Towers No. 3, 4015 Wilson Boulevard, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, phone (703) 235–1910.

SUPPLEMENTARY INFORMATION: On December 4, 1989 (54 FR 50209), MSHA published an advance notice of proposed rulemaking seeking comment on the need to revise its noise standards for coal and metal/nonmetal mines. The Agency has received requests from the mining community to extend the period for comment on the advance notice. The comment period was scheduled to close on March 5, 1990. In response to these requests, the Agency is extending the comment period to June 22, 1990. All interested parties are encouraged to submit comments prior to that date.

Dated: February 14, 1990.

John B. Howerton,

Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 90–3874 Filed 2–20–90; 8:45 am]

BILLING CODE 4510–43–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 716 and 721

[OPTS–50574; FRL–3713–3]

Certain Chemical Substances; Proposed Significant New Use Rule and Addition to Health and Safety Data Reporting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to gather information on certain chemicals that may be used as substitutes for chlorofluorocarbons (CFCs). CFCs have been identified as potential contributors to the depletion of the Earth's stratospheric ozone layer and their production will be phased down under the terms of an international agreement. However, there is also a need to evaluate whether potential CFC substitutes may present unreasonable risks to human health or the environment. For two of the chemical substances, 2-chloro-1,1,1-trifluoroethane (HCFC–133a, CAS Number 75–88–7) and 1,2-dichloro-1,1-difluoroethane (HCFC–132b, CAS Number 1649–08–7), although not currently being considered as CFC substitutes, EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA). EPA believes that the SNUR is necessary because HCFC–132b and HCFC–133a may be hazardous to human health, and that the uses designated herein and activities associated with such uses may result in significant adverse exposure. EPA is also proposing to add these two chemical substances and five additional potential CFC substitutes (listed herein) to the Health and Safety Data Reporting Rule (40 CFR part 716), issued under section 8(d) of TSCA.

DATE: Written comments should be submitted to EPA by March 23, 1990.

ADDRESSES: Since some comments may contain confidential business information (CBI), all comments should be sent in triplicate to: TSCA Document Processing Center (TS–790), Office of Toxic Substances, Environmental Protection Agency, Rm. L–100, 401 M St., SW., Washington, DC 20460. –

Comments regarding this proposal should include the docket control number OPTS–50574. Nonconfidential comments will be placed in the rulemaking record and will be available for public inspection. Unit VIII of this preamble contains additional information on submitting comments containing CBI.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, – Environmental Protection Agency, Rm. E–545, 401 M St., SW., Washington, DC 20460, –Telephone: (202) 554–1404, TDD: (202) 554–0551.

SUPPLEMENTARY INFORMATION: The proposed SNUR would require persons to notify EPA at least 90 days before commencing the manufacture, import, or processing of HCFC–132b for any use or HCFC–133a for any use other than as an intermediate. The required notice would provide EPA with the information needed to evaluate an intended use and associated activities, and an opportunity to protect against potentially adverse exposure to the chemical substances before it can occur. Under the Health and Safety Data Reporting Rule, manufacturers, importers, and processors would be required to provide lists and copies of unpublished health and safety studies on the seven substances listed in Unit III. EPA would use the reported data to evaluate risks associated with the substances.

I. Statutory Authority

This rule is proposed under the authority of sections 5(a)(2) and 8(d) of the Toxic Substances Control Act (TSCA, 15 U.S.C. 2604(a)(2) and 15 U.S.C. 2607 (a) and (d)).

II. Regulatory Background

A. Proposed SNUR

Section 5(a)(2) of TSCA authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the substance for that use.

Persons subject to this SNUR would comply with the same notice requirements and EPA regulatory procedures as submitters of premanufacture notices (PMNs) under section 5(a)(1)(A) of TSCA. In particular, these requirements include the information submission requirements of section 5(b) and (d)(1), and the regulations at 40 CFR part 720. Once EPA receives a SNUR notice, EPA may take regulatory action under section 5(e), 5(f), 6, or 7 to control the activities for which it has received a SNUR notice. If EPA does not take action, section 5(g) of TSCA requires EPA to explain in the **Federal Register** its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret section 12(b) appear at 40 CFR part 707.

General regulatory provisions applicable to SNURs are codified at 40 CFR part 721, subpart A. On July 27, 1988 (53 FR 28354), and July 27, 1989 (54 FR 31298), EPA promulgated amendments to the general provisions which apply to this SNUR except as provided in proposed § 721.760(b)(1). Interested persons should refer to these documents for further information. In the **Federal Register** of August 17, 1988 (53 FR 31252), EPA promulgated a "User Fee Rule" (40 CFR part 700) under the authority of TSCA section 26(b). Provisions requiring persons submitting significant new use notices to submit certain fees to EPA are discussed in detail in that **Federal Register** document.

B. Proposed Health and Safety Data Reporting Rule Amendment

Under the authority of section 8(d) of TSCA, EPA issued the model Health and Safety Data Reporting Rule (40 CFR part 716, hereinafter referred to as the section 8(d) model rule). The section 8(d) model rule contains standard reporting requirements for persons who

manufacture, import, or process (or propose to manufacture, import, or process) substances and mixtures that are listed in the rule. The model rule requires these persons to provide EPA with copies and lists of health and safety studies pertaining to the listed substances and mixtures. EPA has the authority to amend the list of substances and mixtures in the section 8(d) model rule. Generally, EPA may add substances and mixtures to the model rule listing by means of a chemical-specific amendment to the model rule, as EPA is doing with this proposed rule.

The reporting requirements of the model rule are applicable as of the date a substance or mixture is listed in the rule, and remain in effect for up to 10 years after the listing date. The model rule also is applicable to persons who manufactured, imported, or processed a listed substance or mixture (or proposed to do so) during the 10 years prior to the listing date. Most persons subject to the rule are required to submit two types of data to EPA:

1. Copies of unpublished health and safety studies pertaining to substances and mixtures listed in the rule, provided that such studies are in the possession of the manufacturer, importer, or processor.

2. Lists of unpublished health and safety studies which are being conducted by (or for) the manufacturer, importer, or processor, or which are known to but not in the possession of the manufacturer, importer, or processor.

Potential respondents to this proposed rule should refer to 40 CFR part 716 for complete information on section 8(d) reporting requirements.

III. Summary of this Proposed Rule

The chemical substances which are the subjects of this proposed SNUR are 2-chloro-1,1,1-trifluoroethane (HCFC–133a, CAS Number 75–88–7) and 1,2-dichloro-1,1-difluoroethane (HCFC–132b, CAS Number 1649–08–7). EPA is proposing to designate any use of HCFC–132b and any use of HCFC–133a other than as an intermediate as significant new uses. Thus, this proposed rule would require persons who intend to manufacture, import, or process HCFC–132b or HCFC–133a for a designated significant new use to notify EPA at least 90 days before such manufacture, import, or processing.

Additionally, EPA is proposing to add HCFC–132b, HCFC–133a, and five additional potential CFC substitutes to the list of substances and mixtures in the section 8(d) model rule. Through this amendment, EPA would trigger reporting unpublished health and safety data. These data are necessary for EPA's risk assessment activities associated with the substances listed in this unit. The substances being proposed for addition to the section 8(d) model rule follow:

SUBSTANCES PROPOSED FOR ADDITION TO 8(d) MODEL RULE

CAS number	Trivial/Common chemical name	TSCA chemical substance inventory name
75-88-7	2-Chloro-1,1,1-trifluoroethane (HCFC-133a)	Ethane, 2-chloro-1,1,1-trifluoro-
306-83-2	2,2-Dichloro-1,1,1-trifluoroethane (HCFC-123)	Ethane, 2,2-dichloro-1,1,1-trifluoro-
354-25-6	1-Chloro-1,1,2,2-tetrafluoroethane (HCFC-124)	Ethane, 1-chloro-1,1,2,2-tetrafluoro-
354-33-6	Pentafluoroethane (HFC-125)	Ethane, pentafluoro-
811-97-2	1,1,1,2-Tetrafluoroethane (HFC-134a)	Ethane, 1,1,1,2-tetrafluoro-
1649-08-7	1,2-Dichloro-1,1-difluoroethane (HCFC-132b)	Ethane, 1,2-dichloro-1,1-difluoro-
1717-00-6	1,1-Dichloro-1-fluoroethane (HCFC-141b)	Ethane, 1,1-dichloro-1-fluoro-

Certain persons may have previously reported data to the Office of Air and Radiation pursuant to section 114 of the Clean Air Act who may be exempt from particular section 8(d) model rule reporting requirements. Interested persons are directed to 40 CFR 716.20(a)(3) for further information.

IV. Background, Objectives, and Rationale for this Proposed Rule

A. Proposed SNUR on HCFC–132b and HCFC–133a

1. *Production and use.* EPA review of the TSCA Chemical Substance Inventory Data Base and other information sources indicate that there is currently no ongoing commercial manufacture, import, or processing of HCFC–132b. Data available to EPA indicate that HCFC–133a is manufactured solely for use as an intermediate. While major potential uses for both substances include use as a refrigerant and as a solvent, neither is currently being considered for use as a CFC substitute.

2. *Exposure data.* EPA has little data on actual numbers of persons who have been exposed to HCFC–132b or HCFC–133a, or at what levels. EPA believes that the potential use of these substances as refrigerants or foam blowing agents, among other potential uses, would greatly increase the magnitude and duration of exposure to human beings and the environment over that which currently exists.

3. *Health effects.* Data indicate that in animals HCFC–132b is a developmental, reproductive, and liver toxicant. HCFC–132b was tested in a pilot inhalation study for developmental toxicity and in a 90-day subchronic inhalation study. The developmental toxicity study showed a reduction in pregnancy rate in the high dose group and reduced maternal weight gain at all doses tested. Both hepatic and testicular toxicity were observed in the 90-day study.

Toxicity data reviewed by EPA indicates that in animal test systems HCFC–133a is a reproductive toxicant, a developmental toxicant, and a carcinogen. Reduced fertility was observed following administration by inhalation of HCFC–133a to male mice. Inhalation exposure is reported to result in sperm abnormalities and severe damage to testicular tubules. The reproductive organs were also the target site for tumor formation in male and female rats. Following 1 year of exposure via gavage, female rats developed adenocarcinomas and males developed testicular interstitial cell tumors. Additionally, developmental toxicity was seen in an inhalation study in rats.

Further information regarding health effects of HCFC–132b and HCFC–133a is contained in the public record for this proposed rule.

4. *Objectives and rationale for the proposed SNUR.* To determine what would constitute a significant new use of HCFC–132b and HCFC–133a, EPA considered relevant information on the toxicity of the substances, likely exposures and releases associated with possible uses, and the four factors listed in section 5(a)(2) of TSCA. Based on these considerations, EPA wishes to achieve the following objectives with regard to the significant new use that is designated in this proposed rule:

a. EPA wants to ensure that it would receive notice of any company's intent to manufacture, import, or process HCFC–132b or HCFC–133a for a

significant new use before that activity begins.

b. EPA wants to ensure that it would have an opportunity to review and evaluate data submitted in a significant new use notice before the notice submitter begins manufacturing, importing, or processing HCFC–132b or HCFC–133a for a significant new use.

c. EPA wants to ensure that it would be able to regulate prospective manufacturers, importers, or processors of HCFC–132b or HCFC–133a before the manufacture, import, or processing of theses substances for a significant new use occurs, provided that the degree of potential health and/or environmental risk is sufficient to warrant such regulation.

EPA believes that any use of HCFC–132b, or any use of HCFC–133a other than as an intermediate, and their related manufacture, import, or processing, has a high potential to increase the magnitude and duration of exposure to these substances from that which currently exists.

HCFC–132b and HCFC–133a are developmental and reproductive toxicants in animals. Additionally, data indicate that HCFC–133a is a carcinogen in rats, and HCFC–132b is a liver toxicant in test animals. Neither HCFC–132b nor HCFC–133a are currently subject to any Federal regulation that would notify the Federal Government of activities that might result in increased exposures to these substances or provide a regulatory mechanism that could protect human health or the environment from potentially adverse exposures before they occurred. Given the reasonably anticipated situations that could result in increased exposure, the potential toxicity of these substances, and the lack of sufficient regulatory controls, individuals could be exposed to HCFC–132b or HCFC–133a at levels which may cause adverse effects. For the foregoing reasons, EPA has decided to designate any use of HCFC–132b and any use of HCFC–133a other than as an intermediate as significant new uses.

B. Proposed Additions to the Section 8(d) Model Rule

EPA has conducted some preliminary evaluations of the health and environmental hazards posed by the substances listed herein. However, EPA wants to ensure that it has all reasonably ascertainable unpublished health and safety data on the substances before undertaking in-depth risk assessment or further regulatory action. Therefore, EPA is proposing to gather data under section 8(d) of TSCA in order to perform risk identification and assessment activities to support EPA's decisionmaking under TSCA.

V. Alternative to Proposed SNUR for HCFC–132b and HCFC–133a

An alternative to proposing the SNUR for HCFC–132b and HCFC–133a would be to promulgate a section 8(a) reporting rule for these substances. Under such a rule, EPA could require any person to report information to the Agency when they intend to manufacture, import, or process HCFC–132b or HCFC–133a for the uses designated in this proposed rule. However, if EPA used section 8(a) rather than SNUR authority, the Agency would not be able to take immediate follow-up regulatory action under section 5 (e) or (f) to prohibit or limit the activity. In addition, EPA may not receive important information from small businesses, because such firms are exempt from section 8(a) reporting requirements. In view of the level of health and environmental concern for HCFC–132b and HCFC–133a, EPA believes that a section 8(a) rule for these substances would not meet EPA's regulatory objectives.

VI. Applicability of Proposed SNUR to Uses Occurring Before Effective Date of the Final SNUR

EPA believes that the intent of section 5(a)(1)(B) is best served by designating a use as a significant new use as of the proposal date of the SNUR rather than as of the effective date of the final rule. If uses begun during the proposal period of a SNUR were considered ongoing as of the effective date, it would be difficult for EPA to establish SNUR notice requirements, because any person could defeat the SNUR by initiating the proposed significant new use before the rule became final; this interpretation of section 5 would make it extremely difficult for EPA to establish SNUR notice requirements.

Persons who begin commercial manufacture, import, or processing of HCFC–132b or HCFC–133a for a significant new use designated in this proposed rule between proposal and the effective date of the SNUR may comply with this proposed SNUR before it is promulgated. If a person were to meet the conditions of advance compliance as codified at § 721.45(h) (53 FR 28354, July 17, 1988), the person will be considered to have met the requirements of the final SNUR for those activities. If persons who begin commercial manufacture, import, or processing of the substance between proposal and the effective date of the SNUR do not meet the conditions of advance compliance, they must cease that activity before the effective date of the rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expires.

VII. Economic Analysis

EPA has evaluated the potential costs of establishing SNUR and 8(d) model rule reporting requirements for the substances listed herein. EPA's complete economic analysis is available in the public record for this proposed rule (OPTS–50574).

VIII. Comments Containing Confidential Business Information

Any person who submits comments claimed as CBI must mark the comments as "confidential," "trade secret," or other appropriate designation. Comments not claimed as CBI at the time of submission will be placed in the public file. A complete public version must be submitted if the submitter claims any material CBI. Any comments marked as CBI will be treated in accordance with the procedures in 40 CFR part 2.

IX. Rulemaking Record

EPA has established a record for this rulemaking (docket control number OPTS–50574). The record includes basic information considered by EPA in developing this proposed rule. EPA will supplement the record with additional information as it is received and will identify the complete rulemaking record by the date of promulgation. A public version of this record containing nonconfidential materials is available for reviewing and copying from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Public Docket Office, located at Rm. NE–G004, 401 M St., SW., Washington, DC.

X. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore requires a Regulatory Impact Analysis. EPA has determined that this proposed rule would not be a "major" rule because it would not have an effect on the economy of $100 million or more, and it would not have a significant effect on competition, costs, or prices.

This proposed rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 605(b), EPA has determined that this proposed rule would not have a

significant impact on a substantial number of small businesses. EPA has not determined whether parties affected by the proposed SNUR would likely be small businesses. However, EPA expects to receive few SNUR notices for HCFC–132b and HCFC–133a. Therefore, EPA believes that the number of small businesses affected by the proposed SNUR would not be substantial, even if all the SNUR notice submitters were small firms. In a study of respondents to the section 8(d) model rule, EPA found that only 1 of 69 respondents had less than $100 million in sales. EPA does not expect this proposed amendment of the model rule to affect that distribution of burden within the chemical industry.

C. Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been approved by OMB under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and have been assigned OMB control numbers 2070–0038 for SNUR reporting and 2070–0004 for TSCA section 8(d) reporting.

Public reporting burden for this collection of information is estimated to average 100 hours per response for SNUR reporting (varying from 30 to 170 hours) and 27.5 hours for each firm (5.4 hours per study) for TSCA section 8(d) reporting, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Parts 716 and 721

Chemicals, Environmental protection, Hazardous materials, Health and safety, Recordkeeping and reporting requirements, Significant new uses.

Dated: February 3, 1990.

Linda J. Fisher,

Assistant Administrator for Pesticides and Toxic Substances.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 716—[AMENDED]

1. In part 716:

a. The authority citation for part 716 would continue to read as follows:

Authority: 15 U.S.C. 26O7(d).

b. In § 716.120(a) by adding substances numerically by CAS Number to read as follows:

§ 716.120 Substances and listed mixtures to which this subpart applies.

* * * * *

(a) * * *

CAS number	Substance	Special exemptions	Effective date	Sunset date
•	•	•	•	•
75-88-7	Ethane, 2-chloro-1,1,1-trifluoro-		(—/—/—)	(—/—/—)
•	•	•	•	•
306-83-2	Ethane, 2,2-dichloro-1,1,1-trifluoro-		(—/—/—)	(—/—/—)
•	•	•	•	•
354-25-6	Ethane, 1-chloro-1,1,2,2-tetrafluoro-		(—/—/—)	(—/—/—)
354-33-6	Ethane, pentafluoro-		(—/—/—)	(—/—/—)
•	•	•	•	•
811-97-2	Ethane, 1,1,1,2-tetrafluoro-		(—/—/—)	(—/—/—)
•	•	•	•	•
1649-08-7	Ethane, 1,2-dichloro-1,1-difluoro-		(—/—/—)	(—/—/—)
1717-00-6	Ethane, 1,1-dichloro-1-fluoro-		(—/—/—)	(—/—/—)
•	•	•	•	•

PART 721—[AMENDED]

2. In part 721:

a. The authority citation for part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604 and 2607.

b. By adding new § 721.760 to read as follows:

§ 721.760 Certain hydrogen containing chlorofluorocarbons.

(a) *Chemical substances and significant new uses subject to reporting.* (1) The chemical substances ethane, 2-chloro-1,1,1-trifluoro- (CAS Number 75–88–7) and ethane, 1,2-dichloro-1,1-difluoro- (CAS Number 1649–08–7) are subject to reporting under this section for the significant new use described in paragraphs (a) (2) and (3) of this section.

(2) The significant new use for ethane, 2-chloro-1,1,1-trifluoro- is: Use other than as an intermediate.

(3) The significant new use for ethane, 1,2-dichloro-1,1-difluoro- is: Any use.

(b) *Specific requirements.* The provisions of subpart A of this part apply to this section except as modified by this paragraph:

(1) Section 721.5 applies to this section except § 721.5(a)(2). A person who intends to manufacture, import, or process for commercial purposes the substance identified in paragraph (a)(3) of this section and intends to distribute the substance in commerce must submit a significant new use notice.

(2) [Reserved]

(Approved by the Office of Management and Budget under OMB control number 2070–0038)

[FR Doc. 90–3966 Filed 2–20–90; 8:45 am]

BILLING CODE 6560–50–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 441

[BPD–485–P]

RIN 0938–AD80

Medicaid Program; Prohibitions on FFP for Educational and Vocational Training for Institutionalized Individuals

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise and clarify the meaning of the prohibition against the use of Federal financial participation (FFP) for

vocational training and educational activities in intermediate care facilities for the mentally retarded (ICFs/MR) and in psychiatric facilities or programs providing psychiatric services to individuals under age 21. It would resolve issues that have been raised by the States and courts regarding the method and criteria that have been used by HCFA to determine which services are not eligible for FFP because of the educational and vocational training services exclusion.

DATES: To assure consideration, comments must be mailed or delivered to the appropriate address, as provided below, and must be received by 5 p.m. on April 23, 1990.

ADDRESSES: Mail comments to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–485–P, P.O. Box 26676, Baltimore, Maryland 21207

If you prefer, you may deliver your comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Ave., SW., Washington, DC, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, Maryland

In commenting, please refer to file code BPD–485–P. Comments received timely will be available for public inspection as they are received, beginning approximately three weeks after publication of this document, in Room 309–G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: 202–245–7890).

FOR FURTHER INFORMATION, CONTACT: Samuel Kidder, (301) 966–4623.

SUPPLEMENTARY INFORMATION:

I. Background

Medicaid regulations have contained a provision prohibiting payment for educational and vocational services in intermediate care facilities for the mentally retarded (ICFs/MR) since 1974, when initial regulations for the ICF/MR program were published. The initial regulations implementing the psychiatric services benefit for those under age 21 also included the educational and vocational exclusion. This exclusion is found at 42 CFR 441.13(b). The exclusion was based on the fact that the Medicaid program is fundamentally a medical assistance program that has as its primary purpose the provision of medical care and services (which are defined in section 1905(a) of the Social Security Act (the Act)). It was also based on the principle of Medicaid as the "payor of last resort" under sections 1902(a)(25) and 1902(a)(17)(B) of the Act, which HCFA believed obligated State education agencies, not Medicaid, to pay for services related to special education. The exclusion was explained in a 1978 Medicaid instruction (HCFA Action Transmittal 78–104), which stressed the need to ensure that Medicaid payment is made only for "medical assistance" and not for services covered as educational services under the Education for All Handicapped Children Act of 1975 (Pub. L. 94–142) or for vocational training services. While the issuance stated that there is a distinction between medical assistance and educational or vocational services and stressed the need to avoid duplicate payments, it did not clearly establish the basis for the distinction. Questions concerning decisions by the Departmental Appeals Board (among them Decision Numbers 367, 438, and 777) and audit activities conducted by the Office of the Inspector General (reported under audit control numbers 01–20201, 01–40212, 04–50205, 04–50210, and others) led us to conclude that there was a need for a clearer interpretation of the regulation to provide criteria to distinguish ICF/MR services from "educational services" and "vocational training." Therefore, in September 1985, we issued at section 4396 of part 4 of the State Medicaid Manual, new instructions (Transmittal No. 16) to assist in differentiating educational services from ICF/MR services reimbursable under the Medicaid program. In September 1986, a parallel instruction (Transmittal No. 21) relating to vocational services was issued at section 4397 of the Manual. These issuances were developed with assistance from a Technical Advisory Group composed of State Medicaid representatives.

Our instructions at section 4396 of the State Medicaid Manual recognized that many of the services required to be provided to children under Federal and State education statutes are also services that are covered under the Medicaid program. Such services, in our view, would only be covered under Medicaid if the State educational agencies were not obligated by law to pay for them. We adopted the approach that all services described in the Individualized Education Plan (IEP) and all services required under State and Federal education laws were excluded from Medicaid reimbursement because these services are the responsibility of the State.

The instruction also made it clear that Federal financial participation (FFP) was not available for traditional educational activities such as training in academic subjects on the basis of the broader authority in section 1905(a) relating to the medical and remedial orientation of the Medicaid program. This aspect of the instruction was not controversial.

Several factors have led us to reevaluate our policy on the educational and vocational exclusion. First, in *Commonwealth of Massachusetts* v. *Heckler*, 616 F. Supp. 687 (D. Mass. 1985), the court rejected HCFA's position that FFP is unavailable for services that are covered by State education statutes. Accordingly, HCFA's policy of disallowing certain costs solely because they were included in a client's IEP was invalidated. The court concluded that determination of whether a service is educational (and therefore not eligible for FFP) should rest on the nature of the service rather than on the State's method of administering the service. In *Commonwealth of Massachusetts* v. *Bowen*, 816 F.2d 796 (1st Cir. 1987), the First Circuit Court affirmed the finding of the district court. Following an appeal to the United States Supreme Court on a jurisdictional issue (*Bowen* v. *Massachusetts*, _____ U.S. _____, 108 S.Ct. 2722 (1988)), the district court opinion was upheld.

Second, the Education of the Handicapped Act Amendments of 1986 (Pub. L. 99–457) make it difficult to employ the "payor of last resort" principle outlined above. These amendments indicate that funds provided under Pub. L. 94–142 would not be used to satisfy a financial commitment for services that would have been paid for by other Federal, State, and local agencies (including health agencies) if these services were not provided as part of the handicapped child's IEP.

Finally, section 1903 of the Act has been amended by section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (Pub. L. 100–360). As amended, section 1903 includes a statement that nothing in title XIX—

> shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for *covered services* [emphasis added] furnished to a handicapped child because such services are included in the child's individualized education program established pursuant to part B of the Education of the Handicapped Act or furnished to a handicapped infant or toddler because such services are included in

the child's individualized family service plan adopted pursuant to part H of such Act.

The intent of these amendments is to ensure that services that would ordinarily be provided or paid for by other agencies for handicapped children would be continued. The congressional committee report that accompanied the change states explicitly the committee's intent that Medicaid cover the "related services" it had previously denied under the educational services exclusion (H.R. Rep. No. 661, 100th Cong., 2nd Sess. 268–69 (1988)).

II. Proposed Changes to the Regulations

As a result of the 1986 amendments to Pub. L. 94–142, the litigation in Massachusetts, and provisions of the Medicare Catastrophic Coverage Act of 1988, we propose to revise the regulations concerning the prohibition against the use of FFP for educational and vocational services.

We would revise 42 CFR 441.13(b) to clarify the current prohibition against the use of FFP for vocational and educational activities in ICFs/MR and psychiatric facilities or psychiatric programs for those under 21. The revised language would state that FFP is not available for formal educational services or vocational services for residents of ICFs/MR or for those receiving services from psychiatric facilities or programs that provide inpatient psychiatric services to individuals under age 21. Covered services include only those services that are medical or remedial in nature.

We would specify that formal educational services are those relating to training in traditional academic subjects. Subject matter rather than setting, time of day, or class size determines whether a service is educational. Traditional academic subjects include, but are not limited to, science, history, literature, foreign languages, and mathematics. Vocational services relate to organized programs that are directly related to the preparation of individuals for paid or unpaid employment. (This definition is adapted from 34 CFR 300.14(b)(3), the Department of Education regulations implementing Pub. L. 94–142.) We have used this definition because it clearly ties vocational services to employment, not to acquisition of normal health status. This is compatible with the statutory philosophy of Medicaid as a medical program rather than an educational program. As a side benefit, we hope that the use of a single definition of vocational training by HCFA and the Department of Education will help eliminate confusion about the nature of covered services. We would specify that examples of vocational services include, but are not limited to, sheltered workshops and supported employment. Additionally, we would provide an exception to the FFP limitation. We would specify that services required to provide active treatment to residents would not be subject to the exclusion. Thus, FFP would be available for active treatment as defined at § 483.440(a) for ICF/MR residents and at § 441.154 for individuals under age 21 receiving inpatient psychiatric services. Although vocational and educational services are covered under Medicaid if they are part of active treatment, we caution that the degree of independence and self-reliance exhibited by an individual effectively using these services should bring into question the propriety of his or her placement in an ICF/MR.

III. Regulatory Impact Statement

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed regulation that meets one of the E.O. criteria for a "major rule"; that is, one that would be likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. In addition, we generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C 601 through 612), unless the Secretary certifies that a proposed regulation would not have significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all providers and fiscal intermediaries as small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any proposed rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside a metropolitan statistical area.

These proposed changes would only clarify the prohibition against the use of FFP for vocational training and educational activities in ICFs/MR and in psychiatric facilities or programs providing psychiatric services to individuals under age 21. Recent court decisions and statutory changes have changed current policy. These changes would require coverage of certain medical services that are part of an IEP, and that here to fore were prohibited from FFP. We do not expect that coverage for these additional services would have a significant economic effect on the Medicaid trust fund.

For these reasons, we have determined that the threshold criteria of E.O. 12291 would not be met, and a regulatory impact analysis is not required. Further, we have determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities and would not have a significant impact on the operations of a substantial number of small rural hospitals. Therefore, we have not prepared a regulatory flexibility analysis.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Date" section of this preamble, and, if we proceed with a final rule, we will respond to the comments in the preamble of that rule.

List of Subjects in 42 CFR Part 441

Family planning, Grant programs--health, infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

42 CFR part 441, subpart A would be amended to read as follows:

PART 44—[AMENDED]

1. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 441.13(b) is revised to read as follows:

§ 441.13 Prohibitions on FFP: Institutionalized individuals.

* * * * *

(b) With the exception of active treatment services (as defined in § 483.440(a) of this chapter for residents of ICFs/MR and in § 441.154 for individuals under age 21 receiving inpatient psychiatric services), payments to institutions for the mentally retarded or persons with related conditions and to psychiatric facilities

or programs providing inpatient psychiatric services to individuals under age 21 may not include reimbursement for formal educational services or for vocational services. Formal educational services relate to training in traditional academic subjects. Subject matter rather than setting, time of day, or class size determines whether a service is educational. Traditional academic subjects include, but are not limited to, science, history, literature, foreign languages, and mathematics. Vocational services relate to organized programs that are directly related to the preparation of individuals for paid or unpaid employment. Examples of vocational services include, but are not limited to, sheltered workshops and supported employment.

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

Dated: August 3, 1989.

Louis B. Hays,

Acting Administrator, Health Care Financing Administration.

Approved: November 3, 1989.

Louis W. Sullivan,

Secretary.

[FR Doc. 90-3873 Filed 2-20-90; 8:45 am]

BILLING CODE 4120-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 69

[DA-90-208]

Average Schedule Disbursements

AGENCY: Federal Communications Commission.

ACTION: Proposed rulemaking.

SUMMARY: This notice establishes the comment and reply filing form and dates for comments and replies on: (1) Revisions to the average schedules that were proposed by the National Exchange Carrier Association, Inc. ("NECA") on December 29, 1989; (2) Consolidated Telephone Company's Petition for Reconsideration (filed June 14, 1989); (3) and requests by average schedule companies seeking transitional or other supplemental payments in addition to those proposed by NECA for the period from May 31, 1990 to July 1 1991.

DATES: Comments are due on or before March 5, 1990. Reply comments are due on or before March 19, 1990.

ADDRESSES: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Kent Nilsson, Common Carrier Bureau, Federal Communications Commission, Washington, DC 20554. (202) 632-6363.

SUPPLEMENTARY INFORMATION:

ORDER ESTABLISHING CONSOLIDATED COMMENT CYCLE

In the matter of the National Exchange Carrier Association December 29, 1989 Proposed Revision to the Average Schedule Formula and Other Average Schedule Issues

Order

Adopted: February 12, 1990.

Released: February 14, 1990.

By the Chief, Common Carrier Bureau.

I. Introduction

1. Payments to average schedule companies from interstate revenue pools administered by the National Exchange Carrier Association, Inc. ("NECA") are made in accordance with a formula approved by the Commisison.[1] NECA is required to submit "a proposed revision of the formula for each annual period * * * or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before December 31 of the preceding year." [2] On December 29, 1989, NECA filed proposed revisions to the average schedule formula with an effective date of July 1, 1990.[3] Parties seeking changes to the average schedule formula proposed by NECA for the period beginning July 1, 1990 and concluding June 30, 1991 are to file comments by March 5, 1990 and replies by March 19, 1990. Any average schedule company seeking transitional or other supplemental payments in addition to those proposed by NECA should include such requests in comments to be filed on or before March 5, 1990.[4] In addition, any party wishing to raise any matter concerning disbursements, by NECA, to average schedule companies for the period from May 31, 1990 through June 30, 1991 should do so in this proceeding.

II. NECA's Proposed Average Schedule Formula

2. NECA proposes a monthly settlement per common access line of $12.433867—($.014876) (access lines per exchange) for exchanges with fewer than 385.554541 access lines. In the case of exchanges with 385.554541 access lines or more, NECA proposes a settlement of $6.698135 for each access line. In both cases, settlements would be adjusted to reflect the pooled rate of return based on a common line factor equal to .595399 + (3.371674) (ROR). NECA expects that these modifications will result in aggregate common line formula reductions of 4.17 percent.[5]

3. NECA proposes a settlement per minute for traffic sensitive central office functions equal to $.029183 + ($184.953284 divided by access minutes per exchange). For intertoll switching, NECA proposes a monthly settlement per trunk of $28.17. For distance sensitive line haul, NECA proposes a monthly settlement of ($1.124768) (interstate circuit miles) + ($.001500) (traffic sensitive switched minutes). With respect to the "Line Haul Non Distance-Sensitive" category, NECA proposes a settlement for each interestate circuit termination of $32.87, and, for special access, a settlement equal to .936639 times the exchange carrier's special access revenues. All traffic sensitive settlements under NECA's proposal would be adjusted to reflect the pooled rate of return on the basis of a factor that is equal to .635825 + (3.034791) (ROR). NECA expects that those modifications will result in traffic sensitive formula reductions of 3.19 percent.[6]

4. In addition to common line and traffic sensitive settlement schedules, NECA has also proposed settlement schedules for the following services: CABS and administrative expenses, equal access implementation, interim 800 NXX translation services, and Signaling System 7 services. For these services, the NECA proposed monthly settlement is: (1) $371.54 + ($.000468) (total access minutes) for CABS and administrative expenses; (2) "the interestate portion of initial incremental equal access expenses paid in the month in which they are incurred" plus .0238 times the interstate portion of initial incremental equal access investment for equal access implementation; and (3) interim 800 NXX translation service

[1] 47 CFR 69.606(a).

[2] 47 CFR 69.606(b) as revised in Access Tariff Filing Schedules, 3 FCC Rcd 5495, 5500 (1988).

[3] NECA 1990 Modification of Average Schedules at 1 (filed Dec. 29, 1989) and Errata (filed Jan. 16, 1990) ("1990 Average Schedule Filing").

[4] In this proceeding we will also consider Consolidated's Petition for Reconsideration of the Commission's decision concerning the average schedule formula that became effective April 1, 1989. Consolidated Telephone Company Petition For Reconsideration (filed June 14, 1989) ("Consolidated petition"). See also Consolidated Reply (July 7, 1989). See, generally, Revisions to the Average Schedules Proposed by NECA, 4 FCC Rcd 2804 (Com. Car. Bur. 1989) ("*1989 Average Schedule Revisions Order*").

[5] *Id.* at ii, I-12 to I-14; NECA Errata (Jan. 16, 1990).

[6] *Id.* at ii, I-13 to I-15.