance of a draft decision and order. Currently, the Administrator for Coal Mine Safety and Health issues a draft proposed decision and order prior to the PDO to enable interested parties to comment before the PDO is issued. Although the proposed rule would have merely formalized this procedure, commenters indicated that the proposed provision was unnecessary. These commenters stated that issuing a draft PDO only serves to add a procedural step and cause further delay in the petition process.

After consideration of the comments, the final rule does not include a

procedure for issuing a draft PDO. Additionally, when the final rule becomes effective, the Administrator for Coal Mine Safety and Health will suspend the current practice of issuing a draft PDO. Like the Administrator for Metal and Nonmetal Mine Safety and Health, the Coal Administrator will instead move directly to issuing a PDO when the investigation is complete. MSHA anticipates that elimination of this informal procedure may expedite the issuance of a PDO by up to 30 days or more.

Section 44.14 Request for Hearing

The final rule adds a new paragraph (c) to existing § 44.14 to permit partial appeals to be filed on proposed decisions and orders of the Administrator. No changes are made to existing paragraphs (a) and (b).

Commenters suggested that the final rule should include a provision for partial appeals to enable challenges to be filed to specific terms in the Administrator's PDO. Commenters stated that in some cases hearings are not requested even though the petitioner objects to one or more of the terms of the PDO. Under existing part 44, no portion of the Administrator's PDO is operative pending appeal. Therefore, if a hearing is requested based on an objection to a specific term or condition in the PDO, implementation of the entire PDO is delayed until the litigation is resolved regarding the objectionable term or condition.

The final rule will allow partial appeals to be filed by any party within 30 days of the Administrator's PDO. The request for hearing must be based upon specific objection to one or more of the terms and conditions in the PDO. Those terms and conditions specified in the request for hearing will be the subject of the appeal.

Unlike a notice of appeal filed in accordance with paragraph (a), the filing of a partial appeal will not delay the effective date of the PDO. Under paragraph (c), if a partial appeal is filed the PDO will become effective on the 30th day after service, provided that no request for hearing on the entire PDO is filed by any other party. This includes the terms and conditions which are the subject of the partial appeal. Thus, the decision and order will remain in effect as proposed by the Administrator until the terms and conditions for which the hearing was requested are modified, affirmed, or set aside by a final order of the presiding administrative law judge or the Assistant Secretary.

Paragraph (c) also sets out the grounds the presiding administrative law judge or Assistant Secretary must

follow to modify, affirm, or set aside the terms and conditions which are the subject of the partial appeal. In the case of a petition for modification based upon an equally safe alternative method, the presiding judge or Assistant Secretary must decide whether the terms and conditions for which the hearing was requested are necessary to ensure that the alternative method will at all times guarantee to the miners at the mine at least the same measure of protection as afforded by the standard.

In diminution of safety cases, the presiding judge or Assistant Secretary must determine whether the terms and conditions for which the hearing was requested are necessary to provide protection to the miners at the mine from the hazard against which the standard is directed. To ensure that the protection provided to the miners is not reduced, the final rule specifies that the terms and conditions must provide protection that is "equivalent." MSHA intends this provision to mean that the protection provided to the miners from the hazard against which the standard is directed must be equivalent to that which would otherwise be afforded by the standard in the absence of the diminution of safety caused by application of the standard at the mine.

Section 44.15 Referral to Chief Administrative Law Judge

The final rule revises existing § 44.15 to specifically state that the MSHA investigation report on the petition for modification will be referred to the Chief Administrative Law Judge if a hearing is requested, along with the Administrator's proposed decision and order. Thus, under the final rule, the MSHA investigation report will be made a part of the record on the petition. Consistent with this aspect of the final rule, § 44.34 will be revised to require the administrative law judge to transmit to the Assistant Secretary, when an appeal is filed, the MSHA investigation report as part of the record of the petition case.

A commenter objected to including the MSHA investigation report as part of the record of the petition case. Specifically, the commenter stated that including this information as part of the record sent to the presiding administrative law judge gives the administrator an unfair advantage in the proceeding in that the report is before the judge without the opportunity for other parties to object to its contents or to cross-examine its authors. However, under part 44, the Administrator is not merely a party to a petition for modification case, but the initial

decisionmaker for the Secretary. As such, it is important for review purposes that all of the information upon which the Administrator's decision is based be before the presiding judge as part of the record of the proceeding.

In the Agency's view, the final rule merely clarifies that the investigation report is a part of the case record, and does not constitute a substantive change to the existing rule. MSHA has always interpreted the existing rule, which requires referral of all information upon which the PDO is based to the Chief Administrative Law Judge, to include all facts and expert opinions supporting the PDO. Since the purpose of the investigation report is to summarize these facts and opinions, referral of the MSHA investigation report to the Chief Judge is consistent with the existing requirement for referral of all information upon which the PDO is based. Even so, under part 44 the Administrator participates as a party in all petition for modification cases. Witnesses are usually, if not always, presented by the Administrator to support the facts and expert opinions reflected in the record. These witnesses are subject to cross-examination, and their testimony and the investigation report are afforded appropriate weight by the presiding administrative law judge in each case. Since the final rule does not change this framework, no "advantage" should benefit the Administrator's position merely because the final rule clarifies that the MSHA investigation report is part of the record to be transmitted for hearing.

The final rule is also responsive to comments indicating that the Administrator should be required to refer the request for hearing to the Chief Administrative Law Judge within a specified time after filing. Under the existing rule, the Administrator is required to refer the request and the petition file "upon receipt" of the request. The final rule includes a provision requiring referral within 5 days of receipt.

Section 44.16 Application for Temporary Relief; Relief To Give Effect to the Proposed Decision and Order

The final rule replaces the existing provision governing applications for interim relief. The rule is structured to conform to considerations raised by the Court of Appeals in the *UMWA v. MSHA* decision referenced above. It will permit temporary relief to be granted by the Administrator in the narrow circumstances outlined in the final rule. Also, the final rule retains the proposed procedure addressing circumstances where implementation of a proposed

decision and order of the Administrator may be appropriate before it becomes final.

In its July 1987 decision in *UMWA v. MSHA*, the United States Court of Appeals for the District of Columbia Circuit held that the Agency had improperly granted indefinite interim relief from enforcement of a mandatory safety standard under 30 CFR 44.16, without an opportunity for a hearing for the opposing party and with no provision for that party to appeal the decision. The Court found that to be consistent with section 101(c) of the Mine Act, modifications of mandatory safety standards may not be granted except after notice, an opportunity for a hearing, and upon a finding by the Secretary that an alternative method exists which will at all time guarantee no less than the same measure of protection as the standard or that the application of the standard will result in a diminution of safety to the miners at the mine. The Court of Appeals also found that "Congress did not intend to authorize the Secretary to grant temporary relief from mandatory safety standards as a matter of course under section 101(c)." 823 F.2d at 619. The Court, however, specifically recognized that MSHA may have a legitimate need "to provide a short term remedy to prevent frustration of a statutory mandate," *Id.* at 619 n.8. The Court did not rule whether the Agency would have authority to grant relief from a mandatory safety standard, on a temporary basis, when application of the standard would increase the danger to miners. *Id.* at 616 n.6.

In a decision issued on August 14, 1987, the Deputy Assistant Secretary of Labor for Mine Safety and Health interpreted the Court of Appeals decision to permit granting "prudent and timely relief" in cases where the safety of miners is in jeopardy. In the matter of: *Utah Power and Light Company, Mining division*, slip op. at 8. As noted above, the Deputy Assistant Secretary's decision included a commitment to revise the Agency's interim relief regulations.

The final rule is consistent with the decision of the Court of Appeals and the Deputy Assistant Secretary, and is responsive to comments stressing the need for the availability for some form of temporary relief in cases involving a diminution of safety to miners or other emergency. The rule authorizes granting the relief only upon a finding by the Administrator that application of the standard at the mine will result in a diminution of safety to the miners of such mine.

The final rule will require several specific showings to be made by the applicant. Most important among these showings is that the applicant must demonstrate an identifiable hazard for the miners in the mine caused by application of the standard at the mine. Such hazard cannot be speculative or remote. Like all other criteria in the final rule, an allegation of an identifiable hazard caused by application of the standard must be supported by specific evidence which, in this example, must document the hazard. Under paragraph (g), such evidence may be in the form of affidavits or other documents.

In addition to an identifiable hazard, the applicant must show that compliance with the standard while the petition for modification is pending will expose miners to such hazard. For example, if the petition is filed by a mine operator because an entry required to be examined weekly has become unsafe for travel and cannot be rehabilitated safely, temporary relief may be appropriate in such circumstances to allow remote evaluation of the entry so that the examiner is not exposed to the unsafe conditions while the petition is pending. This aspect of the final rule is aimed at ensuring that the hazard providing the basis for the application is not speculative or remote, or is one which will occur with the passage of considerable time from the filing of the petition. In these situations, MSHA believes that the normal procedures for investigating and deciding petitions provide ample opportunity to the petitioner to avoid exposing miners to anticipated hazards caused by application of the standard at the mine.

Under the final rule, the applicant must also show that other means will be used to reasonably address the hazard against which the original standard was designed to protect. This factor is consistent with the concept described in the legislative history of section 101(c) of the Mine Act that no modification may reduce the protection afforded miners by the standard. Thus, the applicant must show that this will not occur. Also consistent with this aspect of the legislative history, the final rule retains the existing criterion which requires a showing that the requested relief will not adversely affect the health or safety of miners in the affected mine. This requirement is designed to ensure that the temporary relief, if granted, will not expose miners to additional health or safety risks.

An additional requirement in the final rule is that the applicant must show that the application is filed in good faith.

This criterion is also derived from the existing provision, and requires a showing by the applicant that the primary motive for filing the application is the welfare of the miners in the mine.

Paragraph (a) of the final rule provides that an application for temporary relief must be filed prior to the Administrator's decision on the petition for modification. This provision modifies the existing rule, which allows requests for interim relief to be filed at any time before a final Agency decision on the related petition for modification. Thus, under the final rule, all decisions on applications for temporary relief will be made by the Administrator. An application must be served upon all parties to the proceeding and, unlike the petition, must be filed with the appropriate Administrator.

Paragraph (c) provides that, upon receipt of an application for temporary relief, the Administrator shall cause an investigation to be made as to the merits of the application. Following the investigation, the Administrator must issue a decision as soon as practicable. The Administrator's decision, however, must be issued no more than 60 days from the filing of the application. Under the final rule, if the Administrator does not issue a decision within 60 days of the filing of the application, the application will be deemed to be denied.

When an application for temporary relief is filed with the Administrator, all other parties to the proceeding will have 15 days from receipt of the application to file a written response. This aspect of the final rule corrects a deficiency in existing § 44.16 identified by the Court of Appeals. Under the existing rule, other parties are afforded only 3 days in which to respond to an application. The Court of Appeals determined this time to be inadequate.

Paragraph (i) incorporates the ruling in the *UMWA v. MSHA* case that section 101(c) requires an opportunity for a hearing before any modification of a mandatory safety standard may be granted. Thus, if an application for temporary relief is granted by the Administrator, any other party may request a hearing within 15 days of the Administrator's decision. The final rule does not provide for a hearing on a denial of a request for temporary relief. Instead, MSHA will continue to evaluate the related petition for modification and will issue a decision as soon as practicable after the denial of the application for temporary relief. All parties will have the opportunity to challenge the Administrator's decision and obtain a hearing at that time.

A request for a hearing under paragraph (i) must be addressed to the

Administrator. The Administrator will thereafter refer the request to the Chief Administrative Law Judge. In accordance with § 44.15, the related petition for modification will also be referred. This action will avoid separate hearings and appeals of decisions rendered on the application for temporary relief and on the petition. Although the Administrator will participate as a party to any hearing or subsequent appeal, the final rule provides that no further decisions will be rendered by the Administrator in the proceeding.

After the application for temporary relief and the petition are referred by the Administrator, the hearing and decision of the presiding judge will be in accordance with subparts C through E of part 44. MSHA interprets these subparts to require a *de novo* hearing before the presiding judge, at which the petitioner will have the burden of proving the case by a preponderance of the evidence as required by § 44.30(b).

During the pendency of the hearing, the Administrator's order granting temporary relief will remain in effect until modified, affirmed, or set aside by the presiding administrative law judge. However, in no case under the final rule will the Administrator's order remain in effect for more than one year without being renewed or affirmed by the presiding administrative law judge. Paragraph (j) thus responds to the concerns raised by the Court of Appeals *UMWA v. MSHA* regarding the unlimited duration of interim relief under the existing rule. If no hearing has been requested on the order granting temporary relief, the order would remain in effect until superseded by the Administrator's PDO.

In addition to the application for temporary relief addressed in paragraphs (a) through (j), the final rule retains the proposed procedure for permitting the Administrator's Decision and Order to become effective on an accelerated schedule. As under the proposal, this will be available when the Administrator has proposed granting a petition based upon either an alternative method or a diminution of safety and no party disagrees with this determination. Agency experience with the petition process has been that after a petition is granted, the 30-day contest period provided by existing § 44.13 can, in some instances, delay timely implementation of the decision and cause unnecessary compliance problems or other unforeseen circumstances. To prevent this when no party opposes implementation of a proposed decision and order, the final rule will permit applications for relief following a

proposed decision and order to be filed with the Administrator.

Under the final rule, an application to give effect to the Administrator's decision and order during the 30-day contest period will be required to include a good faith representation that no party is expected to contest the granting of the modification. This representation may include an affidavit from the petitioner that assurance has been received from the other party that no contest will be filed. Comments from the other party supporting the petition for modification may also be included.

A commenter indicated that assurance from the miners' representative that no contest is expected to be filed should not be binding upon the representative. Under the final rule, such assurance, if made, is not intended to be legally binding. Also, as described below, the final rule is structured to provide ample opportunity for a party to prevent or to terminate the accelerated implementation of a PDO. Related to this issue, another commenter indicated that the mechanism for preventing or terminating relief may lend itself to abuse by the representative of miners. According to the commenter, the representative could give assurance that no contest will be filed with the intention of disrupting mining operations by filing a contest after the modification is implemented.

The Agency has not modified the proposed provisions based on the latter comments. Under the final rule, no right or expectation is created by an order giving effect to the PDO during the 30-day contest period. Such an order merely allows the petitioner to avoid the normal contest period if no contest is expected. It will be the petitioner-operator's responsibility to determine whether the assurance received from the miners' representative can reasonably be relied upon to avoid disruption of mining operations.

A commenter indicated that the final rule should clarify that the assurance obtained from the representative of miners should include an assurance from the international union where the miners are represented by a union. The final rule does not incorporate this suggestion. MSHA recognizes the international and local union as one party in all petition cases in which the miners are represented by a union. Thus, the union is responsible for the actions of its membership, just as the operator is responsible for determining whether the assurance received from the representative of miners can reasonably be relied upon. Also, in cases in which assurance is provided by the local, the

international can prevent the relief from taking effect, or can terminate the relief, as described below.

A decision granting relief following a proposed decision and order will take effect in 7 days. This period will allow any party to the petition for modification to prevent accelerated implementation of a proposed decision and order by filing a contest of the decision and order before an administrative law judge. Under the final rule, such a contest will prevent the relief from becoming effective. If, after relief becomes effective, a contest is filed on the underlying petition, the relief will expire immediately. Under these circumstances, the case will be referred to the Chief Administrative Law Judge, who may consider requests to expedite the hearing schedule.

This aspect of the final rule is intended to apply only when, due to unforeseen circumstances, delaying the effective date of the proposed decision and order of an Administrator for 30 days would unnecessarily disrupt mining, cause dislocation of a workforce, or otherwise unduly injure the interests of the parties to the petition process. As discussed above, it would have no application when any party opposes a proposed decision and order granting a petition for modification. In addition, MSHA will continue to require that petitions for modification be timely filed in advance of when the requested modification will be needed at the mine. In the vast majority of cases, the 30-day contest period provided for by existing § 44.13 well serves the purpose of providing parties to the petition for modification process a reasonable opportunity to contest the proposed decision and order of an Administrator. MSHA, therefore, anticipates that relief under paragraphs (k) through (m) would be granted only in exceptional circumstances.

The final rule includes a conforming amendment to § 44.4(b), which substitutes a reference to § 44.16 for an existing reference to § 44.50. This conforming amendment recognizes that a decision of an Administrator will not be operative until the 30-day appeal period has expired, unless relief is granted under paragraph (k) of this section. Also, as discussed more fully below, the existing procedures for relief pending appeal included in § 44.50 are removed by the final rule.

Section 44.20 Designation of Administrative Law Judge

The final rule retains the existing provision which specifies that, following a request for hearing on the Administrator's PDO, the Chief

Administrative Law Judge must designate a presiding judge to conduct the hearing. As is the current practice, the presiding judge must be one appointed under Section 3105 of Title 5 of the United States Code. Under the final rule, the Chief Judge must designate the presiding judge within five days of receipt of the Administrator's referral of the hearing request under § 44.15. This aspect of the final rule is intended to reduce the potential for unnecessary delay in the timely adjudication of petition for modification cases.

Section 44.22 Administrative Law Judges; Powers and Duties

The final rule adds a new paragraph (e) to existing § 44.22. Paragraph (e) addresses situations in which a presiding administrative law judge may remand the petition for modification case to the appropriate Administrator.

MSHA has determined that a rule setting out the authority of the presiding administrative law judge to remand proceedings to the Administrator is warranted in light of the new provisions in the final rule, such as the provision allowing partial appeals in petition cases. Although the procedure for remand will be applicable to all petition cases, MSHA believes that such a procedure will be especially useful in these new types of petition cases. For example, in a partial appeal pending before the presiding judge, new evidence may become available at the hearing which may have materially affected the Administrator's decision to grant the petition had the evidence been before the Administrator. Under existing part 44, which has been interpreted to preclude remand to the Administrator, the presiding judge may have no other recourse when presented with such evidence than to choose between two unacceptable proposed modifications. Remand would be appropriate in this example to allow the Administrator to evaluate the new evidence and determine if a new proposed decision and order is necessary.

The new rule for review of petitions, discussed below, may present a similar example. If new evidence comes to light in a case involving an amended PDO, remand may be appropriate to allow the Administrator to evaluate the new evidence to determine if other modifications to the original decision and order are needed, including revocation.

Under the final rule, remand may occur upon the motion of the presiding judge or of any party. Requests for remand from the parties may be granted at the discretion of the presiding judge.

Section 44.24 Discovery

The final rule adds a provision to the existing rule that limits the period afforded to the parties for discovery to 45 days. In most cases 45 days will be adequate to allow full development of the evidence to be presented at the hearing by all parties. However, the final rule will allow the presiding administrative law judge to prescribe an alternative time for discovery upon request of any party. In this way, the presiding judge will be able to tailor the discovery period to the particular demands of each case. The final rule also specifies that as soon as is practicable after the close of discovery, the presiding judge must schedule a hearing in accordance with existing § 44.28, which is unchanged by the final rule.

A commenter stated that the final rule should permit 60 days for discovery to be consistent with the rules of the Federal Mine Safety and Health Review Commission. Although this suggestion was not incorporated into the final rule, a 60-day discovery period may be prescribed by the presiding judge under the authority given the presiding judge to conform the discovery period to the particular needs of each case.

Section 44.27 Consent Findings

The final rule amends paragraph (a) of existing § 44.27 to clarify that petition for modification cases may be settled by the parties at any time after a hearing is requested on the Administrator's PDO. The existing rule specifies that an opportunity for settlement may be provided by the presiding judge at any time before the reception of evidence in a petition proceeding.

Under the final rule, cases may thus be settled even after a hearing occurs. Presumably, settlements will occur in a petition proceeding before the presiding administrative law judge issues an initial decision. The final rule therefore does not specifically address situations in which a settlement is proposed after a judge's decision is appealed to the Assistant Secretary. MSHA believes, however, that part 44 does not preclude settlements at this stage of a petition proceeding. Thus, MSHA interprets the Assistant Secretary's decisionmaking authority under part 44 to include approval of consent agreements in petition cases. MSHA envisions that the Assistant Secretary would apply the provisions of § 44.27 as the guiding principles by which consent agreements would be considered, including among them the requirements of the public interest.

Related to this issue, a commenter questioned the need for settlement agreements in petition for modification cases to be approved by the presiding judge. The commenter stated that the administrative law judge assigned to the case may be unfamiliar with mining conditions and practices. Therefore, the commenter stated that unnecessary time and resources may be utilized to familiarize the judge with these basic concepts before the settlement can be approved.

After consideration of this comment, MSHA has retained the authority of the presiding judge to approve consent agreements in its current form. In the Agency's view, petition for modification cases differ from most other litigation in that they involve mine-specific modifications of mandatory mine safety standards. As such, petition cases have been likened to mine-specific rulemaking proceedings. Weighing the often complex health and safety issues which are involved in modifying a safety standard at a mine therefore should be undertaken carefully. Requiring approval of consent agreements by the presiding judge provides a neutral arbiter for these issues and well serves the goal of thorough evaluation of all factors involved in a petition case.

The final rule also modifies existing § 44.27(b)(2) to expand the record upon which a consent agreement can be based in a petition for modification case. The existing rule permits this record to consist "solely of the petition and agreement," a provision which has caused confusion in instances where cases have been settled. The final rule will allow the record to include the MSHA investigation and recommendation, and other pertinent information.

A commenter stated that the final rule should allow the administrative law judge to exclude irrelevant evidence from the record when evaluating a consent agreement. Although the final rule, like the proposal, expands the record upon which the consent agreement may be based, it is not intended to limit the administrative law judge's discretion to independently evaluate the relevance and weight of the evidence in the record. Thus, the presiding judge will have the same discretion to exercise this authority under the final rule as under the existing rule.

Section 44.31 Proposed Findings of Fact, Conclusions, and Orders

The final rule revises existing § 44.31 to require that post-trial submissions to the presiding judge be filed within a time period of 30 days, or as otherwise

prescribed by the judge upon the request of a party. The existing rule requires that proposed findings of fact, conclusions of law, rules or orders, and supporting briefs be filed within a period of time prescribed by the judge of not less than 20 days. MSHA believes that the 30 days permitted by the final rule will in most cases provide adequate time for development of post-trial positions of the parties and will expedite decisionmaking in petition for modification cases.

A commenter asked whether the 30-day time would be counted from when the record closes or when the transcripts become available to the parties. MSHA believes that unless otherwise specified by the judge, the 30 days should normally begin upon receipt of the transcripts.

Section 44.32 Initial Decision

The final rule revises paragraph (a) of existing § 44.32. It requires the presiding administrative law judge to issue a decision in a petition for modification case within 60 days of the filing of the post-trial submissions required by § 44.31. The Agency determined that this time period was appropriate after consulting with the Office of Administrative Law Judges of the Department of Labor. MSHA believes that 60 days will be adequate to arrive at a reasoned decision in most petition cases, and will well serve the goal of reducing unnecessary delay in the petition process. However, the final rule will permit the judge to extend or expedite the decisionmaking process, after consultation with the parties, and based upon the facts of the particular case.

A commenter asked what would occur if the presiding judge failed to issue a decision within the 60-day timeframe. The final rule does not address this issue. In complex cases, MSHA believes that the presiding judge will consult with the parties as specified in the final rule and determine if 60 days is a realistic period in which to reach a decision. If the judge determines that more time will be required, MSHA believes that the parties will by mutual agreement arrive at a more appropriate deadline for the decision. If a situation arises in which the presiding judge does not issue a decision within the specified time, the parties should consult the presiding judge or otherwise pursue their legal remedies as they deem necessary.

Section 44.35 Decision of the Assistant Secretary

The final rule revises § 44.35 and addresses final decisions of the

Department of Labor in petition for modification cases. As under the existing rule, the final rule retains the authority of the Assistant Secretary for Mine Safety and Health to review decisions of administrative law judges in such cases.

The decision to retain final decisionmaking responsibility in petition proceedings with the Assistant Secretary is based upon comments to the proposed transfer of such responsibility to the Secretary's Office of Administrative Appeals. Many commenters requested that the current appeal structure be retained to take advantage of the Assistant Secretary's greater expertise and familiarity with mine safety and health issues in petition cases. Additionally, the Agency determined that having the Assistant Secretary continue to review petition cases will facilitate an expeditious resolution of the case at this stage of review. A time schedule was requested by commenters.

In light of the comments and in the interest of meaningful review of petition for modification decisions as expeditiously as practicable, the final rule will require the Assistant Secretary to issue final decisions within 120 days of the filing of responding statements under existing § 44.33. MSHA believes that this period will enable the Assistant Secretary to fully consider all issues raised in petition cases and to issue well formulated decisions in a reasonable time.

Related to this issue, some commenters objected to the ability of parties to stay the effect of administrative law judge decisions by filing appeals with the Assistant Secretary. Since some decisions of the Assistant Secretary have required extended times from the date of appeal, commenters noted that the impact of this automatic stay can be great. MSHA believes that the 120-day time period for final decision will help to minimize the impact of appeals of administrative law judge decisions as well as the need for relief pending appeal in petition cases. As discussed more fully below, the existing rule for relief pending appeal is removed by this final rule.

The *UMWA v. MSHA* case and section 101(c) indicate that no modification of a mandatory safety standard can be granted except after notice to interested parties, the opportunity for a hearing, and a finding that the modification meets one of the two statutory grounds in section 101(c). Under section 101(c) and part 44, and consistent with the APA, only the decision of the Assistant Secretary can

be considered a final finding for purposes of judicial review that the statutory grounds are met. MSHA interprets these provisions, including the APA, to require such a final finding before the modification can be implemented. Thus, absent a provision in part 44 like the existing rule for relief pending appeal, or like the final rule authorizing temporary relief in certain diminution of safety cases, MSHA believes that no decision of the administrative law judge can be implemented if an appeal is filed on the decision. In order to emphasize this interpretation, the final rule accordingly retains that portion of § 44.50 which states that a proposed decision and order of an Administrator is not operative pending appeal to an administrative law judge, and a decision of an administrative law judge is not operative pending appeal to the Assistant Secretary.

As noted above, the final rule removes from § 44.50 the procedures for filing applications for relief pending appeal. In the proposal, MSHA indicated its intention to delete this provision. Under the existing rule, an application for relief pending appeal can be filed in order to give effect to a favorable decision of either the Administrator or an administrative law judge. However, under this rule, few requests have ever been filed and none have ever been granted. Additionally, in light of the *UMWA v. MSHA* decision, it would seem unlikely that an administrative law judge would grant such relief prior to a hearing, and may not have authority to do so. Thus, the existing rule addressing applications to give effect to favorable decisions of the Administrator pending appeal has little practical utility.

Likewise, MSHA believes that a rule authorizing relief pending appeal to give effect to a favorable decision of an administrative law judge also has little practical value. As stated in the proposal, an application for relief pending appeal at this stage of review serves as little more than a motion to expedite a decision on the petition for modification. Under the final rule, the Assistant Secretary must issue decisions within a 120-day time frame, and parties may request that decisions be expedited. Such requests may be granted at the discretion of the Assistant Secretary. In light of these provisions, no additional benefit would be served by a relief pending appeal rule.

Under the final rule, as under existing § 44.35, the decision of the Assistant Secretary must be based on a consideration of the entire record, and

may affirm, modify, or set aside, in whole or in part, the decision of the administrative law judge. Also, the final rule clarifies the implied authority in the current rule to remand a case to the administrative law judge by specifically stating that the Assistant Secretary has this authority.

Section 44.52 Revocation of Modification

The final rule revises the existing rule for revocation of granted petitions for modification by adding a provision which will allow the appropriate Administrator to initiate revocation proceedings by issuing a new proposed decision and order. Paragraph (a) retains the existing procedure for revocation, and specifies that a party may file a petition for revocation with the Chief Administrative Law Judge for disposition.

Under paragraph (b), the Administrator may propose to revoke a modification previously granted by the Administrator, an administrative law judge, or the Assistant Secretary by issuing a PDO revoking the original decision and order. The PDO will be required to include a statement of reasons supporting the revocation. Such revocation will become final on the 30th day after it is served upon all parties, unless a hearing is requested by any party. As under the existing rule, disposition of the revocation under either paragraphs (a) or (b) will be in accordance with the applicable procedures of subparts C through E of part 44.

Paragraph (c) retains, with a clarifying disjunctive, the provision in the existing rule specifying the basis for a revocation. Revocation must be based upon a change in circumstances or because findings which originally supported the modification are no longer valid.

The new procedure in paragraph (b) of the final rule is based on a commenter's suggestion that the existing rule for revoking granted modifications is inadequate, and on the Agency's experience under the existing rule. According to the commenter, the Secretary is in the best position to evaluate the effectiveness of the modification and whether revocation is in order. The Agency agrees, and does not believe that the existing rule provides a procedure for the Administrator which is consistent with the Administrator's responsibilities to enforce the terms of each modification and to manage the petition for modification program to ensure the best safety and health protection for all miners. MSHA also believes that the

existing rule establishes a particularly cumbersome procedure, requiring the filing of a petition to revoke with the Chief Administrative Law Judge in all cases, even for those circumstances in which revocation of the petition is not opposed. MSHA believes that the final rule facilitates the Administrator's role as the overseer of granted modifications while ensuring the rights of the parties to a hearing on the issues raised by the revocation.

A commenter stated that the rule governing petition revocations should not require the person or entity filing for revocation to be a party. The commenter interprets the existing rule to preclude petitions for revocation by non-parties to the original petition for modification proceeding. MSHA does not agree with this interpretation. Under existing § 44.3, which is unchanged by the final rule, any person claiming a right of participation as an interested party may become a party upon application of the Assistant Secretary, and the granting of such application by the Assistant Secretary. MSHA interprets this provision to allow the Assistant Secretary to grant party status for purposes of filing a petition to revoke to non-participants in the original proceedings. Also, MSHA believes that the operator of the mine and the miners' representative will be considered as parties to a revocation proceeding even if party status was not exercised in prior petition proceedings. Accordingly, the final rule retains the existing provision requiring the person or entity filing a petition to revoke to be a party.

Section 44.53 Amended Modification

This section is new and provides a procedure by which final order granting petitions for modification may be amended by the Administrator.

Commenters indicated that a deficiency in current practices for granting petitions for modification is that no review procedure exists for ensuring that granted petitions continue to provide adequate protection to miners. These commenters stressed the importance of such a procedure in cases where no termination date is included in the petition.

After consideration of these comments, MSHA agrees that periodic review of granted modifications is a necessary part of the petition for modification process. Under current practice, the Administrator reviews petitions frequently to assess the status of granted modifications and to incorporate information and experience obtained under such modifications into decisions on pending petitions. Although

the final rule does not adopt the commenter's suggestion that all petitions be reviewed at specific intervals, MSHA believes that a procedure in the final rule for updating granted modifications will further the goal of providing miners the best available health and safety protection.

The Agency considers a procedure for updating granted modifications to be particularly important in areas where MSHA field experience and current research demonstrate that new or modified terms and conditions should be implemented. Currently, only two options are available to MSHA when the Agency determines that a term or condition of a final order should be modified: (1) MSHA may ask the petitioner to file an amendment; or (2) MSHA may petition to revoke the modification in accordance with the procedures in § 44.52. Neither of these approaches provides an efficient process for resolving situations in which MSHA determines that modified terms and conditions are necessary.

The final rule provides a mechanism to the Administrator to more easily achieve necessary improvements to the terms and conditions of granted modifications. Under the final rule, this mechanism is available to the Administrator in two limited circumstances derived from the revocation procedures in § 44.52. A change in circumstances which originally supported the terms and conditions of the modification must have occurred, or the Administrator must determine that findings which originally supported the terms and conditions of the modification are no longer valid.

When the Administrator decides that an order granting a petition for modification should be amended based upon one or both of these conditions, paragraph (a) authorizes the Administrator to propose to revise the terms and conditions of the decision and order by issuing an amended PDO. With the amended PDO, the Administrator will be required to include a statement of reasons supporting the proposed amendment.

Under the final rule, an amended PDO will have the same effect as the original PDO of the Administrator. It would not be effective until all parties have 30 days in which to challenge the amended PDO. Such a challenge, however, will be limited to the amended terms and conditions proposed by the Administrator. If challenged, a hearing will be required, and the decision of the administrative law judge following the hearing will be subject to appeal to the Assistant Secretary. The scope of the hearing will be the amended terms and

conditions. The original modification will remain in effect until final resolution of all issues related to the amended PDO. If the amended PDO is not challenged, it will become effective on the 30th day after service.

Consistent with section 101(c), the amended decision and order must continue to meet the statutory requirement for granting modifications to mandatory safety standards. Thus, in alternative method cases, the amended decision and order must at all times provide to miners the same measure of protection afforded to the miners at the mine by the standard. In cases involving a diminution of safety, such diminution of safety must continue at the mine and the amended decision and order must not reduce the level of protection afforded miners by the original decision and order.

A commenter stated that a petition review process, if adopted, should include an evaluation of the operator's compliance with the terms and conditions of the modification. The commenter also suggested that this review should include a follow-up visit to the mine by MSHA, and consultation with representative of miners at the mine.

As stated above, the final rule does not include provision requiring the Administrator to review granted modifications at definite intervals to determine if amendments should be proposed. In the Agency's view, the appropriate interval for review by the Administrator will vary with each modification, and will depend upon a number of factors, such as whether the petition implements new technology or presents other novel issues. However, the Agency agrees that compliance with the terms of the modification is relevant to whether such terms should be revised. Also, MSHA believes that consistent non-compliance with the modification may form an appropriate basis for revocation of the modification under § 44.52.

Regarding a follow-up visit to the mine MSHA agrees that follow-up investigations may be appropriate in some cases. However, MSHA believes that in most circumstances the regular MSHA inspection presence at the mine provides sufficient information to the Agency regarding implementation of the modification. Thus, the final rule does not require a follow-up investigation before the Administrator proposes amendments to the modification, nor does it formally require consultation with the representative of miners. As in the past, however, MSHA encourages the submission of information about the petition by the miners' representative,

especially regarding problems in applying the terms and conditions of the modification. Also, if the miners at the mine believe that the operator is violating the terms and conditions of the order granting the petition, an inspection may be requested under § 103(g) of the Mine Act.

Other Issues

Department of Interior cases. Existing part 44 includes a number of references to pending petition for modification cases transferred to the Department of Labor from the Department of the Interior when MSHA was created in 1978. No such petitions remain pending before MSHA. Accordingly, the final rule removes § 44.2(f), § 44.7, § 44.33(d) and the provision in § 44.35 which references § 44.33(d). The final rule also revises § 44.1 to remove a reference to pending Department of the Interior cases from the existing scope and construction provision.

Notice of granted petition. In the proposal, MSHA indicated its intention to delete § 44.5(a). This section requires a notice of a granted petition for modification to be published in the Federal Register. A commenter, however, indicated that such notices are the only means by which interested non-parties to the petition proceeding are informed of the modification. After consideration of this comment, § 44.5(a) is retained in its current form.

Definition of miners' representative. Commenters suggested revising the current definition of representative of miners in final rule. Generally, the commenters wished to clarify that the term "representative of miners" means a person employed at the mine.

The final rule does not incorporate this suggestion. MSHA believes that the current definition is adequate to ensure meaningful participation by the miners in the petition process and is consistent with the provisions of the Mine Act.

Power of administrative law judges. A commenter suggested adding a provision to existing § 44.22 to authorize the administrative law judge to stay petition proceedings to permit time for the investigation of conditions causing an imminent danger to miners which may impact the decision. After consideration of this comment, the final rule does not include such a provision. MSHA recognizes the authority of the administrative law judge to suspend hearings, if necessary. Generally, however, a stay of the proceeding should not be necessary, especially because a granted petition for modification is not operative during the hearing unless temporary relief has been

granted by the Administrator under the final rule. In § 44.16, the administrative law judge is specifically authorized to modify, affirm, or set aside the order granting such relief. Additionally, MSHA inspectors always have the authority to investigate conditions which may result in an imminent danger to miners. If such conditions may impact the presiding judge's decision in the case, MSHA believes that is the Administrator's duty to bring this evidence to the judge's attention. The presiding judge may use the evidence, and take any actions which are necessary and appropriate under the circumstances. Also under § 44.22(e) of the final rule, the Administrator may request a remand of the proceeding, if necessary.

III. Executive Order 12291 and the Regulatory Flexibility Act

The Agency has determined that this final rule will not result in a major cost increase nor have an incremental effect of \$100 million or more on the economy. Therefore, a regulatory impact analysis is not required. The agency has also determined that the final rule will not have a significant impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

IV. Paperwork Reduction Act

The final rule does not introduce new recordkeeping requirements and will not change existing recordkeeping burdens associated with filing petitions for modification.

V. List of Subjects in 30 CFR Part 44

Mine safety and health, Rules of practice for petitions for modification of mandatory safety standards, Temporary relief, Relief pending appeals.

Dated: December 20, 1990.

William J. Tattersall,

Assistant Secretary for Mine Safety and Health.

Accordingly, subparts A, B, C, and E, part 44, chapter I of title 30, Code of Federal Regulations are amended as follows:

PART 44—RULE OF PRACTICE FOR PETITIONS FOR MODIFICATION OF MANDATORY SAFETY STANDARDS

1. The authority citation for part 44 is revised to read as follows:

Authority: 30 U.S.C. 957.

2. Paragraph (a) of § 44.1 is revised to read as follows:

§ 44.1 Scope and construction.

(a) The procedures and rules of practice set forth in this part shall govern petitions for modification of mandatory safety standards filed under section 101(c) of the Act.

* * * * *

§ 44.2 [Amended]

3. Paragraph (f) of § 44.2 is removed.

4. Paragraph (b) of § 44.4 is revised to read as follows:

§ 44.4 Standard of evaluation of petitions; effect of petitions granted.

* * * * *

(b) Except as may be provided in § 44.16 for relief to give effect to a proposed decision and order, a decision of an Administrator or an administrative law judge granting or denying a petition for modification shall not be effective until time for appeal has expired under § 44.14 or § 44.33, as appropriate.

* * * * *

5. Section 44.6 is amended by revising paragraphs (b), (e), and (f) to read as follows:

§ 44.6 Service.

* * * * *

(b) All documents filed subsequent to a petition for modification may be served personally or by first class mail to the last known address of the party. Service may also be completed by telecopier or other electronic means.

* * * * *

(e) Service by mail shall be complete upon mailing. Service by telecopier or other electronic means shall be complete upon receipt.

(f) Whenever a party has the right to do some act within a prescribed period after the service of a document or other material upon the party and the document or other material is served upon the party by mail, 5 days shall be added to the prescribed period: *Provided*, that specific provisions may, for good cause, be made otherwise by an order of an administrative law judge or the Assistant Secretary in a particular proceeding pending before that person.

6. Section 44.7 is revised to read as follows:

§ 44.7 Filing.

For purposes of this part, a petition, request for hearing, notice of appeal, or other document shall be considered to be filed when received, or when mailed by certified mail, return receipt requested. Such documents may be filed by telecopier or other electronic means.

7. Section 44.8 is revised to read as follows:

§ 44.8 Ex parte communication.

There shall be no ex parte communication with respect to the merits of any case not concluded between the Assistant Secretary or the administrative law judge, including any employee or agent of the Assistant Secretary or of the administrative law judge, and any of the parties, intervenors, representatives, or other interested parties.

8. Section 44.10 is revised to read as follows:

§ 44.10 Filing of petition; service.

A petition for modification of the application of a mandatory safety standard under section 101(c) of the Act may be filed only by the operator of the affected mine or any representative of the miners at such mine. All petitions must be in writing and must be filed with the Director, Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 4015 Wilson Boulevard, Arlington, VA 22203. If the petition is filed by a mine operator, a copy of the petition shall be served by the mine operator upon a representative of miners at the affected mine. If the petition is filed by a representative of the miners, a copy of the petition shall be served by the representative of miners upon the mine operator. Service shall be accomplished personally or by registered or certified mail, return receipt requested.

9. Section 44.12 is amended by revising paragraphs (a) and (b) to read as follows:

§ 44.12 Procedure for public notice of petition received.

(a) Within 15 days from the filing of a petition for modification, the Mine Safety and Health Administration will give notice of the petition to each known representative of miners or the operator of the affected mine, as appropriate, and shall publish notice of the petition in the *Federal Register*.

(b) The *Federal Register* notice shall contain a statement that the petition has been filed, identify the petitioner and the mine or mines to which the petition relates, cite the mandatory safety standard for which modification is sought, and describe the requested relief.

* * * * *

10. Section 44.13 is revised to read as follows:

§ 44.13 Proposed decision.

(a) Upon receipt of a petition for modification, the Mine Safety and Health Administration shall cause an

investigation to be made as to the merits of the petition. Any party may request that the investigation of the petition for modification be expedited, or that the time period for investigating the petition be extended. Such requests shall be granted in the discretion of the Administrator upon good cause shown.

(b) As soon as is practicable after the investigation is completed, the appropriate Administrator shall make a proposed decision and order, which shall be served upon all parties to the proceeding. The proposed decision shall become final upon the 30th day after service thereof, unless a request for hearing has been filed with the appropriate Administrator, as provided in § 44.14 of this part.

(c) Service of the proposed decision is complete upon mailing.

11. A new paragraph (c) is added to section 44.14 to read as follows:

§ 44.14 Request for hearing.

(c) *Partial appeal.* (1) If the Administrator has issued a proposed decision and order granting the requested modification, a request for hearing on the proposed decision and order may be made by any party based upon objection to one or more of the terms and conditions of the Administrator's proposed decision and order. If such a request for hearing is made, the request should specify which of the terms and conditions should be the subject of the hearing.

(2) During the pendency of the partial appeal, the proposed decision and order of the Administrator will become final on the 30th day after service thereof, unless a request for hearing on the proposed decision and order is filed in accordance with paragraph (a) of this section by any other party. The decision and order will remain in effect as proposed by the Administrator until the terms and conditions for which the hearing was requested are modified, affirmed, or set aside by a final order of the presiding administrative law judge or the Assistant Secretary. The presiding administrative law judge shall take such action upon a determination of whether—

(i) The terms and conditions for which the hearing was requested are necessary to ensure that the alternative method of achieving the result of the standard will at all times guarantee to the miners at the mine at least the same measure of protection afforded to the miners at the mine by such standard; or

(ii) In the case of a petition involving a finding by the Administrator of a diminution of safety to the miners caused by application of the standard at

the mine, whether the terms and conditions for which the hearing was requested are necessary to provide equivalent protection to the miners at the mine from the hazard against which the standard is directed.

12. Section 44.15 is revised to read as follows:

§ 44.15 Referral to Chief Administrative Law Judge.

Upon receipt of a request for hearing as provided in § 44.14 of this part, the Administrator shall, within 5 days, refer to the Chief Administrative Law Judge the original petition, the proposed decision and order, all information upon which the proposed decision was based, any written request for a hearing on the petition filed, any other written comments or information received and considered in making the proposed decision. The MSHA investigation report shall be made part of the record on the petition.

13. Section 44.16 is revised to read as follows:

§ 44.16 Application for temporary relief; relief to give effect to the proposed decision and order.

(a) *Time for filing.* An application for temporary relief from enforcement of a mandatory standard may be filed at any time before a proposed decision and order is issued on a petition for modification and shall be served upon all parties to the proceeding.

(b) *With whom filed.* The application shall be filed with and decided by the appropriate Administrator.

(c) *Investigation and decision.* Upon receipt of an application for temporary relief, the Administrator shall cause an investigation to be made as to the merits of the application. As soon thereafter as practicable, but in no event greater than 60 days from filing of the application, the Administrator shall issue a decision. If the Administrator does not issue a decision within 60 days of filing of the application, the application shall be deemed to be denied.

(d) *Contents of application.* An application for temporary relief shall comply with applicable general requirements of this part, state the specific relief requested, and include specific evidence showing how the applicant meets the criteria set forth in paragraph (e) of this section.

(e) *Criteria.* Before temporary relief is granted, the applicant must clearly show that—

(1) The application was filed in good faith;

(2) The requested relief will not adversely affect the health or safety of miners in the affected mine;

(3) An identifiable hazard to miners exists in the mine which is caused by application of the standard at the mine;

(4) Other means will be used to reasonably address the hazard against which the original standard was designed to protect; and

(5) Compliance with the standard while the petition for modification is pending will expose miners to the identifiable hazard upon which the application is based.

(f) *Response.* All parties to the proceeding in which an application for temporary relief has been filed shall have 15 days from receipt of the application to file a written response with the Administrator.

(g) *Evidence.* An application for temporary relief or a response to such an application may be supported by affidavits or other evidentiary matter.

(h) *Findings.* Temporary relief may be granted by the Administrator upon a finding that application of the standard at the mine will result in a diminution of safety to the miners at such mine.

(i) *Appeal to the Office of the Administrative Law Judges.* If the application for temporary relief is granted by the Administrator, any other party may request a hearing within 15 days of the Administrator's decision. The request shall be addressed to the Administrator and shall be referred by the Administrator, along with the petition for modification, to the Chief Administrative Law Judge in accordance with § 44.15. The hearing and decision of the presiding administrative law judge shall be in accordance with subparts C through E of this part. After referral of the petition for modification and application for temporary relief, no further decision shall be rendered by the Administrator.

(j) *Duration of relief.* An order granting temporary relief shall be effective until superseded by the Administrator's proposed decision and order, unless a hearing is requested in accordance with paragraph (i) of this section. If such hearing is requested, the temporary relief shall remain in effect until modified, affirmed or set aside by the presiding administrative law judge. In no case, however, shall the Administrator's order remain in effect for more than one year, unless renewed or affirmed by the presiding administrative law judge.

(k) *Application for relief to give effect to the proposed decision and order.* At any time following the proposed decision and order of the Administrator on the accompanying petition for modification, any party may request relief to give effect to the proposed

decision and order until it becomes final.

(l) An application for relief under paragraph (k) shall be filed with the Administrator and shall include a good faith representation that no party is expected to contest the granting of the petition for modification.

(m) A decision to grant relief requested under paragraph (k) will take effect on the seventh day following the decision. If a request for hearing on the proposed decision and order is filed in accordance with § 44.14 prior to the seventh day following the granting of such relief, the relief will not become effective. If such request for hearing on the proposed decision and order is filed after relief becomes effective, the relief will expire immediately.

14. Section 44.20 is revised to read as follows:

§ 44.20 Designation of administrative law judge.

Within 5 days after receipt of a referral of a request for hearing in a petition for modification proceeding, the Chief Administrative Law Judge shall designate an administrative law judge appointed under section 3105 of Title 5 of the United States Code to preside over the hearing.

15. In § 44.22, paragraph (e) is added to read as follows:

§ 44.22 Administrative law judges; powers and duties.

(e) *Remand.* The presiding administrative law judge shall be authorized to remand the petition for modification proceeding to the appropriate Administrator based upon new evidence which was not available to the Administrator and which may have materially affected the Administrator's proposed decision and order. Remand may be upon the judge's own motion or the motion of any party, and shall be granted in the discretion of the presiding administrative law judge.

16. Section 44.24 is revised to read as follows:

§ 44.24 Discovery.

Parties shall be governed in their conduct of discovery by appropriate provisions of the Federal Rules of Civil Procedure, except as provided in § 44.25 of this part. After consultation with the parties, the administrative law judge shall prescribe a time of not more than 45 days to complete discovery. Alternative periods of time for discovery may be prescribed by the presiding administrative law judge upon the request of any party. As soon as is practicable after completion of

discovery, the administrative law judge shall schedule a hearing in accordance with § 44.28 of this part.

17. Section 44.27 is amended by revising paragraphs (a) and (b)(2) to read as follows:

§ 44.27 Consent findings and rules or orders.

(a) *General.* At any time after a request for hearing is filed in accordance with § 44.14, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceedings. Allowance of such opportunity and the duration thereof shall be in the discretion of the Chief Administrative Law Judge, if no administrative law judge has been assigned, or of the presiding administrative law judge. In deciding whether to afford such an opportunity, the administrative law judge shall consider the nature of the proceeding, requirements of the public interest, representations of the parties, and probability of an agreement which will result in a just disposition of the issues involved.

(b)(1) * * *

(2) That the record on which any rule or order may be based shall consist of the petition and agreement, and all other pertinent information, including: any request for hearing on the petition; the investigation report; discovery; motions and requests, filed in written form and rulings thereon; any documents or papers filed in connection with prehearing conferences; and, if a hearing has been held, the transcript of testimony and any proposed findings, conclusions, rules or orders, and supporting reasons as may have been filed.

* * * * *

18. Section 44.31 is revised to read as follows:

§ 44.31 Proposed findings of fact, conclusions, and orders.

After consultation with the parties, the administrative law judge may prescribe a time period of 30 days within which each party may file proposed findings of fact, conclusions of law, and rule or order, together with a supporting brief expressing the reasons for such proposals. Such time may be expedited or extended upon request and at the discretion of the Administrative Law Judge. Proposals and briefs shall be served on all other parties and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

19. Paragraph (a) in § 44.32 is revised to read as follows:

§ 44.32 Initial decision.

(a) Within 60 days after the time allowed for the filing of proposed findings of fact and conclusions of law, the administrative law judge shall make and serve upon each party a decision, which shall become final upon the 30th day after service thereof, unless an appeal is filed as provided in § 44.33 of this part. After consultation with the parties, the administrative law judge may expedite or extend the time for issuing the decision. The decision of the administrative law judge shall include:

(1) A statement of findings of fact and conclusions of law, with reasons therefor, upon each material issue of fact, law, or discretion presented on the record; and

(2) The appropriate rule, order, relief, or denial thereof.

* * * * *

20. Paragraph (d) of § 44.33 is removed.

21. Section 44.34 is revised to read as follows:

§ 44.34 Transmission of record.

If an appeal is filed, the administrative law judge shall, as soon thereafter as is practicable, transmit the record of the proceeding to the Assistant Secretary for review. The record shall include: the petition; the MSHA investigation report; any request for hearing on the petition; the transcript of testimony taken at the hearing, together with exhibits admitted in evidence; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions of law, rules or orders, and supporting reasons, as may have been filed; and the administrative law judge's decision.

22. Section 44.35 is revised to read as follows:

§ 44.35 Decision of the Assistant Secretary.

Appeals from a decision rendered pursuant to § 44.32 of this part shall be decided by the Assistant Secretary within 120 days after the time for filing responding statements under § 44.33 of this part. The Assistant Secretary's decision shall be based upon consideration of the entire record of the proceedings transmitted, together with the statements submitted by the parties. The decision may affirm, modify, or set aside, in whole or part, the findings, conclusions, and rule or order contained in the decision of the presiding administrative law judge and shall include a statement of reasons for the

action taken. The Assistant Secretary may also remand the petition to the administrative law judge for additional legal or factual determinations. Any party may request that the time for the Assistant Secretary's decision be expedited. Such requests shall be granted in the discretion of the Assistant Secretary.

23. Section 44.50 is revised to read as follows:

§ 44.50 Effect of appeal on initial decision.

Except as provided in § 44.14(c), a proposed decision and order of an Administrator is not operative pending appeal to an administrative law judge, and a decision of an administrative law judge is not operative pending appeal to the Assistant Secretary.

24. Section 44.52 is revised to read as follows:

§ 44.52 Revocation of modification.

(a) *Petition for revocation.* Any party to a proceeding under this part in which a petition for modification of a mandatory safety standard was granted by an Administrator, administrative law judge, or the Assistant Secretary may petition that the modification be revoked. Such petition shall be filed with the Chief Administrative Law Judge for disposition.

(b) *Revocation by the Administrator.* The appropriate Administrator may propose to revoke a modification

previously granted by the Administrator, an administrative law judge, or the Assistant Secretary, by issuing a proposed decision and order revoking the modification. Such proposed revocation and a statement of reasons supporting the proposal must be served upon all parties to the proceeding, and shall become final on the 30th day after service thereof unless a hearing is requested in accordance with § 44.14.

(c) Revocation of a granted modification must be based upon a change in circumstances or because findings which originally supported the modification are no longer valid.

(d) Disposition of the revocation shall be subject to all procedures of subparts C through E of this part.

25. Section 44.53 is added to read as follows:

§ 44.53 Amended modification.

(a) The Administrator may propose to revise the terms and conditions of a granted modification by issuing an amended proposed decision and order, along with a statement of reasons for the amended proposed decision and order, when one or both of the following occurs:

(1) A change in circumstances which originally supported the terms and conditions of the modification.

(2) The Administrator determines that findings which originally supported the

terms and conditions of the modification are no longer valid.

(b) The Administrator's amended proposed decision and order shall be served upon all parties to the proceeding and shall become final upon the 30th day after service thereof, unless a request for hearing on the proposed amendments is filed under § 44.14. If a request for hearing is filed, the amended proposed decision and order shall be subject to all procedures of subparts C through E of this part as if it were a proposed decision and order of the Administrator issued in accordance with § 44.13. The original modification shall remain in effect until superseded by a final amended modification.

(c) In cases where the original decision and order was based upon an alternative method of achieving the result of the standard, the amended decision and order shall at all times provide to miners at the mine at least the same measure of protection afforded to the miners at the mine by such standard. In cases where the original decision and order was based upon a diminution of safety to the miners resulting from application of the standard at such time, the amended decision and order shall not reduce the protection afforded miners by the original decision and order.

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