additional contributions described in § 1.401(a)(4)–8(b)(3)(v)) as of that determination date (i.e., the actuarial present value of the level contributions due for each plan year through the end of the plan year in which the employee attains normal retirement age). This calculation is made assuming that the required contribution in each future year will be equal to the required contribution for the plan year that includes that determination date, and applying the interest rate that was used in determining that required contribution.

(iii) Determine the excess, if any, of the amount determined in paragraph (e)(1)(i) of this section over the amount determined in paragraph (e)(1)(ii) of this section. This excess is the employee's theoretical reserve on that determination date.

(2) *Example.* The following example illustrates the determination of an employee's theoretical reserve.

Example. (a) A target benefit plan was adopted and in effect before September 19, 1991, and satisfied the requirements of Rev. Rul. 76–464, 1976–2 C.B. 115, with respect to all years credited under the stated benefit formula through 1993. The plan provides a stated benefit equal to 40 percent of compensation, payable annually as a straight life annuity beginning at normal retirement age. Normal retirement age under the plan is 65. The stated interest rate under the plan is six percent. The determination date for required contributions under the plan is the last day of the plan year. Employee M is 38 years old on the determination date for the 1993 plan year, has participated in the plan for five years, and has compensation equal to $60,000 in 1993. The amount of employer contribution to Employee M's account for 1993 was $2,468.

(b) Under these facts, Employee M's theoretical reserve is equal to $13,909, calculated as follows:

(1) The actuarial present value of Employee M's stated benefit is calculated using the actuarial assumptions, provisions of the plan and Employee M's compensation as of the determination date for the 1993 plan year. This amount is equal to $46,512, Employee M's stated benefit of $24,000 ($60,000 multiplied by 40 percent), multiplied by 1.938, the actuarial present value factor applicable to a participant who is 38 years old using a stated interest rate of six percent.

(2) The actuarial present value of future employer contributions is calculated assuming that the required contribution in each future year will be equal to the required contribution for the 1993 plan year and assuming the same interest rate as was used in determining that contribution. This amount is equal to $32,603, which is equal to the amount of the level annual employer contribution ($2,468) multiplied by a factor of 13.2105 (the temporary annuity factor for a period of 27 years, assuming the six percent interest rate that was used to determine the required employer contribution).

(3) Employee M's theoretical reserve is $13,909, the excess of the amount determined in paragraph (b)(1) of this *Example* over the amount determined in paragraph (b)(2) of this *Example*.

* * * * *

Par. 5. Section 1.411(d)–4 is amended by revising the sentence at the end of paragraph A–1(b)(1) to read as follows:

§ 1.411(d)–4 Section 411(d)(6) protected benefits.

* * * * *

A–1: * * *

(b) * * * (1) * * * See § 1.401(a)(4)–4(d) for the definition of an optional form of benefit for plan years beginning on or after January 1, 1994 (or January 1, 1996, in the case of plans maintained by organizations exempt from income taxation under section 501(a), including plans subject to section 403(b)(12)(A)(i) (nonelective plans)).

* * * * *

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: August 23, 1993.

Leslie Samuels,

Assistant Secretary of the Treasury.

[FR Doc. 93–21377 Filed 8–30–93; 2:23 pm]

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26 CFR Part 1

[T.D. 8486]

RIN 1545–AR53

Permitted Disparity With Respect to Benefits and Contributions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains amendments to the final regulations under section 401(l) of the Internal Revenue Code of 1986, which provides for permitted disparity in employer contributions to, and employer-provided benefits under, qualified plans. The regulations reflect changes made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. The regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans.

DATES: These regulations are effective January 1, 1994, and apply to plan years beginning on or after January 1, 1994, except as provided in the transition rules of § 1.401(l)–6.

FOR FURTHER INFORMATION CONTACT: Patricia McDermott at (202) 622–4606 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 19, 1991, final regulations under sections 401(a)(5) and 401(l) (T.D. 8359) were published in the **Federal Register** (56 FR 47610). In the **Federal Register** of August 10, 1992, (57 FR 35536), the Internal Revenue Service published proposed regulations to extend the effective date of the final regulations under section 401(a)(4), section 401(a)(5), section 401(l), and related regulations generally to plan years beginning on or after January 1, 1994.

On April 21, 1993, proposed regulations amending the final regulations were published in the **Federal Register** (58 FR 21426). Written comments were received from the public on the proposed regulations, and a public hearing was held on June 7, 1993. After consideration of all of the written comments received and the statements made at the public hearing, these regulations are adopted as modified by this Treasury decision.

Explanation of Provisions

1. Overview

Section 401(a)(4) requires that contributions or benefits not discriminate in favor of highly compensated employees. Section 401(a)(5) provides that a plan does not discriminate merely because the contributions or benefits under the plan bear a uniform relationship to compensation, taking into account the permitted disparity under section 401(l). The regulations under section 401(a)(4) provide certain safe harbor plan designs that use the permitted disparity under section 401(l).

The April 1993 proposed regulations amend the September 1991 regulations generally to address issues raised since the publication of the 1991 regulations. In addition, the proposed regulations make coordinating amendments to the September 1991 regulations under section 401(l) to take into account the changes proposed in the January 1993 proposed section 401(a)(4) regulations. Major changes in the proposed regulations include the following:

- Allowing a defined benefit plan that offsets an employee's benefit by a percentage of the employee's primary insurance amount (PIA offset plan) to satisfy section 401(l) if the offset is limited to the maximum offset permitted under section 401(l).
- Allowing application of the cumulative disparity limit on a formula-by-formula basis in the case of a defined benefit plan providing the greater of the

benefits under two formulas and allowing similar treatment in plan offset arrangements.

• Expanding the exception for optional forms of benefit subject to section 417(e) to allow the employer to use the same interest rates for all such forms.

• Allowing a plan to provide a qualified disability benefit within the meaning of section 411(a)(9) without having to use a reduced disparity rate.

In general, comments received on the changes contained in the proposed regulations were favorable. Accordingly, these final regulations incorporate those changes. In addition, in response to comments, certain modifications and clarifications have been made to the regulations. The more significant changes made in these final regulations are discussed below.

2. Overall Disparity

a. Background

Section 401(l) of the Code limits the disparity permitted with respect to any year of service and with respect to all years of service. The September 1991 regulations provide annual and cumulative overall permitted disparity limits, that is, limits on the disparity that can be provided to an employee for one year under more than one plan and for the employee's total years of service. For purposes of the overall disparity limits, all plans of the employer are taken into account. In addition, plans of another employer are taken into account for years of service with the other employer which are also credited by the current employer. The reason for taking the other employer's plan into account is to assure that the current employer does not duplicate the disparity provided for years of service with the other employer, thus exceeding the disparity limits.

The overall disparity limits are applied by determining an annual disparity fraction for the employee for each year of service under a plan, reflecting the portion of the disparity maximum used under the plan for that year. The cumulative disparity limit prohibits the sum of the employee's annual disparity fractions from exceeding 35. Generally, if a defined benefit plan provides a benefit equal to the greater of the benefits under two formulas, or if the benefits under the plan are offset by benefits under another defined benefit plan (offset arrangement), the annual disparity fraction for a given year is the larger of the fractions determined separately under each formula or under each plan in an offset arrangement. In addition, because of the difficulty in measuring the amount of disparity used prior to the 1989 effective date of section 401(l), the September 1991 regulations set the disparity fraction equal to one for any year of service before 1989.

b. Greater of Two Formulas

The proposed regulations provide a special rule under which a defined benefit plan providing the greater of the benefits under two or more formulas is deemed to satisfy the cumulative disparity limit if each formula separately satisfies the cumulative limit. In order to avoid the complexity of coordinating the annual disparity fractions under each formula with disparity provided under another plan, the special rule applies only if an employee never benefited under another plan using permitted disparity.

Commentators asked that the special rule be expanded to apply in the case where an employee has benefited under another plan using permitted disparity, but where neither plan provides service credit for the period of service credited under the other plan. (In the case of plans covering nonoverlapping years of service, the annual disparity fractions under each plan are determined without regard to the disparity provided under the other plan.) The final regulations expand the special rule to cover that case, provided that certain conditions are satisfied.

c. Mergers and Acquisitions

Commentators requested certain changes to the overall disparity rules when an employer acquires a business and gives the employees of that business credit under the employer's defined benefit plan for years of service with the business. Under the regulations, if the employees were credited with the same service under a plan of the previous owner of the business (previous owner's plan), that plan must be taken into account in applying the overall disparity limits.

Commentators asked that the provisions for applying the overall disparity limits in an offset arrangement be available when the new employer credits past service with the business and offsets benefits under its plan by the benefits accrued under the previous owner's plan. Commentators also asked that the overall disparity limits be applied to the current employer's plan without regard to any plan maintained by a previous owner because in many cases the current employer does not know the level of disparity provided in a previous owner's plan or even whether such a plan exists.

The final regulations change the rule for offset arrangements to apply to an offset by benefits under a previous owner's plan. However, the regulations do not allow a previous owner's plan to be disregarded in applying the overall disparity limits. The Treasury and the Service recognize that information on a previous owner's plan is not always available to the current employer. However, allowing the current plan to provide disparity for years of service with the previous owner, without regard to whether the previous owner's plan also provided disparity for those years, would be inconsistent with the statutory disparity limits. Moreover, as a result of the change noted above, the current employer can comply with the overall disparity limits by offsetting benefits under its plan by benefits under the previous owner's plan, thus avoiding in most cases the need to determine disparity fractions under the previous owner's plan, or by limiting the service taken into account under its plan to service after the date of acquisition.

d. Disparity Fraction for Pre-1989 Years

Commentators have stated that application of a disparity fraction of one for an employee's years of service before 1989 is inappropriate in the case of a new plan that applies a formula satisfying section 401(l) to all years of service because no other disparity has been provided for those years. The regulations clarify that the deemed one rule applies to plans in existence as of the end of the 1988 plan year. Thus, if, before the first plan year beginning on or after January 1, 1989, an employee never participated in or benefited under any other plan of the employer, the employee's total annual disparity fractions are determined under the generally applicable overall permitted disparity rules (and without regard to the deemed one rule).

3. Relationship to Other Requirements

The regulations provide that compliance with section 401(l) does not allow a plan to decrease any employee's accrued benefit in violation of section 411(d)(6) and section 411(b)(1)(G). Commentators requested removal of the reference in the proposed regulations to an increase in covered compensation as an example of a decrease in accrued benefit. They believe section 411 does not prohibit a decrease in accrued benefit resulting solely from an increase in covered compensation.

After considering the comments, the Treasury and the Service have determined that the regulations under section 401(l) are not the proper vehicle for addressing the correct application of

section 411 to this situation. Accordingly, the reference to an increase in covered compensation has been removed from the regulations, but no inference should be drawn from this revision as to the correct interpretation of section 411.

4. PIA Offset Safe Harbor

These regulations implement the PIA offset safe harbor described in Notice 92–32, 1992–2 C.B. 362. The regulations allow a PIA offset plan to satisfy section 401(l) (and thus to satisfy the nondiscriminatory amount requirement under section 401(a)(4) on a safe harbor basis) if the plan limits the offset to the maximum offset permitted under section 401(l) (the section 401(l) overlay), which is determined as a percentage of covered compensation rather than PIA.

Commentators asked that certain PIA offset plan designs be allowed to satisfy section 401(a)(4) on a safe harbor basis without having to apply the section 401(l) overlay. They stated that these plans (i.e., those with low offset percentages relative to the gross benefit) easily satisfy the general test for defined benefit plans under section 401(a)(4) and should be spared the necessity of actually performing the test.

The Treasury and the Service have carefully considered these comments regarding PIA offset plans, but believe that application of the section 401(l) overlay is essential to carrying out the statutory purpose of section 401(l) in a safe harbor context. In addition, the fact that such a plan passes the general test today does not ensure that it will pass in the future. Future changes in the relationship between covered compensation and PIA may change the results of the general test. Finally, the section 401(l) overlay eliminates the need to limit the PIA offset percentage to take into account early retirement benefits and other distribution alternatives under the plan, thus permitting the obsolescence of many revenue rulings issued under prior law. However, Rev. Rul. 84–45, 1984–1 C.B. 115, continues to apply in determining the compensation history on which an employee's PIA can be based.

Effective Dates

The regulations generally are effective for plan years beginning on or after January 1, 1994, or, in the case of plans maintained by tax-exempt organizations, for plan years beginning on or after January 1, 1996. For plan years beginning on or after January 1989, and before the applicable regulatory effective date, § 1.401(l)–6(c) provides that a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(l). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 401(l) will generally be determined based on all of the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 401(l) if it is operated in accordance with these final regulations, the April 1993 proposed regulations, the September 1991 regulations, the May 1990 proposed section 401(l) regulations, or the November 1988 proposed section 401(l) regulations.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these final regulations is Patricia McDermott of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.401(a)(5)–1 is amended by:

1. Removing paragraph (e)(7);

2. Redesignating paragraph (e)(8) as (e)(7);

3. Adding paragraph (h) to read as follows:

§ 1.401(a)(5)–1 Special rules relating to nondiscrimination requirements.

* * * * *

(h) *Effective date*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, this section is effective for plan years beginning on or after January 1, 1994.

(2) *Plans of tax-exempt organizations.* In the case of plans maintained by organizations exempt from income taxation under section 501(a), including plans subject to section 403(b)(12)(A)(i) (nonelective plans), this section is effective for plan years beginning on or after January 1, 1996.

(3) *Compliance during transition period.* For plan years beginning before the effective date of these regulations, as set forth in paragraphs (h)(1) and (h)(2) of this section, and on or after the first day of the first plan year to which the amendments made to section 401(a)(5) by section 1111(b) of the Tax Reform Act of 1986 (TRA '86) apply, a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(a)(5), taking into account pre-existing guidance and the amendments made by TRA '86 to related provisions of the Code. Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 401(a)(5) will generally be determined based on all of the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 401(a)(5) if it is operated in accordance with the terms of this section.

§ 1.401(l)–0 [Amended]

Par. 3. Section 1.401(l)–0 is amended by:

1. Removing the entries for § 1.401(l)–1, paragraphs (b) (1) and (2).

2. Revising the entry for § 1.401(l)–1, paragraph (c)(6).

3. Redesignating the entries for § 1.401(l)–1, paragraphs (c)(22) through (c)(24) and paragraphs (c)(25) through (c)(33), as § 1.401(l)–1, paragraphs (c)(23) through (c)(25) and (c)(27) through (c)(35) respectively.

4. Adding entries for § 1.401(l)–1, new paragraphs (c)(22) and (c)(26).

5. Adding entries for § 1.401(l)–3, paragraphs (c)(2)(vi) (A), (B) and (C), (c)(2)(ix), and (d)(8)(iii)(D).

6. Removing the entry for § 1.401(l)–3, paragraph (e)(4), and redesignating

the entries for § 1.401(l)–3, paragraphs (e)(5) and (e)(6), as § 1.401(l)–3, paragraphs (e)(4) and (e)(5), respectively.

7. Revising the entry for § 1.401(l)–3, paragraph (g).

8. Adding entries for § 1.401(l)–5, paragraphs (b)(5) (i) and (ii), (b)(8)(v), and (c)(1) (v) and (vi).

9. Removing the entries for § 1.401(l)–5, paragraphs (c)(3) (i) and (ii).

10. Redesignating the entry for § 1.401(l)–5, paragraph (c)(4), as § 1.401(l)–5, paragraph (c)(5).

11. Adding entries for § 1.401(l)–5, new paragraphs (c)(4), (c)(4)(i), (c)(4)(i)(A), (c)(4)(i)(B), (c)(4)(i)(C), (c)(4)(ii), (c)(4)(ii)(A), (c)(4)(ii)(B), and (c)(4)(ii)(C).

12. Revising the entries for § 1.401(l)–6, paragraphs (a) through (c).

13. Removing the entry for § 1.401(l)–6, paragraph (d).

14. The added and revised entries read as follows:

§ 1.401(1)–0 Table of contents.

* * * * *

§ 1.401(l)–1 Permitted disparity with respect to employer-provided contributions or benefits.

* * * * *

(c) * * *

(6) Benefit, right, or feature.

* * * * *

(22) Nonhighly compensated employee.

* * * * *

(26) PIA.

* * * * *

§ 1.401(l)–3 Permitted disparity for defined benefit plans.

* * * * *

(c) * * *

(2) * * *

(vi) * * *

(A) In general.

(B) Unit credit plans.

(C) Fractional accrual plans.

* * * * *

(ix) PIA offsets.

* * * * *

(d) * * *

(8) * * *

(iii) * * *

(D) Individual disparity reductions.

* * * * *

(g) No reductions in 0.75-percent factor for ancillary benefits.

* * * * *

§ 1.401(l)–5 Overall permitted disparity limits.

* * * * *

(b) * * *

(5) * * *

(i) In general.

(ii) PIA offset plans.

* * * * *

(8) * * *

(v) Fractional accrual plans.

* * * * *

(c) * * *

(1) * * *

(v) Applicable plan years.

(vi) Transition rule for defined contribution plans.

* * * * *

(4) Special rules for greater of formulas and offset arrangements.

(i) Greater of formulas.

(A) In general.

(B) Separate satisfaction by formulas.

(C) Single plan.

(ii) Offset arrangements.

(A) In general.

(B) Separate satisfaction by plans.

(C) No other plan.

* * * * *

§ 1.401(l)–6 Effective dates and transition rules.

(a) Statutory effective date.

(1) In general.

(2) Collectively bargained plans.

(b) Regulatory effective date.

(1) In general.

(2) Plans of tax-exempt organizations.

(3) Defined contribution plans.

(4) Defined benefit plans.

(c) Compliance during transition period.

§ 1.401(l)–1 [Amended].

Par. 4. Section 1.401(l)–1 is amended as follows:

1. The fourth sentence of paragraph (a)(1) is amended by removing the reference "1.401(a)(4)–2(b)(3)" and adding "1.401(a)(4)–2(b)(2)" in its place.

2. The last sentence of paragraph (a)(3) is removed.

3. Paragraph (b) is revised.

4. Paragraphs (c)(2), (c)(6), (c)(9), (c)(17)(i), (c)(19), and (c)(21) are revised.

5. Paragraphs (c)(22) through (c)(24) and paragraphs (c)(25) through (c)(33) are redesignated as (c)(23) through (c)(25) and (c)(27) through (c)(35) respectively, and new paragraphs (c)(22) and (c)(26) are added.

6. Newly designated paragraph (c)(35) is revised.

7. The additions and revisions read as follows:

§ 1.401(l)–1 Permitted disparity in employer-provided contributions or benefits.

* * * * *

(b) *Relationship to other requirements.* Unless explicitly provided otherwise, section 401(l) does not provide an exception to any other requirement under section 401(a). Thus, for example, even if the plan complies with section 401(l), the plan may not provide a benefit lower than the minimum benefit required under section 416. Moreover, a plan may not adjust benefits in any manner that results in a decrease in any employee's accrued benefit in violation of section 411(d)(6) and section 411(b)(1)(G). However, a plan does not fail to satisfy section 401(l) merely because, in order to ensure compliance with section 411, an employee's accrued benefit under the plan is defined as the greater of the employee's previously accrued benefit and the benefit determined under a strict application of the plan's benefit formula and accrual method. See section 401(a)(15) for additional rules relating to circumstances under which plan benefits may not be decreased because of increases in social security benefits.

(c) * * *

(2) *Average annual compensation. Average annual compensation* means average annual compensation within the meaning of § 1.401(a)(4)–3(e)(2).

* * * * *

(6) *Benefit, right, or feature. Benefit, right, or feature* means a benefit, right, or feature within the meaning of § 1.401(a)(4)–12. * * * * *

(9) *Defined contribution plan. Defined contribution plan* means a defined contribution plan within the meaning of § 1.410(b)–9. In addition, for purposes of §§ 1.401(l)–1 through 1.401(l)–6, a defined contribution plan includes a simplified employee pension as defined in section 408(k) (SEP), other than a SEP (or portion or a SEP) that is a salary reduction arrangement described in section 408(k)(6) (SARSEP).

* * * * *

(17) *Final average compensation*—(i) *In general. Final average compensation* for an employee means the average of the employee's annual section 414(s) compensation for the 3-consecutive-year period ending with or within the plan year or for the employee's period of employment if shorter. The year in which an employee terminates employment may be disregarded in determining final average compensation. The definition of final average compensation used in the plan must be applied consistently with respect to all employees. For example, if the plan provides that the year in which the employee terminates employment is disregarded in determining final average compensation, the year must be disregarded for all employees who terminate employment in that year. The plan may specify any 3-consecutive-year period ending in the plan year, provided the period is determined consistently for all employees. See § 1.401(a)(4)–11(d)(3)(iii) and § 1.414(s)–1(f) for rules permitting service and compensation with another employer to be taken into account for purposes of

nondiscrimination testing, including satisfying section 401(l).

* * * * *

(19) *Highly compensated employee. Highly compensated employee* means HCE within the meaning of § 1.401(a)(4)–12.

* * * * *

(21) *Nonexcludable employee. Nonexcludable employee* means nonexcludable employee within the meaning of § 1.401(a)(4)–12.

(22) *Nonhighly compensated employee. Nonhighly compensated employee* means NHCE within the meaning of § 1.401(a)(4)–12.

* * * * *

(26) *PIA. PIA* or *primary insurance amount* means the old-age insurance benefit under section 202 of the Social Security Act (42 U.S.C. 402) payable to each employee at a single age that is not earlier than age 62 and not later than age 65. PIA must be determined under the Social Security Act as in effect at the time the employee's offset is determined. Thus, it is determined without assuming any future increases in compensation, any future increases in the taxable wage base, any changes in the formulas used under the Social Security Act to determine PIA (for example, changes in the breakpoints), or any future increases in the consumer price index. However, it may be assumed that the employee will continue to receive compensation at the same rate as that received at the time the offset is being determined, until reaching the single age described in the first sentence of this paragraph (c)(26). PIA must be determined in a consistent manner for all employees and in accordance with revenue rulings or other guidance provided by the Commissioner.

* * * * *

(35) *Year of service. Year of service* means a year of service as defined in the plan for purposes of the benefit formula and the accrual method under the plan, unless the context clearly indicates otherwise. See § 1.401(a)(4)–11(d)(3) for rules on years of service that may be taken into account for purposes of nondiscrimination testing, including satisfying section 401(l).

§ 1.401(l)–2 [Amended]

Par. 5. Section 1.401(l)–2 is amended as follows:

1. The second sentence of paragraph (a)(1) is amended by removing the reference "1.401(a)(4)–2(b)(5)" and adding "1.401(a)(4)–2(b)(4)" in its place.

2. The third sentence of paragraph (a)(1) is amended by removing the reference "1.401(a)(4)–8(b)(3)(i)(E)" and adding "1.401(a)(4)–8(b)(3)(i)(C)" in its place.

§ 1.401(l)–3 [Amended]

Par. 6. Section 1.401(l)–3 is amended as follows:

1. The second sentence of paragraph (a)(1) is amended by removing the reference "1.401(a)(4)–3(b)(8)" and adding "1.401(a)(4)–3(b)(6)" in its place.

2. The third sentence of paragraph (a)(1) is amended by removing the reference "1.401(a)(4)–3(b)(7)(viii)" and adding "1.401(a)(4)–3(b)(5)(viii)" in its place.

3. The first sentence of paragraph (b)(4)(iii)(C) is amended by removing the reference "1.401(a)(4)–3(d)(5)(iv)" and adding "1.401(a)(4)–12" in its place.

4. Paragraph (b)(4)(iii)(E) is revised.

5. *Example 9* in paragraph (b)(5) is revised.

6. Paragraph (c)(2)(i) is amended by removing the reference "paragraphs (c)(2) (ii) through (viii)" and adding "paragraphs (c)(2) (ii) through (ix)" in its place.

7. Paragraph (c)(2)(ii) is amended by removing the reference "or 1.401(a)(4)–3(b)(5)(i)(B)".

8. Paragraph (c)(2)(iii) is amended by removing the reference "or 1.401(a)(4)–3(b)(5)(i)(B)".

9. Paragraph (c)(2)(vi) is revised.

10. Paragraph (c)(2)(ix) is added.

11. *Example 2* in paragraph (c)(3) is amended by removing the reference "1.401(a)(4)–3(b)(5)(i)(B)" and adding "1.401(a)(4)–3(b)(4)(i)(B)" in its place.

12. Paragraph (d)(8)(iii) introductory text is revised.

13. Paragraph (d)(8)(iii)(D) is added.

14. Paragraph (e)(1) is amended by removing the reference "(e)(4)" from the second sentence and adding "(g)" in its place and by removing the reference "(e)(5)" from the fourth sentence and adding "(e)(4)" in its place.

15. Paragraph (e)(4) is removed and paragraphs (e)(5) and (e)(6) are redesignated as paragraphs (e)(4) and (e)(5) respectively.

16. Newly designated paragraph (e)(4)(i) is amended by removing the reference "(e)(5)(ii)" and adding "(e)(4)(ii)" in its place.

17. Newly designated paragraph (e)(4)(ii) is amended by removing the reference "(e)(5)(ii)" and adding "(e)(4)(ii)" in its place.

18. *Example 6* in newly designated paragraph (e)(5) is amended by removing the phrase "(other than a temporary disability benefit)" from the seventh sentence.

19. Paragraphs (g) and (h) are revised.

20. The added and revised provisions read as follows:

§ 1.401(l)–3 Permitted disparity for defined benefit plans.

* * * * *

(b) * * *

(4) * * *

(iii) * * *

(E) *Section 417(e) exception.* A plan will not fail to satisfy this paragraph (b) merely because the disparity in a benefit that is subject to the interest rate restrictions of sections 401(a)(11) and 417(e) exceeds the maximum disparity that would otherwise be allowed under this paragraph (b) if the increase in disparity is required to satisfy § 1.417(e)–1(d). In applying the exception in this paragraph (b)(4)(iii)(E), for purposes of determining what is required under § 1.417(e)–1(d), a plan may use the rate described in § 1.417(e)–1(d)(2)(i) for all employees, without regard to whether the present value of an employee's vested benefit exceeds $25,000.

(5) * * *

Example 9. Plan U is a defined benefit excess plan that provides a normal retirement benefit of 1.0 percent of average annual compensation up to the integration level, plus 1.7 percent of average annual compensation in excess of the integration level, for each year of service up to 35, payable in the form of a straight life annuity. Plan U provides a single sum optional form of benefit at normal retirement age equal to 100 times the monthly annuity payable at that age. Thus, if an employee elects the single sum optional form of benefit, the base portion of the single sum benefit is 8.33 percent (100 times 1.0 percent/12) of average annual compensation up to the integration level per year of service, and the excess portion of the single sum benefit is 14.17 percent (100 times 1.7 percent/12) of average annual compensation in excess of the integration level per year of service. Each respective portion of the single sum option is normalized to a straight life annuity commencing at normal retirement age, using 8-percent interest and the UP–84 mortality table. After normalization, the base portion of the benefit is 1.02 percent of average annual compensation up to the integration level, and the excess portion of the benefit is 1.73 percent of average annual compensation in excess of the integration level. The single sum optional form of benefit satisfies this paragraph (b) because the disparity provided in the optional form of benefit does not exceed the maximum excess allowance.

(c) * * *

(2) * * *

(vi) *Overall permitted disparity*—(A) *In general.* The benefit formula provides that, with respect to each employee's years of service after reaching the cumulative permitted disparity limit applicable to the employee under § 1.401(l)–5(c), employer-provided benefits are determined with respect to the employee's total average annual

compensation at a rate equal to the nondisparate percentage. For purposes of this paragraph (c)(2)(vi), the nondisparate percentage is generally the excess benefit percentage or gross benefit percentage otherwise applicable under the benefit formula to an employee with the same number of years of service.

(B) *Unit credit plans.* In the case of a unit credit plan described in § 1.401(a)(4)–3(b)(3), if the 411(b)(1)(B) limit percentage is less than the nondisparate percentage, the 411(b)(1)(B) limit percentage must be substituted for the nondisparate percentage. For this purpose, the 411(b)(1)(B) limit percentage is 133⅓ percent of the smallest base benefit percentage, or 133⅓ percent of the smallest difference between the gross benefit percentage and the offset percentage, whichever is applicable, where the smallest base benefit percentage or difference is determined by reference to the benefit formula as applied to employees with no more years of service than the employee.

(C) *Fractional accrual plans.* In the case of a fractional accrual plan described in § 1.401(a)(4)–3(b)(4), the benefit formula must provide for the nondisparate percentage with respect to years of service after the employee would reach the cumulative permitted disparity limit applicable to the employee under § 1.401(l)–5(c) as modified by this paragraph (c)(2)(vi)(C). Solely for purposes of this paragraph (c)(2)(vi)(C), the employee's annual disparity fractions (and thus the year in which the employee would reach the cumulative permitted disparity limit) are determined using the disparity provided under the benefit formula (rather than the special rule for fractional accrual plans in § 1.401(l)–5(b)(8)(v)).

* * * * *

(ix) *PIA offsets.* In the case of an offset plan, the plan provides that the offset applied to each employee's benefit is the lesser of a specified percentage of the employee's PIA and an offset that otherwise satisfies the requirements of this section (the "section 401(l) overlay"). The specified percentage of PIA must be the same for all employees with the same number of years of service. In the case of a plan that determines each employee's accrued benefit under the fractional accrual method of section 411(b)(1)(C), the specified percentage of PIA is deemed to be the same for all employees with the same number of years of service if the plan satisfies either of the deemed uniformity rules in paragraph (c)(2)(ii) or (iii) of this section, substituting "offset, expressed as a percentage of PIA, per year of service" for the term "offset percentage" (in addition to satisfying either of those rules with respect to the section 401(l) overlay).

* * * * *

(d) * * *

(8) * * *

(iii) *Nondiscrimination requirement.* The requirement of this paragraph (d)(8)(iii) is satisfied only if at least one of the following tests in paragraphs (d)(8)(iii) (A) through (D) of this section is satisfied.

* * * * *

(D) *Individual disparity reductions.* This test is satisfied only if the plan is an offset plan that uses an offset level of each employee's final average compensation and makes individual disparity reductions as permitted under paragraph (d)(9)(iii)(B) of this section.

* * * * *

(g) *No reductions in 0.75-percent factor for ancillary benefits.* For purposes of applying the maximum excess allowance or the maximum offset allowance under paragraph (b)(2) or (3) of this section, no reduction is made to the 0.75-percent factor merely because the plan provides disparity in qualified disability benefits (within the meaning of section 411(a)(9)) or preretirement death benefits and the relevant benefits are payable before an employee's social security retirement age.

(h) *Benefits attributable to employee contributions not taken into account.* Benefits attributable to employee contributions to a defined benefit plan are not taken into account in determining whether the disparity provided under a defined benefit excess plan or an offset plan exceeds the maximum permitted disparity described in paragraph (b) of this section. See § 1.401(a)(4)–6(b) for methods of determining the employer-provided benefit under a plan that includes employee contributions not allocated to separate accounts (i.e., a contributory DB plan), including § 1.401(a)(4)–6(b)(2)(iii)(B) for adjustments to the base and excess benefit percentages or the gross benefit percentage under a section 401(l) plan. If, after adjustment, the employee's base benefit percentage or gross benefit percentage (whichever is applicable) is less than zero, such percentage is deemed to be zero for purposes of the maximum excess allowance or maximum offset allowance under paragraph (b)(2) or (3) of this section.

* * * * *

§ 1.401(l)–5 [Amended]

Par. 7. Section 1.401(l)–5 is amended as follows:

1. Paragraph (b)(5) is revised.

2. Paragraph (b)(8)(iii)(A) is revised by removing the words "of the employer" and adding "taken into account under paragraph (a)(3) of this section as" in their place.

3. Paragraph (b)(8)(v) is added.

4. Paragraphs (c)(1) (i) through (iii) are revised and new paragraphs (c)(1) (v) and (vi) are added.

5. Paragraph (c)(2) is amended by removing the reference "(b)(3)" and adding "(b)(2)" in its place.

6. Paragraph (c)(3) is revised.

7. Paragraph (c)(4) is redesignated as paragraph (c)(5) and a new paragraph (c)(4) is added.

8. Newly designated paragraph (c)(5) is amended by removing the language "paragraph (b)(2) or (b)(3) of this section" from the third sentence and adding "§ 1.401(l)–3(b) (2) or (3)" in its place and by adding a new *Example 5.*

9. The added and revised provisions read as follows:

§ 1.401(l)–5 Overall permitted disparity limits.

* * * * *

(b) * * *

(5) *Annual offset plan disparity fraction*—(i) *In general.* For a plan year, the annual offset plan disparity fraction for an employee benefiting under an offset plan that is a section 401(l) plan is a fraction—

(A) The numerator of which is the disparity provided under the plan for the plan year; and

(B) The denominator of which is the maximum offset allowance under § 1.401(l)–3(b)(3) for the plan year.

(ii) *PIA offset plans.* In the case of an offset plan that applies an offset of a specified percentage of the employee's PIA, as permitted under § 1.401(l)–3(c)(2)(ix), the numerator of the annual offset plan disparity fraction is the offset percentage used in the section 401(l) overlay under the plan.

* * * * *

(8) * * *

(v) *Fractional accrual plans.* If a section 401(l) plan determines each employee's accrued benefit under the fractional accrual method of section 411(b)(1)(C), the numerator of an employee's annual disparity fraction is based on the disparity provided in the benefit accrued for the employee for the plan year.

* * * * *

(c) *Cumulative permitted disparity limit*—(1) *In general*—(i) *Employees who benefit under defined benefit plans.* In

the case of an employee who has benefited under one or more defined benefit plans for a plan year described in paragraph (c)(1)(v) of this section, the cumulative permitted disparity limit is satisfied if the employee's cumulative disparity fraction, as defined in paragraph (c)(2) of this section, does not exceed 35.

(ii) *Employees who do not benefit under defined benefit plans.* In the case of an employee who has not benefited under a defined benefit plan for any plan year described in paragraph (c)(1)(v) of this section, the cumulative permitted disparity limit is satisfied.

(iii) *Certain plan years disregarded.* For purposes of this paragraph (c), an employee is not treated as benefiting under a defined benefit plan for a plan year described in paragraph (c)(1)(v) of this section if the employer can establish that for that plan year the defined benefit plan was not a section 401(l) plan and did not impute permitted disparity under § 1.401(a)(4)–7.

* * * * *

(v) *Applicable plan years.* In applying paragraphs (c)(1) (i), (ii), and (iii) of this section, for purposes of determining whether an employee benefits under a defined benefit plan, the applicable plan years are all plan years that begin on or after the regulatory effective date, as set forth in § 1.401(l)–6(b), or, in the case of governmental plans, as set forth in § 1.401(a)(4)–13(b).

(vi) *Transition rule for defined contribution plans.* A defined contribution plan is deemed to satisfy the cumulative permitted disparity limit for the first plan year to which these regulations apply, as set forth in § 1.401(l)–6(b), or, in the case of governmental plans, as set forth in § 1.401(a)(4)–13(b).

* * * * *

(3) *Determination of total annual disparity fractions for prior years.* For each of the employee's years of service credited as of the end of the last plan year beginning before January 1, 1989, not to exceed 35, under all plans as of that time that are taken into account under paragraph (a)(3) of this section (whether or not terminated), the employee's total annual disparity fraction is one. Therefore, if, before the first plan year beginning on or after January 1, 1989, an employee never participated in or benefited under any plan taken into account under paragraph (a)(3) of this section, the employee's total annual disparity fractions are determined without regard to this paragraph (c)(3). An employer may apply the rule in this paragraph (c)(3) with respect to all employees, using a year (including the current year) that is chosen by the employer and is later than 1989. Thus, for example, in lieu of calculating annual disparity fractions for all plan years, the employer may assume that the full disparity limit has been used in each prior plan year for which an employee has been credited with a year of service.

(4) *Special rules for greater of formulas and offset arrangements*—(i) *Greater of formulas*—(A) *In general.* A defined benefit plan that is a section 401(l) plan and that provides a benefit equal to the greater of the benefits determined under two or more formulas is deemed to satisfy the cumulative permitted disparity limit with respect to an employee if each of the requirements in paragraphs (c)(4)(i) (B) and (C) of this section is satisfied. For this purpose, a plan that uses a fresh-start formula that determines the accrued benefit as the greater of two amounts under § 1.401(a)(4)–13(c)(4) (ii) or (iii) provides a benefit equal to the greater of the benefits determined under two or more formulas.

(B) *Separate satisfaction by formulas.* Each formula under the plan would satisfy the cumulative permitted disparity limit if it were the only formula under the plan. In the case of a current formula that applies to the employee's total years of service (as, for example, under § 1.401(a)(4)–13(c)(4) (ii)(B) or (iii)(B)), for purposes of determining whether that formula would satisfy the cumulative permitted disparity limit if it were the only formula under the plan, the special rule for prior years under paragraph (c)(3) of this section may be disregarded.

(C) *Single plan.* The employee has never benefited under another plan taken into account under paragraph (a)(3) of this section that is a section 401(l) plan or that satisfies section 401(a)(4) by relying on § 1.401(a)(4)–7. For this purpose, if the benefit under the plan is offset in an offset arrangement described in paragraph (b)(8)(iii)(B) of this section, the other plan is disregarded. In addition, a plan does not fail the requirements of this paragraph (c)(4)(i)(C) merely because the employee benefits under another defined benefit plan, provided that—

(*1*) With respect to each benefit formula under the plan, no years of service taken into account under that benefit formula are taken into account under a benefit formula of the other plan; and

(*2*) Paragraph (c)(4)(i)(B) of this section would be satisfied if the plans were treated as a single plan that provided a benefit equal to the greater of the benefits provided under two or more formulas. For this purpose, a formula consists of the sum of a formula for the years of service taken into account under one plan and a formula for the years of service taken into account under the other plan. Thus, each possible combination of the formulas under the plans must satisfy paragraph (c)(4)(i)(B) of this section.

(ii) *Offset arrangements*—(A) *In general.* If a defined benefit plan is a section 401(l) plan and the benefit under the plan (the gross benefit plan) is offset by the benefit under another plan (the offsetting plan) in an offset arrangement described in paragraph (b)(8)(iii)(B) of this section, the gross benefit plan is deemed to satisfy the cumulative permitted disparity limit with respect to an employee if each of the requirements in paragraphs (c)(4)(ii) (B) and (C) of this section is satisfied.

(B) *Separate satisfaction by plans.* This requirement is satisfied if the gross benefit plan would satisfy the cumulative disparity limit if no offset applied, and the offsetting plan satisfies the cumulative permitted disparity limit, not taking into account the gross benefit plan.

(C) *No other plan.* Except for the plans in the offset arrangement, the employee has never benefited under another plan taken into account under paragraph (a)(3) of this section that is a section 401(l) plan or that satisfies section 401(a)(4) by relying on § 1.401(a)(4)–7. An offset arrangement does not fail the requirements of this paragraph (c)(4)(ii)(C) merely because the employee benefits under another defined benefit plan, provided no years of service taken into account under a benefit formula of any plan in the offset arrangement are also taken into account under a benefit formula of the other plan.

(5) * * *

Example 5. (a) Plan O is a noncontributory defined benefit excess plan. Plan O provides an employee whose social security retirement age is 65 with the greater of the benefits determined under two formulas. The first formula provides a benefit of 1 percent of average annual compensation up to covered compensation, plus 1.75 percent of average annual compensation above covered compensation, for each year of service up to 35. The second formula provides a benefit of 1 percent of average annual compensation up to covered compensation, plus 1.6 percent of average annual compensation above covered compensation, for each year of service up to 40.

(b) Under paragraph (b)(4) of this section, an employee's annual defined benefit excess plan fraction for each of the 35 years under the first formula is 0.75/0.75 or one, and an employee's annual defined benefit excess

plan fraction for each of the 40 years under the second formula is 0.6/0.75 or 0.8. Under paragraph (b)(8)(ii) of this section, an employee's annual defined benefit excess plan fraction (and total annual disparity fraction because the employee benefits only under Plan O) for the plan year is the larger fraction under the two formulas or one. Therefore, after 35 years, the employee has a cumulative disparity fraction of 35. The disparity provided under the second formula for years of service after 35 thus exceeds the cumulative permitted disparity limit unless the plan qualifies for the special rule in paragraph (c)(4)(i) of this section.

(c) Assume the condition in paragraph (c)(4)(i)(C) of this section is satisfied because no employee has benefited under another plan taken into account under paragraph (a)(3) of this section. In addition, the largest cumulative disparity fraction possible under the first formula is 35 times one or 35, and the largest cumulative disparity fraction possible under the second formula is 40 times 0.8 or 32. Thus, the requirement of paragraph (c)(4)(i)(B) of this section is also satisfied because each formula would satisfy the cumulative permitted disparity limit if it were the only formula under the plan. Under paragraph (c)(4)(i) of this section, the plan is deemed to satisfy the cumulative permitted disparity limit with respect to an employee whose social security retirement age is 65.

* * * * *

Par. 8. Section 1.401(l)–6 is revised to read as follows:

§1.401(l)–6 Effective dates and transition rules.

(a) *Statutory effective date*—(1) *In general.* Except as otherwise provided in paragraph (a)(2) of this section, section 401(a)(5)(C) is effective for plan years beginning on or after January 1, 1989, and section 401(l) is effective with respect to plan years, and benefits attributable to plan years, beginning on or after January 1, 1989. The preceding sentence is applicable to a plan without regard to whether the plan was in existence as of a particular date.

(2) *Collectively bargained plans.* (i) In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before March 1, 1986, sections 401(a)(5) and 401(l) are applicable for plan years beginning on or after the later of—

(A) January 1, 1989; or

(B) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension of any such agreement occurring on or after March 1, 1986). However, notwithstanding the preceding sentence, sections 401(a)(5) and 401(l) apply to plans described in this paragraph (a)(2) no later than the first plan year beginning after January 1, 1991.

(ii) For purposes of paragraph (a)(2)(i)(B) of this section, a change made after October 22, 1986, in the terms or conditions of a collectively bargained plan, pursuant to a collective bargaining agreement ratified before March 1, 1986, is not treated as a change in the terms and conditions of the plan.

(iii) In the case of a collectively bargained plan described in paragraph (a)(2)(i) of this section, if the date in paragraph (a)(2)(i)(B) of this section precedes November 15, 1988, then the date in this paragraph (a)(2) is replaced with the date on which the last of any collective bargaining agreements in effect on November 15, 1988, terminates, provided that the plan complies during this period with a reasonable good faith interpretation of section 401(l).

(iv) Whether a plan is maintained pursuant to a collective bargaining agreement is determined under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 266 (1974). In addition, a plan is not treated as maintained under a collective bargaining agreement unless the employee representatives satisfy section 7701(a)(46) of the Internal Revenue Code after March 31, 1984. See § 301.7701–17T of this chapter for other requirements for a plan to be considered to be collectively bargained.

(b) *Regulatory effective date*—(1) *In general.* Except as otherwise provided in paragraph (b)(2) of this section, §§ 1.401(l)–1 through 1.401(l)–6 apply to plan years beginning on or after January 1, 1994.

(2) *Plans of tax-exempt organizations.* In the case of plans maintained by an organization exempt from income taxation under section 501(a), including plans subject to section 403(b)(12)(A)(i) (nonelective plans), §§ 1.401(l)–1 through 1.401(l)–6 apply to plan years beginning on or after January 1, 1996.

(3) *Defined contribution plans.* A defined contribution plan satisfies section 401(l) with respect to a plan year beginning on or after the effective date of these regulations, as set forth in paragraphs (b)(1) and (b)(2) of this section, if it satisfies the applicable requirements of §§ 1.401(l)–1 through 1.401(l)–5 for the plan year.

(4) *Defined benefit plans.* A defined benefit excess plan or offset plan satisfies section 401(l) with respect to all plan years, and benefits attributable to all plan years, beginning on or after the effective date of these regulations, as set forth in paragraphs (b)(1) and (b)(2) of this section, by satisfying the applicable requirements of §§ 1.401(l)–1 through 1.401(l)–5 and the requirements of § 1.401(a)(4)–13(c) (and § 1.401(a)(4)–13(d), if applicable), using a fresh-start date that is on or after December 31, 1988, and before the effective date of these regulations. A defined benefit excess plan or offset plan that does not satisfy section 401(l) with respect to all plan years beginning on or after the effective date of these regulations may, under the rules of § 1.401(a)(4)–13(c) (and § 1.401(a)(4)–13(d), if applicable), satisfy section 401(l) for plan years beginning after a fresh-start date by satisfying the applicable requirements of §§ 1.401(l)–1 through 1.401(l)–5 after the fresh-start date.

(c) *Compliance during transition period.* For plan years beginning on or after January 1, 1989, and before the effective date of these regulations, as set forth in paragraph (b) of this section, a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(l). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 401(l) will generally be determined based on all of the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 401(*l*) if it is operated in accordance with the terms of §§ 1.401(*l*)–1 through 1.401(*l*)–5.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: August 23, 1993.

Leslie Samuels,

Assistant Secretary of the Treasury.

[FR Doc. 93–21378 Filed 8–31–93; 4:02 pm]

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26 CFR Part 1

[T.D. 8487]

RIN 1545–AR51

Minimum Coverage Requirements

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains amendments to the final regulations under section 410(b), which provides minimum coverage requirements. The regulations reflect changes made by the Tax Reform Act of 1986 and by the Technical and Miscellaneous Revenue Act of 1988. The regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement

plans and certain other employee benefit plans.

DATES: These regulations are effective January 1, 1994, and apply to plan years beginning on or after January 1, 1994, except as provided in the transition rules of § 1.410(b)–10.

FOR FURTHER INFORMATION CONTACT: Dave Munroe at (202) 622–4606 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On September 19, 1991, final regulations under section 410(b) (T.D. 8363) were published in the **Federal Register** (56 FR 47638). Amendments to those regulations were published in the **Federal Register** on December 4, 1991 (56 FR 63420), in connection with finalizing the separate line of business regulations (T.D. 8376) under section 414(r) of the Code. In the **Federal Register** of August 10, 1992 (57 FR 35536), the Internal Revenue Service published proposed regulations to extend the effective date of the final regulations under section 410(b) and related regulations generally to plan years beginning on or after January 1, 1994.

On April 21, 1993, proposed regulations amending the final regulations were published in the **Federal Register** (58 FR 21417). Written comments were received from the public on the proposed regulations, and a public hearing was held on June 7, 1993. After consideration of all of the written comments received and the statements made at the public hearing, these regulations are adopted as modified by this Treasury decision.

Explanation of Provisions

1. Overview

Section 410(b) provides a minimum coverage requirement that a plan must meet in order to be tax qualified. In addition, the minimum coverage requirement is also relevant under the related section 401(a)(4) regulations in determining whether certain requirements of those regulations are satisfied.

The September 1991 final regulations under section 410(b) provide that a plan can meet the section 410(b) minimum coverage requirement by satisfying one of two tests, the section 410(b)(1) (A) and (B) ratio percentage test or the section 410(b)(2) average benefit test. To satisfy the ratio percentage test for a plan year, a plan must have a ratio percentage of at least 70 percent. A plan's ratio percentage is the percentage of the employer's nonhighly compensated employees who benefit under the plan divided by the percentage of the employer's highly compensated employees who benefit under the plan.

To satisfy the average benefit test, two requirements must be met—the nondiscriminatory classification test of section 410(b)(2)(A)(i) and the average benefit percentage test of section 410(b)(2)(A)(ii). The nondiscriminatory classification test requires a plan to benefit employees who qualify under a reasonable employer-determined classification that does not discriminate in favor of highly compensated employees. The average benefit percentage test requires that the average of the employee benefit percentages for nonhighly compensated employees be at least 70 percent of the average of the employee benefit percentages for highly compensated employees, generally taking into account all the plans of the employer.

The April 1993 regulations proposed to amend the September 1991 regulations generally to simplify them and to address other issues raised since the publication of those regulations. In addition, the proposed regulations make coordinating amendments to the September 1991 regulations under section 410(b) to take into account the changes proposed in the January 1993 proposed section 401(a)(4) regulations. Major changes in the April 1993 proposed regulations include the following:

- Replacing the rules for the average benefit percentage test in their entirety with less detailed rules that coordinate the determination of these percentages with the determination of accrual rates under the section 401(a)(4) regulations.
- Replacing objective testing of coverage of former employees with a flexible facts-and-circumstances analysis.
- Expanding the situations where employees in a multiemployer plan may continue to be treated as collectively bargained employees after they have switched from collectively bargained to noncollectively bargained status.
- Providing that the portion of a plan benefiting employees who have not satisfied the greatest permissible minimum age and service conditions may be disaggregated for purposes of the average benefit percentage test.

In general, comments received on the changes in the proposed regulations were favorable. Accordingly, these final regulations incorporate those changes. In addition, in response to comments, certain modifications have been made to further simplify and increase flexibility in compliance alternatives. The more significant changes made in these final regulations are discussed below.

2. Special Multiemployer Plan Rules

The September 1991 regulations provide that a plan benefiting both collectively bargained employees (as defined in the regulations) and noncollectively bargained employees is treated as two separate plans for section 410(b) purposes. The portion of the plan benefiting collectively bargained employees is deemed to satisfy the section 401(a)(4) and section 410(b) requirements automatically. In testing the portion of the plan benefiting noncollectively bargained employees, all collectively bargained employees are treated as excludable.

The April 1993 proposed regulations contain several special rules that allow noncollectively bargained employees in a multiemployer plan who were formerly collectively bargained employees to continue to be treated as collectively bargained employees. These rules represent an exception to the general requirement that benefits provided to noncollectively bargained employees be tested under sections 401(a)(4) and 410(b).

In view of the practical problems for plan trustees in identifying and accounting for noncollectively bargained employees of different employers, one of the special rules in the proposed regulations permits formerly collectively bargained employees to continue to be treated as collectively bargained employees indefinitely. This exception applies only if no more than two percent of the employees covered under the multiemployer plan are in this category and the terms of the plan providing for benefit accruals treat those employees in the same manner as similarly situated employees who are collectively bargained. In addition, in order to use this special alumni rule, the employees treated as collectively bargained must be performing services for one or more employers that are parties to the collective bargaining agreement.

The Treasury and the Service believe that this exception for alumni is appropriate only if those noncollectively bargained employees represent a limited percentage of the multiemployer plan's population. However, commentators on the April 1993 regulations requested that the two-percent limit for the alumni rule be expanded to make this exception available to additional multiemployer plans. After weighing both the practical concerns expressed by the commentators and the importance of limiting this exemption from

nondiscrimination testing (which could apply for an indefinite period of time), the Treasury and the Service have increased the percentage from two percent to five percent. In addition, it is anticipated that guidance on data collection and testing will be provided for multiemployer plans in the revenue procedure on substantiating compliance (proposed in Announcement 92–81, 1992–22 I.R.B. 56) when that document is finalized shortly.

In response to comments, these regulations also liberalize and clarify the special multiemployer plan rules in a number of respects. For example, certain of the rules are conditioned on the noncollectively bargained employees being treated under the plan in the same manner as similarly situated collectively bargained employees. These regulations require only that the noncollectively bargained employees be treated in a manner that is generally no more favorable than similarly situated collectively bargained employees and clarify that only the terms of the plan providing for benefit accruals must treat the noncollectively bargained employees in this manner. Thus, for example, differences in vesting that may arise because the noncollectively bargained employees are subject to different statutory vesting schedules than collectively bargained employees will not prevent a multiemployer plan from using the special rules. These regulations also make clear that these special rules apply if the employee performs services for the plan or for the employee representative. In addition, among other clarifications, these regulations provide that the term "collective bargaining agreement" as used in these rules includes any successor agreement.

3. Employees Benefiting Under a Plan

The regulations generally provide that an employee is treated as benefiting under a defined benefit plan for a plan year only if there is an increase in the employee's accrued benefit. In response to comments, a revision has been made to these regulations that is intended to clarify that increases in the dollar amount of the accrued benefit merely because of the passage time or because of a change in indices affecting the accrued benefit do not cause an employee to be treated as benefiting.

The regulations provide that in certain situations, however, an employee in a defined benefit plan will be treated as benefiting for a plan year even though the employee does not receive an accrual for the plan year. One of these situations is where an employee's accrued benefit would have increased if a previously accrued benefit were disregarded, such as where the plan utilizes a "wear-away" formula. The regulations include an increase in covered compensation or a decrease in the employee's compensation for the plan year as further examples of situations where this might occur. These examples have been eliminated in order to remove any possible inference concerning the proper interpretation of section 411(d)(6) or section 411(b)(1)(G) in these situations, but no inference should be drawn from this revision as to the correct interpretation of section 411.

4. Employees Transferring Between Plans That Are Mandatorily Disaggregated

The regulations require that certain plans be mandatorily disaggregated and treated as separate plans for purposes of section 410(b). Among the situations in which a plan must be disaggregated are those in which a plan benefits employees of different qualified separate lines of business, employees of more than one employer, or both collectively bargained and noncollectively bargained employees. Questions have arisen regarding the treatment of employees who change from being tested under one portion of a disaggregated plan to another portion of the disaggregated plan due to a change in status. To address these questions, proposed amendments to the mandatory disaggregation rules will be published in the proposed qualified separate line of business regulations, rather than in these final regulations.

5. Governmental Plans

Under the regulations, a plan that benefits employees of more than one employer (treating all members of a controlled group of employers under section 414 as a single employer) is treated as consisting of separate plans, each of which is maintained by a separate employer. Each of these plans must satisfy coverage and test for nondiscrimination with reference only to the applicable employer's employees.

Some commentators have requested, in the absence of specific controlled group rules applicable to governmental entities, that they be permitted to treat all federal instrumentalities as a single employer and, thus, test a plan benefiting employees of more than one federal instrumentality on a plan-wide basis. The commentators note that such plan-wide testing would simplify compliance and reduce additional administrative costs for plans sponsored by federal instrumentalities.

Under a special transition rule, governmental plans described in section 414(d) are deemed to satisfy the regulations under section 401(a)(4), section 410(b) and related nondiscrimination requirements generally for plan years beginning before 1996. A principal purpose of the transition rule is to provide the Treasury and the Service additional time to receive comments from governmental employers regarding appropriate modifications to the regulations to take into account the special circumstances of governmental plans. Consequently, treating federal instrumentalities as members of a controlled group will be considered, together with other comments received on the unique features of governmental plans, in developing future appropriate modifications to the regulations for governmental plans.

6. Changes to Minimum Participation Requirements

These regulations finalize the effective date change for governmental plans and certain 403(b) annuities under § 1.401(a)(26)–9(b)(1) that was proposed in August, 1992. In addition, they conform the language in the special testing rule in § 1.401(a)(26)–1(b)(4) for section 401(k) plans maintained by certain governmental or tax-exempt entities to the corresponding language used for such plans under the excludable employee rules in § 1.410(b)–6(g) of the regulations.

Effective Dates

The regulations generally are effective for plan years beginning on or after January 1, 1994, or, in the case of governmental plans and plans maintained by tax-exempt organizations, for plan years beginning on or after January 1, 1996. For plan years beginning on or after the first day of the first plan year to which the amendments made by section 1112(a) of the Tax Reform Act of 1986 (TRA '86) apply and before the applicable regulatory effective date, § 1.410(b)–10 provides that a plan must be operated in accordance with a reasonable, good faith interpretation of the requirements of section 410(b). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 410(b) generally will be determined based on all of the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 410(b) if it is operated in accordance with these final

regulations, the April 1993 proposed regulations, the September 1991 regulations, the May 1990 proposed section 410(b) regulations, or the May 1989 proposed section 410(b) regulations.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Dave Munroe of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.401(a)(26)–1(b)(4) is revised to read as follows:

§ 1.401(a)(26)–1 Minimum participation requirements.

* * * * *

(b) * * *

(4) *Section 401(k) plan maintained by employers that include certain governmental or tax-exempt entities.* Section 401(k)(4)(B) prevents certain State and local governments and tax-exempt organizations from maintaining a qualified cash or deferred arrangement. A plan (or portion of a plan) that is either a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan may be treated as a separate plan that satisfies section 401(a)(26) for a plan year if the following requirements are satisfied:

(i) The section 401(k) plan is maintained by an employer who has employees precluded from being eligible employees under the arrangement by reason of section 401(k)(4)(B), and

(ii) More than 95 percent of the employees of the employer who are not precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B) benefit under the section 401(k) plan.

Par. 3. Section 1.401(a)(26)–9(b)(1) is revised to read as follows:

§ 1.401(a)(26)–9 Effective dates and transition rules.

* * * * *

(b) * * *

(1) *Governmental plans and certain section 403(b) annuities.* Section 401(a)(26) is treated as satisfied for plan years beginning before the later of January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously, in the case of governmental plans described in section 414(d), including plans subject to section 403(b)(12)(A)(i) (nonelective plans). For purposes of this paragraph (b)(1), the term "governing body with authority to amend the plan" means the legislature, board, commission, council, or other governing body with authority to amend the plan.

* * * * *

§ 1.410(b)–0 [Amended]

Par. 4. Section 1.410(b)–0 is amended by:

1. Revising the introductory text and the section headings for §§ 1.410(b)–1 and 1.410(b)–2.

2. Removing the entries for § 1.410(b)–2(c)(2) (i) and (ii).

3. Amending the entries for § 1.410(b)–3 by:

a. Revising the entries for paragraphs (a)(2)(iii) and (a)(2)(iv).

b. Removing the entry for paragraph (a)(2)(v).

4. Revising the entries for § 1.410(b)–5, paragraphs (d) and (e).

5. Amending the entries for § 1.410(b)–6 by:

a. Revising the entry for paragraph (d)(2)(ii).

b. Correctly designating the entry for paragraph (i), *Previously excludable employees*, as the entry for paragraph (h)(3) and adding a new entry for paragraph (i).

6. Amending the entries for § 1.410(b)–9 by removing the following: Defined benefit excess plan, Excess benefit percentage, Gross benefit percentage, and Offset plan;

7. Revising the entries for § 1.410(b)–10.

8. The revisions and addition read as follows:

§ 1.410(b)–0 Table of contents.

This section contains a listing of the major headings of §§ 1.410(b)–1 through 1.410(b)–10.

§ 1.410(b)–1 Minimum coverage requirements (before 1994).

* * * * *

§ 1.410(b)–2 Minimum coverage requirements (after 1993).

* * * * *

§ 1.410(b)–3 Employees and former employees who benefit under a plan.

(a) * * *

(2) * * *

(iii) Certain employees treated as benefiting.

(iv) Section 412(i) plans.

* * * * *

§ 1.410(b)–5 Average benefit percentage test.

* * * * *

(d) Determination of employee benefit percentages.

(1) Overview.

(2) Employee contributions and employee-provided benefits disregarded.

(3) Plans and plan years taken into account.

(i) Testing group.

(ii) Testing period.

(4) Contributions or benefits basis.

(5) Determination of employee benefit percentage.

(i) General rule.

(ii) Plans with differing plan years.

(iii) Options and consistency requirements.

(6) Permitted disparity.

(i) In general.

(ii) Plans which may not use permitted disparity

(7) Requirements for certain plans providing early retirement benefits.

(i) General rule.

(ii) Exception.

(e) Additional optional rules.

(1) Overview.

(2) Determination of employee benefit percentages as the sum of separately determined rates.

(i) In general.

(ii) Exception from consistency requirement.

(iii) Permitted inconsistencies.

(3) Determination of employee benefit percentages without regard to plans of another type.

(i) General rule.

(ii) Restriction on use of separate testing group determination method.

(iii) Treatment of permitted disparity

(iv) Example.

(4) Simplified method for determining employee benefit percentages for certain defined benefit plans.
(i) In general.
(ii) Simplified method.
(5) Three-year averaging period.
(6) Alternative methods of determining compensation.
* * * * *

§ 1.410(b)–6 Excludable employees.
* * * * *
(d) * * *
(2) * * *
(ii) Special rules for certain employees in multiemployer plans.
* * * * *
(i) Former employees treated as employees.
* * * * *

§ 1.410(b)–10 Effective dates and transition rules.
(a) Statutory effective dates.
(1) In general.
(2) Special statutory effective date for collective bargaining agreements.
(i) In general.
(ii) Example.
(iii) Plan maintained pursuant to a collective bargaining agreement.
(b) Regulatory effective dates.
(1) In general.
(2) Plans of tax-exempt organizations.
(c) Compliance during transition period.
(d) Effective date for governmental plans.

Par. 5. Section 1.410(b)–1 is amended by revising the section heading to read as follows:

§ 1.410(b)–1 Minimum coverage requirements (before 1994).

Par. 6. Section 1.410(b)–2 is amended by:
1. Revising the section heading.
2. Revising paragraph (c)(2);
3. Revising the last sentence of paragraph (d).
4. Revising the last sentence of paragraph (e) and adding a sentence at the end of paragraph (e).;
5. Revising paragraph (f).
6. The revisions and addition read as follows:

§ 1.410(b)–2 Minimum coverage requirements (after 1993).

* * * * *
(c) * * *
(2) *Testing former employees.* A plan satisfies section 410(b) with respect to former employees if and only if, under all of the relevant facts and circumstances (including the group of nonexcludable former employees not benefiting under the plan), the group of former employees benefiting under the plan does not discriminate significantly in favor of highly compensated former employees.
* * * * *
(d) * * * For plan years beginning before the effective date set forth in § 1.410(b)–10(d), any plan described in section 410(c)(1)(A) (regarding governmental plans) satisfies the requirements of this section.
(e) * * * For plan years beginning before the effective date set forth in § 1.410(b)–10(d), any plan described in section 410(c)(1)(A) (regarding governmental plans) satisfies the requirements of this section and is thus treated as satisfying the requirements of section 401(a)(3) as in effect on September 1, 1974. See § 1.410(b)–10(b)(2) for a special rule for plans of tax-exempt organizations.
(f) *Certain acquisitions or dispositions.* Section 410(b)(6)(C) (relating to certain acquisitions or dispositions) provides a special rule whereby a plan may be treated as satisfying section 410(b) for a limited period of time after an acquisition or disposition if it satisfies section 410(b) (without regard to the special rule) immediately before the acquisition or disposition and there is no significant change in the plan or in the coverage of the plan other than the acquisition or disposition. For purposes of section 410(b)(6)(C) and this paragraph (f), the terms "acquisition" and "disposition" refer to an asset or stock acquisition, merger, or other similar transaction involving a change in employer of the employees of a trade or business.
* * * * *

Par. 7. Section 1.410(b)–3 is amended by:
1. Revising paragraphs (a)(1), and (a)(2)(ii) through (a)(2)(iv) as set forth below.
2. Removing paragraph (a)(2)(v).

§ 1.410(b)–3 Employees and former employees who benefit under a plan.

(a) * * * (1) *In general.* Except as provided in paragraph (a)(2) of this section, an employee is treated as benefiting under a plan for a plan year if and only if for that plan year, in the case of a defined contribution plan, the employer receives an allocation taken into account under § 1.401(a)(4)–2(c)(2)(ii), or in the case of a defined benefit plan, the employee has an increase in a benefit accrued or treated as an accrued benefit under section 411(d)(6).
(2) * * *
(ii) *Section 415 limits*—(A) *General rule for defined benefit plans.* In determining whether an employee is treated as benefiting under a defined benefit plan for a plan year, plan provisions that implement the limits of section 415 are disregarded. Any plan provision that provides for increases in an employee's accrued benefit under the plan due solely to adjustments under section 415(d)(1), additional years of participation or service under section 415(b)(5), or changes in the defined contribution fraction under section 415(e) is also disregarded, but only if such provision applies uniformly to all employees in the plan.
(B) *Defined benefit plans taking section 415 limits into account under section 401(a)(4) testing.* Paragraph (a)(2)(ii)(A) of this section does not apply in the case of a defined benefit plan that uses the option in § 1.401(a)(4)–3(d)(2)(ii)(B) to take into account plan provisions implementing the provisions of section 415 in determining accrual rates under the section 401(a)(4) general test.
(C) *Defined contribution plans.* A defined contribution plan is permitted to apply the rule in the first sentence of paragraph (a)(2)(ii)(A) of this section in determining whether an employee is treated as benefiting under the plan, provided it applies the rule on a consistent basis for all employees in the plan.
(iii) *Certain employees treated as benefiting*—(A) *In general.* An employee is treated as benefiting under a plan for a plan year if the employee satisfies all of the applicable conditions for accruing a benefit or receiving an allocation for the plan year but fails to have an increase in accrued benefit or to receive an allocation solely because of one or more of the conditions set forth in paragraphs (a)(2)(iii) (B) through (F) of this section.
(B) *Certain plan limits.* The employee's benefit would otherwise exceed a limit that is applicable on a uniform basis to all employees in the plan. Thus, for example, if the formula under a defined benefit plan takes into account only the first 30 years of service for accrual purposes, an employee who has completed more than 30 years of service is still treated as benefiting under the plan.
(C) *Benefits previously accrued.* The benefit previously accrued by the employee is greater than the benefit that would be determined under the plan if the benefit previously accrued were disregarded. This could happen, for example, when the plan is applying the wear-away formula of § 1.401(a)(4)–13(c)(4)(ii) and the employee's frozen accrued benefit exceeds the benefit determined under the current formula.
(D) *Benefit offset arrangements.* The plan offsets the employee's current benefit accrual under an offset arrangement described in § 1.401(a)(4)–3(f)(9) (without regard to whether the offset is attributable to pre-participation service or past service).

(E) *Target benefit plans.* In the case of a target benefit plan that satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) by satisfying the safe harbor in § 1.401(a)(4)–8(b)(3), the employee's theoretical reserve is greater than or equal to the actuarial present value of the fractional rule benefit.

(F) *Post-normal retirement age adjustments.* The employee has attained normal retirement age under a defined benefit plan and fails to accrue a benefit because of the provisions of section 411(b)(1)(H)(iii) regarding adjustments for delayed retirement.

(iv) *Section 412(i) plans*—(A) *General rule.* Notwithstanding paragraph (a)(1) of this section, an employee is treated as benefiting under an insurance contract plan within the meaning of section 412(i) for a plan year if and only if a premium is paid on behalf of the employee for the plan year.

(B) *Exceptions.* Notwithstanding paragraph (a)(2)(iv)(A) of this section, an employee is treated as benefiting under an insurance contract plan within the meaning of section 412(i) for a plan year if the sole reason that a premium is not paid on behalf of the employee is one of the reasons described in paragraph (a)(2)(iii) of this section. In addition, an employee is treated as benefiting under an insurance contract plan, within the meaning of section 412(i), that is a defined benefit plan if a premium is not paid on behalf of the employee solely because the insurance contracts that have previously been purchased on behalf of the employee guarantee to provide for the employee's projected normal retirement benefit without regard to future premium payments.

* * * * *

Par. 8. Section 1.410(b)–5 is amended by revising paragraphs (d) and (e) to read as follows:

§ 1.410(b)–5 Average benefit percentage test.

* * * * *

(d) *Determination of employee benefit percentages*—(1) *Overview.* This paragraph (d) provides rules for determining employee benefit percentages. See paragraph (e) of this section for alternative methods for determining employee benefit percentages.

(2) *Employee contributions and employee-provided benefits disregarded.* Only employer-provided contributions and benefits are taken into account in determining employee benefit percentages. Therefore, employee contributions (including both employee contributions allocated to separate accounts and employee contributions not allocated to separate accounts), and benefits derived from such contributions, are not taken into account in determining employee benefit percentages.

(3) *Plans and plan years taken into account*—(i) *Testing group.* All plans included in the testing group under § 1.410(b)–7(e)(1), and only those plans, are taken into account in determining an employee's employee benefit percentage.

(ii) *Testing period.* An employee's employee benefit percentage is determined on the basis of plan years ending with or within the same calendar year. These plan years are referred to in this section as the relevant plan years or, in the aggregate, as the testing period.

(4) *Contributions or benefits basis.* Employee benefit percentages may be determined on either a contributions or a benefits basis. Employee benefit percentages for any testing period must be determined on the same basis (contributions or benefits) for all plans in the testing group.

(5) *Determination of employee benefit percentage*—(i) *General rule.* The employee benefit percentage for an employee for a testing period is the rate that would be determined for that employee for purposes of applying the general test for nondiscrimination in §§ 1.401(a)(4)–2, 1.401(a)(4)–3, 1.401(a)(4)–8 or 1.401(a)(4)–9, if all the plans in the testing group were aggregated for purposes of section 410(b). Thus, if employee benefit percentages are determined on a contributions basis, each employee's employee benefit percentage is the aggregate normal allocation rate that would be determined for the employee under § 1.401(a)(4)–9(b)(2)(ii)(A) (if the plans in the testing group include both defined benefit and defined contribution plans), the allocation rate that would be determined for the employee under § 1.401(a)(4)–2(c)(2) (if the plans in the testing group include only defined contribution plans), or the equivalent normal allocation rate that would be determined for the employee under § 1.401(a)(4)–8(c)(2) (if the plans in the testing group include only defined benefit plans). Similarly, if employee benefit percentages are determined on a benefits basis, each employee's employee benefit percentage is the aggregate normal accrual rate that would be determined for the employee under § 1.401(a)(4)–9(b)(2)(ii)(B), the normal accrual rate that would be determined for the employee under § 1.401(a)(4)–3(d), or the equivalent accrual rate that would be determined for the employee under § 1.401(a)(4)–8(b)(2), depending on whether the plans in the testing group include both defined benefit and defined contribution plans, only defined benefit plans, or only defined contribution plans.

(ii) *Plans with differing plan years.* If not all the plans in the testing group share the same plan year, § 1.410(b)–7(d)(5) would ordinarily prohibit them from being aggregated for purposes of section 410(b). In such a case, employee benefit percentages are determined by applying the rules of paragraph (d)(5)(i) of this section separately to each subset of plans in the testing group that share the same plan year (or the same accrual computation period) and aggregating the results for all plans in the testing group. Thus, an employee's employee benefit percentage is determined as the sum of these separate employee benefit percentages that are determined consistently for all the plans in the testing group (except for differences attributable solely to the differences in plan years).

(iii) *Options and consistency requirements.* In determining employee benefit percentages under this paragraph (d)(5), any optional or alternative methods or rules available for determining rates in §§ 1.401(a)(4)–2, 1.401(a)(4)–3, 1.401(a)(4)–8, or 1.401(a)(4)–9, whichever is applicable, may be applied. Thus, for example, employee benefit percentages may generally be calculated using any of the alternative methods of determining average annual compensation or plan year compensation under § 1.401(a)(4)–12, and using any underlying definition of compensation that satisfies section 414(s). Except as otherwise specifically permitted, the determination of employee benefit percentages must be made on a consistent basis for all employees and for all plans in the testing group as required by §§ 1.401(a)(4)–2(c)(2)(vi), 1.401(a)(4)–3(d)(2)(i), 1.401(a)(4)–8(b)(2)(iv), 1.401(a)(4)–8(c)(2)(iv) or 1.401(a)(4)–9(b)(2)(iv).

(6) *Permitted disparity*—(i) *In general.* Permitted disparity may be imputed in determining employee benefit percentages as provided in §§ 1.401(a)(4)–2, 1.401(a)(4)–3, 1.401(a)(4)–8, or 1.401(a)(4)–9, whichever is applicable. When separate employee benefit percentages are determined for individual plans under paragraph (e)(2) of this section (or for subsets of plans that have the same plan year as described in paragraph (d)(5)(ii) of this section), permitted disparity may be imputed for an employee only in one individual plan (or subset of plans) and may not be imputed for the same employee in another individual plan (or

subset of plans). However, if the same average annual compensation or plan year compensation is used to determine employee benefit percentages in more than one plan, the employee's employee benefit percentages for those plans may be summed prior to imputing permitted disparity.

(ii) *Plans which may not use permitted disparity.* Permitted disparity may be reflected in the determination of rates only to the extent that the plans for which rates are being determined are plans for which the permitted disparity of section 401(l) is available. Thus, for example, if a section 401(k) plan is included in the testing group and permitted disparity is imputed under § 1.401(a)(4)–2(c)(iv), then employee benefit percentages are determined by first calculating an adjusted allocation rate (within the meaning of § 1.401(a)(4)–7(b)(1)) without regard to the amount of allocations under the section 401(k) plan and adding to it the allocation rate for the section 401(k) plan. See § 1.401(l)–1(a)(4) for a list of types of plans for which permitted disparity is not available.

(7) *Requirements for certain plans providing early retirement benefits*—(i) *General rule.* If any defined benefit plan in the testing group provides for early retirement benefits in addition to normal retirement benefits to any highly compensated employee, and the average actuarial reduction for any one of these benefits commencing in the five years prior to the plan's normal retirement age is less than four percent per year, then the aggregate most valuable allocation rate, equivalent most valuable allocation rate, aggregate most valuable accrual rate, or most valuable accrual rate must be substituted for the related normal rates in paragraph (d)(5) of this section.

(ii) *Exception.* Paragraph (d)(7)(i) of this section does not apply if early retirement benefits with average actuarial reductions described in that paragraph are currently available, within the meaning of § 1.401(a)(4)–4(b), under plans in the testing group to a percentage of nonhighly compensated employees that is at least 70 percent of the percentage of highly compensated employees to whom these benefits are currently available.

(e) *Additional optional rules*—(1) *Overview.* This paragraph (e) contains various alternative methods for determining employee benefit percentages for a testing period.

(2) *Determination of employee benefit percentages as the sum of separately determined rates*—(i) *In general.* Employee benefit percentages may be determined as the sum of separately determined employee benefit percentages for each of the plans in the testing group that are aggregated under paragraphs (d)(5) (i) or (ii) of this section, provided that these employee benefit percentages are determined on a consistent basis for all of these plans pursuant to paragraph (d)(5)(iii) of this section.

(ii) *Exception from consistency requirement.* The consistency requirement of paragraph (e)(2)(i) of this section is not violated merely because employee benefit percentages are not determined in a consistent manner for all of the plans in the testing group and the inconsistencies in determination of rates among plans are described in paragraph (e)(2)(iii) of this section. The exception in this paragraph (e)(2)(ii) applies only if it is reasonable to believe that the inconsistencies do not result in an average benefit percentage that is significantly higher than the average benefit percentage that would be determined had employee benefit percentages been determined on a consistent basis pursuant to paragraph (d)(5)(iii) of this section.

(iii) *Permitted inconsistencies.* The following inconsistencies between plans are permitted under this paragraph (e)(2)—

(A) Use of different underlying definitions of section 414(s) compensation in the determination of rates;

(B) Use of different definitions of average annual compensation;

(C) Use of different testing ages;

(D) Use of different fresh-start dates;

(E) Use of different actuarial assumptions for normalization; or

(F) Disregard of actuarial increases after normal retirement age and QPSA charges without regard to any requirement for uniformity in the actuarial increases or QPSA charges.

(3) *Determination of employee benefit percentages without regard to plans of another type*—(i) *General rule.* Employee benefit percentages may be determined under plans of one type (i.e., defined benefit plans or defined contribution plans) by treating all plans of the other type (i.e., defined contribution plans or defined benefit plans, respectively) as if they were not part of the testing group, using the method provided in this paragraph (e)(3). If this method is used to determine whether a defined contribution plan satisfies the average benefit percentage test, employee benefit percentages under all defined contribution plans in the testing group must be determined on a contributions basis, and benefits under any defined benefit plans may not be included in the employee benefit percentage. Similarly, if this method is used to determine whether a defined benefit plan satisfies the average benefit percentage test, employee benefit percentages under all defined benefit plans in the testing group must be determined on a benefits basis, and allocations under any defined contribution plans may not be included in the employee benefit percentage.

(ii) *Restriction on use of separate testing group determination method.* A plan does not satisfy the average benefit percentage test using the method provided in this paragraph (e)(3) unless each of the plans in the testing group of the other type (i.e., defined benefit plan or defined contribution plan) than the plan being tested satisfies the average benefit test of § 1.410(b)–2(b)(3) using the method in this paragraph (e)(3) or satisfies the ratio percentage test of § 1.410(b)–2(b)(2).

(iii) *Treatment of permitted disparity.* Although under the general rule of this paragraph (e)(3) plans of another type are disregarded in determining employee benefit percentages, the permitted disparity used by those plans (including any permitted disparity that is used by those plans to satisfy § 1.401(a)(4)–1(b)(2)) is nonetheless taken into account in determining the extent to which permitted disparity may be used in determining employee benefit percentages.

(iv) *Example.* The following example illustrates the rules of this paragraph (e)(3):

Example. Employer A maintains two defined benefit plans, neither of which covers a group of employees that satisfies the ratio percentage test of § 1.410(b)–2(b)(2), and a profit-sharing plan and a section 401(k) plan, each of which benefits a group of employees that satisfies the ratio percentage test of § 1.410(b)–2(b)(2). The defined benefit plans will satisfy the average benefit percentage test if the actual benefit percentage of all nonexcludable nonhighly compensated employees, computed on a benefits basis without regard to contributions under the profit-sharing plan or the section 401(k) plan, is at least 70 percent of the actual benefit percentage of all nonexcludable highly compensated employees, computed on a benefits basis without regard to contributions under the profit-sharing plan or the section 401(k) plan.

(4) *Simplified method for determining employee benefit percentages for certain defined benefit plans*—(i) *In general.* An employee's employee benefit percentage with respect to a plan may be determined under the simplified method of paragraph (e)(4)(ii) of this section, provided the following conditions are satisfied:

(A) The only plans included in the testing group are defined benefit plans, and employee benefit percentages under

these plans are determined on a benefits basis.

(B) Employee benefit percentages under the plans in the testing group are not required to be determined by taking into account early retirement benefits under paragraph (d)(7) of this section.

(C) The plan is a safe harbor defined benefit plan described in § 1.401(a)(4)–3(b).

(ii) *Simplified method*—(A) *Section 401(l) plans.* Under the simplified method of this paragraph (e)(4)(ii), an employee's employee benefit percentage with respect to a section 401(l) plan described in § 1.401(a)(4)–3(b)(3) (i.e., a unit credit plan) may be deemed equal to the employee's excess benefit percentage or gross benefit percentage (as defined in § 1.401(*l*)–1(c) (14) or (18), respectively), whichever is applicable under the plan's benefit formula in the plan year. In the case of a section 401(l) plan described in § 1.401(a)(4)–3(b)(4) (i.e., a fractional accrual plan), an employee's employee benefit percentage with respect to that plan may be deemed equal to the rate at which the excess or gross benefit, whichever is applicable, accrues for the employee in the plan year, taking into account the plan's benefit formula and the employee's projected service at normal retirement age. The use of this simplified method will be treated as an imputation of permitted disparity. See paragraph (d)(6) of this section for a restriction on multiple use of permitted disparity.

(B) *Other plans.* Under the simplified method of this paragraph (e)(4)(ii), an employee's employee benefit percentage with respect to a plan described in § 1.401(a)(4)–3(b)(3) that is not a section 401(*l*) plan and that is not imputing permitted disparity may be deemed equal to the employee's benefit rate in the plan year under the plan's benefit formula. In the case of a plan described in § 1.401(a)(4)–3(b)(4) that is not a section 401(*l*) plan and that is not imputing permitted disparity, an employee's employee benefit percentage with respect to that plan may be deemed equal to the rate at which the benefit accrues for the employee in the plan year, taking into account the plan's benefit formula and an employee's projected service at normal retirement age.

(5) *Three-year averaging period.* An employee's employee benefit percentage may be determined for a testing period as the average of the employee's employee benefit percentages determined separately for the testing period and for the immediately preceding one or two testing periods (referred to in this section as an averaging period). Employee benefit percentages of a particular employee that are averaged together within an averaging period must be determined on a consistent basis for all testing periods within the averaging period.

(6) *Alternative methods of determining compensation.* Employee benefit percentages may be determined on the basis of any definition of compensation that satisfies § 1.414(s)–1(d) (without regard to whether the definition satisfies § 1.414(s)–1(d)(3)), provided that the same definition is used for all employees and it is reasonable to believe that the definition does not result in an average benefit percentage that is significantly higher than the average benefit percentage that would be determined had employee benefit percentages been determined using a definition of compensation that also satisfies § 1.414(s)–1(d)(3).

* * * * *

Par. 9. Section 1.410(b)–6 is amended by:

1. Removing the reference "(b) through (h)" and adding "(b) through (i)" in its place in the first sentence of paragraph (a)(1) and in the second and third sentence of paragraph (a)(2).

2. Revising paragraphs (b)(1), (b)(2), (d)(2), and (g) as set forth below.

3. Adding paragraph (i) as set forth below.

§ 1.410(b)–6 Excludable employees.

* * * * *

(b) *Minimum age and service exclusions*—(1) *In general.* If a plan applies minimum age and service eligibility conditions permissible under section 410(a)(1) and excludes all employees who do not meet those conditions from benefiting under the plan, then all employees who fail to satisfy those conditions are excludable employees with respect to that plan. An employee is treated as meeting the age and service requirements on the date that any employee with the same age and service (including service permitted to be taken into account for purposes of nondiscrimination testing under § 1.401(a)(4)–11(d)(3)) would be eligible to commence participation in the plan, as provided in section 410(b)(4)(C).

(2) *Multiple age and service conditions.* If a plan, including a plan for which an employer chooses the treatment under paragraph (b)(3) of this section, has two or more different sets of minimum age and service eligibility conditions, those employees who fail to satisfy all of the different sets of age and service conditions are excludable employees with respect to the plan. Except as provided in paragraph (b)(3) of this section, an employee who satisfies any one of the different sets of conditions is not an excludable employee with respect to the plan. Differences in the manner in which service is credited (e.g., hours of service calculated in accordance with 29 CFR 2530.200b–2 for hourly employees and elapsed time calculated in accordance with § 1.410(a)–7 for salaried employees) for purposes of applying a service condition are not taken into account in determining whether multiple age and service eligibility conditions exist.

* * * * *

(d) * * *

(2) *Definition of collectively bargained employee*—(i) *In general.* A collectively bargained employee is an employee who is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, provided that there is evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers. An employee is a collectively bargained employee regardless of whether the employee benefits under any plan of the employer. See section 7701(a)(46) and § 301.7701–17T of this chapter for additional requirements applicable to the collective bargaining agreement. An employee who performs hours of service during the plan year as both a collectively bargained employee and a noncollectively bargained employee is treated as a collectively bargained employee with respect to the hours of service performed as a collectively bargained employee and a noncollectively bargained employee with respect to the hours of service performed as a noncollectively bargained employee. See § 1.410(b)–7(c) for disaggregation rules for plans benefiting collectively bargained and noncollectively bargained employees.

(ii) *Special rules for certain employees in multiemployer plans*—(A) *In general.* For purposes of this paragraph (d), in testing the disaggregated portion of a multiemployer plan benefiting noncollectively bargained employees, a noncollectively bargained employee who benefits under the plan may be treated as a collectively bargained employee with respect to all of the employee's hours of service under the rules of paragraphs (d)(2)(ii) (B) through (E) of this section, if the employee is or was a member of a unit of employees covered by a collective bargaining agreement and that agreement or a successor agreement provides for the

employee to benefit under the plan in the current plan year. For this purpose, provisions of a participation agreement or similar document are taken into account in determining whether a collective bargaining agreement provides for an employee to benefit under a multiemployer plan.

(B) *Employees who were collectively bargained employees during a portion of the current plan year.* An employee described in paragraph (d)(2)(ii)(A) of this section who performs services for one or more employers that are parties to the collective bargaining agreement, for the plan, or for the employee representative both as a collectively bargained employee and as a noncollectively bargained employee during a plan year may be treated as a collectively bargained employee for the plan year, provided that at least half of the employee's hours of service during the plan year are performed as a collectively bargained employee.

(C) *Employees who were collectively bargained employees during the collective bargaining agreement.* An employee described in paragraph (d)(2)(ii)(A) of this section who was a collectively bargained employee with respect to all of the employee's hours of service during a plan year (including employees who are treated as collectively bargained employees with respect to all of their hours of service during a plan year under paragraph (d)(2)(ii) (B) or (E) of this section) may be treated as a collectively bargained employee with respect to all of the employee's hours of service for the duration of the collective bargaining agreement applicable for such plan year or, if later, until the end of the following plan year. For this purpose, a collective bargaining agreement is applicable for a plan year if it provided for the employee to benefit in the plan and was effective for any portion of that plan year. This paragraph (d)(2)(ii)(C) does not apply unless the terms of the plan providing for benefit accruals treat the employee in a manner that is generally no more favorable than similarly-situated employees who are collectively bargained employees.

(D) *Employees who previously were collectively bargained employees.* An employee who was treated as a collectively bargained employee pursuant to paragraph (d)(2)(ii)(C) of this section may be treated as a collectively bargained employee with respect to all of the employee's hours of service after the end of the period described in paragraph (d)(2)(ii)(C) of this section, provided that the employee is performing services for one or more employers that are parties to the collective bargaining agreement, for the plan, or for the employee representative. This paragraph (d)(2)(ii)(D) does not apply unless the terms of the plan providing for benefit accruals treat the employee in a manner that is generally no more favorable than similarly-situated employees who are collectively bargained employees, and no more than five percent of the employees covered under the multiemployer plan are noncollectively bargained employees (determined without regard to this paragraph (d)(2)(ii)(D)). In determining whether more than five percent of the employees covered under the multiemployer plan are noncollectively bargained employees, those employees who are described in paragraphs (d)(2)(ii) (B) and (C) of this section are treated as collectively bargained employees.

(E) *Transition rule.* For a plan year beginning before the applicable effective date of these regulations as set forth in § 1.410(b)–10 (b) or (d), any employee described in paragraph (d)(2)(ii)(A) of this section may be treated as a collectively bargained employee with respect to all of the employee's hours of service for that plan year.

(F) *Consistency requirement.* The rules in paragraphs (d)(2) (i) and (ii) of this section must be applied to all employees on a reasonable and consistent basis for the plan year.

* * * * *

(g) *Employees of certain governmental or tax-exempt entities precluded from maintaining a section 401(k) plan.* For purposes of testing either a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, an employer may treat as excludable those employees of governmental or tax-exempt entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B), if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B) benefit under the plan for the plan year.

* * * * *

(i) *Former employees treated as employees.* An employer may treat as excludable employees all formerly nonhighly compensated employees who are treated as employees of the employer under § 1.410(b)–9 solely because they have increases in accrued benefits under a defined benefit plan that are based on ongoing service or compensation credits (including imputed service or compensation) after they cease to perform services for the employer.

* * * * *

§ 1.410(b)–7 [Amended]

Par. 10. Section 1.410(b)–7 is amended by:

1. Removing the last sentence in paragraph (d)(5).

2. Removing the reference "(c)(1) through (c)(3)" and adding "(c)(1) and (c)(2)" in its place in the last sentence of paragraph (e)(1).

Par. 11. Section 1.410(b)–9 is amended by:

1. Removing the definitions *Defined benefit excess plan* and *Excess benefit percentage.*

2. Revising the definitions *Employee* and *Former employee* as set forth below.

3. Removing the definition *Gross benefit percentage.*

4. Revising the definitions *Highly compensated employee* and *Highly compensated former employee* as set forth below.

5. Removing the definition *Offset plan.*

6. Removing the reference "§ 1.401(a)(4)–2(b)(3)" and adding "§ 1.401(a)(4)–2(b)(2)" in its place in paragraph (2) of the definition *Section 401(l) plan.*

7. Removing the word "engineer" from the definition *Professional employee.*

§ 1.410(b)–9 Definitions.

* * * * *

Employee. Employee means an individual who performs services for the employer who is either a common law employee of the employer, a self-employed individual who is treated as an employee pursuant to section 401(c)(1), or a leased employee (not excluded under section 414(n)(5)) who is treated as an employee of the employer-recipient under section 414(n)(2) or 414(o)(2). Individuals that an employer treats as employees under section 414(n) pursuant to the requirements of section 414(o) are considered to be leased employees for purposes of this rule. In addition, an individual must be treated as an employee with respect to allocations under a defined contribution plan taken into account under § 1.401(a)(4)–2(c)(ii) and with respect to increases in accrued benefits (within the meaning of 411(a)(7)) under a defined benefit plan that are based on ongoing service or compensation (including imputed service or compensation) credits.

* * * * *

Former employee. Former employee means an individual who was, but has ceased to be, an employee of the

employer (i.e., the individual has ceased performing services as an employee for the employer). An individual is treated as a former employee beginning on the day after the day on which the individual ceases performing services as an employee for the employer. Thus, an individual who ceases performing services as an employee for an employer during a plan year is both an employee and a former employee for the plan year. Notwithstanding the foregoing, an individual is an employee (and not a former employee) to the extent that the individual is treated as an employee with respect to the plan for the plan year under the definition of employee in this section.

* * * * *

Highly compensated employee. Highly compensated employee means an employee who is a highly compensated employee within the meaning of section 414(q) or a former employee treated as an employee under the definition of employee in this section who is a highly compensated former employee within the meaning of section 414(q).

Highly compensated former employee. Highly compensated former employee means a former employee who is a highly compensated former employee within the meaning of section 414(q).

* * * * *

Par. 12. Section 1.410(b)–10 is revised to read as follows:

§ 1.410(b)–10 Effective dates and transition rules.

(a) *Statutory effective dates*—(1) *In general.* Except as set forth in paragraph (a)(2) of this section, the minimum coverage rules of section 410(b) as amended by section 1112 of the Tax Reform Act of 1986 apply to plan years beginning on or after January 1, 1989.

(2) *Special statutory effective date for collective bargaining agreements*—(i) *In general.* As provided for by section 1112(e)(2) of the Tax Reform Act of 1986, in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the minimum coverage rules of section 410(b) as amended by section 1112 of the Tax Reform Act of 1986 do not apply to employees covered by any such agreement in plan years beginning before the earlier of—

(A) January 1, 1991; or

(B) The later of January 1, 1989, or the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986). For purposes of this paragraph (a)(2), any extension or renegotiation of a collective bargaining agreement, which extension or renegotiation is ratified after February 28, 1986, is to be disregarded in determining the date on which the agreement terminates.

(ii) *Example.* The following example illustrates this paragraph (a)(2).

Example. Employer A maintains Plan 1 pursuant to a collective bargaining agreement. Plan 1 covers 100 of Employer A's noncollectively bargained employees and 900 of Employer A's collectively bargained employees. Employer A also maintains Plan 2, which covers Employer A's other 400 noncollectively bargained employees. The collective bargaining agreement under which Plan 1 is maintained was entered into on January 1, 1986, and expires December 31, 1992. Because Plan 1 is a plan maintained pursuant to a collective bargaining agreement, section 410(b) applies to the first plan year beginning on or after January 1, 1991. In applying section 410(b) to Plan 2, the 100 noncollectively bargained employees in Plan 1 must be taken into account. The deferred effective date for plans maintained pursuant to a collective bargaining agreement is not applicable in determining how section 410(b) is applied to a plan that is not maintained pursuant to a collective bargaining agreement.

(iii) *Plan maintained pursuant to a collective bargaining agreement.* For purposes of this paragraph (a)(2), a plan is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers, if one or more of the agreements were ratified before March 1, 1986. Only plans maintained pursuant to agreements that the Secretary of Labor finds to be collective bargaining agreements and that satisfy section 7701(a)(46) are eligible for the deferred effective date under this paragraph (a)(2). A plan will not be treated as a plan maintained pursuant to one or more collective bargaining agreements eligible for the deferred effective date under this paragraph (a)(2) unless the plan would be a plan maintained pursuant to one or more collective bargaining agreements under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93rd Cong. 2d Sess. 266 (1974).

(b) *Regulatory effective dates*—(1) *In general.* Except as otherwise provided in this section, §§ 1.410(b)–2 through 1.410(b)–9 apply to plan years beginning on or after January 1, 1994.

(2) *Plans of tax-exempt organizations.* In the case of plans maintained by organizations exempt from income taxation under section 501(a), including plans subject to section 403(b)(12)(A)(i) (nonelective plans), §§ 1.410(b)–2 through 1.410(b)–9 apply to plan years beginning on or after January 1, 1996, to the extent such plans are subject to section 410(b).

(c) *Compliance during transition period.* For plan years beginning before the effective date of these regulations, as set forth in paragraph (b) of this section, and on or after the statutory effective date as set forth in paragraph (a) of this section, a plan must be operated in accordance with a reasonable, good faith interpretation of section 410(b). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 410(b) will generally be determined based on all of the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. If a plan's classification has been determined by the Commissioner to be nondiscriminatory and there have been no significant changes in or omissions of a material fact, the classification will be treated as nondiscriminatory for the relevant plan year. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 410(b) if it is operated in accordance with the terms of §§ 1.410(b)–2 through 1.410(b)–9.

(d) *Effective date for governmental plans.* In the case of governmental plans described in section 414(d), including plans subject to section 403(b)(12)(A)(i) (nonelective plans) § 1.410(b)–2 through § 1.410(b)–10 apply to plan years beginning on or after January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously. Such plans are deemed to satisfy section 410(b) (and in the case of such plans that are not subject to section 403(b)(12)(A)(i), section 401(a)(3) as in effect on September 1, 1974) for plan years before that effective date. For purposes of this section, the governing body with authority to amend the plan is the legislature, board, commission, council, or other governing body with authority to amend the plan. See § 1.410(b)–2(d) and (e).

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: August 23, 1993.

Leslie Samuels,

Assistant Secretary of the Treasury.

[FR Doc. 93–21379 Filed 8–31–93; 4:02 pm]

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 913

Illinois Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval, with certain exceptions, of a proposed amendment to the Illinois permanent regulatory program (hereinafter referred to as the Illinois program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment concerns changes to the Illinois Administrative Code (IAC), Title 62, Mining, Chapter I. The amendment is intended to make the requirements of the Illinois program no less effective than the Federal program, to enhance the clarity of Illinois' regulations, and to meet State codification rules and guidelines.

EFFECTIVE DATE: September 3, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Fulton, Director, Springfield Field Office, Office of Surface Mining Reclamation and Enforcement, 511 West Capitol Avenue, suite 202, Springfield, Illinois 62704, Telephone: (217) 492–4495.

SUPPLEMENTARY INFORMATION:

I. Background on the Illinois Program

On June 1, 1982, the Secretary of the Interior conditionally approved the Illinois program. Information pertinent to the general background of the Illinois program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval can be found in the June 1, 1982, **Federal Register** (47 FR 23883). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 913.15, 913.16, and 913.17.

II. Submission of Amendments

OSM notified Illinois of deficiencies in its program regulations which were determined to be less effective than the Federal regulation requirements for surface mining and reclamation operations in a **Federal Register** decision notice dated December 13, 1991 (56 FR 64986). Illinois identified additional regulations that required revisions for clarity and consistency with their Federal counterparts. Illinois is also taking this opportunity to reorganize its hearing regulations to more effectively carry out its responsibilities under the State Act. The amendment also contains nonsubstantive revisions to correct editorial and typographical errors and to accomplish necessary recodification.

In response to OSM's notification and its own initiatives, Illinois submitted proposed changes to its program by letter dated June 22, 1992 (Administrative Record No. IL–1192). The program amendment modifies the following rules of Title 62 of the IAC: 1701.Appendix A, 1702, 1705, 1761, 1764, 1772, 1773, 1774, 1775, 1777, 1778, 1779, 1780, 1783, 1784, 1785, 1800, 1816, 1817, 1827, 1843, 1845, 1846, and adds 62 IAC 1847 and 1848.

OSM announced receipt of the proposed amendment in the August 18, 1992, **Federal Register** (57 FR 37127) and in the same notice, opened the public comment period and provided opportunity for a public hearing on the adequacy of the proposed amendment. The comment period closed on September 17, 1992.

By letter dated April 27, 1993, (Administrative Record No. IL–1207), Illinois submitted revisions to its proposed amendment in response to issue letters prepared by OSM on September 2, and October 2, 1992, and in response to comments received from other agencies and individuals.

Illinois proposed modifications to its revisions of Title 62 of the IAC: 1701.Appendix A, 1702, 1761, 1773, 1774, 1777, 1778, 1780, 1784, 1800, 1816, 1817, 1827, 1843, 1845, 1847, and 1848.

OSM announces receipt of the proposed amendment in the May 17, 1993 **Federal Register** (58 FR 28804) and, in the same notice, reopened the comment period and provided opportunity for a public hearing on the adequacy of the proposed amendments. The comment period closed on June 16, 1993.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.17 are the Director's findings concerning the proposed amendment to the Illinois program submitted on June 22, 1992, and revised by submittal dated April 27, 1993. Revisions not addressed below either concern cross-references and paragraph notations that have been updated to reflect organizational or nomenclature changes or involve nonsubstantive wording changes.

REVISIONS TO ILLINOIS' REGULATIONS THAT ARE SUBSTANTIVELY IDENTICAL TO THE CORRESPONDING FEDERAL REGULATIONS

State regulation	Subject	Federal counterpart
62 IAC 1701.APP.A	Definitions "Office"	30 CFR 700.5.
62 IAC 1701.APP.A	Definitions "Public Park"	30 CFR 761.5.
62 IAC 1702.11(a)(2)	Incidental extraction	30 CFR 702.11(a)(2).
62 IAC 1702.11(f) (1), (2)	Incidental extraction	30 CFR 702.11(f) (1), (2).
62 IAC 1702.17(c) (1)–(3)	Incidental extraction	30 CFR 702.17(c) (1)–(3).
62 IAC 1705.21	Financial Interests	30 CFR 705.21.
62 IAC 1761.11(g)	Designated areas	30 CFR 761.11(g).
62 IAC 1761.12(b)(2)	Designated areas	30 CFR 761.12(b)(2).
62 IAC 1761.12(c)	Designated areas	30 CFR 761.12(d).
62 IAC 1761.12(d)(1)	Designated areas	30 CFR 761.12(e)(1).
62 IAC 1761.12(g)	Designated areas	30 CFR 761.12(h).
62 IAC 1764.19(d)	Areas unsuitable	30 CFR 764.19(c).
62 IAC 1772.12(e)(2)	Coal exploration	30 CFR 772.12(e)(2).
62 IAC 1773.13(a)(1) (E)	Permits	30 CFR 773.13(a)(1)(v).
62 IAC 1773.15(b)(1) (B)	Permits	30 CFR 773.15(b)(1)(ii).
62 IAC 1773.15(b)(3)	Permits	30 CFR 773.15(b)(3).
62 IAC 1773.15(c)(12)	Permits	30 CFR 773.15(c)(11).

REVISIONS TO ILLINOIS' REGULATIONS THAT ARE SUBSTANTIVELY IDENTICAL TO THE CORRESPONDING FEDERAL REGULATIONS—Continued

State regulation	Subject	Federal counterpart
62 IAC 1773.20(b)(2) (B)	Permits	30 CFR 773.20(b)(2)(ii).
62 IAC 1773.21(c)	Permits	30 CFR 773.21(c).
62 IAC 1774.11(c)	Permit revisions	30 CFR 774.11(c).
62 IAC 1774.15(f)	Permit renewals	30 CFR 774.15(f).
62 IAC 1779.19(b)	Permit applications	30 CFR 779.19(b).
62 IAC 1783.19(b)	Permit applications	30 CFR 783.19(b).
62 IAC 1785.13 (a), (g)	Permits for special categories	30 CFR 785.13(a), (g).
62 IAC 1800.40(a)(3)	Bonding	30 CFR 800.40(a)(3).
62 IAC 1800.40(e)	Bonding	30 CFR 800.40(f).
62 IAC 1816.84(b)(2)	Performance standards	30 CFR 816.84(b)(2).
62 IAC 1817.84(b)(2)	Performance standards	30 CFR 817.84(b)(2).
62 IAC 1827.12(b)	Coal preparation plants	30 CFR 827.12(h).
62 IAC 1843.12(i)	State enforcement	30 CFR 843.12(i).
62 IAC 1843.13(c)	State enforcement	30 CFR 843.13(d).
62 IAC 1843.13(e)	State enforcement	43 CFR 4.1191.
62 IAC 1843.14(a)(2)	State enforcement	30 CFR 843.14(a)(2).
62 IAC 1843.15(a)	State enforcement	30 CFR 843.15(a).
62 IAC 1845.13(b)(4) (B), (C)	Civil penalties	30 CFR 845.13(b)(4)(ii) (A), (B).
62 IAC 1845.17(b)	Civil penalties	30 CFR 845.17(b).
62 IAC 1845.17(b)(2)(B)	Civil penalties	30 CFR 845.17(b)(2)(ii).
62 IAC 1845.17(c)	Civil penalties	30 CFR 845.17(c).
62 IAC 1845.18(a)(2)	Civil penalties	30 CFR 845.19(a).
62 IAC 1845.20(a)	Civil penalties	30 CFR 845.20(a).
62 IAC 1846.17(b)(1)	Individual civil penalties	30 CFR 846.17(b)(1).
62 IAC 1846.18(b)	Individual civil penalties	30 CFR 846.18(b).
62 IAC 1847.2	Administrative and judicial review	43 CFR 4.1102.
62 IAC 1847.3(b)	Administrative and judicial review	43 CFR 4.1363(a) (1)–(5).
62 IAC 1847.3(d)(e)	Administrative and judicial review	43 CFR 4.1364, 30 CFR 775.11(b)(1).
62 IAC 1847.3(g)	Administrative and judicial review	30 CFR 775.11(b)(5).
62 IAC 1847.3(h)	Administrative and judicial review	30 CFR 775.11(b)(4).
62 IAC 1847.3(k)	Administrative and judicial review	43 CFR 4.1367.
62 IAC 1847.4(a)	Administrative and judicial review	43 CFR 4.1161, 4.1162.
62 IAC 1847.4(b)	Administrative and judicial review	43 CFR 4.1163.
62 IAC 1847.4(d)	Administrative and judicial review	43 CFR 4.1164.
62 IAC 1847.4(f)	Administrative and judicial review	43 CFR 4.1167.
62 IAC 1847.4(h)	Administrative and judicial review	43 CFR 4.1171.
62 IAC 1847.4(l)	Administrative and judicial review	30 CFR 843.16(b).
62 IAC 1847.4(m)	Administrative and judicial review	30 CFR 845.18(d).
62 IAC 1847.4(o) (1), (2)	Administrative and judicial review	43 CFR 4.1260–1262.
62 IAC 1847.4(o)(3)	Administrative and judicial review	43 CFR 4.1263.
62 IAC 1847.4(o)(4)	Administrative and judicial review	43 CFR 4.1264(a).
62 IAC 1847.4(o)(5)	Administrative and judicial review	43 CFR 4.1266.
62 IAC 1847.4(o)(6)	Administrative and judicial review	30 U.S.C. 1275(c) (1)–(3).
62 IAC 1847.4(p)	Administrative and judicial review	30 U.S.C. 1276(a)(2).
62 IAC 1847.5(a)	Administrative and judicial review	30 CFR 845.19(a).
62 IAC 1847.5(b)	Administrative and judicial review	43 CFR 4.1152(a) (1), (3), (4).
62 IAC 1847.5(c)	Administrative and judicial review	43 CFR 4.1152(b) (1), (2).
62 IAC 1847.5(d)	Administrative and judicial review	43 CFR 4.1152(c).
62 IAC 1847.5(e)	Administrative and judicial review	43 CFR 4.1152(d).
62 IAC 1847.5(g)	Administrative and judicial review	43 CFR 4.1123(a).
62 IAC 1847.5(h)	Administrative and judicial review	30 CFR 845.18(d).
62 IAC 1847.5(k)	Administrative and judicial review	43 CFR 4.1155.
62 IAC 1847.5(l)(1)	Administrative and judicial review	43 CFR 4.1157 (b)(1), (b)(2).
62 IAC 1847.5(l)(2)	Administrative and judicial review	43 CFR 4.1157(c).
62 IAC 1847.5(l)(3)	Administrative and judicial review	43 CFR 4.1157(d).
62 IAC 1847.5(o)	Administrative and judicial review	30 U.S.C. 1276(a)(2).
62 IAC 1847.6(a)	Administrative and judicial review	43 CFR 4.1191.
62 IAC 1847.6(b)	Administrative and judicial review	43 CFR 4.1192.
62 IAC 1847.6(e)	Administrative and judicial review	43 CFR 4.1123(a).
62 IAC 1847.6(g)	Administrative and judicial review	43 CFR 4.1195(a).
62 IAC 1847.6(h)	Administrative and judicial review	43 CFR 4.1193.
62 IAC 1847.6(n)	Administrative and judicial review	30 U.S.C. 1276(a)(2).
62 IAC 1847.8(a)	Administrative and judicial review	43 CFR 4.1300–1301.
62 IAC 1847.8(b)	Administrative and judicial review	43 CFR 4.1302.
62 IAC 1847.8(c)	Administrative and judicial review	43 CFR 4.1303(a)(1).
62 IAC 1847.8(e)	Administrative and judicial review	43 CFR 4.1306.
62 IAC 1847.8(i)(1)	Administrative and judicial review	43 CFR 4.1307(a) (1)–(3).
62 IAC 1847.8(i)(2)	Administrative and judicial review	43 CFR 4.1307(b).
62 IAC 1847.8(j)	Administrative and judicial review	43 CFR 4.1308(a).
62 IAC 1847.8(m)	Administrative and judicial review	30 U.S.C. 1276(a)(2).

REVISIONS TO ILLINOIS' REGULATIONS THAT ARE SUBSTANTIVELY IDENTICAL TO THE CORRESPONDING FEDERAL REGULATIONS—Continued

State regulation	Subject	Federal counterpart
62 IAC 1847.9 (a), (b), (d)	Administrative and judicial review	30 CFR 800.40(f).
62 IAC 1847.9(i)	Administrative and judicial review	30 CFR 800.40(h).
62 IAC 1847.9(l)	Administrative and judicial review	30 U.S.C. 1276(a)(2).
62 IAC 1848.2 (a)–(f)	Procedure and practice	43 CFR 4.22 (a)–(f).
62 IAC 1848.3	Procedure and practice	43 CFR 4.23.
62 IAC 1848.5	Procedure and practice	43 CFR 4.1123.
62 IAC 1848.6	Procedure and practice	43 CFR 4.27(b)(1).
62 IAC 1848.8	Procedure and practice	43 CFR 4.1110.
62 IAC 1848.9(a)	Procedure and practice	43 CFR 4.1130.
62 IAC 1848.9(b)	Procedure and practice	43 CFR 4.1131.
62 IAC 1848.9(c)(1)	Procedure and practice	43 CFR 4.1132(a).
62 IAC 1848.9(c)(2)	Procedure and practice	43 CFR 4.1132(d).
62 IAC 1848.9(d)	Procedure and practice	43 CFR 4.1133.
62 IAC 1848.9(e)	Procedure and practice	43 CFR 4.1134.
62 IAC 1848.9(i)(1)	Procedure and practice	43 CFR 4.1137(a).
62 IAC 1848.9(i)(2)	Procedure and practice	43 CFR 4.1137(b).
62 IAC 1848.9(i)(4)	Procedure and practice	43 CFR 4.1137(c).
62 IAC 1848.9(i)(5)	Procedure and practice	43 CFR 4.1137(d).
62 IAC 1848.9(i)(6)	Procedure and practice	43 CFR 4.1137(g).
62 IAC 1848.9(i)(7)	Procedure and practice	43 CFR 4.1137(e).
62 IAC 1848.9(i)((8)(A)	Procedure and practice	43 CFR 4.1138(b).
62 IAC 1848.9(i)(8)(B)	Procedure and practice	43 CFR 4.1138(c).
62 IAC 1848.9(i)(8)(C)	Procedure and practice	43 CFR 4.1137(f).
62 IAC 1848.9(j)(1)	Procedure and practice	43 CFR 4.1139(a).
62 IAC 1848.9(j)(3)	Procedure and practice	43 CFR 4.1139 (a), (b).
62 IAC 1848.9(j)(4)	Procedure and practice	43 CFR 4.1139(c).
62 IAC 1848.9(k)	Procedure and practice	43 CFR 4.1140.
62 IAC 1848.9(l)	Procedure and practice	43 CFR 4.1141.
62 IAC 1848.9(m)	Procedure and practice	43 CFR 4.1135.
62 IAC 1848.9(n)	Procedure and practice	43 CFR 4.1136.
62 IAC 1848.20 (a), (b)	Procedure and practice	43 CFR 4.1125 (a), (b).
62 IAC 1848.20 (h), (i)	Procedure and practice	43 CFR 4.1125 (c), (d).
62 IAC 1848.21	Procedure and practice	43 CFR 4.1126.

Because the above proposed revisions are identical in meaning to the corresponding Federal rules, the Director finds that Illinois' proposed rules are no less effective than the Federal rules and he is removing the required amendments at 30 CFR 913.16(l), (m), and (n).

Revisions to Illinois' Regulations That Are not Substantively Identical to the Corresponding Federal Regulations

1. 62 IAC 1701.Appendix A—General Definitions

At 62 IAC 1701.Appendix A, Illinois is proposing to revise the definition of "land use" to specify allowable support facilities for the subcategories of "cropland," "pastureland," "forestry," "recreation," and "fish and wildlife habitat."

The Federal definition of "land use" at 30 CFR 701.5 does not include comparable provisions. Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that applicants would still be required to indicate the type and extent of support facilities and that the State would evaluate the size of support facilities relative to the size of the areas being supported (Administrative Record No. IL–1207). Therefore, the Director finds the proposed revisions to the State definition of "land use" described herein no less effective than the Federal definition at 30 CFR 701.5.

Illinois is also proposing to revise the subcategory definitions of "developed water resources" and "undeveloped land or no current use or land management." Where appropriate, developed water resources are to be considered a joint or seasonal use with cropland, pastureland, forestry, recreation and fish and wildlife habitat. A post-mining designation of undeveloped land shall not be allowed for any land which is proposed to be affected by the mining operation.

The Federal definition of "land use" at 30 CFR 701.5 does not include comparable provisions. However, the Director finds the proposed revisions to the State definition of "land use" described herein do not render that definition no less effective than the Federal definition at 30 CFR 701.5.

2. 62 IAC Part 1761—Designated Areas

In Illinois, the regulatory authority does not make any determinations on whether a road may be relocated or closed if the applicant does not have valid existing rights (VER) and the public road authority does not make any determinations for mining activity within 100 feet of a road. To clarify this situation, Illinois is proposing to revise 62 IAC 1761.12(c)(4) by deleting the requirement that a determination be made by the Department of Mines and Minerals (DMM) and the public road authority that the interests of the affected public and landowners will be protected if a road is relocated or closed. Further, Illinois is proposing to delete the requirement that the public road authority (in conjunction with the DMM) determine that the interests of the affected public and landowners will be protected if mining is allowed within 100 feet of the outside right-of-way line of a road.

Illinois' regulation at 62 IAC 1761.12(c)(1) requires an applicant without VER to obtain necessary approvals of the public road authority for relocation or closure of a road. Illinois' regulation at 62 IAC 1761.12(c)(4) still requires the DMM to make a finding as to whether the interests of the affected public and landowners will be protected from the

proposed mining operations and to make a determination that the interests of the affected public and landowners will be protected if mining is allowed within 100 feet of the outside right-of-way line of a road. Therefore, the Director finds the proposed regulation at 62 IAC 1761.12(c)(4) no less effective than the Federal regulation at 30 CFR 761.12(d)(4) which prohibits or limits mining in public road areas.

3. 62 IAC Part 1773—Requirements for Permits and Permit Processing

At 62 IAC 1773.15(d), Illinois is proposing to delete its existing provision for performance bond submittal and add a provision for the expiration of written findings approving a permit application. Illinois' requirements for filing performance bonds appear in 62 IAC 1800.11(a). Illinois is stipulating that written findings issued by the State approving a permit application will expire within one year from the date of issuance if the permit has not been issued based upon the applicant's failure to submit permit fees or a performance bond. If written findings expire, no further action will be taken on the permit application and a new permit application must be submitted if the applicant chooses to resume permitting activity for the area in question.

Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that a permit will not be issued unless fee and bond is paid in accordance with the regulations (Administrative Record No. IL–1207).

Although there is no precise Federal counterpart, the Director finds the proposed regulation at 62 IAC 1773.15(d) consistent with the Federal regulations at 30 CFR 773.15(d) and 777.17 which require that the permit applicant file a performance bond and pay permit fees before the permit is issued by the regulatory authority.

4. 62 IAC Part 1774—Revision, Renewal, and Transfer, Assignment, or Sale of Permit Rights

(a) At 62 IAC 1774.13(b)(2)(E), Illinois is proposing to allow that insignificant changes in land use be approved through its insignificant permit revision process on a case-by-case basis. Changes would be limited to 5 percent of the original total permit acreage, and the 5 percent limitation would be a cumulative total from permit issuance until final bond release.

In response to OSM's concern that alternative land use changes approved through the insignificant permit revision process would not require consultation with the landowner or the land management agency with jurisdiction over the lands, Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that "the proposed regulation language clearly indicates that consultation with the landowner or the land management agency is required for approval" (Administrative Record No. IL–1207).

Since Illinois clarified that consultation with the landowner or land management agency is required for approval of alternative land use changes through both significant and insignificant permit revisions, the Director finds the proposed regulation at 62 IAC 1774.13(b)(2)(E) to be consistent with the Federal regulation at 30 CFR 774.13(b)(2).

(b) At 62 IAC 1774.13(d) (2), (4) and (5), Illinois is proposing to revise its definition of "incidental boundary revisions (IBRs)" to include those areas contiguous with shadow area acreage, with certain exceptions for isolated long-term support facilities. Non-contiguous IBRs are subject to Illinois' performance standards at 62 IAC 1817.182. The maximum size for acreage additions to approved non-contiguous IBR areas are based on the original boundary revision acreage, not the original permit acreage.

Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that non-contiguous IBRs would be used as an alternative to minor underground facilities on a case-by-case basis and that it would require application of applicable performance standards if such minor facilities significantly impacted land, air, or water resources (Administrative Record No. IL–1207).

The Director finds the proposed regulation at 62 IAC 1774.13(d) (2), (4), and (5) to be consistent with the Federal regulation at 30 CFR 774.13(d) which requires that any extensions to the area covered by the permit, except incidental boundary revisions, be made by application for a new permit.

5. 62 IAC Part 1775—Administrative and Judicial Review of Decisions

Illinois is proposing to repeal 62 IAC part 1775. The regulations for the administrative and judicial review of decisions are consolidated into new 62 IAC Part 1847—Administrative and Judicial Review. The Director finds that the repeal of 62 IAC part 1775 does not render the State program less effective than the Federal regulations.

6. 62 IAC Part 1777—General Requirements for Permit Applications

At 62 IAC 1777.17, Illinois is proposing to revise its permit fee regulations to require that: (a) Permit fees are payable at the time of permit issuance and on the anniversary date of the permit; (b) permit fees submitted within 180 days of the date of the State's findings approving the application may be paid in accordance with 62 IAC 1777.17(b), and those fees not submitted within 180 days must be paid as a lump sum; and (c) failure to submit permit fees within one year of the issuance of the State's written findings approving the application will result in the expiration of the findings.

The Federal regulation at 30 CFR 777.17 requires that a permit application be accompanied by a fee, with the amount and method of payment to be determined by the regulatory authority. The Director finds the proposed regulation at 62 IAC 1777.17 to be consistent with the Federal regulation at 30 CFR 777.17.

7. 62 IAC Part 1778—Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information

(a) At 62 IAC 1778.15(a), Illinois is proposing to revise its requirements for permit application right-of-entry information to prohibit the submission of the actual documents upon which the applicant bases his or her legal right to enter and begin mining operations, in lieu of a description of said documents. The applicant may, however, be required to provide such information during the permitting process.

The Federal regulation at 30 CFR 778.15(a) requires that a permit application contain a description of the documents described above. The Director finds the proposed regulation at 30 CFR 1778.15(a) no less effective than the Federal regulation at 30 CFR 778.15(a).

(b) At 1778.15(e), Illinois is adding a provision requiring that an application in which the applicant claims to have valid existing rights to conduct mining operations within an area where mining is prohibited or limited, contain the necessary information and meet the requirements of 62 IAC 1778.16 (Areas Designated Unsuitable for Mining) and 62 IAC 1761.12 (Procedures).

The Federal regulations at 30 CFR 778.15 pertaining to right of entry information contain no comparable provision. However, the Director finds the proposed revision at 62 IAC 1778.15(e) to be consistent with the Federal regulations at 30 CFR 778.15 and 761.12.

8. 62 IAC Part 1780—Minimum Requirements for Reclamation and Operation Plan for Surface Mining Permit Application

(a) At 62 IAC 1780.21(b)(1)(B), Illinois is proposing to revise its requirements for ground water descriptions in permit applications by deleting the word "approximate" as a modifier of "rates of discharge or usage." Permit applicants will be required to provide actual rates of discharge or usage.

The Federal regulations at 30 CFR 780.21(b)(1) permit the submission of approximate rates of discharge or usage. The Director finds the proposed revision at 62 IAC 1780.21(b)(1)(B) no less effective than the Federal regulation at 30 CFR 780.21(b)(1).

(b) At 62 IAC 1780.38, Illinois is proposing to repeal its requirement that each permit application contain a detailed rehabilitation design plan for each siltation structure, diversion, impoundment, and treatment facility to be implemented and completed prior to abandoning the permit area.

The Federal regulations at 30 CFR part 780 pertaining to surface mining permit applications contain no comparable requirement. Therefore, the Director finds that the proposed deletion at 62 IAC 1780.38 does not render the State program less effective than the Federal regulations.

9. 62 IAC Part 1784—Minimum Requirements for Reclamation and Operation Plan for Underground Mining Permit Applications

(a) At 62 IAC 1784.14(b)(1)(B), Illinois is proposing to revise its requirements for ground water descriptions in permit applications by deleting the word "approximate" as a modifier of "rates of discharge or usage." Permit applicants will be required to provide actual rates of discharge or usage.

The Federal regulations at 30 CFR 784.14(b)(1) permit the submission of approximate rates of discharge or usage. The Director finds the proposed revision at 62 IAC 1784.14(b)(1)(B) no less effective than the Federal regulation at 30 CFR 784.14(b)(1).

(b) At 62 IAC 1784.27, Illinois is proposing to repeal its requirement that each permit application contain a detailed rehabilitation design plan for each siltation structure, diversion, impoundment, and treatment facility to be implemented and completed prior to abandoning the permit area.

The Federal regulations at 30 CFR part 784 pertaining to underground mining permit applications contain no comparable requirement. Therefore, the Director finds that the proposed deletion at 62 IAC 1784.27 does not render the State program less effective than the Federal regulations.

10. 62 IAC Part 1800—Bonding and Insurance Requirements

(a) At 62 IAC 1800.11(a), Illinois is proposing to require that failure to file a performance bond or other equivalent guarantee within one year of the issuance of written findings approving a permit application shall result in expiration of the written findings.

Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that when the written findings expire, a permit will not be issued and a new application will be required to permit the area involved (Administrative Record No. IL–1207).

Although the Federal regulation at 30 CFR 800.11(a) does not include this provision, the Director finds that the proposed revision at 62 IAC 1800.11(a) does not render the State regulation less effective than the Federal regulation.

(b) At 62 IAC 1800.40 (e), (f), (g), and (h), Illinois is proposing to delete its existing provisions for bond release hearing procedures and judicial review. Illinois' regulations for bond release hearings and review are consolidated into new 62 IAC part 1847—Administrative and Judicial Review. Therefore, the Director finds that the proposed deletions at 62 IAC 1800.40 (e), (f), (g), and (h) do not render the State program less effective than the Federal regulations.

(c) At 62 IAC 1800.50(c) (2), (3), (4), and (5), Illinois is proposing to delete its existing provisions for bond forfeiture hearings and appeals and is adding a reference to the consolidated hearings and appeals regulations for bond forfeitures at new 62 IAC 1847.7. The Director finds that the proposed deletions at 62 IAC 1800.50(c) (2), (3), (4), and (5) do not render the State program less effective than the Federal regulations.

11. 62 IAC Part 1816—Performance Standards—Surface Mining Activities; 62 IAC Part 1817—Performance Standards—Underground Mining Activities

(a) At 62 IAC 1816.49(a)(9)(B) and 1817.49(a)(9)(B), Illinois is proposing to require that all impoundments be inspected at least quarterly during construction, provided at least one inspection is conducted for impoundments completed in less than one quarter.

The Director finds that the proposed revisions at 62 IAC 1816.49(a)(9)(B) and 1817.49(a)(9)(B) are no less effective than the Federal regulations at 30 CFR 816.49(a)(10)(i) and 817.49(a)(10)(i) which require regular inspections during construction.

(b) At 62 IAC 1816.49(c)(2) and 1817.49(c)(2), Illinois is proposing to revise its temporary impoundment regulations to allow an impoundment to have either: (a) A single spillway meeting a certain prescribed configuration; or (b) sufficient spillway capacity to safely pass or contain, or a combination of storage and spillway capacity, to safely control the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer that certain requirements will be met. Impounding structures relying on the second method shall be located where failure would not be expected to cause loss of life or serious property damage, with certain exceptions.

The Federal regulations at 30 CFR 816.49(a)(8)(i) and 817.49(a)(8)(i) allow single open-channel spillways under identical conditions and according to identical specifications. The Federal regulations at 30 CFR 816.49(c)(2) and 817.49(c)(2) permit the regulatory authority to approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event under certain conditions. Therefore, the Director finds the proposed revisions at 62 IAC 1816.49(c)(2) and 1817.49(c)(2) are no less effective than the Federal regulations at 30 CFR 816.49(c)(2) and 817.49(c)(2).

(c) At 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C), Illinois is proposing to revise its revegetation standards by specifying normal husbandry practices for the State. These include approved agricultural practices described in the Illinois Agronomy Handbook (Administrative Record No. IL–1192A), and those practices which are a part of an approved conservation plan subject to the Food, Agriculture, Conservation and Trade Act of 1990 (7 U.S.C. 1421 *et seq.*). Illinois clarified in the April 27, 1993, modifications to this proposed regulation that it will assess whether site specific activities are outside of normal husbandry practices which will require restarting the responsibility period (Administrative Record No. IL–1207). Illinois clarified that it will consider limited reseeding and associated fertilization and liming as non-augmentative on agricultural and non-agricultural lands where the area is small in relation to the watershed of the area. These will include areas where the surrounding vegetation has been established and temporary features such as sediment ponds, roads, and small

diversions were removed and revegetated under approved plans.

The Federal regulations at 30 CFR 816.116 (c)(2) and (c)(4) and 817.116 (c)(2) and (c)(4) permit the performance of normal husbandry practices during the period of responsibility without restarting the responsibility period if the State regulatory authority and OSM approves such practices. In the May 8, 1984, **Federal Register** (49 FR 19472), OSM considered a State program amendment from Missouri which would have clarified that roads, sediment ponds, diversions, and small stockpiles of soil and overburden would not be subject to a revegetation responsibility period distinct from that applicable to the permit area as a whole. OSM did not approve this amendment because it believed the proposal was inconsistent with the intent and purpose of sections 509, 519, and 520 of SMCRA. In addition to the Illinois proposed rule, OSM is considering State program amendments on this subject from Kentucky (58 FR 32283, June 9, 1993), Oklahoma (57 FR 12784, April 13, 1992) and Ohio (58 FR 17173, April 1, 1993). Oklahoma and Ohio presented additional information in support of their proposals that OSM had not considered when rendering its May 8, 1984, Missouri decision. In order to consider this information and its effect on OSM's interpretation of SMCRA and the Federal rules, OSM is deferring action on Illinois' proposed revisions at 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C) to the extent that the proposed regulations, as clarified by Illinois' policy statement, consider the limited reseeding and fertilization of small areas including temporary structures such as sediment ponds, roads, and small diversions as non-augmentative and therefore not subject to a revegetation responsibility distinct from the rest of the area. In a separate **Federal Register** notice, OSM will request public comment on how SMCRA and the Federal rules should be interpreted regarding this issue.

(d) At 62 IAC 1816.116(a)(3) (A) and (B) and 1817.116(a)(3) (A) and (B), Illinois is proposing to revise its revegetation standards to require that the vegetative ground cover for areas previously disturbed by mining operations that were not reclaimed to State requirements or were otherwise redisturbed by mining operations shall be no less than the greater of 70 percent or the percentage of cover existing before redisturbance and shall be adequate to control erosion during the last year of the responsibility period. For areas to be developed for industrial, commercial, or residential uses less than 2 years after regrading, the ground cover shall not be less than 70 percent.

The Federal regulations at 30 CFR 816.116(b) (4) and (5) and 817.116(b) (4) and (5) require that vegetative ground cover for these categories not be less than that required to control erosion and, for previously mined areas, the ground cover shall also not be less than that which existed before redisturbance. 30 CFR 816.116(c)(2) and 817.116(c)(2) provide that the success standards for previously mined areas must be met during the last year of the responsibility period. The Director finds that the proposed regulations at 62 IAC 1816.116(a)(3) (A) and (B) and 1817.116(a)(3) (A) and (B) are no less effective than the Federal regulations at 30 CFR 816.116(b) (4) and (5) and 817.116(b) (4) and (5).

(e) At 62 IAC 1816.116(a)(3) (C) and (E), and 62 IAC 1817.116(a)(3) (C) and (E), Illinois is proposing to add additional requirements regarding revegetation standards. In subsection (a)(3)(C), Illinois is requiring that all cropland be maintained using proper management practices as specified in subsection (a)(2)(C) until the end of the responsibility period. In subsection (a)(3)(E), Illinois is requiring that all pasture, hayland, and grazing land be maintained using proper management practices as specified in subsection (a)(2)(C) until the end of the responsibility period.

Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that the proposed revisions are intended to ensure that proper management (erosion control and vegetation maintenance) is continued during the responsibility period even if the production requirements have been met early in this period (Administrative Record No. IL–1207).

The Director finds the proposed regulations at 62 IAC 1816.116(a)(3)(C) and 62 IAC 1817.116(a)(3)(C) not inconsistent with the Federal regulations pertaining to revegetation success standards at 30 CFR 816.116(b) and 30 CFR 817.116(b). However, the Federal regulations at 30 CFR 816.116(b)(1) and 817.116(b)(1) require that for areas developed for use as grazing land or pasture land, ground cover and production of living plants on the revegetated area meet certain success standards approved by the regulatory authority. Illinois does not include ground cover success standards in its proposed regulations. By letter dated July 29, 1993 (Administrative Record No. IL–1218), Illinois stated that its ground cover standards for pasture and hayland which have not been previously disturbed by mining is intended to mean a minimum 90 percent ground cover for any 2 years, except the first year, of the responsibility period. Illinois also stated it will clarify the ground cover requirement in its next rulemaking.

The Director finds the proposed State regulations at 62 IAC 1816.116(a)(3)(E) and 1817.116(a)(3)(E) less effective than the Federal regulations at 30 CFR 816.116(b)(1) and 817.116(b)(1) and is requiring that Illinois amend its program to include success standards for ground cover for pasture and grazing land.

(f) At 62 IAC 1816.116(b)(2) and 1817.116(b)(2), Illinois is proposing to revise its regulations to require that a permittee report reclamation activities that initiate or alter the responsibility period or are specifically required by the State to evaluate a normal husbandry practice.

The Federal regulations contain no comparable requirement. However, the Director finds that the proposed revisions at 62 IAC 1816.116(b)(2) and 1817.116(b)(2) are consistent with the requirements of the Federal regulations at 30 CFR 816.116(c)(4) and 817.116(c)(4).

(g) At 62 IAC 1816.117(a) (1) and (2) and 1817.117(a) (1) and (2), Illinois is proposing to revise its tree and shrub revegetation regulations to clarify that vegetation success standards are measured during the fifth year of the responsibility period or later in the responsibility period. Vegetative ground cover shall not be less than 70 percent during the last year of the responsibility period.

The Federal regulations at 30 CFR 816.116(b)(3)(iii) and 817.116(b)(3)(iii) require vegetative ground cover to be not less than that required to achieve the postmining land use. Both 62 IAC 1816.116(a)(2) and 1817.117(a)(2) already contain this requirement, which will not be compromised by the revisions proposed herein. The Director finds the proposed regulations at 62 IAC 1816.117(a) (1) and (2) and 1817.117(a) (1) and (2) to be no less effective than the Federal regulations at 30 CFR 816.116(b)(3) (ii) and (iii) and 30 CFR 817.116(b)(3) (ii) and (iii), and he is removing the required amendment at 30 CFR 913.16(p) because Illinois has revised its rules to clearly state that tree and shrub success must be achieved during the responsibility period.

(h) At 62 IAC 1816.117(a)(5) and 1817.117(a)(5), Illinois is proposing to revise its tree and shrub revegetation requirements to clarify that the repair of rills and gullies shall be limited to those approved as a normal conservation

practice under 62 IAC 1816.116(a)(2)(C), (D), and (E) and 62 IAC 1817.116(a)(2)(C), (D), and (E).

The Federal regulations contain no comparable provision. However, the Director finds that the proposed revisions at 62 IAC 1816.117(a)(5) and 1817.117(a)(5) are consistent with the requirements of the Federal regulations at 30 CFR 1816.116(c)(4) and 1817.116(c)(4) pertaining to selective husbandry practices.

(i) At 62 IAC 1816.117(d)(6) and 1817.117(d)(6), Illinois is proposing to delete its 70 percent vegetative ground cover success standard. This provision is included in the proposed revisions to 62 IAC 1816.117(a)(3) (A) and (B) and 1817.117(a)(3) (A) and (B) as discussed in Finding 11(d) and in the proposed revisions to 62 IAC 1816.117(a)(2) and 1817.117(a)(2) as discussed in Finding 11(g).

The Director finds that the proposed deletion does not render the State program less effective than the Federal regulations and he is removing the required amendment at 30 CFR 913.16(q) since, by deleting 62 IAC 1816.117(d)(6) and 1817.116(d)(6), Illinois has made it clear that the 70% ground cover success standard does not apply to previously unmined pasture and/or hayland or grazing land.

(j) At 62 IAC 1816.151(b) and 1817.151(b), Illinois is proposing to revise its requirements for primary roads. Each primary road embankment shall be shown to have a minimum static factor of safety of 1.3, or shall be designed in compliance with certain specified design factors.

The Federal regulations at 30 CFR 816.151(b) and 817.151(b) require compliance with the minimum static factor of 1.3. The Federal regulations at 30 CFR 780.37(c) and 784.24(c) allow regulatory authorities to establish engineering design standards for primary roads in lieu of engineering tests to establish compliance with the minimum static safety factor of 1.3. OSM conducted a technical review of Illinois' proposed design standards for primary roads and found them to be acceptable (Administrative Record No. IL–1202A). The Director finds the proposed regulations at 1816.151(b) and 1817.1151(b) to be no less effective than the Federal regulations at 30 CFR 816.151(b) and 1817.151(b) and he is removing the required amendment at 30 CFR 913.16(r).

(k) At 62 IAC 1817.182(d), Illinois is revising its regulations for minor underground mine facilities to require compliance with its regulations for primary roads at 62 IAC 1817.151.

There is no comparable Federal regulation. However, the Director finds that the proposed revisions at 62 IAC 1817.182(d) are not inconsistent with SMCRA and the Federal regulations.

12. 62 IAC Part 1843—State Enforcement

(a) At 62 IAC 1843.13(e)–(k), Illinois is proposing to delete its existing regulations for show cause hearings and judicial review.

Illinois' regulations for show cause hearings and review are consolidated in new 62 IAC part 1847—Administrative and Judicial Review. The Director finds that the deletions at 62 IAC 1843.13(e)–(k), with the exception of subsection (j) which is recodified as subsection (f), do not render the State program less effective than the Federal regulations.

(b) Illinois is proposing to repeal the following regulations: 62 IAC 1843.16—Formal Review of Citations, 62 IAC 1843.17—Temporary Injunctive Relief, 62 IAC 1843.20—Intervention, and 62 IAC 1843.21—Discovery. Illinois' regulations for citation hearings and temporary relief are consolidated in new 62 IAC part 1847—Administrative and Judicial Review. Illinois' regulations for intervention and discovery are consolidated in new 62 IAC part 1848—Procedure and Practice. The Director finds that the deletions of 62 IAC 1843.16, 1843.17, 1843.20 and 1843.21 do not render the State program less effective than the Federal regulations.

13. 62 IAC Part 1845—Civil Penalties

(a) At 62 IAC 1845.12(c), Illinois is proposing to revise its penalty assessment regulations to require that a penalty not be assessed for a notice of violation if an assessment of less than $1,100 is derived in accordance with section 1845.13, unless 62 IAC 1845.12(d) applies. At 62 IAC 1845.12(d), Illinois is proposing to revise its regulations to require that if the assessment is below $1,100, the penalty shall be assessed if it is the permittee's second or more related violation within a 12-month period.

The Federal regulations at 30 CFR 845.12(c) permit OSM to assess a penalty after considering the following factors: history of previous violations, seriousness, negligence, and good faith in attempting to achieve compliance. The Director finds the proposed revision at 62 IAC 1845.12(c) no less effective than the Federal regulation at 30 CFR 845.12(c). However, because Illinois must consider all civil penalty criteria, not just history of previous violations, in determining whether to require payment of a penalty of less than $1,100, the Director finds the proposed revision at 62 IAC 1845.12(d) less effective than the Federal regulation at 30 CFR 845.12(c). He is, therefore, requiring that the State amend its program to consider the factors listed in 62 IAC 1845.13(b) in determining whether to assess a penalty.

(b) At 62 IAC 1845.13(b)(4) (A) and (D), Illinois is proposing to revise its civil penalty assessment regulations to require the reduction of the proposed penalty by up to $500 based upon the degree of good faith in attempting to achieve rapid compliance. Good faith credit will not be given for violations administrative in nature.

The Federal regulations at 30 CFR 845.13(b)(4) pertaining to civil penalties contain no comparable provisions. However, the Director finds the proposed revisions at 62 IAC 1845.13(b)(4) (A) and (D) to be consistent with the Federal regulations at 30 CFR 845.13(b)(4).

(c) At 62 IAC 1845.18(c), Illinois is proposing to delete its penalty assessment hearing provisions. Illinois' regulations for civil penalty assessment hearings are consolidated in new 62 IAC part 1847—Administrative and Judicial Review. The Director finds that the deletions at 62 IAC 1845.18(c) do not render the State program less effective than the Federal regulations.

(d) At 62 IAC 1845.19, Illinois is proposing to repeal its procedures for hearings and judicial review pertaining to citations and civil penalty assessments. Illinois' regulations for citation and civil penalty assessment hearings and judicial review are consolidated in new 62 IAC part 1847—Administrative and Judicial Review, and in 62 IAC 1848.7—Pre-Hearing Conferences. The Director finds that the deletions at 62 IAC 1845.19 do not render the State program less effective than the Federal regulations.

14. 62 IAC Part 1847—Administrative and Judicial Review

(a) At new 62 IAC part 1847, Illinois is proposing to consolidate its regulations for administrative and judicial reviews. At 62 IAC 1847.1, Illinois is proposing to define the scope of the regulations. The Federal regulations at 43 CFR part 4 pertaining to hearings and appeals contain no comparable provisions. The Director finds the proposed regulation at 62 IAC 1847.1 not inconsistent with the general Federal provisions.

(b) At 62 IAC 1847.3(a), Illinois is proposing to establish procedures for permit hearings. The procedures also apply to conflict of interest hearings, review of valid existing rights determinations, review of incidental

coal extraction exemption determinations, and hearings related to rescission of improvidently issued permits.

The Federal regulations provide for administrative hearings at 43 CFR 4.1360–1369 for permitting issues, at 30 CFR 705.21 for conflict of interest issues, at 30 CFR 775.11 for valid existing rights issues, at 30 CFR 702.11(f) for exemption determinations, and at 43 CFR 4.1280–1286 for rescission of improvidently issued permits. The Illinois counterpart to 30 CFR part 775 is being repealed herein and replaced by 62 IAC 1847.3, which, as explained below, is being approved by the Director in this final rule. Therefore, the Director finds that the use by Illinois of its proposed 62 IAC 1847.3 for hearings on valid existing rights issues is no less effective than the Federal regulations at 30 CFR 775.11. The use of 62 IAC 1847.3 for hearings on incidental coal extraction exemptions and conflict of interest determinations is consistent with 30 CFR 702.11(f) and 705.21, respectively, both of which allow the states to use their own hearings procedures for these determinations. The Director finds the proposed regulation at 62 IAC 1847.3 to be consistent with 43 CFR 4.1280–1286 for purposes of hearings on rescissions of improvidently issued permits. Finally, for hearings on mining permit decisions generally, the Director finds that 62 IAC 1847.3(a) is substantively identical to 43 CFR 4.1362(a).

(c) At IAC 1847.3(c), Illinois is proposing to allow for a pre-hearing conference. The Federal regulations at 43 CFR 4.1360–4.1369 contain no comparable provisions. However, the Director finds that the proposed regulation at 62 IAC 1847.3(c) adds clarity and specificity to the State program and is not inconsistent with SMCRA or the Federal regulations.

(d) At 62 IAC 1847.3(f), Illinois is proposing to require that a stenographic recording be made of all formal hearings reviewing permitting decisions. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable. Therefore, the Director finds that they are consistent with 30 CFR 775.11(b)(3)(ii) which requires that a verbatim record be made of each public hearing on decisions on permits and are approved to the extent that they require retention and public availability of the hearing record for a period at least as long as the time allowed for filing appeals of agency decisions.

(e) At 62 IAC 1847.3 (i) and (j), Illinois is proposing to establish procedures for the filing of written exceptions to a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the Department of Mines and Minerals (DMM) of a final administrative decision.

The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.3 (i) and (j) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(f) At 62 IAC 1847.3(l) (1) and (2), Illinois is proposing to establish procedures for the judicial review of permit decisions. If the hearing officer fails to act within certain prescribed time limits, a person may request judicial review of the Department's final administrative decision.

The Federal regulations at 30 CFR 775.13(a)(2) also grant judicial review if the regulatory authority, not just the hearing officer, fails to act within the applicable time limits. The Director finds the proposed regulations at 62 IAC 1847.3(l) (1) and (2) less effective than the Federal regulations at 30 CFR 775.13(a)(2) and is requiring that Illinois amend its program to grant judicial review if the regulatory authority fails to act within applicable time limits.

(g) At 62 IAC 1847.3(l)(3), Illinois is clarifying that the judicial review of permit decisions does not limit rights established in Section 8.05 of the State Act. The Director finds the proposed regulation at 62 IAC 1847.3(l)(3) no less effective than the Federal regulation at 30 CFR 775.13(b) which states that the availability of judicial review does not limit the operation of rights established in section 520 of SMCRA.

(h) At 62 IAC 1847.4(c), Illinois is proposing to require that a civil penalty subsequently assessed for a notice of violation or a cessation order for which a hearing was requested be forwarded for placement in escrow in order to continue the review proceedings.

Illinois clarified in the April 27, 1993, modifications to this proposed regulation change that the rule is intended to clarify that in those situations where a notice of violation or cessation order is contested prior to a penalty being assessed, pre-payment of the subsequently assessed penalty is a prerequisite to continuation of the review procedures (Administrative Record No. IL–1207).

Although the special rules applicable to surface coal mining citation hearings and appeals at 43 CFR 4.1160–1171 do not contain this requirement, the Director finds the proposed State regulation at 62 IAC 1847.4(c) not inconsistent with section 518(c) of SMCRA, which requires waiver of all legal rights to contest the violation or the amount of the penalty for failure to make timely payment of the proposed assessment in full.

(i) At 62 IAC 1847.4 (e) and (n), Illinois is proposing to impose certain procedures pertaining to pre-hearing conferences. Illinois is also clarifying the terms of summary dispositions. The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.4 (e) and (n) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(j) At 62 IAC 1847.4(g), Illinois is proposing to require that a stenographic recording be made of all formal citation hearings. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable. Therefore, although there is no Federal counterpart to the proposed regulations at 62 IAC 1847.4(g), the Director finds that they are consistent with 30 CFR 840.13(c) and is approving the regulations to the extent that they require retention and public availability of the hearing record for a period at least as long as the time allowed for filing appeals of agency decisions.

(k) At 62 IAC 1847.4(i), (j), and (k), Illinois is proposing to establish procedures for the filing of written exceptions to a hearing officer's decision, time limits for a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the DMM of a final administrative decision.

The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.4(i), (j), and (k) add clarity and specificity to the

State program and are not inconsistent with SMCRA or the Federal regulations.

(l) At 62 IAC 1847.5(f) and (l) Illinois is proposing to allow for a pre-hearing conference and to impose certain time restrictions for procedures pertaining to hearing officer decisions after civil penalty assessment hearings. The Federal regulations contain no comparable provisions.

However, the Director finds that the proposed regulations at 62 IAC 1847.5 (f) and (l) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(m) At 62 IAC 1847.5(i), Illinois is proposing to establish procedures for summary dispositions when a person against whom a proposed civil penalty is assessed fails to appear at a hearing.

While the proposed language is substantively identical to the Federal regulation at 43 CFR 4.1156(c), Illinois does not have counterparts to 43 CFR 4.1156 (a) and (b) which provide for the referral of a case to an assessment officer upon a person's failure to comply with any prehearing order. The Director finds that while the Illinois program does not contain provisions for referral back to the assessment officer, Illinois does provide recourse for failure to comply with a hearing officer's order at 62 IAC 1848.12, 1848.19, and 1848.22. Therefore, the Director finds the proposed regulation at 62 IAC 1847.5(i) to be no less effective than the Federal regulation at 43 CFR 4.1156.

(n) At 62 IAC 1847.5(j), Illinois is proposing to require that a stenographic record be made of all formal hearings reviewing civil penalty assessments. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable.

Therefore, although there are no Federal counterparts to the proposed regulations at 62 IAC 1847.5(j), the Director finds that they are consistent with 30 CFR 840.13(c) and are approved to the extent that they require retention and public availability of the hearing record for a period of at least as long as the time allowed for filing appeals of agency decisions.

(o) At 62 IAC 1847.5 (m) and (n), Illinois is proposing to establish procedures for the filing of written exceptions to a hearing officer's decision, time limits for a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the DMM of a final administrative decision.

The Federal regulations contain no comparable provision. However, the Director finds that the proposed regulations at 62 IAC 1847.5 (m) and (n) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(p) At 62 IAC 1847.6 (c), (d), (e), and (m), Illinois is proposing to establish procedures for show cause hearings and pre-hearing conferences and to impose certain time restrictions for filing answers or requests for hearings. The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.6 (c),(d),(e), and (m) add clarity and specificity to the State program and are not inconsistent with the SMCRA or the Federal regulations.

(q) At 62 IAC 1847.6(f), Illinois is proposing to establish settlement agreement provisions for permit suspension or termination proceedings. The language of subsection (f) is substantively identical to 30 CFR 845.18(d)(1), except that the Federal rule pertains to civil penalty assessment proceedings.

While there is no Federal counterpart provision pertaining to settlement of permit suspension or revocation proceedings, the Director finds that the proposed regulation at 62 IAC 1847.6(f) will not compromise the public's right to participate in enforcement proceedings in accordance with 30 CFR 840.15, so long as any intervenors to the suspension or revocation proceedings are permitted to participate in settlement negotiations. Therefore, to the extent discussed herein, the Director finds that the proposed regulation at 62 IAC 1847.6(f) is consistent with the Federal regulations at 30 CFR 840.13(c).

(r) At 62 IAC 1847.6(i), Illinois is proposing to require that a stenographic recording be made of all formal hearings reviewing show cause orders. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable. Therefore, although there are no Federal counterparts to the proposed regulations at 62 IAC 1847.6(i), the Director finds that they are consistent with 30 CFR 840.13(c) and are approved to the extent that they require retention and public availability of the hearing record for a period at least as long as the time allowed for filing appeals of agency decisions.

(s) At 62 IAC 1847.6(j), Illinois is proposing to establish time limits and procedures for a hearing officer's issuance and service of a proposed decision after a hearing reviewing show cause orders. The proposed decision will consist of proposed written findings of fact, conclusions of law, an order adjudicating the hearing request, and a determination as to whether a pattern of violations exists.

The Federal regulations at 43 CFR 4.1194(c) set forth the provisions for the administrative review of suspensions or revocations of permits. Although the Federal regulations do not contain the specific requirements proposed at 62 IAC 1847.6(j), the Director finds the proposed regulations add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(t) At 62 IAC 1847.6 (k) and (l), Illinois is proposing to establish procedures for the filing of written exceptions to a hearing officer's decision, time limits for a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the DMM of a final administrative decision.

The Federal regulations contain no comparable provisions, However, the Director finds that the proposed regulations at 62 IAC 1847.6 (k) and (l) add clarity and specificity to the State's program and are not inconsistent with SMCRA or the Federal regulations.

(u) At 62 IAC 1847.7, Illinois sets forth proceedings for bond forfeiture hearings and includes provisions pertaining to deadlines for requesting a hearing, hearing location, pre-hearing conferences, notice of hearing, settlement agreements, summary dispositions, burden of proof, record of hearing, hearing officer's proposed decision, exceptions to proposed decision, final administrative decision, and judicial review.

The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.7 satisfy the public participation requirements of 30 CFR 840.15 and are, therefore, consistent with 30 CFR 800.50.

(v) At 62 IAC 1847.8(d), Illinois is proposing to permit any party to an individual civil penalty hearing to request a pre-hearing conference.

The Federal regulations contain no comparable provision. However, the Director finds that the proposed regulation at 62 IAC 1847.8(d) adds clarity and specificity to the State program and is not inconsistent with SMCRA or the Federal regulations.

(w) At 62 IAC 1847.8(f), Illinois is proposing to establish settlement agreement provisions for the individual civil penalty assessment proceedings. The language of subsection (f) is substantively identical to 30 CFR 845.18(d)(1), except the Federal rule pertains to civil penalty assessment proceedings rather than individual civil penalty assessment proceedings.

While there is no Federal counterpart provision pertaining to individual civil penalty assessment proceedings, the Director finds that the proposed regulation at 62 IAC 1847.8(f) will not compromise the public's right to participate in enforcement proceedings in accordance with 30 CFR 840.15, so long as any intervenors to the assessment proceedings are permitted to participate in settlement negotiations. Therefore, to the extent discussed herein, the Director finds that the proposed regulation at 62 IAC 1847.8(f) is consistent with 30 CFR 840.13(c).

(x) At 62 IAC 1847.8(g), Illinois is proposing to establish procedures for summary disposition of individual civil penalty (ICP) hearings where the person assessed the ICP fails to appear at the hearing. The Federal regulations contain no precisely comparable provisions for ICP hearings but do contain comparable summary disposition procedures for civil penalty assessment hearings at 43 CFR 4.1156 and permit suspension and revocation hearings at 43 CFR 4.1195. Illinois' decision to allow summary dispositions of ICP hearings will not render its program inconsistent with SMCRA or the Federal regulations. The Director finds that the proposed regulations at 62 IAC 1847.8(g) can be approved.

(y) At 62 IAC 1847.8(h), Illinois is proposing to require that a stenographic recording be made of all formal hearings reviewing individual civil penalty assessments. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable. Therefore, although there are no Federal counterparts to the proposed regulations at 62 IAC 1847.8(h), the Director finds that they are consistent with 30 CFR 840.13(c) and is approving them to the extent that they require retention and public availability of the hearing record for a period of at least as long as the time allowed for filing appeals of agency decisions.

(z) At 62 IAC 1847.8 (k) and (l), Illinois is proposing to establish procedures for filing written exceptions to a hearing officer's decision, time limits for a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the DMM of a final administrative decision.

The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.8 (k) and (l) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

(aa) At 62 IAC 1847.9(c), Illinois is proposing to establish procedures for pre-hearing conferences prior to bond release hearings. The Federal regulations contain no comparable provision. However, the Director finds that the proposed regulation at 62 IAC 1847.9(c) adds clarity and specificity to the State program and is not inconsistent with SMCRA or the Federal regulations.

(bb) At 62 IAC 1847.9(e), Illinois is proposing to establish settlement agreement provisions for bond release proceedings. The language of subsection (e) is substantively identical to 30 CFR 845.18(d)(1), except the Federal rule pertains to civil penalty assessment proceedings.

While there is no Federal counterpart provision pertaining to settlement of bond release proceedings, the Director finds that the proposed regulation at 62 IAC 1847.9(e) is not inconsistent with SMCRA or the Federal regulations.

(cc) At 62 IAC 1847.9(f), Illinois proposes that a person who fails to appear at a bond release hearing will be deemed to have waived his right to a hearing.

The Federal regulations contain no comparable provision. However, the Director finds that the proposed regulation at 62 IAC 1847.9(f) is not inconsistent with any provision of SMCRA or the Federal regulations.

(dd) At 62 IAC 1847.9(g), Illinois proposes that any person seeking to reverse the DMM's proposed decision to release a bond shall have the burden of proving that the DMM's decision was clearly erroneous.

The Federal regulations contain no explicit burden of proof counterpart for bond release proceedings. However, the generally accepted standard of proof in administrative proceedings is proof by a preponderance of the evidence. So long as the Illinois proposed rule does not alter this standard, it is acceptable. Therefore, the Director finds the proposed regulation at 62 IAC 1847.9(g) to be no less effective than the Federal regulations at 30 CFR 800.40(f) to the extent that it requires proof by a preponderance of the evidence, that the DMM's decision was clearly erroneous.

(ee) At 62 IAC 1847.9(h), Illinois is proposing to require that a stenographic recording be made of all formal hearings reviewing bond releases. These provisions also require that the record of the hearing be maintained and made available to the public for at least 60 days after the issuance of the Director's decision.

Under the Illinois Administrative Review Law, 735 ILCS 5/3–101 through 5/3–112, a party seeking judicial review of an agency decision has 35 days from the date of service of the decision to appeal. Since the hearing record will be maintained for a period which exceeds the appeal period, the Director finds that these provisions are reasonable. Therefore, the Director finds that they are consistent with 30 CFR 800.40(g) which requires that a verbatim record be made of each public hearing on bond release decisions and are approved to the extent that they require retention and public availability of the hearing record for a period at least as long as the time allowed for filing appeals of agency decisions.

(ff) At 62 IAC 1847.9 (j) and (k), Illinois is proposing to establish procedures for filing written exceptions to a hearing officer's decision, time limits for a hearing officer's decision, time limits for responses to exceptions, and time limits for issuance by the DMM of a final administrative decision.

The Federal regulations contain no comparable provisions. However, the Director finds that the proposed regulations at 62 IAC 1847.9 (j) and (k) add clarity and specificity to the State program and are not inconsistent with SMCRA or the Federal regulations.

15. 62 IAC Part 1848—Procedure and Practice

(a) At new 62 IAC part 1848, Illinois is proposing to consolidate its regulations pertaining to procedure and practice. At 1848.1, Illinois is proposing to define the scope and purpose of the regulations.

The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.1 have no substantive impact on the Illinois program and are, therefore, not inconsistent with SMCRA or the Federal regulations.

(b) At 62 IAC 1848.2(g), Illinois is proposing to establish the address for filing petitions for review and requests for hearing. The Federal regulations at 43 CFR 4.22 pertaining to documents contain no comparable provision. However, the Director finds the proposed regulation at 62 IAC 1848.2(g) not inconsistent with SMCRA or the Federal regulations.

(c) At 62 IAC 1848.7, Illinois is proposing to establish procedures for pre-hearing conferences. A pre-hearing conference may be requested for any type of proceeding under 62 IAC part 1847. The Federal regulations at 43 CFR 4.1121(b) contain similar provisions for pre-hearing conferences. Therefore, the Director finds the proposed regulations at 62 IAC 1848.7 consistent with the Federal regulations at 30 CFR 840.13(c).

(d) At 62 IAC 1848.9(f), (g), and (h), Illinois is proposing to establish discovery procedures with regard to: Stipulations, effect of disclosure, and attempts to resolve discovery differences. The Federal regulations at 43 CFR 4.1130–4.1141 contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.9 (f), (g), and (h) to be consistent with the general Federal provisions at 43 CFR 4.1130–4.1141.

(e) At 62 IAC 1848.9(i)(3), Illinois is proposing to establish procedures for discovery and evidentiary depositions. The Federal regulations at 43 CFR 4.1137 and 4.1138 pertaining to depositions contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.9(i) to be not inconsistent with SMCRA or the Federal regulations at 43 CFR 4.1137 and 4.1138.

(f) At 62 IAC 1848.9(j)(2), (5), and (6), Illinois sets forth certain requirements with regard to written interrogatories. These requirements include: the duty of an attorney directing interrogatories, the option to produce documents as answers to interrogatories, and the use of interrogatory answers. While these provisions have no precise Federal counterparts, the Director finds them to be consistent with 43 CFR 4.1139.

(g) At 62 IAC 1848.11, Illinois is proposing to establish procedures for expert witnesses. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.11 to be not inconsistent with SMCRA or the Federal regulations.

(h) At 62 IAC 1848.12, Illinois is proposing to establish procedures for motions. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.12 to be not inconsistent with SMCRA or the Federal regulations.

(i) At 62 IAC 1848.13, Illinois is proposing to establish procedures for the consolidation of proceedings. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.13 to be not inconsistent with SMCRA or the Federal regulations.

(j) At 62 IAC 1848.15, Illinois is proposing to establish procedures for rules of evidence and official notice. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.15 to be not inconsistent with SMCRA or the Federal regulations.

(k) At 62 IAC 1848.16, Illinois is proposing to establish regulations for the powers of hearing officers. The Federal regulations at 43 CFR 4.1120(a) set forth the powers of the administrative law judges, who are the Federal counterparts to the Illinois hearing officers. The Director finds the proposed regulations at 62 IAC 1848.16 contain substantively the same provisions as and are therefore no less effective than the Federal regulations at 43 CFR 4.1121.

(l) At 62 IAC 1848.17, Illinois is proposing to establish regulations for the disqualification of a hearing officer. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.17 to be not inconsistent with SMCRA or the Federal regulations.

(m) At 62 IAC 1848.18, Illinois is proposing to establish regulations for the postponement or continuance of a hearing.

The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.18 to be not inconsistent with SMCRA or the Federal regulations.

(n) At 62 IAC 1848.19, Illinois is proposing to establish regulations for failure to state a claim. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.19 to be not inconsistent with SMCRA or the Federal regulations.

(o) At 62 IAC 1848.20 (c), (d), (e), (f), and (g), Illinois is proposing to establish regulations for summary decisions. The Federal regulations at 43 CFR 4.1125 pertaining to summary decisions contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.20 (c), (d), (e), (f), and (g) to be not inconsistent with SMCRA or the Federal regulations.

(p) At 62 IAC 1848.22, Illinois is proposing to establish regulations for default. The Federal regulations at 43 CFR part 4 pertaining to procedure and practice contain no comparable provisions. However, the Director finds the proposed regulations at 62 IAC 1848.22 to be not inconsistent with SMCRA or the Federal regulations.

IV. Summary and Disposition of Comments

Public Comments

The public comment period and opportunity to request a public hearing announced in the August 18, 1992, **Federal Register** (57 FR 37127) ended on September 17, 1992. No comments were received and the scheduled public hearing was not held as no one requested an opportunity to provide testimony.

The public comment period and opportunity to request a public hearing announced in the May 17, 1993, **Federal Register** (58 FR 28804) ended on June 16, 1993. The scheduled public hearing was not held as no one requested an opportunity to provide testimony.

One commenter encouraged the development of provisions for and a new process to implement, administer, and enforce portions of a new groundwater program. The Director notes that Illinois withdrew its proposed provisions to the underground mining hydrologic regulations for groundwater analyses at 62 IAC 1780.21 and 1784.14 and may modify and resubmit these regulations at a later date.

Agency Comments

Pursuant to section 503(b) of SMCRA and the implementing regulations at 30 CFR 732.17(h)(11)(i), comments were solicited from various Federal agencies with an actual or potential interest in the Illinois program. No comments were received on either submission.

EPA Concurrence

Under 30 CFR 732.17(h)(11)(ii), the Director is required to obtain the written concurrence of the Administrator of the Environmental Protection Agency (EPA) with respect to any provisions of a State program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). The Director has determined that this amendment contains no provisions in these categories.

V. Director's Decision

Based on the above findings, the Director is approving the amendment to the Illinois regulatory program submitted on June 22, 1992, with the exception of the provisions found not to be in accordance with SMCRA or not consistent with the Federal regulations. Those provisions not approved and requiring further amendment are addressed in Findings 11(e), 13(a), and 14(f). In addition, the Director is deferring action on 62 IAC 1816.116(a)(2)(C) and 1817.116(a)(2)(C) as discussed in Finding 11(c). Finally, the Director is removing required amendments at 30 CFR 913.16 (l), (m), (n), (p), (q), and (r) because of changes submitted by Illinois to 62 IAC 1702.17(c)(1), 1773.15(b)(1)(B), 1816/1817.84(b)(2), 1816/1817.117(a)(1), 1816/1817.117(d)(6), and 1816/1817.151(b), respectively, which satisfy those required amendments.

The Federal rules at 30 CFR part 913 concerning the Illinois program are being amended to implement the Director's decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to conform their programs to the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

Effect of the Director's Decision

Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Section 503 of SMCRA provides that a State may not exercise jurisdiction under SMCRA unless the State program is approved by the Secretary. Similarly, 30 CFR 732.17(a) requires that any alteration of an approved State program be submitted to OSM for review as a program amendment. Thus, any changes to a State program are not enforceable until approved by OSM. The Federal regulations at 30 CFR 732.17(g) prohibit any unilateral changes to approved programs. In his oversight of the Illinois program, the Director will recognize only the statutes, regulations, and other materials approved by him, together with any consistent implementing policies, directives and other materials, and will require the enforcement by Illinois of only such provisions.

VI. Procedural Determinations

Executive Order 12291

On July 12, 1984, the Office of Management and Budget (OMB) granted OSM an exemption from sections 3, 4, 7 and 8 of Executive Order 12291 for actions related to approval or conditional approval of State regulatory programs, actions and program amendments. Therefore, preparation of a regulatory impact analysis is not necessary and OMB regulatory review is not required.

Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA [30 U.S.C. 1292(d)] provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C).

Paperwork Reduction Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Hence, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

List of Subjects in 30 CFR Part 913

Intergovernmental relations, Surface mining, Underground mining.

Dated: August 27, 1993.

Ronald C. Recker,

Acting Assistant Director, Eastern Support Center.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 913—ILLINOIS

1. The authority citation for part 913 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. In § 913.15, a new paragraph (o) is added to read as follows:

§ 913.15 Approval of Regulatory Program Amendments.

* * * * *

(o) The following amendment, as submitted to OSM on June 22, 1992, and revised on April 27, 1993, is approved effective September 3, 1993, with the exceptions identified herein. The amendment consists of the following modifications to the Illinois program:

1. Revisions of the following regulations of Chapter I of Title 62 of the Illinois Administrative Code:

62 IAC 1701.APP.A—Definitions
62 IAC 1702.11(a)(2)—Incidental Extraction
62 IAC 1702.11(f)(1), (2)—Incidental Extraction
62 IAC 1702.17(c)(1)–(3)—Incidental Extraction
62 IAC 1705.21—Financial Interests
62 IAC 1761.11(g)—Designated Areas
62 IAC 1761.12(b)(2), (c), (c)(4), (d)(1), (g)—Designated Areas
62 IAC 1764.19(d)—Areas Unsuitable
62 IAC 1772.12(e)(2)—Coal Exploration
62 IAC 1773.13(a)(1)(E)—Permits
62 IAC 1773.15(b)(1)(B), (b)(3), (c)(12), (d)—Permits
62 IAC 1773.20(b)(2)(B)—Permits
62 IAC 1773.21(c)—Permits
62 IAC 1774.11(c)—Permit Revisions
62 IAC 1774.13(b)(2)(E), (d)(2), (4), (5)—Permit Revisions

62 IAC 1774.15(f)—Permit Renewals
62 IAC 1777.17(a)–(d)—Permit Applications
62 IAC 1778.15(a), (e)—Permit Applications
62 IAC 1779.19(b)—Permit Applications
62 IAC 1780.21(b)(1)(B)—Permit Applications
62 IAC 1783.19(b)—Permit Applications
62 IAC 1784.14(b)(1)(B)—Permit Applications
62 IAC 1785.13(a), (g)—Permits for Special Categories
62 IAC 1800.11(a)—Bonding
62 IAC 1800.40(a)(3), (e)—Bonding
62 IAC 1800.50 (c)(2)—Bonding
62 IAC 1816.49(a)(9)(B), (c)(2)—Performance Standards
62 IAC 1816.84(b)(2)—Performance Standards
62 IAC 1816.116(a)(3), (A), (B), (C), (E)—Performance Standards
62 IAC 1816.116(b)(2)—Performance Standards
62 IAC 1816.117(a)(1), (2), (5)—Performance Standards
62 IAC 1816.151(b)—Performance Standards
62 IAC 1817.49(a)(9)(B), (c)(2)—Performance Standards
62 IAC 1817.84(b)(2)—Performance Standards
62 IAC 1817.116(a)(3), (A), (B), (C), (E)—Performance Standards
62 IAC 1817.116(b)(2)—Performance Standards
62 IAC 1817.117(a)(1), (2), (5)—Performance Standards
62 IAC 1817.151(b)—Performance Standards
62 IAC 1817.182(d)—Performance Standards
62 IAC 1827.12(b)—Coal Preparation Plants
62 IAC 1843.12(i)—State Enforcement
62 IAC 1843.13(c), (e)—State Enforcement
62 IAC 1843.14(a)(2)—State Enforcement
62 IAC 1843.15(a)—State Enforcement
62 IAC 1845.12(c), (d)—Civil Penalties
62 IAC 1845.13(b)(4)(A), (B), (C), (D)—Civil Penalties
62 IAC 1845.17(b), (b)(2)(B), (c)—Civil Penalties
62 IAC 1845.18(a)(2)—Civil Penalties
62 IAC 1845.20(a)—Civil Penalties
62 IAC 1846.17(b)(1)—Individual Civil Penalties
62 IAC 1846.18(b)—Individual Civil Penalties

2. Addition of the following regulations to Chapter I of Title 62 of the Illinois Administrative Code:

62 IAC 1847.1—Administrative and Judicial Review
62 IAC 1847.2—Administrative and Judicial Review
62 IAC 1847.3—Administrative and Judicial Review
62 IAC 1847.4—Administrative and Judicial Review
62 IAC 1847.5—Administrative and Judicial Review
62 IAC 1847.6—Administrative and Judicial Review
62 IAC 1847.7—Administrative and Judicial Review
62 IAC 1847.8—Administrative and Judicial Review
62 IAC 1847.9—Administrative and Judicial Review
62 IAC 1848.1—Procedure and Practice
62 IAC 1848.2—Procedure and Practice
62 IAC 1848.3—Procedure and Practice
62 IAC 1848.5—Procedure and Practice
62 IAC 1848.6—Procedure and Practice
62 IAC 1848.7—Procedure and Practice
62 IAC 1848.8—Procedure and Practice
62 IAC 1848.9—Procedure and Practice
62 IAC 1848.11—Procedure and Practice
62 IAC 1848.12—Procedure and Practice
62 IAC 1848.13—Procedure and Practice
62 IAC 1848.15—Procedure and Practice
62 IAC 1848.16—Procedure and Practice
62 IAC 1848.17—Procedure and Practice
62 IAC 1848.18—Procedure and Practice
62 IAC 1848.19—Procedure and Practice
62 IAC 1848.20—Procedure and Practice
62 IAC 1848.21—Procedure and Practice
62 IAC 1848.22—Procedure and Practice

3. Repeal of the following regulations of Chapter I of Title 62 of the Illinois Administrative Code:

62 IAC 1775—Administrative and Judicial Review
62 IAC 1780.38—Permit Applications
62 IAC 1784.27—Permit Applications
62 IAC 1800.40(f)–(h)—Bonding
62 IAC 1800.50(c)(3)–(5)—Bonding
62 IAC 1816.117(d)(6)—Performance Standards
62 IAC 1817.117(d)(6)—Performance Standards
62 IAC 1843.13(f)–(k)—State Enforcement
62 IAC 1843.16—State Enforcement
62 IAC 1843.17—State Enforcement
62 IAC 1843.20—State Enforcement
62 IAC 1843.21—State Enforcement
62 IAC 1845.18(c)—Civil Penalties
62 IAC 1845.19—Civil Penalties

4. Deferral of the following regulations of Chapter I of Title 62 of the Illinois Administrative Code:

62 IAC 1816.116(a)(2)(C)—Performance Standards
62 IAC 1817.116(a)(2)(C)—Performance Standards

3. In § 913.16, paragraphs (1), (m), (n), (p), (q), and (r) are removed and reserved and new paragraphs (s), (t), and (u) are added to read as follows:

§ 913.16 Required program amendments.

* * * * *

(s) By *November 2, 1993, Illinois shall submit a revision to 62 IAC 1816.116(a)(3)(E) and 1817.116(a)(3)(E) to include ground cover success standards for pasture and grazing lands.*

(t) By *November 2, 1993, Illinois shall submit a revision to 62 IAC 1845.12(d) to require consideration of all civil penalty criteria in determining whether to require payment of a penalty of less than $1,100.*

(u) By *November 2, 1993, Illinois shall submit a revision to 62 IAC 1847.3(l) (1) and (2) to grant judicial review if the regulatory authority fails to act within applicable time limits.*

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30 CFR Part 914

Indiana Permanent Regulatory Authority

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing the approval, with an exception, of a proposed amendment to the Indiana permanent regulatory program (hereinafter referred to as the Indiana program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment (Program Amendment 92–4) consists of changes to the Indiana Surface Mining Rules concerning coal extraction incidental to extraction of other minerals. The amendment is intended to establish criteria and procedures for use in determining whether an operation qualifies initially, and on a continuing basis, for an exemption from permitting.

EFFECTIVE DATE: September 3, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. Roger W. Calhoun, Director, Indianapolis Field Office, Office of Surface Mining Reclamation and Enforcement, Minton-Capehart Federal Building, 575 North Pennsylvania Street, room 301, Indianapolis, IN 46204, Telephone (317) 226–6166.

SUPPLEMENTARY INFORMATION:

I. Background on the Indiana Program

On July 29, 1982, the Indiana program was made effective by the conditional approval of the Secretary of the Interior. Information pertinent to the general background on the Indiana program, including the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Indiana program can be found in the July 26, 1982, **Federal Register** (47 FR 32071). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 914.15 and 914.16.

II. Submission of the Amendment

By letter dated February 7, 1990 (Administrative Record No. IND–0756), OSM informed Indiana of changes to the Federal regulations concerning coal extraction incidental to extraction of