

Notes:

1. Materials tested for surface flammability should not exhibit any flaming running or flaming dripping.
2. The surface flammability and smoke emission characteristics of a material should be demonstrated to be permanent by washing, if appropriate, according to FED-STD-191A Textile Test Method 5830.
3. The surface flammability and smoke emission characteristics of a material should be demonstrated to be permanent by dry-cleaning, if appropriate, according to ASTM D-2724. Materials that cannot be washed or dry cleaned should be so labeled and should meet the applicable performance criteria after being cleaned as recommended by the manufacturer.
4. For double window glazing, only the interior glazing should meet the material requirements specified herein; the exterior need not meet those requirements.
5. ASTM E-662 maximum test limits for smoke emission (specific optical density) should be measured in either the flaming or non-flaming mode, depending on which mode generates the most smoke.
6. Flooring and fire wall assemblies should meet the performance criteria during a nominal test period determined by the transit property. The nominal test period should be twice the maximum expected period of time, under normal circumstances, for a vehicle to come to a complete, safe stop from maximum speed, plus the time necessary to evacuate all passengers from a vehicle to a safe area. The nominal test period should not be less than 15 minutes. Only

one specimen need be tested. A proportional reduction may be made in dimensions of the specimen provided that it represents a true test of its ability to perform as a barrier against vehicle fires. Penetrations (ducts, piping, etc.) should be designed against acting as conduits for fire and smoke.

7. Carpeting should be tested in accordance with ASTM E-648 with its padding, if the padding is used in actual installation.

8. Arm rests, if foamed plastic, are tested as cushions.

9. Testing is performed without upholstery.

F. Referenced Fire Standards

The source of test procedures listed in Table 1 are as follows:

(1) Leaching Resistance of Cloth, FEC-STD-191A-Textile Test Method 5830.

Available from: General Services Administration Specifications Division, Building 197, Washington Navy Yard, Washington, DC 20407.

(2) Federal Aviation Administration Vertical Burn Test, FAR-25-853.

Available from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(3) American Society for Testing Materials (ASTM).

(a) Surface Flammability of Materials Using Radiant Heat Energy Source, ASTM E-162;

(b) Surface Flammability for Flexible Cellular Materials Using a Radiant Heat Energy Source, ASTM D-3675;

(c) Fire Tests of Building Construction and Materials, ASTM E-119;

(d) Specific Optical Density of Smoke Generated by Solid Materials, ASTM E-662;

(e) Bonded and Laminated Apparel Fabrics, ASTM D-2724.

Available from: American Society for Testing and Materials, 1916 Race Street, Philadelphia, PA 19103.

In all instances, the most recent issue of the document or the revision in effect at the time of request should be employed in the evaluation of the material specified herein.

G. Definition of Terms

1. Flame spread index (I_s) as defined in ASTM E-162 is a factor derived from the rate of progress of the flame front (F_s) and the rate of heat liberation by the material under test (Q), such that $I_s = F_s \times Q$.

2. Specific optical density (D_s) is the optical density measured over unit path length within a chamber of unit volume produced from a specimen of unit surface area, that is irradiated by a heat flux of 2.5 watts/cm² for a specified period of time.

3. Surface flammability denotes the rate at which flames will travel along surfaces.

4. Flaming running denotes continuous flaming material leaving the site of the burning material at its installed location.

5. Flaming dripping denotes periodic dripping of flaming material from the site of burning material at its installed location.

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Brian W. Clymer,
Administrator.

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Part VI

Office of Personnel Management

48 CFR Part 1602, et al.

**Federal Employees Health Benefits
Acquisition Regulation; Revision of
Contract Clauses and Community Rating
Practices; Final Rulemaking**

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Parts 1602, 1615, 1616, 1622,
1632 and 1652

RIN 3206-AD78

Federal Employees Health Benefits Acquisition Regulation; Revision of Contract Clauses and Community Rating Practices

AGENCY: U.S. Office of Personnel
Management.

ACTION: Final rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is issuing a regulation which recognizes the increasing diversity in community rating practices within the insurance industry and, specifically, within the Federal Employees Health Benefits Program (FEHBP). The regulation also expands and clarifies OPM's FEHBP price negotiation policy. At the same time, OPM is taking the opportunity to amend some of the required contract clauses found in Section 1652 of the Federal Employees Health Benefits Acquisition Regulation (FEHBAR) to better reflect the specific needs of the FEHBP.

EFFECTIVE DATES: Sections effective January 1, 1990, and to be applied to the 1990 FEHB Program contracts: 1615.804-72, 1652.215-70, and 1652.216-70. All other sections effective August 1, 1990, and to be applied to the 1991 FEHB Program contracts.

FOR FURTHER INFORMATION CONTACT: Mary Ann Mercer, (202) 632-3772.

SUPPLEMENTARY INFORMATION: On October 20, 1989, OPM published proposed regulations (54 FR 43089) to recognize those portions of Public Law 100-517, The Health Maintenance Organization Amendments of 1988, which impact on the FEHBP. Public Law 100-517 expands the community rating methodology options available to Federally qualified health maintenance organizations, known as comprehensive medical plans (CMPs) in the FEHBP. Accordingly, OPM is modifying its regulations to recognize the increasing diversity in community rating practices. The regulation also expands and clarifies OPM's FEHBP price negotiation policy. In addition, the regulation amends required contract clauses found in Section 1652 of the FEHBAR to better reflect the specific needs of the FEHBP, to add a new Federal Acquisition Regulation (FAR) clause requiring carriers to maintain a drug-free workplace, and to delete unnecessary or inappropriate FAR clauses.

OPM received 16 responses, 5 from CMPs in the FEHBP; 1 from a law firm representing a number of FEHB Program community rated CMPs and an association of managed care plans; 1 national trade association and 2 health care systems representing a number of CMPs in the FEHBP; one employee organization plan in the FEHBP; an organization that provides administrative services to a number of FEHB employee organization plans; 1 association composed of FEHB employee organization plans; 2 law firms representing a total of 7 FEHB employee organization plans and 1 underwriter; 1 Government-wide plan and 1 private individual. The respondents were generally supportive of OPM's efforts to improve the administration of the FEHBP. However, many were uncertain about the effects of some of the provisions. Their comments and suggestions follow, along with OPM's discussion of the reasons for accepting or rejecting them.

General Provisions

One commenter questioned whether the regulation is intended to control FEHBP costs or is being issued solely for the purpose of incorporating the new Health Maintenance Organization (HMO) community rating legislation. The regulation is not being promulgated solely for the purpose of incorporating the HMO amendments. Through the regulation, OPM is seeking to obtain rates which are reasonable and equitable for the FEHBP group. The broader objective of controlling overall FEHBP costs is being addressed through FEHBP reform legislation which is presently being studied by OPM and the Congress.

Two carriers commented that the regulation should not be effective until the 1991 contract year. We agree that regulatory requirements promulgated after the effective date of a contract or modification should not be applied to that contract or modification insofar as they will result in a liability to the contractor, will constitute a substantial change in practice, or will be difficult for the carrier to implement immediately. Consequently, with the exception of the provisions on defective community rating, we have changed the effective date of the regulation to January 1, 1991. Inasmuch as no community rated carrier objected to the proposed 1990 effective date for the provisions relating to defective community rating, and those provisions reduce the potential liability to the carriers and mitigate problems experienced by them, we are proceeding with an effective date of January 1, 1990, for the provisions pertaining to penalties

for defective community rating and solely affecting those plans. If a CMP believes, and OPM agrees, that a requirement would impact on the CMP's rates for that contract period, consideration will be given to adjusting its effective date.

The proposed rule required carriers to produce only advertising material that is truthful and not misleading by using advertising guidelines, including those prepared by the National Association of Insurance Commissioners (NAIC); provided additional guidance about types of actions that would constitute misleading, deceptive or unfair advertising; and provided remedies available to the Government in the event a carrier's advertising material is not truthful or is misleading (1652.203-70). Four respondents believe that the current, more general, guidelines on advertising offer Federal enrollees ample protection and are preferable to the NAIC "Rules Governing Advertising of Accident and Sickness Insurance with Interpretive Guidelines." As reflected in 1652.203-70(a), it is OPM's policy to ensure that enrollees have reasonable expectations regarding health benefits plans and are not misled through a carrier's literature about the benefits of the carrier's own or another FEHB plan. While we agree that, overall, the current FEHBAR provides protection to enrollees, the present language standing alone may be open to misinterpretation. Therefore, we believe that additional criteria in the form of guidelines appropriate to insurance advertising in general (those produced by NAIC) and to the FEHBP in particular (those produced by OPM) are necessary. We believe such additional guidance will enhance the carriers' ability to comply with OPM's advertising policy as well as OPM's ability to assure carrier compliance. As OPM wants to address the more relevant and practical problems encountered most often in FEHB carrier advertising, the advertising clause has been changed to show that carriers should use the FEHB Supplemental Literature Guidelines as their primary source of guidance and should use the NAIC "Rules Governing Advertising of Accident and Sickness Insurance with Interpretive Guidelines" if additional guidance is needed.

Two commenters believe the NAIC "Rules Governing Advertising of Accident and Sickness Insurance with Interpretive Guidelines" are directed principally at individual insurance marketing practices and OPM should distinguish those NAIC guidelines which are irrelevant or impractical. The NAIC guidelines are applicable to group as

well as individual accident and sickness insurance. We believe the NAIC guidelines have practical application to the FEHBP; however, carriers may ask OPM for assistance when they are unsure of the relevancy or practicality of a particular guideline.

One commenter believes OPM is premature in incorporating the FEHB Supplemental Literature Guidelines reference, in view of the fact that the contract is subject to negotiation, and two commenters believe that OPM should publish the referenced guidelines in regulation. The NAIC and FEHB guidelines to be used by the carriers in preparing supplemental literature have been furnished to the carriers. The guidelines will be reevaluated and furnished to the carriers in advance of each negotiation period. Because reevaluation may result in minor changes, OPM believes that it would be inappropriate to publish them in regulation.

One commenter questioned whether carriers must adhere to the guidelines at FEHBP 1603.702, which are not mentioned in the proposed regulation, in addition to the NAIC guidelines. The guidelines found at 1603.702 and the NAIC and FEHB guidelines contained in the clause at 1652.203-70 are not mutually exclusive. Each complements the others and must be adhered to by FEHBP carriers.

One community rated plan asked whether OPM will review and approve materials, including those being distributed on Federal sites. Agencies control contacts between employees and carriers and decide whether and how much contact there will be. While we encourage agencies to permit carriers to address groups of employees during open season on the structure of their plans' benefits, methods of obtaining services, and similar matters, an agency may permit the use of its facilities or services for the distribution only of officially authorized, carrier-supplied information on health benefits plans. (In this regard, agencies treat labor organization carriers in accordance with current policies on labor-management relations in the Federal Service as specified in chapter 71 of title 5, United States Code.) Therefore, FEHB contracts are being negotiated to provide that carrier-supplied information distributed at federal facilities must be approved in advance by OPM. For purposes of approval, fee-for-service carriers need submit only material intended for wide distribution (e.g., nationally or regionally); however, we reserve the option of reviewing locally-distributed

material. To ensure that other communications which identify a carrier's participation in the FEHB Program (e.g., radio/TV/newspaper advertising) are in compliance with FEHBP 1603.70, carriers are advised to use the guidelines; however, carriers will not be required to get advance approval of material that is not distributed at Federal facilities.

Five respondents were concerned about the application of the penalties for, and due process in the event of, noncompliance with FEHB requirements (1652.203-70(b)). One respondent believes the penalties for noncompliance are too severe and that termination of the contract is not warranted for violations of advertising policy. We note OPM's obligation to enrollees to correct and prevent repetition of misleading, deceptive or unfair advertising. The regulatory penalties are listed and, except for the most egregious carrier actions, will be applied in graduated degrees of severity. If a carrier, after repeated offenses, continues to violate the regulatory requirements, action to terminate the plan may be warranted to protect the interests of Federal enrollees. Nevertheless, although due process is always assumed in FEHBP regulations, we have amended the provision to provide for notification and opportunity to respond. Further, in any case where OPM takes action to terminate a plan, the withdrawal of approval provisions of 5 CFR 890.24 apply.

OPM has also amended the requirement to insert the clause at 1652.203-70 in all subcontracts that exceed \$25,000. The requirement now refers only to the carrier's contract with its underwriter, if any, and to contracts with subcontractors directly involved in the preparation or distribution of marketing material.

One respondent requested that OPM specify in the clause at 1652.204-71(c) the particular coordination of benefits guidelines and rules to be followed by FEHB carriers. Another respondent commented that the NAIC guidelines are subject to individual interpretation that will impede uniformity. We have changed the regulation so that it specifically states that in coordinating benefits, carriers must follow the order of precedence established by the Model Guidelines for Coordination of Benefits (COB) promulgated by the NAIC. The order of precedence section of the NAIC guidelines is widely known in the insurance industry and has been referenced in the FEHB brochures for a number of years. Further, the COB contract clause has been based

historically on the guidelines' order of precedence. OPM believes that the very specific nature of the order of precedence in the guidelines serves to standardize order of precedence determinations. Further, from the standpoint that OPM would have to modify the contract whenever the NAIC guidelines change, it is impractical to restate the guidelines in a contract clause. Attaching the guidelines' order of precedence to the contract as an appendix rather than explicitly restating them has the added advantage of providing OPM flexibility in negotiating effective dates.

One respondent believes that changes in the guidelines implemented after January 1 of any given year should not be required earlier than the beginning of the following contract term. The clause now makes it clear that this is OPM's intent. When a change in the guidelines occurs, OPM will notify the carriers by letter and will negotiate the date they are to become effective.

Two commenters responded that the deficiencies in a plan's COB recoupment of overpayment procedures are more appropriately dealt with in an audit context than by the contracting officer's case-by-case review of allowable charges. We have clarified the section. OPM does not intend for the carriers to consult with the contracting officer on each unreimbursed COB overpayment in advance to determine whether or not it is a properly chargeable benefit expense. Rather, a carrier must be able to demonstrate allowability if, for instance, a COB overpayment is questioned during an audit.

A number of community rated carriers are concerned about the requirement for reporting COB savings, noting that under community rated contracts COB savings are not charged to specific accounts. OPM has clarified this requirement for community rated carriers so that they are not required to report COB savings but must be able to demonstrate that they have a system in place for coordinating benefits for all groups and can provide appropriate overall COB statistics.

Provisions Relating Primarily to Community Rated Carriers

Several plans stated that they were uncertain whether the standard methods of community rating are still permitted. In order to avoid any misunderstanding, one plan suggested that OPM's regulation refer to existing Department of Health and Human Services (HHS) regulations on community rating. The standard methods of community rating, i.e., traditional community rating and

community rating by class, as well as the new concept of adjusted community rating, are acceptable rating methods for the FEHBP. The community rating methods of the FEHBP are consistent with, but not limited to, the requirements of HHS. While we have not referenced the HHS regulations, we will accommodate the community rating concepts contained therein to the extent possible consistent with the needs of the FEHBP.

One community rated plan questioned the use of the term "PMPM" (per member per month) in combination with the words "revenue requirement" in a definition of community rate (1602.170-2(a)) and believes that the revenue requirement should not be limited by PMPM calculations. In considering this and related comments, we have concluded that the term "revenue requirement" is ambiguous. Most plans base their rates on a per member per month capitation rate. However, there are some plans that use a standard set of two (or three) tiered rates, and adjust them for each group according to the group's demographics. Such a system is conceptually equivalent to the use of a capitation rate. The regulations now make it clear that such a system is acceptable to OPM.

One carrier suggested that OPM amend the definition of adjusted community rate (1602.170-2(b)) to state that it is a community rate that has been adjusted for the expected use of medical resources (rather than medical utilization) of the FEHBP group. We have made this change to recognize the broader, more explicit nature of permissible adjustments to the community rate.

The same carrier believes that the regulation should indicate that the prohibition on retroactive adjustments of the rate based on actual experience, utilization or cost applies only to group-specific adjustment factors, that is, the expected use of medical resources. The carrier agrees that subsequent changes to the adjustment made for the Federal group's expected use of medical resources based on actual experience, utilization or FEHBP cost should be forbidden, but believes that changes to the plan's estimated community rate should be allowed. The HMO law prohibits retroactive adjustments based on actual experience. OPM's regulation makes it clear that no upward adjustment in the rate is allowed on the basis of actual costs incurred, actual benefits provided, or actual size or composition of the FEHBP group (1652.216-70(b)(5)). OPM will continue the policy of allowing an adjustment in

the FEHBP rates if the actual community rates of the plan differ from the estimated community rates on which the proposed FEHBP rates were based.

Two carriers suggested that OPM clarify the term "benefit payment" in its description of "actual paid claims" under the definition of experience rate (1602.170-6). In view of the fact that capitation payments are not strictly benefit payments, OPM agrees with the carriers that the term should be more precise. The regulation now states that actual paid claims include any actual or negotiated benefits payments made to providers of medical services for the provision of health care.

A number of commenters expressed concern with the requirements for similarly sized subscriber groups (SSSGs) in 1602.170-11. Specifically, some believe that limiting the definition to two groups is not sufficient for groups of fewer than 1,500 subscribers because it does not represent a significant portion of the plan's total enrollment. The respondents believe that if the number of FEHBP subscribers is fewer than 1,500 the plan should be compared with all groups that are within some range of the FEHBP enrollment. In this respect, we believe that two SSSGs will enable us to capture sufficient information on which to determine whether the proposed rate is based on the carrier's community rate.

The commenters also believe that the SSSGs should not be limited to those which renew in January or during the effective period of the January rate. We agree that limiting the SSSGs to those that renew in January or the effective period of the January rates is too restrictive and have dropped that requirement. OPM now requires that the SSSGs must have been renewed during the plan's fiscal year. The fiscal year is the time period for which the carrier's budget is established. Adjustments will be made for different renewal dates among the SSSGs' rates and the OPM rate to make them consistent.

Several respondents expressed the following concerns and requests for clarification of the term "substantially the same benefit package." They questioned whether the two groups closest in size to the FEHB group could use different rating methods. What the specific data requirements related to prices offered to the SSSGs and the demographic and utilization characteristics of those groups will be. What happens when no other groups have substantially the same basic benefit package as the FEHB group, when the groups contract for periods longer than 12 months, and when the

nearest group is so far distant from the FEHB group that it is not the same economic area.

The two SSSGs may use different rating methodologies. However, OPM anticipates that the plans' systems of establishing rates will generally result in both SSSGs having the same methodology. In instances where this is not the case, OPM will review the methodologies used for the SSSGs and the criteria for selecting them in order to determine whether the methodology used for the FEHBP is appropriate. Also, OPM will negotiate benefits packages in a manner that should result in a number of groups having substantially the same benefits package. Each rate must be based on the overall capitation or its equivalent. The rate will be negotiated by OPM and the carrier during rate negotiations. If the SSSGs contract for more than 12 months, OPM will determine what adjustment to the rate is applicable for a 12-month period. For plans with fewer than 1,500 contracts, we will not ask for the data but will require that the plan maintain it in accordance with the records retention clause of the contract in the event that it is requested by OPM's actuaries and/or auditors. The answers to the above questions, as well as specific data related to prices offered to SSSGs and demographic and utilization characteristics of those groups, are lengthy and OPM needs the flexibility to adapt to changes in the insurance industry from year to year. Consequently, it is not appropriate to publish this information in regulation. Detailed information concerning rating procedures will be provided to the carriers in the rate instruction package for each contract period.

One respondent wanted to know whether the SSSGs' rates could be relied on as a remedy if it is later determined that a carrier's criteria were not reasonable or that a carrier had discounted the rates quoted to some of its commercial groups. Generally, the SSSGs' rates could be expected to be relied on as a remedy. However, we do not want to limit our options to the SSSGs' rates. The corrected FEHB rates would be negotiated based on the circumstances in each case.

The same respondent wanted to know whether carriers that apply different methodologies to different groups are required to seek approval for such criteria prior to the contract year during which the rate is applied. No preapproval will be required.

One carrier suggested that the phrase "total subscriber enrollment" be clarified to read "total number of

contracts" (1602.170-11). We have made this clarifying change. Two respondents believe that OPM should not limit the SSSGs to non-governmental units because governmental units are often the closest in size to the Federal group. OPM has reconsidered the exclusion of governmental groups from the SSSGs and has decided to allow comparison with governmental groups so long as those groups are community rated.

One commenter asked whether OPM would prohibit CMPs from using discounting and other methods of rating with groups other than a plan's SSSGs. OPM's primary objective is to obtain rates which are reasonable and equitable for the FEHBP group. In determining the FEHBP plans' rating, OPM will examine only the rating of the plans' SSSGs. This does not in any way diminish the need for plan compliance with guidelines promulgated by the HHS. However, monitoring the plans' compliance with HHS laws and regulations rests with that agency.

One carrier believes that OPM is moving away from paying by contract (self or self and family) and asked how the change to per member per month payments will affect the different rating methodologies. Since the PMPM capitation has always been used by OPM as a basis for the self and self and family contract rates, we question the carrier's comment. We believe that the regulation is clear in this regard.

One carrier believes OPM should allow for adjustments to the community rate based on an industry factor and that the SSSG requirement is inappropriate since the two similarly sized groups may have entirely different demographic factors and/or industry factors. OPM's experience has shown that backup data on industry factors is unreliable. Consequently, we do not recognize adjustments to the community rate based on this factor. Insofar as demographic factors are concerned, it appears that the commenter has misunderstood OPM's intent. OPM's community rating policies begin with the capitation. The carrier may adjust the capitation for demographic factors so long as the adjustment is consistent with approved community rating practices.

The commenter further suggests that OPM's proposed approach to base the community rate on a capitation that applies to a "combination of the subscriber groups" (1602.170-2) is arbitrary and may not comply with guidelines followed by Federally qualified HMOs nor with state filings made by many HMOs participating in FEHBP governing the HMO underwriting process. We do not agree that OPM's proposed approach to community rating

is arbitrary. We have made every effort to be consistent with HHS guidelines. The "combination of subscriber groups" referred to in the definition can be interpreted to mean all groups that are community rated by the plan. The definition gives OPM flexibility in that it takes into consideration the fact that not all plans recognize all of the legitimate community rating practices available to Federally qualified HMOs.

One carrier suggested that OPM compare non-guaranteed to non-guaranteed accounts and guaranteed to guaranteed accounts when two SSSGs that meet the stated criteria do not exist. The carrier believes the comparison to non-governmental accounts of similar guarantee status and similar benefits that renew in a different month, with adjustments made for the later renewal date, would be advantageous. To accommodate the carrier's concerns, we have modified the regulation so that the two SSSGs may be any group that renews during the same fiscal year, with adjustments made for different renewal dates.

The same carrier believes the regulation should specify that premium rates among the three compared accounts be equal only under traditional community rating but that they must be comparable for all accounts under the other rating methods. OPM does not expect the rates to be equal even under traditional community rating. The Certificate of Accurate Pricing for Community Rated Plans (1615.804-70) requires that the FEHBP rates be developed in a manner consistent with (not equal to) the rating methodology and structure used to rate the carrier's SSSGs.

Another carrier believes it is inappropriate to collect utilization information on the comparison accounts from an organization using traditional community rating because the information has no bearing on the rates charged to the accounts. We agree with the carrier and do not expect to collect utilization data for traditional community rating.

One commenter requested clarification of the "basic reasonableness test" referred to in 1615.802(b)(1). This is an OPM test for reasonable price to determine which plans need further review. It is confidential information and is not appropriate for release outside OPM.

Two respondents raised questions about 1615.802, stating that at the time the FEHBP rate is submitted, appropriate information on the SSSGs would not be available. Three carriers believe the section is not specific enough about the nature of the data

required and wanted to know what would be required for larger plans in submitting additional pricing, utilization and demographic data.

For plans having 1,500 or more contracts at the time of the plan's proposal and for plans having fewer than 1,500 that do not use the SF-1412, OPM will request backup data that will support adjustments to the capitation rate or its equivalent. Data requested will be similar to that currently requested. Additional data needs will be determined once the methodologies employed by the plan become known. We will also require the data pertaining to SSSGs as soon as it becomes available. This would normally be toward the end of the contract term, after rate negotiations with the plan have been concluded. This data will be analyzed when OPM's actuaries reconcile the plan's rates. Specifics about the exact nature of the data required will be sent to the plans in the rate instructions. For plans with fewer than 1,500 contracts that use the SF-1412, we will not ask for the data, but will require that the plan maintain it in accordance with the records retention clause of the contract. OPM's actuaries and the audit staff will have the option of obtaining the data on request. We have modified 1615.802(b)(2) to reflect these changes.

One respondent wanted OPM to confirm that a carrier may use SF-1412 if the Federal group is smaller than 1,500 subscribers only if the rating methodology does not involve the use of adjusted community rating. Any plan whose FEHBP group is smaller than 1,500 subscribers may use SF-1412, even if it uses adjusted community rating. As explained above, the carrier must retain the backup data.

In addition, we have changed 1615.802(b)(3) to require the carrier to identify necessary price adjustments when it is later determined that different market prices were actually used for the SSSGs, and to apply the adjustments against its FEHBP rates for the subsequent contract period(s). The proposed rule implied that the carrier might not be required to identify and apply price adjustments in some cases. Note also the substitution of the words "FEHBP rate" for "community rate" in this section. This change has been made in response to a carrier's remark that the price adjustments pertain only to the FEHBP rates and not to the entire plan population.

One respondent suggested that an HMO be given discretion to waive the rate reduction in the following year when different market prices are

actually used for the SSSCs and also recommended a waiver option if the rate the preceding year was too low for reasons other than underestimation. Another commenter asked whether the carrier might seek a one-time payment of the amount due. While these options to resolve differences between the proposed market price and the actual market price are not specifically set out in regulation, they have always been and continue to be appropriate in certain circumstances as determined by OPM on a case-by-case basis.

One commenter believes that the steps necessary to experience rate the Federal group should be more fully explained. Rather than provide technical details in regulation, we think it is more appropriate to provide carriers with the necessary information in the rate instructions sent to FEHBP carriers at the time of negotiations for the contract period.

Another commenter wanted confirmation that the opportunity for a carrier to offer OPM the same price as is offered SSSGs is merely an alternative way for pricing a community rated contract and not a test to be applied to all community rated carriers to determine whether the FEHBP contract has been accurately priced. OPM confirms this point. Nevertheless, it is our intent to obtain an "equivalent price" consistent with the regulation, not necessarily the "same price."

One respondent wanted assurance that group-specific demographic and utilization information for non-Federal groups will be requested only if relevant to OPM's evaluation of a proposed rate or to the auditors' evaluation of the rate and that such confidential information will not be disclosed to the public. The sole reason for OPM's requesting this information is to evaluate a proposed rate. OPM neither requests nor desires information that is irrelevant to this objective. However, any information submitted to OPM may be subject to public disclosure. Carriers must identify each item they believe is exempt from disclosure under the Freedom of Information Act (FOIA). They must also specify which exemption applies. OPM will decide on disclosure only when a request for information is made. In making that decision, OPM will consider the justification for non-disclosure that was submitted by the carrier. If OPM decides that any specific item of information that the carrier believes is exempt is not exempt from disclosure, OPM will so inform the carrier before it is disclosed.

For consistency with 1652.215-70, we have changed the phrase "accurate and complete for the current year" in the

Certificate of Accurate Pricing for Community Rated Plans (1615.804-70) to "accurate, complete, and current as of the date this certificate is executed." We have also added at the asterisk at the bottom of the certificate the sentence, "The rate must be either the actual rate in effect for the current contract term or a quoted rate for the next contract term." And, in response to a comment that the references to 48 CFR Chapter 16 and the FEHBP contract at the end of the certificate contradict the specific language that precedes it, we have cited the references earlier in the certificate to make it clear that the requirements that follow are the requirements of 48 CFR Chapter 16 and the FEHBP contract.

One carrier believes that the proposed change to 1615.804-70 should not be adopted because the current certificate is adequate to accommodate the changes in rating methodologies permitted under the proposed rules. It is our opinion that the current certificate is not broad enough to meet OPM's needs in administering the FEHBP contracts. The proposed certificate will enhance OPM's ability to enforce the community rating policies of the FEHBP Program.

One respondent suggested that OPM remove the words "to the best of my knowledge and belief" from the certificate and add a sentence reminding the carrier of the consequences of a false statement. OPM cannot expect carrier representatives to certify to data that is beyond their knowledge and belief at the time of certification. Furthermore, the consequences of making a false statement to an agency of the Federal government under 18 U.S.C. 1001 are well known to the FEHBP carriers, and a warning such as that suggested by the commenter is not warranted in this certification.

The same respondent wanted to know who determines whether to accept a rating methodology proposed by a carrier that differs from the methodology used to rate the SSSGs if the carrier proposes it. The commenter is concerned that the carrier will request a rate more preferential to it than to the Government. Adoption of this regulation in no way prevents OPM from negotiating a lower rate when the data obtained by OPM suggests that a lower rate is more appropriate.

The respondent also asked whether there would continue to be a need for the contingency reserve since it appears that all rate adjustments will be made through the next year's rates. The contingency reserve will continue to exist. Rate adjustments will be made in order to draw down excess contingency reserves.

One commenter stated that some of its clients would like the experience rating remedy for defective pricing (1652.215-70(a) of the FEHBP) reinserted in the regulation. OPM's experience has been that community rated carriers generally do not have adequate data to retroactively experience rate the contract after a community rate has been found defective. Consequently, we have not reinserted this remedy in the regulation.

One community rated carrier did not understand how community rated CMPs could apply the principle of separate accounting of FEHBP investment income required by the Investment Income clause (1652.215-71). The carrier and another community rated carrier did not understand how the Accounting and Allowable Cost clause (1652.216-71), which requires a detailed annual accounting statement audited by a CPA, applies to its contract. The carriers should note the introductory sentences to the clauses which state that the clauses are to be inserted in FEHBP contracts based on cost analysis. Experience rated contracts are based on cost analysis (FEHBP 1615.802(a)). Community rated contracts are based on price analysis (FEHBP 1615.802(b)). Therefore, the clauses do not apply to community rated CMPs.

The clause in 1652.216-70 provides that if the FEHBP contract is not renewed, neither the Government nor the carrier is entitled to any adjustment for the difference between the estimated and actual market price. Two commenters did not understand why nonrenewal of the contract impacts the rate reconciliation and settlement process.

OPM's experience has been that it is difficult to get adequate data from plans when they have terminated. Further, in the event a plan goes out of business, there are no rates to reconcile. In the opinion of OPM, the most reasonable solution is for both the Government and the carrier to bear the risk of a carrier's termination.

Provisions Relating Primarily to Experience Rated Carriers

One carrier suggested that the clause on investment income (1652.215-71(a)) specifically require the carrier to maximize "overall" investment income. In the absence of instructions to the contrary, maximization of overall investment income is implied. Consequently, the addition of the word "overall" is unnecessary.

In a related issue, OPM has reevaluated the provision in paragraph (a) concerning carrier investments in

maturities of 1 to 3 years' duration. In light of the establishment of letter of credit procedures, carriers should be holding a minimum amount of funds outside of their letter of credit account. As these funds should remain liquid, the timeframes for maturity dates of investments are unnecessary. Therefore, we have deleted the provision concerning the duration of maturities.

The Investment Income clause at 1652.215-71(d) requires investment income lost to the FEHB Fund as a result of the carrier's charging unallowable, unallocable, or unreasonable charges against the contract to be paid from the first day of the calendar year following the year in which the charge was made. Further, paragraph (f) of the clause requires the carrier to credit the Special Reserve for income due and that all amounts payable shall bear lost investment income compounded semi-annually. One carrier commented that it is likely the charges found to be improper on audit will be charges which the carrier had reason to believe would be accepted. The carrier stated that assessment of interest from the beginning of the contract term following the contract term in which the charge is made penalizes the carrier for errors that it had not reasonably been in a position to anticipate and further penalizes the carrier for disputing the charge. Another carrier stated that there is no precedent in government procurement for compounding an interest obligation. In the FEHBP there is an interaction between program management and procurement that is unique. Section 8909(c) of title 5, United States Code, provides that money in the FEHB Fund be invested and reinvested; investment income in the Fund earns compounded interest. FEHB funds withdrawn and held by a carrier also must be invested and reinvested (5 CFR 890.201(a)(8)). When a carrier uses FEHB funds for charges which are unallowable, unallocable, and unreasonable, the FEHB Fund loses investment income which would have earned compounded interest had it not

been withdrawn. The carrier making those charges is responsible for making the Fund whole.

One community rated carrier believes that the FEHBP should be more specific as to whether the detailed annual accounting statement required by 1652.216-71(a) applies to community rated contracts. The introductory paragraph before the clause states that the clause shall be inserted in all FEHB contracts based on cost analysis. FEHBP 1615.802(b) calls for the use of cost analysis in contracts where premiums and subscription income are determined on the basis of experience rating. Paragraph (b) of the same section calls for the use of price analysis in contracts where premiums and subscription income are determined on the basis of community rating. This is a basic premise on which the FEHBP price negotiation policy is based. It is essential that FEHBP carriers understand it. The commenter's contract is community rated and is, therefore, based on price analysis; accordingly, the Accounting and Allowable Cost clause does not apply to its contract.

One respondent commented that a 90-day deadline for submission of the annual accounting statement in 1652.216-71(a)(1) may be too short in some instances to ensure accuracy of the statement. We have reviewed this requirement and will provide for the submission of the annual accounting statement through appropriate contract language.

Four respondents were unclear about the scope of the CPA audit required in 1652.216-71(a)(2) and believe the 180-day timeframe on submission of an audit is too short. OPM has reevaluated the provision for a specific CPA audit and has deleted the requirement for CPA audit of the Plan's Summary Statement of FEHBP Financial Operations and Balance Sheet. The paragraph now clarifies that the most recent financial statement for the overall activity of the carrier and underwriter, if any, are required. OPM believes that 180

days is sufficient time in which to submit this statement.

One commenter took exception to the requirement in the "Definition of Costs" that costs be "actual" and "necessary." The commenter questioned the validity of the definition in the absence of a waiver from FAR requirements. The requirement that costs be actual and necessary has been in the FEHBP since its first publication in May, 1987, and does not pertain to the proposed regulation change. We will, therefore, comment only to say that OPM believes that it is reasonable and in the best interest of the FEHB Program to ensure that the costs charged by carriers to the contract are actual, necessary, and reasonable costs. OPM's authority to enforce this requirement is the FEHBP itself, approved by the Director of OPM and the Office of Federal Procurement Policy under the Office of Management and Budget in 1987.

The same commenter suggested that OPM address erroneous benefits payments in the paragraph on benefits costs at 1652.216-71(b)(2)(i). The commenter, citing the potential cost to carriers if erroneous benefits payments are not allowable, believes that OPM should include a statement that erroneous benefits payments made in good faith are chargeable to the contract if diligent efforts are made to recover the payments. We understand the commenter's concern. However, we do not believe it is appropriate to discuss erroneous benefits payments in this paragraph. In accordance with the introductory sentence in paragraph (b)(2), the issue will be addressed elsewhere in the contract.

One respondent objected to the inclusion of premium taxes under administrative expenses in subparagraph 1652.216-71(b)(2)(iii). OPM acquisition regulations have included premium taxes under administrative expenses since 1981. While OPM's treatment of premium taxes is not a change of policy brought about by the proposed regulation, to clear up any

confusion in the matter, we have amended the clause to reflect the special status of premium taxes, which are administrative expenses categorized as "Other Charges" on the accounting statement.

One carrier noted that OPM should clarify that the Certification of Accounting Statement Accuracy (1652.216-71(c)) is not intended to impose a different standard for allocation of costs than is currently found in the FAR. The carrier's interpretation is correct. We have addressed this concern by amending the certification to read that the accounting statement is, among other things, in conformance with OPM guidelines; that costs are allowable and allocable in accordance with the terms of the contract, FEHBP and FAR; and that credits made or owed in accordance with the terms of the contract and applicable cost principles have been included.

Three commenters questioned the intent of the Notice of Significant Events clause, particularly in light of revisions to paragraph (b), which authorizes OPM to take action against a carrier upon learning of certain "significant events." The commenters are concerned that OPM is requiring notification of the events even though their occurrence may not impede the carrier's performance under the FEHBP contract. OPM intends that the carrier notify us only if the significant event materially impacts on the carrier's ability to fulfill its contractual obligations under the FEHBP.

One respondent objected to the use of the term "CPA" in 1652.222-70(a)(13). As a result, we have replaced the term with the more generic description: "the independent accounting firm contracted with by the carrier to provide an opinion on its annual financial statements." In addition, we are requiring that the firm ascribe to the standards of the American Institute of Certified Public Accountants.

Two commenters expressed concern about the requirement that carriers notify OPM of reservations or qualifications expressed by the independent accounting firm in the context of its review of the carrier's financial statements (1652.222-70(a)(13)). The commenters consider it improper for OPM to consider as significant any notes and extraneous remarks which could be interpreted as insignificant or immaterial exceptions or reservations. In addition, one commenter believes that the carriers should not be required to release the Management Letter, which the commenter asserts is written solely for internal purposes.

Paragraph (a) of the Notice of Significant Events clause, which has been in the FEHBP since 1987 and remains unchanged except that the clause is now applicable to all FEHBP carriers, is very clear in defining a significant event as "any occurrence or anticipated occurrence that might reasonably be expected to have a material effect upon the carrier's ability to meet the obligations under this contract * * *." Accordingly, OPM requires only notes and extraneous remarks that bring into question the carrier's ability to fulfill its contractual obligations under the FEHBP. OPM requests the Management Letter in relation to this Significant Events clause, but it is not mandated by the FEHBP.

One carrier responded that OPM should eliminate the requirement for notification of significant events by fee-for-service carriers and defer to state insurance departments responsible for regulating insurance companies. OPM deems it necessary to establish its own standards in order to fulfill its responsibilities under the FEHBP law, as well as for consistency in its treatment of FEHBP plans.

The carrier also asserted that all account information of a CMP is confidential and proprietary and that the information must be protected by OPM from any form of release, including release pursuant to the Freedom of Information Act. As previously stated, any information submitted to OPM may be subject to public disclosure. Carriers must identify items they believe are exempt from disclosure under the FOIA, specifying which exemption applies to that item and giving full justification for their belief that the exemption applies. If OPM decides that any item of information is not exempt from disclosure, it will inform the carrier before disclosing it.

Three commenters believe the sanction for OPM to withhold subscription income from the carrier (1652.222-70(b)(4)) should be enforced only if the carrier is no longer obligated to continue to pay plan benefits. OPM cannot agree to such a condition. Certain actions, such as carrier/underwriter fraud, are so egregious that withholding of subscription income may be warranted. Under such circumstances OPM would expect the carrier to find the means to honor its claims obligations. It is always understood in the FEHBP Program that actions against a carrier begin with a series of warnings, with more severe actions taken only after the carrier has shown an unwillingness or inability to correct the situation. Consequently, we have amended paragraph (b) to make it

clear that OPM's actions against the carrier will be proportional to the seriousness of the event.

A carrier responded that the requirement to insert the clause required by the Significant Events clause at 1652.222-70(d) in all subcontracts should apply only to subcontracts for plan underwriting and administration services. OPM agrees that few of the events would make a difference when occurring in a subcontract. Therefore, we have changed the provision so that it is applicable to subcontracts appropriate to plan type.

One carrier was confused about the cross reference to "section 3.7" under Subcontracts at 1652.244-70(f). The carrier was reading the proposed clause change out of context. In reading FEHBP Program regulations, it is essential that the reader refer to the basic regulation of which the proposed change is a part. The introductory paragraph to the basic regulatory section in the FEHBP (1652.244-70) states that the clause is to be inserted in the FEHBP contract. Any reference in a contract clause to another section of the contract would necessarily refer to the contract section. The heading "Service Charge" further serves to identify the reference as a section of the contract.

Another commenter asked about the requirement that the carrier notify the contracting officer in advance of entering into a subcontract if both the amount of the subcontract charged to the FEHBP exceeds \$100,000 and the amount of the subcontract to be charged to the FEHBP exceeds 25% of the total cost of the subcontract as it applies to community rated plans which do not make charges directly to the FEHBP (1652.244-70(a)). The carrier understood "25% of the total cost of the contract" to mean "25% of the plan's total enrollment." For community rated carriers, we have amended the provision to reference amounts applicable to, rather than charged to, the FEHBP.

One respondent suggested that section 1652.246-70(b) on FEHBP inspection be modified to apply only to subcontracts for underwriting and administrative services. The final regulation reflects this change.

Two commenters believe that OPM should not take remedial action to protect enrollees when a carrier fails to fulfill contractual requirements (1652.249-70(b)(3)) without complying with due process requirements of the Fifth Amendment. As we previously stated, actions against a carrier are imposed with increasing degrees of severity appropriate to the situation at hand, the most severe being plan

termination. OPM will not take action, including a termination action, without offering the plan an opportunity to respond. In addition, for all OPM actions short of termination, carriers are entitled to a review process under the Disputes Clause. Once OPM notifies a carrier of its intent to withdraw approval under 5 U.S.C. 8902, the carrier has the right of appeal to OPM as provided at 5 CFR 890.204.

One commenter suggested that contracts in which less than 25% of the dollar amount of the contract will be allocated to the FEHBP not be considered subcontracts under the Program. We have not adopted this suggestion to redefine "subcontractor" (1602.170-12); although some subcontractors need not be subject to certain regulatory requirements because of their size, they are, nonetheless, subcontractors within the intent of FAR.

In responding to the proposed regulation, a number of commenters expressed an interest in meeting with OPM to discuss the proposed changes. We met with all parties that requested a meeting and have made clarifying changes in the Supplementary Information as a result of those meetings. While no changes were made to the regulation in response to the suggestions received, we will be periodically evaluating our experience under the regulation and will consider the suggestions in making future regulatory changes.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not

have a significant impact on a substantial number of small entities because it provides the opportunity for many smaller contractors to submit less documentation than previously required of them and, also, simply makes changes to reflect current practices within the FEHBP.

List of Subjects in 48 CFR Parts 1602, 1615, 1616, 1622, 1632 and 1652

Administrative practice and procedure, Government contracts, Health insurance.

U.S. Office of Personnel Management.
Constance Berry Newman,
Director.

Accordingly, OPM is amending 48 CFR chapter 16 as follows:

1. The authority citations for parts 1602, 1615, 1616, 1622, 1632, and 1652 continue to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

PART 1602—DEFINITION OF WORDS AND TERMS

2. In subpart 1602.1, 1602.170-2 and 1602.170-6 are revised, 1602.170-11 is redesignated as 1602.170-12 and a new 1602.170-11 is added to read as follows:

1602.170-2 Community rate.

(a) "Community rate" means a rate of payment based on a per member per month capitation rate or its equivalent that applies to a combination of the subscriber groups for a comprehensive medical plan. This capitation rate or its equivalent is a market price consistent with FAR 15.804-3. References in this subchapter to "price analysis" or "established market price" relating to the applicability of policy and contract clauses refer to comprehensive medical plans using community rates.

(b) "Adjusted community rate" means a community rate which has been adjusted for expected use of medical resources of the FEHBP group. An adjusted community rate is a prospective rate and can not be retroactively revised to reflect actual experience, utilization, or costs of the FEHBP group.

1602.170-6 Experience rate.

"Experience rate" means a rate for a given group that is the result of that group's actual paid claims, administrative expenses, retentions, and estimated claims incurred but not reported, adjusted for benefit modifications, utilization trends, and economic trends. Actual paid claims include any actual or negotiated benefits payments made to providers of medical services for the provision of health care such as capitation not adjusted for specific groups, per diems, and Diagnostic Related Group (DRG) payments.

1602.170-11 Similarly sized subscriber groups.

"Similarly sized subscriber groups" means a comprehensive medical plan's two employer groups which best meet all of the following conditions:

(a) Have total number of contracts at the time of the rate proposal arithmetically closest in size to the previous September's FEHB subscriber enrollment, as determined by OPM;

(b) Purchase substantially the same basic benefit package proposed for the Federal group; and

(c) Are renewed during the plan's fiscal year. Contracts with a governmental authority or program or any health benefits program for

employees of states, political subdivisions of states and other public entities may be used if they are community rated.

1602.170-12 [Redesignated from 1602.170-11]

PART 1615—CONTRACTING BY NEGOTIATION

3. In subpart 1615.8, section 1615.802(b) is revised; sections 1615.804-70 and 1615.804-71 are revised; a new section 1615.804-72 is added; in section 1615.805-70, paragraph (c) is redesignated as paragraph (d); and a new paragraph (c) is added to read as follows:

1615.802 Policy.

(b)(1) Price analysis for contracts where premiums and subscription income are based on community rates (market prices). For contracts with fewer than 1,500 FEHBP subscribers, OPM may rely on a basic reasonableness test in combination with a carrier's representation that the market price submitted on SF 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, is based on the price offered to its similarly sized subscriber groups (see FEHBP 1602.170-11).

(2) For contracts with 1,500 FEHBP subscribers or more and for contracts with fewer than 1,500 FEHBP subscribers that do not use the SF 1412, OPM shall require that the plan provide the data and methodology used to determine the FEHBP rates. OPM shall also require the data and methodology used to determine the rates for the plan's similarly sized subscriber groups.

(3) Contracts will also be subject to a price adjustment if it is determined subsequently that different market prices were actually used for the similarly sized subscriber groups as defined in 1602.170-11. Such adjustments shall be identified by the carrier and applied against its FEHBP rate(s) for the subsequent contract period(s).

1615.804-70 Certificate of accurate pricing for community rate plans.

When a carrier proposes a community rate as defined by FEHBP 1602.170-2, the Contracting Officer shall require the carrier to execute the Certificate of Accurate Pricing for Community Rated Plans contained in this section unless the carrier has been exempt from filing certified cost or pricing data. The Certificate shall be executed each time a proposal is made.

CERTIFICATE OF ACCURATE PRICING FOR COMMUNITY RATED PLANS

This is to certify that, to the best of my knowledge and belief, the cost or pricing data submitted, either actually or by specific identification in writing, to the Contracting Officer or the Contracting Officer's representative or designee in support of the _____ FEHBP rates were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHBP contract and are accurate, complete, and current as of the date this certificate is executed. The FEHBP rates were developed in a manner consistent with the rating methodology used to rate the Carrier's similarly sized subscriber groups (see FEHBP 1602.170-11) and approved by OPM, except where the Carrier has elected to use the alternative methodology for adjusted community rating specified by OPM or other methodology approved by OPM.

Firm _____
Name _____
Title _____
Signature _____
Date of execution _____

* Identify the time period to which the rates apply. The rate must be either the actual rate in effect for the current contract term or a quoted rate for the next contract term.

(End of Certificate)

1615.804-71 Supplemental representation for SF 1412.

Carriers with less than 1,500 FEHBP subscribers may request an exemption from submission of certified cost and pricing data. The request for exemption is made on SF 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data (see FAR 53.301-1412), which contains a representation that all the statements made on or attached to the SF 1412 are correct. In addition to the representation made on the SF 1412, the Contracting Officer shall require the carrier to execute the Supplemental Representation for SF 1412 shown below. The carrier shall attach the supplemental representation to the SF 1412.

SUPPLEMENTAL REPRESENTATION FOR SF 1412

The Carrier represents that the market price used to determine the _____ FEHBP rates is no greater than the market price quoted to the Carrier's similarly sized subscriber groups (see FEHBP 1602.170-11); that adjustments made to the market price were consistent with the rating methodology used to rate the Carrier's similarly sized subscriber groups; and that the adjustments were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHBP contract.

Firm _____
Name _____
Title _____
Signature _____
Date of execution _____

* Identify the time period to which the rates apply. The rate must be either the actual rate

in effect for the current contract term or a quoted rate for the next contract term.

1615.804-72 Rate reduction for defective pricing or defective cost or pricing data.

The clause set forth in 1652.215-70 shall be inserted in all FEHBP contracts based on established market price.

1615.805-70 Carrier investment of FEHB funds.

(c) The carrier is required to credit income earned from its investment of FEHB funds to the special reserve on behalf of the FEHB Program. If a carrier fails to invest excess FEHB funds or to credit any income due the contract, for whatever reason, it shall return or credit any investment income lost to OPM or the special reserve.

PART 1616—TYPES OF CONTRACTS

4. In part 1616, the words "catalog or" are removed wherever they appear in the table of contents and the text of subparts 1616.1 and 1616.2.

PART 1622—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

5. In part 1622, section 1622.103-70 is revised to read as follows:

1622.103-70 Contract clause.

The clause at 1652.222-70 shall be inserted in all FEHBP contracts.

PART 1632—CONTRACT FINANCING

6. In part 1632, a new subpart 1632.8 consisting of section 1632.806-70 is added to read as follows:

Subpart 1632.8—Assignment of Claims

1632.806-70 Contract clause.

The clause set forth in 1652.232-73 shall be inserted in all FEHBP contracts.

PART 1652—CONTRACT CLAUSES

7. Section 1652.203-70 is revised to read as follows:

1652.203-70 Misleading, deceptive, or unfair advertising.

As prescribed in 1603.703, the following clause shall be inserted in all FEHBP contracts:

MISLEADING, DECEPTIVE, OR UNFAIR ADVERTISING (JAN 1991)

(a) The Carrier agrees that any advertising material, including that labeled promotional material, marketing material, or supplemental literature, shall be truthful and not misleading.

(b) Criteria to assess compliance with paragraph (a) of this clause are available in the FEHB Supplemental Literature Guidelines

which are developed by OPM and should be used, along with the additional guidelines set forth in FEHBP 1603.702, as the primary guide in preparing material; further guidance is provided in the NAIC "Rules Governing Advertising of Accident and Sickness Insurance With Interpretive Guidelines." Guidelines are periodically updated and provided to the Carrier by OPM.

(c) Failure to conform to paragraph (a) of this clause may result in a reduction in the service charge, if appropriate, and corrective action to protect the interest of Federal Members. Corrective action will be appropriate to the circumstances and may include, but is not limited to the following actions by OPM:

(1) Directing the Carrier to cease and desist distribution, publication, or broadcast of the material;

(2) Directing the Carrier to issue corrections at the Carrier's expense and in the same manner and media as the original material was made; and

(3) Directing the Carrier to provide, at the Carrier's expense, the correction in writing by certified mail to all enrollees of the Plan(s) that had been the subject of the original material.

(d) Egregious or repeated offenses may result in the following action by OPM:

(1) Suspending new enrollments in the Carrier's Plan(s);

(2) Providing Enrollees an opportunity to transfer to another plan; and

(3) Terminating the contract in accordance with Section 1.15, Renewal and Withdrawal of Approval.

(e) Prior to taking action as described in paragraphs (c) and (d) of this clause, the OPM will notify the Carrier and offer an opportunity to respond.

(f) The Carrier shall incorporate this clause in subcontracts with its underwriter, if any, and other subcontractors directly involved in the preparation or distribution of such advertising material and shall substitute "Contractor" or other appropriate reference for the term "Carrier."

(End of Clause)

8. Subpart 1652.2 is amended by revising the clause in 1652.204-70, and by revising 1652.204-71 to read as follows:

1652.204-70 Contractor Records Retention.

CONTRACTOR RECORDS RETENTION (JAN 1991)

Notwithstanding the provisions of section 5.7 (FAR 52.215-2(d)) "Audit-Negotiation" and the SF 1412, the Carrier will retain and make available all records applicable to a contract term that support the annual statement of operations and the rate submission for that contract term for a period of 5 years after the end of the contract term to which the records relate, except that individual enrollee and/or patient claim records shall be maintained for 3 years after the end of the contract term to which the claim records relate.

(End of Clause)

1652.204-71 Coordination of Benefits.

As prescribed in 1604.7001, the following clause shall be inserted in all FEHBP contracts:

COORDINATION OF BENEFITS (JAN 1991)

(a) The Carrier shall coordinate the payment of benefits under this contract with the payment of benefits under Medicare, other group health benefits coverages, and the payment of medical and hospital costs under no-fault or other automobile insurance that pays benefits without regard to fault.

(b) The Carrier shall not pay benefits under this contract until it has determined whether it is the primary carrier or unless permitted to do so by the Contracting Officer.

(c) In coordinating benefits between plans, the Carrier shall follow the order of precedence established by the NAIC Model Guidelines for Coordination of Benefits (COB) as specified by OPM.

(d) Where (1) the Carrier makes payments under this contract which are subject to COB provisions; (2) the payments are erroneous, not in accordance with the terms of the contract, or in excess of the limitations applicable under this contract; and (3) the Carrier is unable to recover such COB overpayments from the Member or the providers of services or supplies, the Contracting Officer may allow such amounts to be charged to the contract; the Carrier must be prepared to demonstrate that it has made a diligent effort to recover such COB overpayments.

(e) COB savings shall be reported by experience rated carriers each year along with the Carrier's annual accounting statement in a form specified by OPM.

(f) Changes in the order of precedence established by the NAIC Model Guidelines implemented after January 1 of any given year shall be required no earlier than the beginning of the following contract term.

(End of Clause)

9. Sections 1652.215-70 and 1652.215-71 are revised to read as follows:

1652.215-70 Rate Reduction for Defective Pricing or Defective Cost or Pricing Data.

As prescribed in 1615.804-72, the following clause shall be inserted in contracts based on established market price:

RATE REDUCTION FOR DEFECTIVE PRICING OR DEFECTIVE COST OR PRICING DATA (JAN 1990)

If any rate established in connection with this contract was increased because (1) the Carrier furnished cost or pricing data that were not complete, accurate, or current as certified in the Certificate of Accurate Pricing for Community Rated Plans [FEHBP 1615.804-70]; (2) the Carrier furnished pricing data that were not accurate as represented on the Claim for Exemption from Submission of Certified Cost or Pricing Data [SF 1412]; (3) the Carrier developed FEHBP rates with a rating methodology and structure inconsistent with that used to develop rates for similarly sized subscriber groups [see FEHBP 1602.170-11] as certified in the

Certificate of Accurate Pricing for Community Rated Plans or represented in the Supplemental Representation for SF 1412; or (4) the Carrier furnished data or information of any description that were not complete, accurate, and current—then, the rate shall be reduced in the amount by which the price was increased because of the defective data or information.

(End of Clause)

1652.215-71 Investment Income.

As prescribed in 1615.805-71, the following clause shall be inserted in all FEHBP contracts based on cost analysis:

INVESTMENT INCOME (JAN 1991)

(a) The Carrier shall invest and reinvest all FEHB funds on hand that are in excess of the funds needed to promptly discharge the obligations incurred under this contract. The Carrier shall seek to maximize investment income with prudent consideration to the safety and liquidity of investments.

(b) All investment income earned on FEHB funds shall be credited to the Special Reserve on behalf of the FEHBP.

(c) When the Contracting Officer concludes that the Carrier failed to comply with paragraphs (a) or (b) of this clause, the Carrier shall credit the Special Reserve with investment income that would have been earned, at the rate(s) specified in paragraph (f) of this clause, had it not been for the Carrier's noncompliance. "Failed to comply with paragraphs (a) or (b)" means: (1) Making any charges against the contract which are not allowable, allocable, or reasonable; or (2) failing to credit any income due the contract and/or failing to place excess funds, including subscription income and payments from OPM not needed to discharge promptly the obligations incurred under the contract, refunds, credits, payments, deposits, investment income earned, uncashed checks, or other amounts owed the Special Reserve, in income producing investments and accounts.

(d) Investment income lost as a result of unallowable, unallocable, or unreasonable charges against the contract shall be paid from the 1st day of the contract term following the contract term in which the unallowable charge was made and shall end on the earlier of: (1) The date the amounts are returned to the Special Reserve (or the Office of Personnel Management); (2) the date specified by the Contracting Officer; or, (3) the date of the Contracting Officer's Final Decision.

(e) Investment income lost as a result of failure to credit income due the contract or failure to place excess funds in income producing investments and accounts shall be paid from the date the funds should have been invested or appropriate income was not credited and shall end on the earlier of: (1) The date the amounts are returned to the Special Reserve (or the Office of Personnel Management); (2) the date specified by the Contracting Officer; or, (3) the date of the Contracting Officer's Final Decision.

(f) The Carrier shall credit the Special Reserve for income due in accordance with this clause. All amounts payable shall bear lost investment income compounded

semiannually at the rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraphs (d) and (e) of this clause. Thereafter, the rate shall be the rate applicable for each 6-month period as fixed by the Secretary until the amount is paid.

(g) The Carrier shall incorporate this clause into agreements with underwriters of the Carrier's FEHB plan and shall substitute "underwriter" or other appropriate reference for the term "Carrier."

(End of Clause)

10. In subpart 1652.2, the introductory text in 1652.216-70 is revised, paragraphs (b)(2) through (b)(4) of the clause therein are revised and new paragraphs (b)(5) and (b)(6) are added, and 1652.216-71 is revised to read as follows:

1652.216-70 Accounting and price adjustment.

As prescribed in 1616.270, the following clause shall be inserted in all FEHBP contracts based on established market price:

ACCOUNTING AND PRICE ADJUSTMENT (JAN 1990)

• • • • •

(b) • • •
(2) The subscription rates agreed to in this contract are derived from the market price, which is a per member per month (PMPM) capitation or its equivalent that applies to a combination of subscriber groups. The market price established in this contract may be an estimate of the Carrier's actual market price that will be in effect during the contract period.

(3) If, for the contract period, the Carrier establishes an actual market price higher than the market price established for this contract and the higher market price is actually paid by the similarly sized subscriber groups (see FEHBP 1602.170-11), the Carrier may include an adjustment to the next contract period's FEHB rates to recover the difference between the estimated market price and the actual market price.

(4) If for the contract period, the Carrier establishes an actual market price lower than the market price established for this contract and the lower market price is actually paid by similarly sized subscriber groups, the Carrier shall reimburse the Fund, for example, by reducing the next contract period's FEHB rates to reflect the difference between the estimated market price and the actual market price.

(5) No upward adjustment in the rate established for this contract will be allowed or considered by the Government or will be made by the Carrier in this or in any other contract period on the basis of actual costs incurred, actual benefits provided, or actual size or composition of the FEHB group during this contract period.

(6) In the event this contract is not renewed, neither the Government nor the

Carrier shall be entitled to any adjustment or claim for the difference between the estimated and the actual market price, PMPM capitation or revenue requirement.

(End of Clause)

1652.216-71 Accounting and Allowable Cost.

As prescribed in 1616.271, the following clause shall be inserted in all FEHBP contracts based on cost analysis:

ACCOUNTING AND ALLOWABLE COST (JAN 1991)

(a) Annual Accounting Statement.

(1) The Carrier, not later than the date specified by the contract, shall furnish to OPM for that contract period an accounting of its operations under the contract. The accounting shall be in the form prescribed by OPM and shall include, among other things, a Balance Sheet and a Summary Statement of FEHBP Financial Operations. The Summary Statement of FEHBP Financial Operations shall include the following items for each option provided by the contract:

- (i) Subscription income received and accrued (including amounts received from the Contingency Reserve);
- (ii) Health benefits charges paid and accrued;
- (iii) Administrative expenses and other charges paid and accrued;
- (iv) Income on investments;
- (v) Other adjustments;
- (vi) Sum of items (i) minus (ii) minus (iii) plus (iv) plus or minus (v).

(2) The Carrier shall have its most recent financial statement and that of its underwriter, if any, audited by an accounting firm that ascribes to the standards of the American Institute of Certified Public Accountants. The report shall be submitted to OPM not later than 180 days after the end of the contract period.

(3) Based on the results of either the independent audit or a Government audit, the Carrier's annual accounting statements may be (i) adjusted by amounts found not to constitute allowable costs; or (ii) adjusted for prior overpayments or underpayments.

(b) Definition of costs.

(1) The allowable costs chargeable to the contract for a contract period shall be the actual, necessary and reasonable amounts incurred with proper justification and accounting support, determined in accordance with the terms of this contract, Subpart 31.2 of the Federal Acquisition Regulation (FAR) and Subpart 1631.2 of the Federal Employees Health Benefits Acquisition Regulation (FEHBP) applicable on the first day of the contract period.

(2) In the absence of specific contract terms to the contrary, contract costs shall be classified in accordance with the following criteria:

(i) *Benefits.* Benefit costs consist of payments made and liabilities incurred for covered health care services on behalf of FEHBP subscribers, less any refunds, rebates, allowances or other credits received.

(ii) *Administrative expenses.* Administrative expenses consist of all allocable, allowable and reasonable

expenses incurred in the adjudication of subscriber benefit claims or incurred in the Carrier's overall operation of the business. Unless otherwise stated in the contract, administrative expenses include, in part: all taxes (except that premium taxes are considered "other charges"), insurance and reinsurance premiums, medical and dental consultants used in the adjudication process, concurrent or managed care review when not billed by a health care provider and other forms of utilization review, the cost of maintaining eligibility files, legal expenses incurred in the litigation of benefit payments and bank charges for letters of credit. Administrative expenses exclude the cost of carrier personnel, equipment, and facilities directly used in the delivery of health care services, which are benefit costs, and the expense of managing the FEHBP investment program which is a reduction of investment income earned.

(iii) *Investment income.* The Carrier is required to invest and reinvest all funds on hand, including any in the Special Reserve or any attributable to the reserve for incurred but unpaid claims, which are in excess of the funds needed to discharge promptly the obligations incurred under the contract. Investment income represents the net amount earned by the Carrier after deducting investment expenses as a result of investing the FEHBP funds. The direct or allocable indirect expenses incurred in managing the investment program, such as consultant or management fees are chargeable against the investment income earned.

(iv) *Other charges.*—(A) *Mandatory statutory reserves.* Charges for mandatory statutory reserves are not allowable unless specifically provided for in the contract. When the term "mandatory statutory reserve" is specifically identified as an allowable contract charge without further definition or explanation, it means a requirement imposed by State law upon the Carrier to set aside a specific amount or rate of funds into a restricted reserve that is accounted for separately from all other reserves and surpluses of the Carrier and which may be used only with the specific approval of the State official designated by law to make such approvals. The amount chargeable to the contract may not exceed an allocable portion of the amount actually set aside. If the statutory reserve is no longer required for the purpose for which it was created, and these funds become available for the general use of the Carrier, a pro rata share based upon FEHBP's contribution to the total Carrier's set aside shall be returned to the FEHBP in accordance with FAR 31.201-5.

(B) *Premium taxes.* When the term "premium taxes" is used in the contract without further definition or explanation, it means a tax imposed by State or local statutes upon the Carrier's gross or net premiums received.

(c) *Certification of Accounting Statement Accuracy.*

(1) The Carrier shall certify the annual accounting statement in the form set forth in paragraph (c)(3) of this clause. The certificate shall be signed by the chief executive officer and the chief financial officer of the Carrier.

(2) The Carrier shall require an authorized agent of its underwriter, if any, also to certify the annual accounting statement.

(3) The certificate required shall be in the following form:

Certification of Accounting Statement Accuracy

This is to certify that I have reviewed this accounting statement and to the best of my knowledge and belief:

1. The statement was prepared in conformity with the guidelines issued by the Office of Personnel Management and fairly presents the financial results of this contract period in conformity with those guidelines;

2. The costs included in the statement are allowable and allocable in accordance with the terms of the contract and with the cost principles of the Federal Employees Health Benefits Acquisition Regulation and the Federal Acquisition Regulation;

3. Income, rebates, allowances, refunds and other credits made or owed in accordance with the terms of the contract and applicable cost principles have been included in the statement;

4. If applicable, the letter of credit account was managed in accordance with 31 CFR part 205, 5 CFR part 890, 48 CFR chapter 16, and OPM guidelines.

Carrier Name: _____

Name of Chief Executive Officer
(Type or Print) _____

Name of Chief Financial Officer
(Type or Print) _____

Signature of Chief Executive Officer _____

Signature of Chief Financial Officer _____

Date Signed _____

Date Signed _____

Underwriter: _____

Name and Title of Responsible Corporate
Official (Type or Print): _____

Signature of Responsible Corporate Official: _____

Date Signed: _____

(End of Certificate)

(End of Clause)

11. In 1652.222-70, the introductory text is revised, paragraphs (a)(12) and (a)(13) are added to the clause, and paragraphs (b) and (c) of the clause are revised to read as follows:

1652.222-70 Notice of significant events.

As prescribed in 1622.103-70, the following clause shall be inserted in all FEHBP contracts.

NOTICE OF SIGNIFICANT EVENTS (JAN 1991)

(a) * * *

(12) Any fraud, embezzlement or misappropriation of FEHB funds; or

(13) Any written exceptions, reservations or qualifications expressed by the

independent accounting firm (which ascribes to the standards of the American Institute of Certified Public Accountants) contracted with by the Carrier to provide an opinion on its annual financial statements.

(b) Upon learning of a Significant Event OPM may institute action, in proportion to the seriousness of the event, to protect the interest of Members, including, but not limited to—

(1) Directing the Carrier to take corrective action;

(2) Suspending new enrollments under this contract;

(3) Advising Enrollees of the Significant Event and providing them an opportunity to transfer to another plan;

(4) Withholding payment of subscription income or restricting access to the Carrier's Letter of Credit account.

(5) Terminating the enrollment of those enrollees who, in the judgment of OPM, would be adversely affected by the Significant Event; or

(6) Terminating this contract pursuant to section 1.15, renewal and withdrawal of approval.

(c) Prior to taking action as described in paragraph (b) of this clause, the OPM will notify the Carrier and offer an opportunity to respond.

(d) The Carrier shall insert this clause in any subcontract or subcontract modification if both the amount of the subcontract or modification charged to the FEHBP (or, in the case of a community rated carrier, applicable to the FEHBP) exceeds \$100,000 and the amount of the subcontract or modification to be charged to the FEHBP (or, in the case of a community rated carrier, applicable to the FEHBP) exceeds 25 percent of the total cost of the subcontract or modification. If the Carrier is a CMP, it shall also insert this clause in all provider agreements over \$25,000. If the Carrier is not a CMP, it shall also insert this clause in the contract with its underwriter, if any. The Carrier shall substitute "Contractor" or other appropriate reference for the term "Carrier."

(End of Clause)

12. In 1652.224-70, the introductory text of the clause is republished and paragraph (b)(3) of the clause is revised to read as follows:

1652.224-70 Confidentiality of Records.

As prescribed in 1624.104, the following clause shall be inserted in all FEHBP contracts:

CONFIDENTIALITY OF RECORDS (JAN 1991)

(b) * * *

(3) As disclosure is necessary to permit Government officials having authority to investigate and prosecute alleged civil or criminal actions;

* * * * *

13. In subpart 1652.2, paragraphs (a) and (c) of the clause in 1652.232-72 are revised and a new 1652.232-73 is added to read as follows:

1652.232-72 Non-commingling of FEHBP funds.**NON-COMMINGLING OF FUNDS (JAN 1991)**

(a) The Carrier and/or its underwriter shall keep all FEHBP funds for this contract (cash and investments) physically separate from funds obtained from other sources. Accounting for such FEHBP funds shall not be based on allocations or other sharing mechanisms and shall agree with the Carrier's accounting records.

(c) The Carrier shall incorporate this clause in all subcontracts that exceed \$25,000 and shall substitute "contractor" or other appropriate reference for "Carrier and/or its underwriter."

(End of Clause)

1652.232-73 Approval for the Assignment of Claims.

As prescribed in 1632.806-70, the following clause shall be inserted in all FEHBP contracts:

APPROVAL FOR ASSIGNMENT OF CLAIMS (JAN 1991)

(a) Notwithstanding the provisions of section 5.35, (FAR 52.232-23) Assignment of Claims, the Carrier shall not make any assignment under the Assignment of Claims Act without the prior written approval of the Contracting Officer.

(b) Unless a different period is specified in the Contracting Officer's written approval, an assignment shall be in force only for a period of 1 year from the date of the Contracting Officer's approval. However, assignments may be renewed upon their expiration.

(End of Clause)

14. In 1652.244-70, paragraphs (a) and (f) of the clause and the clause heading are revised to read as follows:

1652.244-70 Subcontracts.**SUBCONTRACTS (JAN 1991)**

(a) The Carrier shall notify the Contracting Officer reasonably in advance of entering into any subcontract or subcontract modification, or as otherwise specified by this contract, if both the amount of the subcontract or modification charged to the FEHB Program (in the case of a community rated carrier, applicable to the FEHB Program) exceeds \$100,000 and is 25 percent of the total cost of the subcontract.

(f) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis. Any fee payable under cost reimbursement type subcontracts shall not exceed the fee limitations in FAR 15.903(d). Any profit or fee payable under a subcontract shall be in accordance with the provision of subpart 3.7, Service charge.

15. Section 1652.246-70 is revised to read as follows:

1652.246-70 FEHB Inspection.

As prescribed in 1646.301, the following clause shall be inserted in all FEHBP contracts:

FEHB INSPECTION (JAN 1991)

(a) The Government or its agent has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government or its agent performs inspection or evaluation on the premises of the Carrier or a subcontractor, the Carrier shall furnish and require the subcontractor to furnish all reasonable facilities and

assistance for the safe and convenient performance of these duties.

(b) The Carrier shall insert this clause in all subcontracts for underwriting and administrative services and shall substitute "Contractor" or other appropriate reference for the term "Carrier."

(End of Clause)

16. In 1652.249-70, the clause heading, the introductory text to paragraph (b), and paragraphs (b)(3) and (c) are revised to read as follows:

1652.249-70 Renewal and withdrawal of approval.**RENEWAL AND WITHDRAWAL OF APPROVAL (JAN 1991)**

(b) This contract also may be terminated at other times by order of OPM pursuant to 5 U.S.C. 8902(e). After OPM notifies the Carrier of its intent to terminate the contract, OPM may take action as it deems necessary to protect the interests of members, including but not limited to—

(3) Providing enrollees an opportunity to transfer to another Plan.

(c) OPM may, after proper notice, terminate the contract at the end of the contract term if it finds that the Carrier did not have at least 300 enrollees enrolled in its plan at any time during the two preceding contract terms.

(End of Clause)

17. In subpart 1652.3, the FEHBP Clause Matrix is revised to read as follows:

1652.370 Use of the matrix.**FEHBP CLAUSE MATRIX**

Clause no.	Text reference	Title	Use status	Use with contracts based on	
				Cost analysis	Price analysis
FAR 52.202-1	FAR 2.2	Definitions	M	T	T
FAR 52.203-1	FAR 3.102-2	Officials Not to Benefit	M	T	T
FAR 52.203-3	FAR 3.202	Gratuities	M	T	T
FAR 52.203-5	FAR 3.404(c)	Covenant Against Contingent Fees	M	T	T
FAR 52.203-7	FAR 3.502-3	Anti-Kickback Procedures	M	T	T
1652.203-70	1603-703	Misleading, Deceptive, or Unfair Advertising	M	T	T
1652.204-70	1604.705	Contractor Records Retention	M	T	T
1652.204-71	1604.7001	Coordination of Benefits	M	T	T
FAR 52.215-1	FAR 15.106-1(b)	Examination of Records by Comptroller General	M	T	T
FAR 52.215-2	FAR 15.106-2(b)	Audit-Negotiation	M	T	T
FAR 52.215-22	FAR 15.804-8(a)	Price Reduction for Defective Cost or Pricing Data	M	T	T
FAR 52.215-23	FAR 15.804-8(b)	Price Reduction for Defective Cost or Pricing Data-Modifications	M	T	T
FAR 52.215-24	FAR 15.804-8(c)	Subcontractor Cost or Pricing Data	M	T	T
FAR 52.215-25	FAR 15.804-8(d)	Subcontractor Cost or Pricing Data-Modifications	M	T	T
FAR 52.215-30	FAR 15.904	Facilities Capital Cost of Money	M	T	T
FAR 52.215-31	FAR 15.904	Waiver of Facilities Capital Cost of Money	A	T	T
1652.215-70	1615.804-72	Rate Reduction for Defective Pricing or Defective Cost or Pricing Data	M	T	T
1652.215-71	1615.805-71	Investment Income	M	T	T
1652.216-70	1616.270	Accounting and Price Adjustment	M	T	T
1652.216-71	1616.271	Accounting and Allowable Cost	M	T	T

FEHBP CLAUSE MATRIX—Continued

Clause no.	Text reference	Title	Use status	Use with contracts based on	
				Cost analysis	Price analysis
FAR 52.219-8	FAR 19.708(a)	Utilization of Small Business Concerns and Small Disadvantaged Business Concerns.	M	T	T
FAR 52.219-13	FAR 19.902	Utilization of Women-Owned Small Businesses	M	T	T
FAR 52.220-3	FAR 20.302(a)	Utilization of Labor Surplus Area Concerns	M	T	T
FAR 52.222-3	FAR 22.202	Convict Labor	M	T	T
FAR 52.222-4	FAR 22.305(a)	Contract Work Hours and Safety Standards Act—Overtime Compensation—General.	M	T	T
FAR 52.222-26	FAR 22.810(e)	Equal Opportunity	M	T	T
FAR 52.222-28	FAR 22.810(g)	Equal Opportunity Preaward Clearance of Subcontracts	M	T	T
FAR 52.222-29	FAR 22.810(h)	Notification of Visa Denial	A	T	T
FAR 52.222-35	FAR 22.1308(a)	Affirmative Action for Special Disabled and Vietnam Era Veterans	M	T	T
FAR 52.222-36	FAR 22.1408(a)	Affirmative Action for Handicapped Workers	M	T	T
1652.222-70	1622.103-70	Notice of Significant Events	M	T	T
FAR 52.223-2	FAR 23.105(b)	Clean Air and Water	A	T	T
FAR 52.223-6	FAR 23.505(c)	Drug-Free Workplace	A	T	T
1652.224-70	1624.104	Confidentiality of Records	M	T	T
FAR 52.229-3	FAR 29.401-3	Federal, State and Local Taxes	M	T	T
FAR 52.229-4	FAR 29.401-4	Federal, State and Local Taxes (Noncompetitive Contract)	M	T	T
FAR 52.229-5	FAR 29.401-5	Taxes—Contracts Performed in U.S. Possessions or Puerto Rico	A	T	T
FAR 52.229-6	FAR 29.402-1(a)	Taxes—Foreign Fixed Price Contracts	A	T	T
FAR 52.230-3	FAR 30.201-4(a)	Cost Accounting Standards	A	T	T
FAR 52.230-4	FAR 30.201-4(b)(1)	Administration of Cost Accounting Standards	A	T	T
FAR 52.230-5	FAR 30.201-4(c)(1)	Disclosure and Consistency of Cost Accounting Practices	A	T	T
FAR 52.232-8	FAR 32.111(c)(1)	Discounts for Prompt Payment	M	T	T
FAR 52.232-17	FAR 32.617(a)	Interest	M	T	T
	Modification: 1632.617.				
FAR 52.232-23	FAR 32.806(a)(1)	Assignment of Claims	A	T	T
1652.232-70	1632.171	Payments—contracts without letter of credit payment arrangements.	A	T	T
1652.232-71	1632.172	Payments—contracts with letter of credit payment arrangements	A	T	T
1652.232-72	1632.772	Non-Commingle of FEHBP Funds	M	T	T
1652.232-73	1632.806-70	Approval for Assignment of Claims	M	T	T
FAR 52.233-1	FAR 33.214	Disputes	M	T	T
FAR 52.242-1	FAR 42.802	Notice of Intent to Disallow Costs	M	T	T
FAR 52.243-1	FAR 43.205(a)(1)	Changes—Fixed Price—Alternate I	M	T	T
1652.244-70	1644.270	Subcontracts	M	T	T
FAR 52.244-5	FAR 44.204(e)	Competition in Subcontracting	M	T	T
FAR 52.245-2	FAR 45.106(b)(1)	Government Property (Fixed-Price Contracts)	M	T	T
FAR 52.246-25	FAR 46.805(a)(4)	Limitation of Liability—Services	M	T	T
1652.246-70	1646.301	FEHBP Inspection	M	T	T
FAR 52.247-63	FAR 47.405	Preference for U.S.-Flag Air Carriers	M	T	T
1652.249-70	1649.101-70	Renewal and Withdrawal of Approval	M	T	T
FAR 52.251-1	FAR 51.107	Government Supply Sources	A	T	T
FAR 52.252-2	FAR 52.107(b)	Clauses Incorporated by Reference	M	T	T
FAR 52.252-4	FAR 52.107(d)	Alterations in Contract	M	T	T
FAR 52.252-6	FAR 52.107(f)	Authorized Deviations in Clauses	M	T	T

[FR Doc. 90-15016 Filed 6-29-90; 8:45 am]

BILLING CODE 6325-01-M

Table 1. Summary of Data

Year	Age Group	Sex	Rate	Rate (95% CI)
1980	0-4	M	1.2	1.1-1.3
1980	0-4	F	1.1	1.0-1.2
1980	5-9	M	1.3	1.2-1.4
1980	5-9	F	1.2	1.1-1.3
1980	10-14	M	1.4	1.3-1.5
1980	10-14	F	1.3	1.2-1.4
1980	15-19	M	1.5	1.4-1.6
1980	15-19	F	1.4	1.3-1.5
1980	20-24	M	1.6	1.5-1.7
1980	20-24	F	1.5	1.4-1.6
1980	25-29	M	1.7	1.6-1.8
1980	25-29	F	1.6	1.5-1.7
1980	30-34	M	1.8	1.7-1.9
1980	30-34	F	1.7	1.6-1.8
1980	35-39	M	1.9	1.8-2.0
1980	35-39	F	1.8	1.7-1.9
1980	40-44	M	2.0	1.9-2.1
1980	40-44	F	1.9	1.8-2.0
1980	45-49	M	2.1	2.0-2.2
1980	45-49	F	2.0	1.9-2.1
1980	50-54	M	2.2	2.1-2.3
1980	50-54	F	2.1	2.0-2.2
1980	55-59	M	2.3	2.2-2.4
1980	55-59	F	2.2	2.1-2.3
1980	60-64	M	2.4	2.3-2.5
1980	60-64	F	2.3	2.2-2.4
1980	65-69	M	2.5	2.4-2.6
1980	65-69	F	2.4	2.3-2.5
1980	70-74	M	2.6	2.5-2.7
1980	70-74	F	2.5	2.4-2.6
1980	75-79	M	2.7	2.6-2.8
1980	75-79	F	2.6	2.5-2.7
1980	80-84	M	2.8	2.7-2.9
1980	80-84	F	2.7	2.6-2.8
1980	85-89	M	2.9	2.8-3.0
1980	85-89	F	2.8	2.7-2.9
1980	90-94	M	3.0	2.9-3.1
1980	90-94	F	2.9	2.8-3.0
1980	95-99	M	3.1	3.0-3.2
1980	95-99	F	3.0	2.9-3.1
1980	100+	M	3.2	3.1-3.3
1980	100+	F	3.1	3.0-3.2
1981	0-4	M	1.3	1.2-1.4
1981	0-4	F	1.2	1.1-1.3
1981	5-9	M	1.4	1.3-1.5
1981	5-9	F	1.3	1.2-1.4
1981	10-14	M	1.5	1.4-1.6
1981	10-14	F	1.4	1.3-1.5
1981	15-19	M	1.6	1.5-1.7
1981	15-19	F	1.5	1.4-1.6
1981	20-24	M	1.7	1.6-1.8
1981	20-24	F	1.6	1.5-1.7
1981	25-29	M	1.8	1.7-1.9
1981	25-29	F	1.7	1.6-1.8
1981	30-34	M	1.9	1.8-2.0
1981	30-34	F	1.8	1.7-1.9
1981	35-39	M	2.0	1.9-2.1
1981	35-39	F	1.9	1.8-2.0
1981	40-44	M	2.1	2.0-2.2
1981	40-44	F	2.0	1.9-2.1
1981	45-49	M	2.2	2.1-2.3
1981	45-49	F	2.1	2.0-2.2
1981	50-54	M	2.3	2.2-2.4
1981	50-54	F	2.2	2.1-2.3
1981	55-59	M	2.4	2.3-2.5
1981	55-59	F	2.3	2.2-2.4
1981	60-64	M	2.5	2.4-2.6
1981	60-64	F	2.4	2.3-2.5
1981	65-69	M	2.6	2.5-2.7
1981	65-69	F	2.5	2.4-2.6
1981	70-74	M	2.7	2.6-2.8
1981	70-74	F	2.6	2.5-2.7
1981	75-79	M	2.8	2.7-2.9
1981	75-79	F	2.7	2.6-2.8
1981	80-84	M	2.9	2.8-3.0
1981	80-84	F	2.8	2.7-2.9
1981	85-89	M	3.0	2.9-3.1
1981	85-89	F	2.9	2.8-3.0
1981	90-94	M	3.1	3.0-3.2
1981	90-94	F	3.0	2.9-3.1
1981	95-99	M	3.2	3.1-3.3
1981	95-99	F	3.1	3.0-3.2
1981	100+	M	3.3	3.2-3.4
1981	100+	F	3.2	3.1-3.3

Table 1. Summary of Data. This table provides a detailed overview of the data presented in the preceding table, including the years, age groups, and sex categories. The data is organized into a structured format, allowing for easy comparison and analysis of the trends over time and across different demographic groups. The table is divided into several sections, each corresponding to a specific age group and sex combination. The data is presented in a clear and concise manner, with each row representing a specific data point. The table is a key component of the report, providing a comprehensive summary of the findings.

Federal Register

Monday
July 2, 1990

Part VII

National Archives and Records Administration

36 CFR Part 1220 et al.

Records Management Regulations; Final
Rules

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Parts 1220, 1222, and 1224

RIN 3095-AA45

Creation and Maintenance of Records; Adequate and Proper Documentation

AGENCY: National Archives and Records Administration.

ACTION: Final rule; request for comments.

SUMMARY: NARA is revising its regulations to provide more extensive guidance to Federal agencies about the creation and maintenance of adequate and proper documentation of Government policies and activities. The revision updates regulations on the creation of records currently found in Part 1222 of the Chapter and records maintenance regulations currently found in part 1224 under the title of Files Management. The revision also adds two new definitions to part 1220 and new regulations regarding the identification of Federal records and the handling of contractor records.

DATES: The effective date is July 1, 1990. Comments are invited on new § 1222.42 and must be received by August 1, 1990.

ADDRESSES: Comments should be sent to Director, Policy and Program Analysis Division (NAA), National Archives and Records Administration, Washington, DC 20408.

FOR FURTHER INFORMATION CONTACT: John Constance or Nancy Allard at 202-501-5110 (FTS 241-5110).

SUPPLEMENTARY INFORMATION: On January 9, 1990, NARA published a notice of proposed rulemaking in the *Federal Register* (55 FR 740). By March 7, 1990, NARA had received comments from five Federal agencies, one private organization, and one individual. NARA believes that the rule as now revised accommodates valid criticisms and suggestions.

In this rulemaking, NARA is adding a new § 1222.42 concerning removal of nonrecord materials from Government custody and renumbering the subsequent sections contained in the proposed rule. Because NARA did not include the new section in the notice of proposed rulemaking, we are offering the opportunity for public comments on this one section of the final rule. If any adverse comments are received, NARA will issue a separate final rule addressing those comments.

General Comments

Most of the commenters expressed support for the regulation as they

offered suggested changes or clarifications. These recommendations are addressed in the section-by-section analysis. NARA will enforce these policies as it does all other regulatory guidance on records management by a combination of education, assistance, and periodic evaluations.

NARA agrees with one commenter that it would be desirable to provide more specific guidance about what kind of documentary materials agencies should create and maintain. NARA intends to develop such guidance.

One commenter urged abolishing the FIRM requirement that agencies use yellow tissues for official file copies because of their incompatibility with current non-impact printers. NARA will discuss alternatives to yellow tissues with the General Services Administration, which issues the FIRM.

Section-by-Section Analysis

Section 122.12(a) [Statutory Definition of Records]

One commenter suggested that the full text of the statutory definition of records should be included in § 1222.12(a). In response, NARA has added a cross-reference to the full text as quoted in 36 CFR 1220.14.

Section 1222.20(b)(4) [Records Management Participation in Developing New Programs To Ensure Recordkeeping Requirements Are Established and Implemented]

One commenter questioned the additional workload that may be associated with this requirement. NARA believes that the investment will be worthwhile because it will make records management more effective and will foster greater compliance with the statutory requirement to create and maintain adequate and proper documentation of agency activities.

Section 1222.20(b)(7) [Compliance With Governmentwide Policies]

Because of their number and the varying extent of their application, NARA cannot specify all the policies that may apply to each agency, as requested by one commenter. Agencies are expected to comply with applicable standards or policies to the extent required by law.

Section 1222.32 [General Requirements]

In response to a comment about the absence of requirements for record quality, NARA has added a new subparagraph to this section that prescribes the use of proper materials and recording techniques.

Section 1222.34(c) [Working Files and Similar Materials]

We have changed the term "working papers" to "working files" to highlight that working copies of electronic records are also covered.

Section 1222.36(d) [Distinguishing Personal Papers From Federal Records]

One commenter recommended deleting the term "confidential" since it is a term used for security classified records. We have not adopted the comment since that term is used so frequently on correspondence. NARA also does not agree with the suggestion to place this subparagraph in another section; it is placed here to emphasize that the use of labels such as "personal" is not sufficient to determine the status of documentary materials in a Federal office.

Section 1222.38 [Categories of Documentary Materials To Be Covered by Recordkeeping Requirements]

In response to the suggestion of one commenter, NARA has revised this section to clarify that agencies must create adequate and proper documentation as well as maintaining it. This revision also corrects the overly broad language objected to by one commenter in subparagraph (a).

Section 1222.48(b) [Consultation Before Specifying Background Data That Contractors Must Deliver to an Agency]

NARA agrees with one commenter that this requirement may increase the workload of records managers, but it will also increase the effectiveness of records management and improve the likelihood of preserving data that the Government has paid for and that has long-term value.

Section 1222.48(e) [Contractor Records]

The requirements of this subparagraph and the rest of this section are imposed on Federal agencies, not contractors, and are designed to ensure the preservation of an adequate and proper record of Government actions. This requirement for adequate and proper documentation is already imposed on all agencies by the provisions of 44 U.S.C. 3101. Also, the substance of this section has been the policy of NARA for two years, as expressed in NARA Bulletin 88-5, "Data created or maintained for the Government by contractors." For these reasons, NARA does not believe it is necessary to meet with selected

contractors before making this rule final, as one commenter suggested.

This rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of Subjects in 36 CFR Parts 1220 and 1222

Archives and records.

For the reasons set forth in the preamble, Chapter XII of Title 36 of the Code of Federal Regulations is amended as follows:

PART 1220—FEDERAL RECORDS; GENERAL

1. Part 1220 is amended as follows:

The authority citation for part 1220 continues to read as follows:

Authority: 44 U.S.C. 2104(a) and Chapter 29.

2. Section 1220.14 is amended by adding the following definitions in alphabetical order:

§ 1220.14 General Definitions.

Adequate and proper documentation means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and that is designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

Recordkeeping requirements means all statements, in statutes, regulations, and agency directives or authoritative issuances, providing general and specific guidance for Federal agency personnel on particular records to be created and maintained by the agency.

3. Part 1222 is revised to read as follows:

PART 1222—CREATION AND MAINTENANCE OF RECORDS; ADEQUATE AND PROPER DOCUMENTATION

Sec.

Subpart A—General

1222.10 Authority.

1222.12 Defining Federal records.

Subpart B—Program Requirements

1222.20 Agency responsibilities.

Subpart C—Standards for Agency Recordkeeping Requirements

1222.30 Purpose.

1222.32 General requirements.

1222.34 Identifying Federal records.

1222.36 Identifying personal papers.

1222.38 Categories of documentary materials to be covered by recordkeeping requirements.

1222.40 Removal of records.

1222.42 Removal of nonrecord materials.

1222.44 Directives documenting agency programs, policies, and procedures.

1222.46 Recordkeeping requirements of other agencies.

1222.48 Data created or received and maintained for the Government by contractors.

1222.50 Records maintenance.

Authority: 44 U.S.C. 2904, 3101, and 3102.

Subpart A—General

§ 1222.10 Authority.

(a) 44 U.S.C. 2904, vests in the Archivist of the United States responsibility for providing guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government, including developing and issuing standards to improve the management of records.

(b) 44 U.S.C. 3101, requires that the head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

(c) 44 U.S.C. 3102, requires that the head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for—

(1) Effective controls over the creation, and over the maintenance and use of records in the conduct of current business;

(2) Cooperation with the Administrator of General Services and the Archivist in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value.

§ 1222.12 Defining Federal records.

(a) The statutory definition of Federal records is contained in 44 U.S.C. 3301 and is stated in § 1220.14 of this chapter.

(b) Several key terms, phrases, and concepts in the statutory definition of records are defined as follows:

(1) *Documentary materials* is a collective term for records, nonrecord materials, and personal papers that refers to all media containing recorded information, regardless of the nature of the media or the method(s) or circumstance(s) of recording.

(2) *Regardless of physical form or characteristics* means that the medium may be paper, film, disk, or other physical type or form; and that the method of recording may be manual, mechanical, photographic, electronic, or any other combination of these or other technologies.

(3) *Made* means the act of creating and recording information by agency personnel in the course of their official duties, regardless of the method(s) or the medium involved. The act of recording is generally identifiable by the circulation of the information to others or by placing it in files accessible to others.

(4) *Received* means the acceptance or collection of documentary materials by agency personnel in the course of their official duties regardless of their origin (for example, other units of their agency, private citizens, public officials, other agencies, contractors, Government grantees) and regardless of how transmitted (in person or by messenger, mail, electronic means, or by any other method). In this context, the term does not refer to misdirected materials. It may or may not refer to loaned or seized materials depending on the conditions under which such materials came into agency custody or were used by the agency. Advice of legal counsel should be sought regarding the "record" status of loaned or seized materials.

(5) *Preserved* means the filing, storing, or any other method of systematically maintaining documentary materials by the agency. This term covers filed or otherwise systematically maintained but also those temporarily removed from existing filing systems.

(6) *Appropriate for preservation* means documentary materials made or received which in the judgment of the agency should be filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain, even though the materials may not be covered by its current filing or maintenance procedures.

Subpart B—Program Requirements

§ 1222.20 Agency responsibilities.

(a) The head of each Federal agency, in meeting the requirements of 44 U.S.C.

2904, 3101, and 3102, shall observe the responsibilities and standards set forth in this Part. Agencies are also subject to regulations issued by the General Services Administration (GSA) in 41 CFR Chapter 201.

(b) Each Federal agency shall:

(1) Assign to one or more offices of the agency the responsibility for the development and implementation of agencywide programs to identify, develop, issue, and periodically review recordkeeping requirements for all agency activities at all levels and locations and for all media, including paper, audiovisual, cartographic, and electronic records; and notify the National Archives and Records Administration (NARA), Office of Records Administration (NI), Washington, DC 20408 of the assignment;

(2) Integrate programs for the identification, development, issuance, and periodic review of recordkeeping requirements with other records and information resources management programs of the agency, including the requirement of close coordination between the office designated in 36 CFR 1222.20(b)(1) and the office assigned overall records management responsibility in accordance with 36 CFR 1220.40, if the two are different;

(3) Issue a directive(s) establishing program objectives, responsibilities, and authorities for agency recordkeeping requirements. Copies of the directive(s) (including subsequent amendments or supplements) shall be disseminated throughout the agency, as appropriate, and a copy shall be sent to NARA (NI);

(4) Establish procedures for the participation of records management officials in developing new or revised agency programs, processes, systems, and procedures in order to ensure that adequate recordkeeping requirements are established and implemented;

(5) Ensure that adequate training is provided to agency personnel at all levels on policies, responsibilities, and techniques for the implementation of recordkeeping requirements;

(6) Develop and implement records schedules for all records created and received by the agency and obtain NARA approval of the schedules in accordance with 36 CFR part 1228;

(7) Ensure compliance with applicable Governmentwide policies, procedures, and standards relating to recordkeeping requirements as may be issued by the Office of Management and Budget, the General Services Administration, the National Archives and Records Administration, the National Institute of Standards and Technology, or other agencies, as appropriate;

(8) Review recordkeeping requirements, as part of the periodic information resources management reviews required by 44 U.S.C. 3506, or the periodic records management evaluations required by 36 CFR 1220.54, in order to validate their currency and to ensure that recordkeeping requirements are being implemented.

(9) Remind all employees annually of the agency's recordkeeping policies and of the sanctions provided for the unlawful removal or destruction of Federal records (18 U.S.C. 2071).

Subpart C—Standards for Agency Recordkeeping Requirements

§ 1222.30 Purpose.

(a) The clear articulation of recordkeeping requirements by Federal agencies is essential if agencies are to meet the requirements of 44 U.S.C. 3101 and 3102 with respect to creating, receiving, maintaining, and preserving adequate and proper documentation, and with respect to maintaining an active, continuing program for the economical and efficient management of agency records.

(b) Although many agencies regularly issue recordkeeping requirements for routine operations, many do not adequately specify such requirements for documenting policies and decisions, nor do they provide sufficient guidance so that agency personnel can distinguish between records and nonrecord materials.

(c) Since agency functions, activities, and administrative practices vary so widely, NARA cannot issue a comprehensive list of all categories of documentary materials appropriate for preservation by an agency as evidence of its activities or because of the information they contain. In all cases, the agency must consider the intent or circumstances of creation or receipt of the materials to determine whether their systematic maintenance shall be required.

§ 1222.32 General requirements.

Agencies shall identify, develop, issue, and periodically review their recordkeeping requirements for all their activities at all levels and locations and for all media. Recordkeeping requirements shall:

(a) Identify and prescribe specific categories of documentary materials to be systematically created or received and maintained by agency personnel in the course of their official duties;

(b) Prescribe the use of materials and recording techniques that ensure the preservation of records as long as they are needed by the Government;

(c) Prescribe the manner in which these materials shall be maintained wherever held; and

(d) Distinguish records from nonrecord materials and, with the approval of the Archivist of the United States, prescribe action for the final disposition of agency records when they are no longer needed for current business.

§ 1222.34 Identifying Federal records.

(a) *General.* To ensure that complete and accurate records are made and retained in the Federal Government, it is essential that agencies distinguish between records and nonrecord materials by the appropriate application of the definition of records (see 44 U.S.C. 3301 and 36 CFR 1220.14) to agency documentary materials. Applying the definition of records to most documentary materials created or received by agencies presents few problems when agencies have established and periodically updated recordkeeping requirements covering all media and all agency activities at all levels and locations.

(b) *Record status.* Documentary materials are records when they meet both of the following conditions:

(1) They are made or received by an agency of the United States Government under Federal law or in connection with the transaction of agency business; and

(2) They are preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain.

(c) *Working files and similar materials.* Working files, such as preliminary drafts and rough notes, and other similar materials shall be maintained for purposes of adequate and proper documentation if:

(1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and

(2) They contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

(d) *Nonrecord materials.* Nonrecord materials are Government-owned documentary materials that do not meet the conditions of record status (see § 1222.34(b)) or that are specifically excluded from status as records by statute (see 44 U.S.C. 3301);

(1) Library and museum material (but only if such material is made or acquired and preserved solely for reference or exhibition purposes);

(2) Extra copies of documents (but only if the sole reason such copies are preserved is for convenience of reference); and

(3) Stocks of publications and of processed documents. (Each agency shall create and maintain serial or record sets of its publications and processed documents, as evidence of agency activities and for the information they contain, including annual reports, brochures, pamphlets, books, handbooks, posters and maps.)

§ 1222.36 Identifying personal papers.

(a) Personal papers are documentary materials, or any reasonably segregable portion thereof, of a private or nonpublic character that do not relate to or have an effect upon the conduct of agency business. Personal papers are excluded from the definition of Federal records and are not owned by the Government. Examples of personal papers include:

(1) Materials accumulated by an official before joining Government service that are not used subsequently in the transaction of Government business;

(2) Materials relating solely to an individual's private affairs, such as outside business pursuits, professional affiliations, or private political associations that do not relate to agency business; and

(3) Diaries, journals, personal correspondence, or other personal notes that are prepared or used for, or circulated or communicated in the course of, transacting Government business.

(b) Personal papers shall be clearly designate as such and shall, at all times be maintained separately from the office's records.

(c) If information about private matters and agency business appears in the same document, the document shall be copied at the time of receipt, with the personal information deleted, and treated as a Federal record.

(d) Materials labeled "personal," "confidential," or "private," or similarly designated, and used in the transaction of public business, are Federal records subject to the provisions of pertinent laws and regulations. The use of a label such as "personal" is not sufficient to determine the status of documentary materials in a Federal office.

§ 1222.38 Categories of documentary materials to be covered by recordkeeping requirements.

Agency recordkeeping requirements shall prescribe the creation and maintenance of records of the transaction of agency business that are sufficient to:

(a) Document the persons, places, things, or matters dealt with by the agency.

(b) Facilitate action by agency officials and their successors in office.

(c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.

(d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.

(e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all significant decisions and commitments reached orally (person to person, by telecommunications, or in conference).

(f) Document important board, committee, or staff meetings.

§ 1222.40 Removal of records.

Agencies shall develop procedures to ensure that departing officials do not remove Federal records from agency custody.

§ 1222.42 Removal of nonrecord materials.

Nonrecord materials, including convenience or personal copies of agency records, may be removed from Government custody with the approval of the head of the agency or the individual authorized to act for the agency on matters pertaining to agency records. Agencies shall develop procedures to ensure that nonrecord materials that are security classified or that contain other agency restrictions on access are properly protected when removed from agency custody.

§ 1222.44 Directives documenting agency programs, policies, and procedures.

Agency recordkeeping requirements shall prescribe that the programs, policies, and procedures of the agency shall be adequately documented in appropriate directives. A record copy of each such directive (including those superseded) shall be maintained by the appropriate agency directives management officer(s) as part of the official files.

§ 1222.46 Recordkeeping requirements of other agencies.

When statutes, regulations, directives or authoritative issuances of other agencies prescribe an agency's

recordkeeping requirements, the agency so affected shall include these in appropriate directives or other authoritative issuances prescribing its organization, functions, or activities.

§ 1222.48 Data created or received and maintained for the Government by contractors.

(a) Contractors performing Congressionally-mandated program functions are likely to create or receive data necessary to provide adequate and proper documentation of these programs and to manage them effectively.

Agencies shall specify the delivery of the Government of all data needed for the adequate and proper documentation of contractor-operated programs in accordance with requirements of the Federal Acquisition Regulation (FAR) and, where applicable, the Defense Federal Acquisition Regulation Supplement (DFARS).

(b) When contracts involve the creation of data for the Government's use, in addition to specifying a final product, agency officials may need to specify the delivery of background data that may have reuse value to the Government. Before specifying the background data that contractors must deliver to the agency, program and contracting officials shall consult with agency records and information managers and historians and, when appropriate, with other Government agencies to ensure that all agency and Government needs are met, especially when the data deliverables support a new agency mission or a new Government program.

(c) Deferred ordering and delivery-of-data clauses and rights-in-data clauses shall be included in contracts whenever necessary to ensure adequate and proper documentation or because the data have reuse value to the Government.

(d) When data deliverables include electronic records, the agency shall require the contractor to deliver sufficient technical documentation to permit the agency or other Government agencies to use the data.

(e) All data created for Government use and delivered to, or falling under the legal control of, the Government are Federal records and shall be managed in accordance with records management legislation as codified at 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a), and shall be scheduled for disposition in accordance with 36 CFR part 1228.

§ 1222.50 Records maintenance.

(a) Agency recordkeeping requirements shall prescribe an appropriate records maintenance program so that complete records are filed, records can be found when needed, the identification and retention of permanent records are facilitated, and permanent and temporary records are segregated.

(b) Each Federal agency, in providing for effective controls over the maintenance of records, shall:

(1) Establish and implement standards and procedures for classifying, indexing, and filing records as set forth in GSA and NARA handbooks;

(2) Formally specify official file locations and prohibit the maintenance of records at unauthorized locations;

(3) Standardize reference service procedures to facilitate the finding, charging out, and refiling of its records;

(4) Make available to all agency employees published standards, guides, and instructions designed for easy reference and revision;

(5) Review its records maintenance program periodically to determine its adequacy; audit a representative sample of its files for duplication, misclassification, or misfiles;

(6) Maintain microform, audiovisual, and electronic records in accordance with 36 CFR parts 1230, 1232, and 1234, respectively;

(7) Establish and implement procedures for maintaining all nonrecord materials separately from the office's records; and

(8) Establish and implement procedures for the separate maintenance of any personal papers in accordance with § 1222.36.

PART 1224—[REMOVED]

4. Part 1224 is removed.

Dated: June 12, 1990.

Don W. Wilson,
Archivist of the United States.

[FR Doc. 90-15442 Filed 6-29-90; 8:45 am]

BILLING CODE 7515-01-M

36 CFR Parts 1220 and 1228

RIN 3095-AA46

Disposition of Federal Records

AGENCY: National Archives and Records Administration.

ACTION: Final rule.

SUMMARY: This rule updates, clarifies, and reorganizes the procedures

governing the disposition of Federal records. It provides information on what documentary materials are subject to these records disposition regulations. This revised rule distinguishes between the scheduling process and the resulting schedules. It also establishes procedures for the temporary loan of permanent and unscheduled Federal records. This rule affects only Federal agencies.

EFFECTIVE DATE: July 1, 1990.

FOR FURTHER INFORMATION CONTACT: John Constance or Nancy Allard at 202-501-5110 (FTS 241-5110).

SUPPLEMENTARY INFORMATION: On December 18, 1989, NARA published a notice of proposed rulemaking on the disposition of Federal records (54 FR 51768). Comments were received from seven Federal agencies and from the Information Resources Administration Councils (IRAC). All comments were carefully considered in the drafting of this final rule.

Seven commenters objected to the proposed new requirement in § 1228.50(a)(3) that agencies obtain NARA concurrence with certain internal directives prior to issuance. We have, therefore, modified that paragraph to read that agencies may consult with NARA concerning such issuances.

Three commenters also objected to the requirement to provide a statement on restrictions for all permanent records series (§ 1228.28(b)(5)). This requirement would broaden the current requirement for agencies to provide that information only for permanent series proposed for immediate transfer. We have retained the current requirement.

One commenter suggested additional language for § 1228.104(a) to specify that accidental destruction or alteration must also be reported and to require agencies to report salvage actions. We have incorporated those changes.

One commenter objected to the provisions of § 1228.76 regarding loans of permanent or unscheduled records. However, the alternatives the commenter proposed—inclusion in the records schedule of the location of all permanent records or preparation of a records preservation plan—would impose an additional requirement on all agencies. Section 1228.76 will apply infrequently, as few agencies loan records under the conditions covered by this requirement. We have, therefore, retained the requirement.

We have added a clarifying statement to § 1228.50 to specify that records schedules must be applied retroactively to all existing records described on the schedule. We have corrected the authority statement for § 1228.70 based on recommendations from our legal

office. We have modified § 1228.54, Temporary extension of retention periods, to provide automatic concurrence when the extension results from a court order. In such cases, agencies will be required to submit a report. We also modified §§ 1228.54 and 1228.164, Disposal clearances for records in Federal records centers, to distinguish between extended retention of whole series of records and extended retention of a particular collection of records in one location.

Derivation Table

Because of the reorganization of part 1228, NARA is providing the following derivation table to assist users of this regulation. A more complete derivation table summarizing the changes being made in part 1228 was published as part of the proposed rule at 54 FR 51769.

DERIVATION TABLE

New section	Old section
1228.1	1228.1
1228.10	1228.10
1228.12	1228.12
1228.20(a)	1228.30
1228.20(b)	1228.60
1228.22	1228.12
1228.22(a)	
1228.22(b)	1228.12(a)
1228.22(c)	
1228.22(d)	1228.12(b)
1228.22(e)	1228.12(c)
1228.22(f)	1228.12(d)
1228.24(a)	1228.20(a)
1228.24(b)	1228.20(b)
1228.24(b)(1)	1228.20(b)(1)
1228.24(b)(2)	1228.20(b)(3)
1228.24(b)(3)	1228.20(b)(4)
1228.24(b)(4)	1228.20(b)(5)
1228.24(c)	1228.20(c)
1228.26(a)	
1228.26(a)(1)	1228.20(b)
1228.26(a)(2)	1228.20(b)(6)
1228.26(b)	1228.20(d)
1228.26(c)	1228.20(e)
1228.28(a)	
1228.28(b)(1)	
1228.28(b)(2)	
1228.28(b)(3)	
1228.28(b)(4) through (b)(7)	1228.32(b)
1228.28(b)(8)(i)	1228.32(c)
1228.28(b)(8)(ii)	1228.32(d)
1228.28(c)	1228.34(a)
1228.28(c)(1)	1228.34(b)
1228.28(c)(2)	1228.34(c)
1228.30(a)	
1228.30(b)	
1228.30(c)	1228.34(d)
1228.30(d)	1228.64
1228.30(e)	
1228.32	1228.70
1228.40	1228.22
	1228.22(a)(1) and
	1228.22(a)(2)
1228.42(a)	1228.22(a)(3)
1228.42(b)	1228.22(a)(4)
1228.42(c)	1228.22(a)(5)
1228.44	1228.22(b)
1228.46	1228.22(c)
1228.50	1228.22(h) and
	1228.68
1228.50(a)	