

Interested persons are invited to participate through written or oral presentations. Persons wishing to make oral presentations are requested to notify Chris Flanigan, Office of Rulemaking, National Highway Traffic Safety Administration, Room 5320, 400 Seventh Street, SW, Washington, DC 20590, 202-366-4918, before the close of business on August 9, 1994. Written

comments must be submitted to the same address on or before August 11, 1994.

The agency's investigative file (NCI 3270) and litigation file in this matter are available for public inspection during working hours (9:30 a.m. to 4:00 p.m.) in its Technical Reference Library, Room 5108, 400 Seventh Street, SW, Washington, DC 20590.

Authority: 49 U.S.C. §§ 30118, 30120; delegation of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: July 26, 1994.

Barry Felrice,

Associate Administrator for Rulemaking
[FR Doc. 94-18628 Filed 7-27-94; 11:38 am]

BILLING CODE 4910-59-M

Sunshine Act Meetings

Federal Register

Vol. 58, No. 146

Monday, August 1, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF

PREVIOUS ANNOUNCEMENT: July 25, 1994, 59 FR 37811.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., July 27, 1994.

CHANGE IN THE MEETING: The following Docket Number has been added on the Agenda scheduled for July 27, 1994:

Item No., Docket No., and Company

CAG-21

RP94-87-000 *et al.*, Natural Gas Pipeline Company of America

Lois D. Cashell,

Secretary.

[FR Doc. 94-18731 Filed 7-28-94; 10:46 am]

BILLING CODE 6717-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, August 3, 1994.

PLACE: 6th Floor, 1730 K Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Peabody Coal Co.*, Docket No. KENT. 93-295. (Issues include whether the judge correctly found that Peabody's violation of 30 CFR § 77.370(a)(1) was not significant and substantial.)

2. *Pyramid Mining, Inc.*, Docket No. KENT. 93-184. (Issues include whether the judge correctly concluded that Pyramid did not violate 30 CFR § 77.1505.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653-5629 / (202) 708-9300 for TDD Relay / 1-800-877-8339 for toll free.

Dated: July 27, 1994.

[FR Doc. 94-18804 Filed 7-28-94; 3:46 pm]

BILLING CODE 6735-01-M

UNITED STATES INTERNATIONAL TRADE COMMISSION

TIME AND DATE: August 3, 1994 at 2:30 p.m.

PLACE: Room 101, 500 E Street S.W. Washington, DC 20436

STATUS: Open to the public.

1. Agenda for future meeting.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701-TA-362 and 731-TA-707-710 (Preliminary) (Certain Seamless Pipes from Argentina, Brazil, Germany and Italy)—briefing and vote.
5. Inv. No. 701-TA-312 (Third Remand) (Softwood Lumber from Canada)—briefing and vote.
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

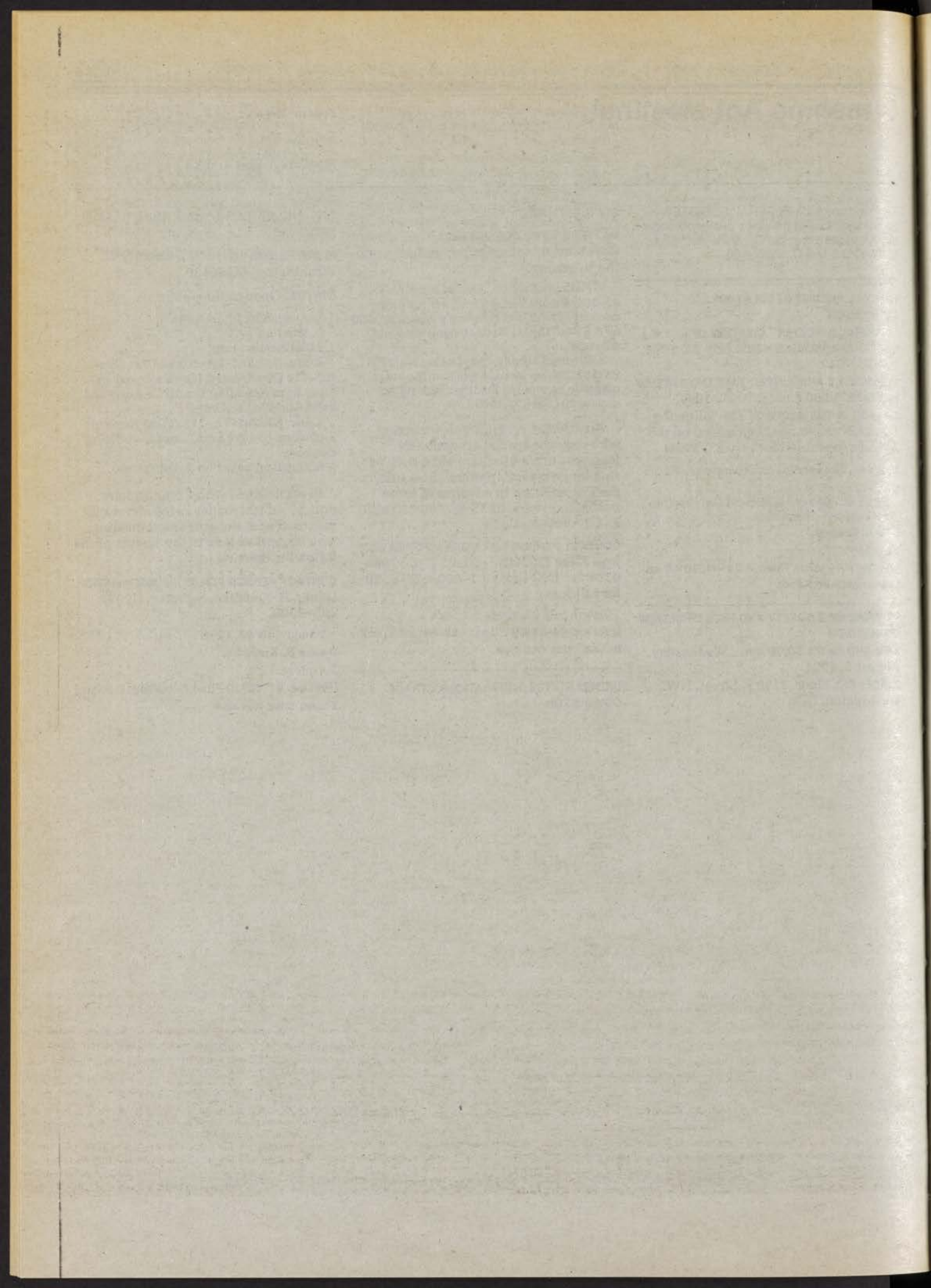
CONTACT PERSON FOR MORE INFORMATION. Donna R. Koehnke, Secretary, (202) 205-2000.

Issued: July 27, 1994.

Donna R. Koehnke,
Secretary.

[FR Doc. 94-18730 Filed 7-28-94; 10:45 am]

BILLING CODE 7020-02-P



Monday
August 1, 1994

Part II

**International Trade
Commission**

19 CFR Parts 210 and 211

**Unfair Practices in Import Trade; Final
Rule**

INTERNATIONAL TRADE COMMISSION

19 CFR Parts 210 and 211

Final Rules for Investigations and Related Proceedings Concerning Unfair Practices in Import Trade

AGENCY: U.S. International Trade Commission.

ACTION: Final rules.

SUMMARY: The Commission has adopted final rules of practice and procedure for investigations and related proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).¹ These rules were adopted in response to public comments requesting changes in the interim rules, the need to revise certain interim rules to more accurately reflect actual Commission practice, and the need for Commission rules concerning matters that are not currently provided for in the interim rules. In addition, some provisions of the final rules were adopted in response to public comments on the proposed rules that were published on November 5, 1992.

The final rules will be codified in 19 CFR part 210 and will replace the interim rules that currently appear in 19 CFR parts 210 and 211. Part 211 will be removed from title 19 of the Code of Federal Regulations.

EFFECTIVE DATE: August 31, 1994. The final rules will be applicable to all investigations and related proceedings under section 337 of the Tariff Act that are instituted after August 31, 1994. These rules will also be applicable to the following kinds of written submissions that are filed after August 31, 1994: complaints requesting the institution of a section 337 investigation; motions for temporary relief; and motions, complaints, or petitions requesting the institution of related proceedings.

FOR FURTHER INFORMATION CONTACT: P. N. Smith, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3061. Hearing-impaired individuals can obtain information on the final rules by contacting the Commission's TDD terminal at 202-205-1810.

SUPPLEMENTARY INFORMATION:

Rulemaking Analysis

Like the interim rules that they are replacing, the final rules are not major rules for purposes of Executive Order 12291 of February 17, 1981. As required

by the Regulatory Flexibility Act, the Commission also certifies that the final rules will not have a significant adverse impact on small business entities.

Background

The current rules in parts 210 and 211 were adopted on an interim basis in 1988 to implement the amendments to section 337 of the Tariff Act of 1930 (Tariff Act) (19 U.S.C. § 1337) that were effected by the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100-418, 102 Stat. 1107 (1988) (Omnibus Trade Act).² The interim rules in part 210 contain procedures for adjudicative investigations under section 337 of the Tariff Act. The interim rules in part 211 establish procedures for advisory opinions and the enforcement, modification, or revocation of remedial or consent orders issued under section 337.

The final rules were promulgated in accordance with the Administrative Procedure Act (APA).³ A notice soliciting public comment on proposed final rules was published in the *Federal Register* on November 5, 1992.⁴ The Commission received only one set of comments, from the International Trade Commission Trial Lawyers Association (ITCTLA). The Commission took those comments into account before promulgating the final rules. (The ITCTLA's comments on the proposed rules are summarized and the Commission's responses are provided in the section-by-section analysis of the final rules, which appears elsewhere in this notice.)⁵

Interested persons will note that each final Commission rule based on Rule 11, 26, or 37 of the Federal Rules of Civil Procedure (FRCP) differs from the correspondingly numbered proposed Commission rule that was published on November 5, 1992. The FRCP were amended on December 1, 1993.⁶ The amendments covered FRCP provisions that the Commission is required by law to follow (such as FRCP 11 and 37), as well as some that the Commission has chosen to follow (FRCP 26(e) and (g)).

² See 53 FR 33043 (Aug. 29, 1988) and 53 FR 49118 (Dec. 6, 1988).

³ 5 U.S.C. § 553.

⁴ 57 FR 52830 (Nov. 5, 1992).

⁵ The ITCTLA's comments included (1) suggestions for revising various proposed rules, (2) expressions of the ITCTLA's approval of certain proposed rules, (3) identification of typing errors in certain proposed rules, and (4) suggestions for nonsubstantive editing. All ITCTLA comments were duly considered by the Commission before it decided on the content of the final rules. For the most part, however, the section-by-section analysis of the final rules in this notice focuses on ITCTLA comments which advocated revision of particular proposed rules.

⁶ 146 *Federal Rules Decisions* 401-728 (1993).

The Commission accordingly revised the relevant proposed rules to correspond to the FRCP amendments, before adopting the proposed rules as final rules.

The Commission noted that the APA does not require that the exact text of a proposed rule be published for comment before the proposed rule is adopted as a final rule. A description of the subject and issues involved in the rule is sufficient.⁷ The Commission concluded that the notice of proposed final rulemaking published on November 5, 1992, contained a description of the subjects and issues involved that was sufficient to cover the revised provisions.^{8,9}

Overview of the Final Rules

Interested persons will note first that the organization of the final rules differs from that of the interim rules. To enable readers to readily determine which final rule is replacing a particular interim

⁷ The APA states that a notice of proposed rulemaking shall include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) [emphasis added].

⁸ In that notice, the preamble to each of the proposed rules at issue—namely, proposed rule 210.4(b), 210.25, 210.27(c) and (d), 210.33(c), and 210.70(c)—provided a description of the subject matter and the issues involved. See 57 FR at 52831-52832, 52840, 52843, and 52861.

For example, the preamble to proposed rule 210.25 indicated that the text of that rule was based on the content of proposed final rules 210.4(b), 210.27(d), 210.33(c), and 210.34(c). *Id.* at 52840. The preamble to proposed rules 210.70(c) indicated that the text of that rule was based in part on the content of proposed final rule 210.4(b). *Id.* at 52861.

The preamble to proposed rules 210.4(b), 210.27(d), and 210.33(c) alerted interested persons that those rules had been specifically drafted to correspond to the FRCP 11, 26(g), and 37, respectively. See 57 FR at 52831-52832, 52840, 52842-52843. Similarly, the preamble to proposed final 210.70(c) advised the public that the Commission intended for that rule to incorporate (by reference) the standard of conduct imposed by FRCP 11. *Id.* at 52860-52861.

The preamble to proposed rule 210.27(c) noted that rule was based on FRCP 26(e). 57 FR at 52840. (Proposed rule 210.27(c) is the same as interim rule 210.30(d) and its predecessor, 19 CFR 210.30(d) (1988).) The text of proposed rule 210.27(c) (and its predecessors) came directly from FRCP 26(e), as it read prior to December 1, 1993.

In the case of proposed rules 210.4(b) and 210.33(c), the preamble also noted that 19 U.S.C. § 1337(h) requires the Commission to follow FRCP 11 and 37 in the promulgation of Commission rules governing sanctions for abuse of process or "abuse of discovery" (i.e., failure to make or cooperate in discovery, as described in FRCP 37). 57 FR at 52831-52832 and 52842-52843.

⁹ The discussion in the present notice focuses on the differences between the proposed rules and the final rules. For the most part, this notice does not discuss the substance of—or the reasons for—the FRCP amendments. Persons who are interested in the FRCP amendments and the reasons therefor should consult 146 *Federal Rules Decisions* 401-728 (1993) and the 1993 Committee Notes to the FRCP.

¹ The term "related proceeding" is defined in final rule 210.3, which appears elsewhere in this notice.

rule or which interim rule is the basis, in whole or part, for a particular final rule, the Commission has provided distribution and derivation tables elsewhere in this notice.

The final rules also differ substantively from the interim rules in many respects. New and noteworthy aspects of the final rules are summarized below, according to the subpart in which they appear.

Subpart A—Rules of General Applicability. Provisions based on amended FRCP 11 permit the Commission to impose monetary sanctions for abuse of process. Also included are new specifications for written submissions and prescribed deadlines for filing nonconfidential copies of certain confidential submissions.

Subpart B—Commencement of Preinstitution Proceedings and Investigations. Parties may be allowed to assist the Commission in obtaining personal jurisdiction over a nonparticipating respondent. If the Commission Secretary is unable to obtain proof that copies of the complaint and notice of investigation were served on a particular respondent by certified mail, a party who wishes the Commission to have personal jurisdiction over that respondent may attempt to make personal service on that respondent, with leave from the presiding administrative law judge (ALJ), and may file proof of such service with the Commission Secretary (if the attempt is successful).

Subpart C—Pleadings. The complainant has a duty to supplement the complaint if a change in a material pleaded fact or law occurs after the complaint is filed and before the investigation is instituted.

Subpart D—Motions. Default will be limited to the statutory grounds: (1) a respondent's failure to properly respond to the complaint and notice of investigation or failure to otherwise appear to answer the complaint and notice;¹⁰ or (2) a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery.¹¹ Failures to act other than the statutory forms of default may result in adverse inferences and the issuance of findings of fact, conclusions of law, determinations, and orders adverse to the party who failed to act. This applies to complainants as well as respondents, and can ultimately result in adverse determinations on violation of section 337 and the issuance of remedial orders.

The final rules in subpart D also provide that the permanent relief phase of an investigation may be designated "more complicated" by order of the presiding ALJ or the Commission. The ALJ's order is final, but aggrieved party may appeal to the Commission. The timing of the order determines the procedure for appeal.

Subpart E—Discovery and Compulsory Process. Most of the final rules in subpart E do not provide deadlines for various discovery activities. Such deadlines are to be set by the presiding ALJ. The final rules in subpart E also correspond more closely to the relevant FRCP than the interim rules did.

A signature and certification requirement based on FRCP 26(g) is imposed for all discovery requests, responses, and objections. Monetary sanctions may be imposed for violation of that requirement. Monetary sanctions comparable to those available under certain provisions of FRCP 37 may be imposed for failure to make or cooperate in discovery.

There also is a new reporting requirement concerning requests for disclosure of confidential information covered by an administrative protective order (APO) issued by the Commission or the presiding ALJ. Persons who receive such information under an APO must notify the Commission immediately upon learning that the information is the subject of a subpoena, a judicial or administrative order (other than an order of a court reviewing a Commission decision), a discovery request, or an agreement requiring disclosure of the information to persons who may not be entitled to see it under the Commission's APO or the Commission's rules. A failure to report may result in a sanction or other action by the Commission.

Subpart F—Prehearing Conferences and Hearings. The final rules in subpart F are essentially the same as the interim rules. However, the final rule defining the record codifies longstanding Commission practice by including all briefs as part of the administrative record of an investigation or a related proceeding.

Subpart G—Determinations and Actions Taken. The ALJ must issue a recommended determination (RD) on remedy and bonding by the respondents, within 14 days after issuing an initial determination (ID) on violation of section 337. (This means that the parties will address remedy and bonding while the investigation is before the ALJ, as well as after the investigation returns to the Commission. The ALJ accordingly may order

discovery on those issues.) The Commission will consider the RD (as well as submissions from the parties, other agencies, and the public) in making final determinations on remedy and bonding by the respondents.

The proposed rules published on November 5, 1992, contained a new procedure for processing IDs on violation of section 337. That procedure has not been incorporated into the final rules. IDs on violation will be processed in the same manner that they were processed under the interim rules, although the Commission may decide to implement the new procedure at a future date. IDs on matters other than violation of section 337 (or temporary relief) will also be processed in the manner that they were processed under the interim rules.

Subpart H—Temporary Relief. There is a new method of calculating the amount of a complainant's temporary relief bond. The interim rules provided that the bond was likely to be an amount within 10 to 100 percent of the sales revenues and licensing royalties from the domestic product at issue. The final rules use a tiered schedule of fixed bond amounts based on complainant's sales revenues and licensing royalties from the intellectual property right at issue.

The grounds for modifying, reversing, or setting aside a temporary relief ID in whole or part are no longer limited to errors of law or policy reasons. Such action also may be taken on the basis of errors of material fact in the ID.

Temporary relief bond forfeiture proceedings will no longer be initiated automatically whenever the Commission makes a negative final determination in whole or part on the complaint of a complainant who was granted temporary relief. Instead, forfeiture proceedings will be initiated only upon the Commission's own initiative or upon the filing of a motion by a respondent or a Commission investigative attorney (IA) within 30 days after service of the Commission's negative determination on violation. The standard of conduct the Commission will use in determining whether the complainant's bond should be forfeited will be the amended FRCP 11 standard which is codified in final rule 210.4(c).

If the complainant prevails upon appeal of the Commission's determination on violation of section 337, the appropriate amount of any temporary bond that was forfeited by the complainant will be forthcoming as a matter of procedure. The complainant thus will not have to file a motion or petition to obtain the refund.

¹⁰ See 19 U.S.C. § 1337(g)(1).

¹¹ See 19 U.S.C. § 1337(h).

Subpart I—Enforcement Procedures and Advisory Opinions. Reporting requirements may be imposed for exclusion orders as well as cease and desist orders. Moreover, formal proceedings for the enforcement of a remedial or consent order may be instituted on the Commission's own initiative or in response to the filing of a complaint by the complainant in the original investigation, the complainant's successor in interest (if any), or the Commission's Office of Unfair Import Investigations (OUII). An ALJ's decision in a formal enforcement proceeding must be an ID instead of an RD. The ID will become the determination of the Commission in 90 days if the Commission does not order a review or extend the period for determining whether to order a review.

The final rules in subpart I also clarify that the Commission has the authority to seek judicial enforcement of sanctions orders, and that the Commission need not give notice to any person when it seeks judicial enforcement of an exclusion order, a cease and desist order, a consent order, or a sanctions order—except as required by the court in which the civil action is initiated.

Finally, the final rules governing advisory opinions codify Commission practice by: (1) affording all persons (instead of just respondents) the right to seek such opinions; (2) limiting such opinions to whether a course of action would violate a particular remedial order (rather than whether it would violate section 337); (3) requiring the party requesting an advisory opinion to fully state its request in its first submission to the Commission, since the Commission does not wish to issue *seriatim* advisory opinions to the same requester on the same subject; and (4) stating positively that advisory opinion proceedings are not subject to the APA.

Section-By-Section Analysis of the Final Rules

Many of the final rules set forth in this notice are identical—or virtually identical¹²—to the correspondingly numbered proposed rules published on November 5, 1992. Those final rules are listed below.

210.1–210.3
210.5–210.9
210.10(b) and (c)
210.11–210.15
210.16(a), (b), and (c)(2)
210.17–210.20
210.21(a)–(c)(3) and (d)
210.22(a) and (c)

210.23
210.24(a)(1), (a)(3), (b)(1), (b)(3), and (c)
210.26
210.27(a)
210.28 and 210.29
210.30(a) and (c)
210.31
210.32(a)–(d), (f), and (g)
210.34
210.35(a)–(c)
210.36(a)–(c) and (e)
210.37(a), (c), (d), (f) and (g)
210.38(b)–(d)
210.39–210.41
210.42(a)(2), (b), (c), (e)–(g), (h)(3)–(h)(5), and (i)
210.43(a), (c), and (d)
210.46(b)
210.47–210.49
210.50(b)(1) and (2)
210.51
210.52(b)–(d) and (f)
210.53 and 210.54
210.55(a)
210.56–210.57
210.59–210.69
210.70(a), (b) and (e)
210.71(b)–(d)
210.72 and 210.73
210.74(b)
210.75(a) and (b)
210.76–79

The ITCTLA did not make substantive comments on the proposed version of each of the aforesaid rules, and the Commission found no reason to change the proposed version on its own initiative before adopting it as a final rule. The commentary that preceded the proposed version of the aforesaid rules accordingly constitutes the preamble to the final version of those rules.¹³

Most of the final rules that are discussed below were the subject of a comment by the ITCTLA. The substance of some of those rules also differs substantively from the text of the relevant proposed rule. The changes were made in response to an ITCTLA comment or on the Commission's own initiative after reconsideration of the proposed rule.

The commentary in the notice published on November 5, 1992, which preceded the proposed version of the rules discussed below, constitutes part of the preamble to the final version of these rules (along with the discussion below), to the extent that such commentary is not inconsistent with the discussion below.¹⁴

Subpart A—Rules of General Applicability

Section 210.4

Final rule 210.4 governs written submissions filed by parties or proposed

parties in connection with a section 337 investigation or a related proceeding under part 210.

Paragraph (a). Paragraph (a) of proposed rule 210.4 listed the required information that must appear on the front of written submissions filed in connection with a section 337 investigation. The ITCTLA commented that the final rule should also provide that the front page of a complaint must contain the name of the complainant. The Commission noted that Commission rule 201.8(e) already imposes such a requirement.¹⁵ The Commission has repeated that requirement, however, in paragraph (a)(1) of final rule 210.4.

Paragraph (b). Section 337(h) of the Tariff Act authorizes the Commission to issue sanctions for abuse of process in section 337 proceedings to the extent provided in FRCP 11.¹⁶ Proposed rule 210.4(b) was the Commission analog to FRCP 11, and was based on FRCP 11(a) as it read prior to December 1, 1993.

On December 1, 1993, FRCP 11 was amended for the following purposes:

- to broaden the scope of the obligation that attorneys and pro se litigants have to refrain from conduct that frustrates the aims of FRCP 11 as amended (i.e., to secure the just, speedy, and inexpensive determination of every action);
- to place greater restraints on the imposition of sanctions and thus reduce the number of motions for sanctions; and
- to remove from the ambit of FRCP 11 all discovery requests, responses, objections, and motions that are subject to the provisions of FRCP 26–37.¹⁷

Paragraph (b) of final rule 210.4, is based on amended FRCP 11(a), and imposes a signature requirement for every written submission filed by a party or a proposed party to an investigation or a related proceeding under part 210. This paragraph replaces the signature requirement in paragraph (b)(1) of proposed rule 210.4, which was based on FRCP 11(a) as it read prior to December 1, 1993. Unlike the proposed rule, the final rule makes the signature requirement applicable to "every pleading, written motion, and other paper of a party or proposed party." [Emphasis added.]

The ITCTLA commented that paragraph (b) of the final rule should also provide that the telephone number of the attorney or party who signs each submission must be included on the document. The Commission agreed. Such a requirement appears in amended FRCP 11(a), and thus appears in paragraph (b) of final rule 210.4.

¹² Nonsubstantive editorial changes account for minor differences between some of the final rules and the correspondingly numbered proposed rules.

¹³ See the section-by-section analysis of the proposed rules, which appeared in 57 FR at 52830–52864.

¹⁴ *Id.*

¹⁵ See 19 CFR 201.8(e) (1993).

¹⁶ 19 U.S.C. § 1337(h).

¹⁷ See 146 F.R.D. 583, 584, and 405.

Paragraph (c). Paragraph (c) of final rule 210.4 is based on amended FRCP 11(b). Paragraph (c) states that by presenting a pleading, written motion, or other paper to the presiding ALJ or the Commission, an attorney or unrepresented party or proposed party is certifying the truth, veracity, and good faith of the submission. This paragraph replaces the certification provision in paragraph (b)(1) of proposed rule 210.4, which was based on FRCP 11 as it read prior to December 1, 1993. The final rule differs from the proposed rule in several important respects.

First, the certification is not made solely by signing a pleading, written motion, or other paper. In the final rule, the certification occurs in the presentation of a pleading, written motion, or other paper to the presiding ALJ or the Commission, whether that presentation is by signing, filing, submitting, or later advocating the document to the ALJ or the Commission.

Second, the certification provisions are more explicit in the final rule. Separate standards are provided for legal arguments, for "allegations and other factual contentions," and for "denials of factual contentions."

Third, the certification provisions of the final rule do not apply to discovery requests, responses, objections, or motions that are subject to provisions of final rules 210.27 through 210.34 (i.e., *Subpart E—Discovery and Compulsory Process*).¹⁸

Paragraph (d). Paragraph (d) of final rule 210.4 provides sanctions for violation of the certification requirement, and is based on amended FRCP 11(c). This paragraph replaces paragraphs (b)(1) through (b)(4) of proposed rule 210.4, which were based on FRCP 11(a) as it read prior to December 1, 1993.

Paragraph (d) of final rule 210.4 is similar to paragraph (b)(2) of proposed rule 210.4, since paragraph (d) provides that a representation need not be frivolous in its entirety in order for an ALJ or the Commission to determine that the certification provision has been violated. If any portion of a representation is found to be false, frivolous, misleading, or otherwise in violation of paragraph (b), a sanction may be imposed. In determining

whether paragraph (b), has been violated, the ALJ or the Commission will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.

Paragraph (d)(1)(i) of final rule 210.4 contains new prerequisites to the filing of a motion for sanctions. The movant must first serve the motion on the nonmoving parties. The party or person against whom sanctions are being sought then has seven days (or such other period as the ALJ or the Commission may prescribe) to withdraw or correct the challenged paper, claim, defense, contention, allegation, or denial.¹⁹ If withdrawal or correction does not occur within the prescribed period, the movant is then free to file the motion for sanctions. The motion must be filed separately, however, from the party's other motions (if any).

Paragraph (d)(1)(ii) of final rule 210.4 provides that an ALJ or the Commission may initiate a sanctions inquiry sua sponte, by issuing an order describing the specific conduct that appears to violate the certification provisions and directing an attorney, law firm, or party to show cause why it has not violated the relevant provisions.

The final rule also contains new provisions governing the imposition of sanctions. The stated purpose of the FRCP 11 sanctions authority is to deter, rather than to compensate.²⁰ That policy is recited in paragraph (d)(2) of final Commission rule 210.4, since section 337(h) of the Tariff Act states that the Commission may impose sanctions for abuse of process to the extent authorized in FRCP 11. Paragraph (d)(2) of final rule 210.4 thus provides that each sanction must be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Sanctions may be imposed upon the attorneys, law firms, or parties that have violated the certification provisions of paragraph (b) or are responsible for the violation. Paragraph (d)(1)(i) of final rule 210.4 provides that in the absence of exceptional circumstances, a law firm is jointly responsible for violations committed by its partners, associates, and employees.)

Paragraph (d)(2) of the final rule also imposes certain limitations on the kinds of sanctions that may be imposed.

Appropriate sanctions may consist of or include "directives of a nonmonetary nature."²¹ The preferred monetary sanction is the payment of a penalty to the Commission, rather than costs and attorney's fees. Cost and fee sanctions may be ordered, however, "if imposed on motion and warranted for effective deterrence." Paragraph (d)(2) also indicates that a cost and fee award may consist of "some or all" of the reasonable attorney's fees and other expenses incurred as a direct result of a violation of the certification provisions.²²

There are additional limitations on the Commission's ability to impose monetary sanctions. Paragraph (d)(2)(ii) of final rule 210.4 states that monetary sanctions cannot be imposed on a party for violation of the certification provisions concerning the truth, veracity, and good faith of *legal arguments* presented to the ALJ or the Commission. (The party's attorneys are to be monetarily responsible for violations of that sort.) Paragraph (d)(2)(iii) provides that monetary sanctions also cannot be ordered on the Commission's own initiative, unless—

1. a show cause order was issued before the investigation or related proceeding is terminated, in whole or relevant part, as to the party or proposed party which is, or whose attorneys are, to be sanctioned; and
2. such termination is the result of (a) a motion to withdraw the complaint, motion, or petition that was the basis for the investigation or related proceeding, (b) a settlement agreement, or (c) a consent order agreement.²³

¹⁸ The Committee Notes to FRCP 11 as amended cite the following examples: "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; * * * referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc." See 146 F.R.D. at 587.

¹⁹ That provision is based on amended FRCP 11(c)(2), 146 F.R.D. at 423. See also 146 F.R.D. at 587-589. The Commission notes that the relevant provisions of FRCP 11(c)(2) specifically state that costs and attorney's fees are to be awarded "to the movant." FRCP 11(c)(1)(A) and the Committee Notes indicate, however, that such awards can be made to the party who prevails on the motion for sanctions—regardless of whether that party is the movant or the target of the motion. 146 F.R.D. at 422 and 591.

²⁰ This provision is based on amended FRCP 11(c)(2)(B), which provides that monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claim made by or against the party which is, or whose attorneys are, to be sanctioned. The Committee Notes explain that—Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders

¹⁸ The certification requirement in amended FRCP 11(c) also does not apply to the "disclosures" mandated by amended FRCP 26. Final rule 210.27—which is the Commission analog to amended FRCP 26—does not currently contain provisions on mandatory disclosures. See the discussion in this notice concerning final rule 210.27.

¹⁹ Amended FRCP 11(c)(1)(A) allows 21 days for such withdrawals or corrections. The Commission concluded, however, that 21 days is too lengthy a period for investigations and related proceedings under part 210, in light of the statutory and/or administrative time constraints.

²⁰ FRCP 11(c)(2), as amended; 146 F.R.D. at 422-423. See also 146 F.R.D. at 587-588.

Furthermore, the sanctions in such a case must be limited to a penalty payable to the Commission.²⁴

Paragraph (d)(2)(i) of final rule 210.4 states that the United States, the Commission, and IAs are exempt from monetary sanctions for signing and filing a written submission in violation of the certification provision of paragraph (b).

Paragraph (d)(2)(iv) provides that monetary sanctions imposed to compensate the Commission for expenses incurred by an IA or OUII will include reimbursement for some or all costs reasonably incurred as a direct result of the violation, but will not include attorneys' fees. Paragraph (d)(2)(iv) thus covers cases in which OUII is awarded monetary sanctions on the basis of a motion by OUII, as well as cases in which OUII is found to be entitled to monetary sanctions because it successfully defended against another party's motion for nonmonetary sanctions.

The ITCTLA noted that an IA is a party to a section 337 investigation, that he or she is subject to the same professional and ethical standards as members of the private bar, and that there is no basis to assume, as proposed rule 210.4(b)(3) does, that IAs are less likely to engage in unethical conduct than are members of the private bar. The ITCTLA argued further that since the Commission has the authority to self-initiate section 337 investigations, exempting IAs from monetary sanctions for abuse of process would deny respondents in such investigations the rights that would be available to

respondents in investigations initiated in response to the complaint of a private party.

The ITCTLA added that it is fundamentally unfair to exempt IAs from cost and fee sanctions for violations of rule 210.4(b)(1), but allow them to recover costs for violations by other parties. The ITCTLA urged the Commission either to subject IAs to liability for monetary sanctions or to draft the final rules to prohibit IAs from receiving monetary compensation for violations by other parties.

The Commission disagrees with the ITCTLA's arguments. The Commission notes first that any monetary sanction constituting reimbursement for costs incurred by an IA as a result of another party's abuse of process would be paid to the Commission—not to the IA or OUII. (Similarly, if the Commission were to abandon the rule exempting IAs from liability for monetary sanctions, any such sanction imposed against an IA for an action taken within the scope of his or her employment would probably be paid by the Commission.)

Furthermore, the amount that the Commission would collect on an IA's behalf as a sanction for abuse of process by another party is not likely to be substantial. Paragraph (d) of final rule 210.4 indicates that a sanction imposed for violation of this section shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and that a penalty rather than costs and attorney's fees is the preferred monetary sanction. Moreover, paragraph (d)(2)(iv) provides that monetary sanctions awarded on motion by an IA or OUII will include reimbursement for some or all costs reasonably incurred by the movant as a direct result of the violation, but will not include attorneys' fees (i.e., OUII's personnel costs). The Commission is thus not likely to recover substantial sums (on an IA's or OUII's behalf) in the application of final rule 210.4.

The Commission also believes that a rule permitting monetary sanctions to be levied against IAs is unnecessary. As amended FRCP 11 and the Committee Notes indicate, the sanction authority is to deter abuses of process, rather than to compensate persons aggrieved by such abuses.²⁵ IAs are subject to adverse

personnel action for malfeasance or misconduct involving abuse of process in the performance of their duties. The Commission believes that the threat of such action is an effective and sufficient deterrent.

The Commission also notes that subjecting IAs to monetary sanctions could have serious programmatic implications. The threat of monetary sanctions for actions taken in the course of an IA's ordinary duties would affect his or her ability to serve as a neutral and impartial advocate of the public interest. IAs take positions on the substantive issues in an investigation. An IA's position in a given investigation may be adverse to one or more of the private parties (i.e., the complainant(s), the respondent(s), and/or any non-government intervenor(s)). The actual or potential threat of a motion for monetary sanctions during the course of an investigation or related proceeding could be used as a means to intimidate IAs and to pressure them into taking a position favorable to a particular party.

The Commission notes further that the resources that IAs can devote to a particular investigation or related proceeding are limited. If IAs are forced to deal with motions for monetary sanctions against them, their ability to deal with the substantive issues in the case would be impaired.

The Commission notes finally that adopting a final rule which does not exempt IAs (and other Commission employees) to liability for monetary sanctions would create certain ethical and practical problems for the Commission. For example, Commission determinations on whether to assess monetary penalties against a Commission employee would raise a number of conflict of interest issues. If an ALJ were to issue an order or an RD granting a motion for monetary sanctions, that decision would be subject to review by the Commission, even though the Commission itself might ultimately be responsible for paying the amount awarded.²⁶ Thereafter, if the Commission did not indemnify the IA or otherwise pay the amount awarded, the Commission might have to bring an enforcement action in U.S. district court against one of its own employees in order to collect the award.²⁷

will ordinarily be issued only in situations that are akin to a contempt of court, this rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what if any sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred. 146 F.R.D. at 592.

²⁴ Although this provision authorizes the Commission or the ALJ to issue an order requiring payment of a monetary penalty, the Commission may collect the money but cannot keep it. In the absence of a statute providing otherwise, an official or agent of the United States Government having custody or possession of "public money" that is not for current expenditure must promptly deposit it into the Treasury or a depository designated by the Secretary of the Treasury without deduction for any charge or claim. 31 U.S.C. § 3302. The term "public money" is not defined in that statute. The regulations implementing that provision specifically refer, however, to a federal agency's processes for the collection of "monies owed to or received by" the agency and for the expeditious crediting and availability of such monies to the Treasury. See 31 CFR 206.4(a) (1993). These regulations would appear to cover a monetary penalty payable to the Commission pursuant to a sanction order issued under paragraph (d)(1)(A) of final rule 210.4.

²⁵ Amended FRCP 11(c)(2); 146 F.R.D. at 422-423. See also 146 F.R.D. at 587-588. See also the Committee Notes to the 1983 Amendment, which indicate that the imposition of sanctions under FRCP 11 is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims and defenses." The Commission notes further that one of the reasons that FRCP 11 was amended on December 1, 1993,

was to place greater restraints on the imposition of sanctions and thus reduce number of motions for sanctions. See 146 F.R.D. 583, 584, and 405.

²⁶ See final rule 210.25 regarding the processing of motions for monetary sanctions for abuse of process.

²⁷ It is also possible that the IA might be entitled to independent legal representation at the Commission's expense.

In view of the aforesaid legal and policy arguments against subjecting the Commission and its attorneys from liability for monetary sanctions for abuse of process, the Commission has drafted paragraph (d)(2)(i) of final rule 210.4 to exempt the Commission, its employees, and the United States from liability for such sanctions.

Paragraph (d)(3) of final rule 210.4 is based on amended FRCP 11(c)(3). Paragraph (d) thus provides that when sanctions are imposed, the Commission or the ALJ must describe the conduct determined to constitute a violation of 210.4(b) certification provision and must explain the basis for the sanction imposed.

Paragraph (e). Paragraph (e) of final rule 210.4 is based on amended FRCP 11(d). Paragraph (e) provides that paragraphs (b) through (d) of final rule 210.4 do not apply to discovery requests, responses, objections, or motions that are subject to provisions of sections 210.27 through 210.34.²⁸ (Certification standards and sanctions that apply to discovery requests, responses, objections, or motions are found in final rule 210.27(d).)

Paragraph (f). Paragraph (f) of final rule 210.4 is based on paragraph (c) of proposed rule 210.4, which imposed specifications and other requirements for written submissions in section 337 investigations.

Paragraph (f)(1)(i) of proposed rule 210.4 is based on paragraph (c)(1)(i) of proposed rule 210.4, which contained spacing and print-size requirements for written submissions that are addressed to the Commission in a section 337 investigation or a related proceeding. As the preamble to the proposed rule explained,²⁹ the Commission is of the view that spacing and print-size requirements are necessary and appropriate to prevent evasion of the intended effect of the page limitations in proposed rules 210.66 (c) and (e)(2) by utilizing unusually small spacing in submissions.³⁰ The specific requirements imposed in paragraph (c)(1)(i) of proposed rule 210.4 were identical to those applied to briefs filed

in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in appeals from Commission determinations under section 337.^{31,32}

Paragraph (f)(1)(i) of the final rule contains an additional provision. The Federal Circuit rule in question now provides that "[t]ext and footnotes shall be in the same size type."³³ The Commission accordingly has inserted that requirement in paragraph (f)(1) of final rule 210.4. Requiring text and footnotes to be in the same size type will aid in preventing evasion of the intended effect of the page limitations in proposed rules 210.66 (c) and (e)(2) by utilizing unusually small spacing in footnotes.

Paragraph (f)(3) of final rule 210.4 is based on paragraph (c)(3) of proposed rule 210.4. The proposed rule provided that if certain specified types of submissions contain confidential business information, the submitter must file and serve nonconfidential copies of the submission within 10 business days after filing the confidential version of the submission.

The ITCTLA commented that the prescribed filing period for nonconfidential copies should be shortened to five days. The ITCTLA explained that in order to obtain information and assistance in preparing responses to pleadings, motions, and other papers in a section 337 investigation, an attorney often needs to show the document in question to persons who are employed by the party the attorney represents but are not signatories to the Commission's APO. In the ITCTLA's opinion, a Commission rule imposing a 10-business day filing deadline for sanitized copies of confidential submissions would prevent the attorney from doing this, since the public version of the document in question would not be available until after a response is due.³⁴ The ITCTLA thus believed that having a 10-day deadline for the submission of nonconfidential copies of confidential pleadings, motions, and other papers would seriously impair the party's ability to prepare an adequate response.

The Commission believes that several factors militate against reducing the prescribed filing period to five days. It

may be particularly difficult, for example, for parties with limited resources to comply with a five-day deadline. Moreover, in a case where consultation with opposing parties or third parties is necessary in order to prepare the nonconfidential copies of particular confidential submissions, it may be difficult for any party to meet such a deadline, even if the party has substantial resources.

While the ITCTLA's concerns about consultation with clients who can only see public versions has merit, the Commission also notes that there are many important submissions (such as petitions for review or responses to petitions for review) that must be filed within five days after service or issuance of a particular document. Thus, in many instances, the filing of a public version on the fifth day will not allow for consultation in advance of the preparation of the submission due on that date. Additionally, the Commission is concerned that the shorter time afforded to create public versions, the more likely it will be that such public versions will be characterized by wholesale redactions that will not facilitate consultation with those who are not signatories to the APO, and that requests for extensions of time will be numerous.

The Commission accordingly has not adopted a five-day filing period for mandatory nonconfidential copies of certain confidential submissions. Paragraph (f) of final rule 210.4 does provide, however, that the prescribed period for filing such copies is 10 calendar days (instead of 10 business days).

The last aspect of proposed rule 210.4 that elicited comments from the ITCTLA was paragraph (c)(3), which listed the kinds of confidential submissions that are subject to the mandatory nonconfidential copy requirement. Item (iv) on that list was "the evidentiary record," i.e., "the exhibits offered by a party or a proposed party that are accepted as evidence of record."

The ITCTLA objected to item (iv). The ITCTLA noted that the evidentiary record in section 337 investigations is often quite voluminous. In such a case, the process of reviewing, redacting, and copying of the redacted parts of the record would be extremely expensive and burdensome, and may result in the production of documents that are virtually incomprehensible as a result of the redactions.

The ITCTLA noted further that even though the proposed rule imposed the burden of preparing the public versions on the party submitting the evidence, exhibits frequently consist of

²⁸ Amended FRCP 11(d) also states that amended FRCP 11 does not apply to "disclosures" covered by amended FRCP 26 and 37. Final rules 210.27 and 210.33—which are the Commission analogs to amended FRCP 26 and 37—do not currently contain provisions on mandatory disclosures. See the discussion in this notice concerning final rules 210.27 and 210.33.

²⁹ 57 FR at 52832.

³⁰ See, e.g., *Inv. No. 337-TA-304, Certain Pressure Transmitters* (Commission denied motion to strike respondent's abnormally-spaced written comments on the ID concerning temporary relief, as the interim rules did not impose spacing requirements).

³¹ See Fed. Cir. R. 32(a) (1990).

³² The specifications in paragraph (c)(1)(i) of proposed rule 210.4 did not apply to written submissions that are addressed to an ALJ. Paragraph (c)(1)(ii) of proposed rule 210.4 allowed the ALJ to impose any specifications he deems appropriate for written submissions addressed to the ALJ.

³³ See Fed. Cir. R. 32(a) (effective June 1, 1993).

³⁴ Responses to motions, for example, are generally due within 10 calendar days after service of the motion. See proposed rule 210.15(c) and final rule 210.15(c).

confidential documents produced in discovery by opposing parties. Hence, the task of preparing public versions would most likely fall on the opposing party, i.e., the party which produced the document, instead of the party designating the document for use in evidence. In the ITCTLA's opinion, this would be quite burdensome and could lead to abuses intended to gain a tactical advantage over the opposing parties at the time of the evidentiary hearing, when time is of paramount importance.

The ITCTLA accordingly argued that it would be preferable for the final rule to follow the current practice, which is to designate each separate exhibit confidential or nonconfidential in its entirety.

The Commission agrees and has omitted item (iv) from the list in paragraph (f)(3) of final rule 210.4.

Paragraph (g). Paragraph (g) of final rule 210.4 is the same as paragraph (d) of proposed rule 210.4, which discusses service of written submissions in investigations and related proceedings under part 210.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.10

Paragraph (a). Paragraph (a)(5) of proposed rule 210.10 stated that a complainant has the right to withdraw its section 337 complaint at any time before the Commission votes on whether to institute an investigation in response to the complaint.

In final rule 210.10, paragraph (a)(5) has been divided into paragraphs (a)(5)(i) and (a)(5)(ii).

The new paragraph (a)(5)(i) states that the complainant may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an investigation. It also provides, however, that if the complaint is being withdrawn pursuant to a settlement agreement, confidential and nonconfidential copies of the agreement must be filed with the Commission along with the notice of withdrawal.

The new paragraph (a)(5)(ii) contains a provision from the proposed rule, which states that if a motion for temporary relief was filed in addition to the complaint, the motion must be withdrawn along with the complaint, and the complainant must serve copies of the notice of withdrawal on all proposed respondents and the embassies that were served with copies of the complaint and motion pursuant to final rule 210.54.

Subpart D—Motions

Section 210.16

Final rule 210.16 governs default in section 337 investigations, specifically, the forms of default provided for in sections 337 (g) and (h) of the Tariff Act—i.e., (1) failure to respond or to otherwise appear to answer the complaint and notice of investigation, and (2) a finding of default as a sanction for abuse of process under final rule 210.4 (the Commission analog to FRCP 11) or failure to make or cooperate in discovery under final rule 210.33 (the Commission analog to FRCP 37).

Paragraph (c)(1). Paragraph (c)(1) of proposed rule 210.16 indicated that the Commission could issue a limited remedial order directed to a respondent, on the basis of that respondent's failure to respond to the complaint and notice of investigation in the manner required under the Commission rules or to otherwise fail to appear to answer the complaint and notice of investigation. The point at which such relief would be issued was not specified.

The November 5, 1992, preamble to this rule explained that the Commission believed it necessary and appropriate to retain the flexibility to issue limited remedial orders immediately after the respondent is found to be in default, or after the Commission has adjudicated the violation issues, and that the choice would depend on the facts and circumstances involved. It was noted that in most cases, the Commission would be likely to defer decisions on issuing default relief pending the adjudication of any defenses by participating respondents that may have a bearing on the public interest factors. The preamble went on to say, however, that the Commission was particularly interested in receiving comment from interested persons on whether the final rule should specify the point at which a default remedy should be issued.³⁵

The ITCTLA commented that the final rule should not specify a time at which a default remedy may be issued and that a decision on the point of issuance should be made on the basis of the facts.

The preamble to proposed rule 210.16(c)(1) had noted that there may be cases in which time is of the essence and the complainant should not be forced to wait until the end of the investigation to obtain relief against defaulting respondents. The preamble also had noted that there may be cases in which the rapid issuance of limited relief is not critical and it would be more appropriate to wait until the end

of the investigation.³⁶ The ITCTLA concurred.

The ITCTLA suggested that immediate relief should be provided if the complainant is suffering substantial injury from increased importations of the merchandise of a defaulting respondent. The ITCTLA went on to say, however, that immediate relief should not be granted against a defaulting respondent that is a distributor or manufacturer of the foreign merchandise imported or sold by a participating respondent, since the distributor's violation of section 337 would depend on the finding with regard to the manufacturer.

The Commission believes that the ITCTLA's second hypothetical is incorrect. No finding of violation, on the merits, would be required in order for the Commission to issue a limited remedial order against the defaulting distributor. If the distributing respondent defaulted in the manner described in the statute, the Commission would be required to "presume the facts alleged in the complaint to be true."³⁷ (It therefore would not matter whether a violation had—or had not been—proven with respect to the participating respondent that manufactured the defaulting respondent's imported merchandise.) In such a case, the only justification the Commission could have, as a matter of law, for properly denying relief would be the likely adverse impact on one or more of the statutory public interest factors.³⁸

The Commission did not alter paragraph (c)(1) of proposed rule 210.16 before adopting it as a final rule. The final rule thus does not specify the point at which the Commission may issue a limited remedial order directed to a respondent, on the basis of that respondent's failure to respond to the complaint and notice of investigation in the manner required under the Commission rules or to otherwise fail to appear to answer the complaint and notice of investigation.

³⁶ *Id.*

³⁷ See 19 U.S.C. 1337(g)(1).

³⁸ Section 337(g)(1) provides that "[T]he Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that [respondent] unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued." [Emphasis added]. 19 U.S.C. 1337(g)(1).

³⁵ See 57 FR at 52837.

Section 210.21

Proposed rule 210.21 provided for termination of investigations on the basis of settlement agreements or consent orders.

Paragraph (c)(3). Paragraph (c)(3) of proposed rule 210.21 recited the required content of a consent order stipulation. Before adopting paragraph (c)(3) as a provision of final rule 210.21, the Commission revised paragraph (c)(3)(i)(B) by adding a requirement that the consent order stipulation in an intellectual property-based investigation must state that each signatory to the stipulation who was respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order. The Commission made this change to be consistent with its ruling in *Investigation No. 337-TA-357, Certain Sport Sandals and Components Thereof*.³⁹

Sections 210.22 and 210.24

Proposed rule 210.22 established procedures for designating the permanent relief and/or the temporary relief phase of an investigation "more complicated." Paragraph (b) of proposed rule 210.22 provided that the permanent relief phase of an investigation could be designated "more complicated" by order of the presiding ALJ or the Commission.

Proposed rule 210.24 established the procedure for obtaining Commission review of various interlocutory orders issued by an ALJ (including orders declaring the permanent relief phase of an investigation "more complicated").

³⁹In that investigation, the presiding ALJ issued an ID granting a joint motion by the complainant and one respondent for termination of the investigation as to that respondent on the basis of a settlement agreement, consent order agreement, and proposed consent order. Although the motion was granted, the ID expressed concern that the proposed consent order might not prevent the respondent from challenging the validity of the patent in controversy in any future proceeding to enforce the consent order.

The Commission reviewed the ID and remanded it to the ALJ for clarification of the parties' intent concerning their stipulation of patent validity. Specifically, the Commission noted that it would not approve the issuance of a consent order which permitted the possibility of a challenge to patent validity, by a respondent who had signed the order, in an agency or judicial proceeding concerning enforcement of the order. The Commission thus instructed the ALJ to "advise the parties that, if they wish to terminate the investigation on the basis of a consent order, the stipulated findings in the proposed consent order should make clear that the stipulation concerning the patent's validity will become void only if the patent is found to be invalid by a court or agency in a final decision that is no longer subject to appeal and is unrelated to enforcement of the consent order." [Emphasis in the original.] [Commission] Order at 1 (June 13, 1994).

Paragraph (a)(2) of proposed rule 210.24(a)(2) stated that parties aggrieved by an ALJ's order designating the permanent relief phase of a "more complicated" could file an application for interlocutory review by the Commission, without first having to obtain leave from the ALJ.

The ITCTLA commented that the aforesaid proposed rules are beneficial in light of "the importance of timely adjudication in section 337 investigations and due to the purely injunctive nature of relief."

The Commission agrees. Paragraph (b) of proposed rule 210.22 and paragraph (a)(2) of proposed rule 210.24(a)(2) have been adopted as final rules without any substantive changes.

Another aspect of proposed rule 210.24 concerning interlocutory appeals also drew comment from the ITCTLA. Paragraph (b)(2) of that rule provided that parties aggrieved by an ALJ's order granting or denying confidential treatment could file an application for interlocutory review with the Commission only if leave is granted by the ALJ.

The ITCTLA commented that interlocutory appeals of confidentiality orders could be beneficial in certain circumstances in light of the importance of maintaining the confidentiality of information, and that paragraph (b)(2) of proposed rule 210.24 strikes the proper balance between the possible importance of determinations relating to confidential treatment and the unwieldiness of interlocutory appeals, by requiring the ALJ to grant leave to appeal the order. The ITCTLA also expressed the hope, however, that such leave would not be given as a matter of course.

The Commission agrees with the ITCTLA that the authority to grant leave to seek interlocutory appeals of orders granting or denying confidential treatment under paragraph (b)(2) of the final rule should be used judiciously. Paragraph (b)(2) of final rule 210.24 is substantively the same as the proposed rule.

Section 210.25

Proposed rule 210.25 addressed the filing and adjudication of motions for sanctions for abuse of process, abuse of discovery, failure to make or cooperate in discovery, or violation of an APO. Proposed rule 210.25 established several procedures for the adjudication of such motions, depending on when the motion was filed and whether it was addressed to the Commission or the ALJ.

The Commission drafted final rule 210.4(b)-(f) to conform to the December

1, 1993, amendments to FRCP 11. The text of final rule 210.25 has been drafted to be consistent with those provisions of final rule 210.4. In paragraph (a) of final rule 210.25, a separate sentence has been inserted concerning the appropriate time to file a motion for sanctions, in view of the prerequisites that will apply to certain types of motions (e.g., prior service of the motion on the parties, or a good faith attempt to resolve the dispute before seeking action by the ALJ or the Commission).

The Commission also made two other changes throughout final rule 210.25. First, the wording reflects the fact that the Commission rules for part 210 apply to investigations and related proceedings and that sanctions may be requested in related proceedings as well as in investigations. Second, the rule discusses referring a sanctions motion to an ALJ (instead of the ALJ) because the identity of the presiding ALJ usually is not known when the Commission order making the assignment is issued.

The wording of final rule 210.25 also incorporates suggestions made by the ITCTLA. For example, paragraph (f) of proposed rule 210.25 pertained to motions that were filed with the ALJ, and permitted him to defer issuing a ruling on the motion until 90 days after the issuance of an ID on violation of section 337. The second sentence of that paragraph reads as follows:

His [i.e., the ALJ's] ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after issuance of the aforesaid initial determination on violation of section 337 or termination of the investigation.

The ITCTLA commented that the foregoing sentence should be revised to read as follows:

If the administrative law judge defers his adjudication in such a manner, his ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after his ID on violation of section 337 or termination of the investigation. [Emphasis added.]

The Commission has made that change in paragraph (f) of the final rule 210.25. The changed language accurately states what the Commission actually intended for the proposed rule to provide.

The ITCTLA also commented that allowing the ALJ 90 days from issuance of the ID on violation of section 337 to issue an RD on sanctions "could be problematic in that it could lead to decisions on sanctions issuing simultaneously with the Commission's decision."

The Commission notes first that 90 days is the maximum time that the ALJ

can take to issue the RD. If the circumstances allow it, the ALJ is free to issue the RD in fewer than 90 days. (The Commission encourages its ALJs to do so whenever possible).

The Commission also does not foresee any problem with the 90 day deadline as long as the proposed sanction discussed in the motion and the RD is not one that, if granted, would have a bearing on the merits of the Commission determination on violation of section 337. The likelihood of that occurring is not high, since ALJs usually include affirmative sanction rulings of that sort in the ID on violation, or issue them prior to the ID but make reference to them in the ID. Even if there were a case in which the grounds for an evidentiary sanction do not become apparent until the ALJ adjudicates the sanction motion in an RD issued 90 days after the ID on violation, the final rules contain procedures that would address the difficulties. If the sanction is one that would have a bearing on the issues of violation, remedy, the public interest, and/or bonding by respondents, the Commission could designate the investigation "more complicated," if that designation had not previously been applied, to give the Commission time to consider the RD in connection with its final determinations on those issues. If that were not an option, the Commission could make its final determinations on violation, remedy, the public interest, and bonding without taking the sanction RD into account. The Commission could then process the RD and reconsider the aforesaid determinations if necessary, *sua sponte* or in response to motions under final rules 210.47 and 210.48 ("Petitions for Reconsideration" and "Disposition of Petitions for Reconsideration") or final rule 210.76 ("Modification or Rescission of Exclusion Orders, Cease and Desist Orders, and Consent Orders").

If the sanction RD concerns a sanction that would not have a bearing on the issue of violation, remedy, the public interest, or bonding (e.g., a monetary sanction for failure to make or cooperate in discovery), the Commission sees no problem with the issuance of the sanction RD coinciding with the Commission determinations on those issues.

The ITCTLA's final comment concerning proposed rule 210.25 pertained to the third sentence in paragraph (f), which read as follows:

To aid the Commission in determining whether to adopt a recommended determination granting or denying cost or attorney's fee sanctions, any party may file written comments with the Commission 14

days after service of the recommended determination.

The ITCTLA commented that the foregoing sentence should be revised to read:

To aid the Commission in determining whether to adopt a recommended determination, any party may file written comments with the Commission fourteen (14) days after service of the recommended determination.

The ITCTLA explained that this change was necessary because the wording of the proposed rule improperly restricted a party's ability to appeal orders pertaining to sanctions other than costs or attorneys fees. The Commission agrees and has made the requested change in the final rule.

Subpart E—Discovery and Compulsory Process

Section 210.27

Proposed rule 210.27 covered the permissible methods and subject matter of discovery, time constraints on discovery, and supplementation of responses to discovery requests.

Paragraph (b). Paragraph (b) of proposed rule 210.27 addressed the permissible subject matter of discovery. It was based on portions of subdivision (b)(1) of FRCP 26 as it read prior to December 1, 1993.

On December 1, 1993, subdivision (b) of FRCP 26 was amended to provide U.S. district courts with broader discretion to have greater control of and to impose additional restrictions on the scope and extent of discovery.⁴⁰ A new paragraph (5) was also added to require a party to notify other parties if it is withholding materials otherwise subject to disclosure under FRCP 26 or pursuant to a discovery request because the party is asserting a claim of "privilege or work product protection."⁴¹

The Commission decided against having paragraph (b) of final rule 210.27 match amended subdivision (b) of FRCP 26. The Commission noted first that it is not required by law to follow FRCP 26 concerning the permissible scope and limits of discovery (as it is in the case of the Commission rules providing sanctions for abuse of process or discovery in accordance with FRCP 11 or 37). The Commission also was of the opinion that incorporating the amended FRCP provisions into the Commission rule was not necessary at this time, since proposed rule 210.27 is—and the current practice of the ALJs are—largely consistent with the provisions of those

amendments. The Commission also recognized that some aspects of the FRCP amendments could be problematic if applied in section 337 proceedings.⁴² The Commission thus concluded that wholesale adoption of the amended subdivision (b) of FRCP 26 would be ill-advised, while partial adoption of its provisions would be likely to delay the Commission's adoption of final rules.

The Commission notes, however, that a presiding ALJ can issue his own ground rules to supplement the part 210 discovery rules, and that such ground rules may incorporate provisions of FRCP 26 or other Federal Rules, as the ALJ deems appropriate.

In addition to considering whether to revise paragraph (b) of proposed rule 210.27 to be consistent with amended subdivision (b) of FRCP 26, the Commission also considered whether to revise paragraph (b) in response to a comment by the ITCTLA.

Paragraph (b) of the proposed rule stated that the scope of discovery for the temporary relief phase of an investigation would be governed by proposed rule 210.61. Paragraph (b) also expressly allowed discovery on the issues of remedy and bonding by the respondents in connection with the permanent relief phase of an investigation.

The ITCTLA commented that because the public interest is an issue, the final rule should specifically provide for discovery on the public interest in certain circumstances. The ITCTLA went on to say that to avoid overbreadth, the ALJ should be given discretion not only to determine whether such discovery should be taken, but also to limit the discovery in whatever manner is appropriate.

The Commission does not think it necessary to make the changes the ITCTLA advocated. As the preamble to proposed rule 210.27 explained, serious questions as to whether the granting of permanent relief would have an adverse impact on the public interest arise relatively infrequently. Moreover, the scope of evidence and information that conceivably could be categorized as relevant to the public interest is potentially so vast as to make discovery and findings by the ALJ concerning the public interest impracticable. For those

⁴² For example, subdivision (b)(4)(C) of amended FRCP 26 would require the Commission to reimburse the private parties' experts for deposition testimony and other discovery requested by OUII. The Commission also noted that subdivision (b)(3) of amended FRCP 26 provides that non-parties may obtain transcripts of their testimony, but does not indicate who would bear the costs of those additional transcripts (which usually cost about \$800 per day of testimony).

⁴⁰ See 146 F.R.D. at 436-440 and 638-639.

⁴¹ See 146 F.R.D. at 639-640.

reasons, paragraph (b) of proposed rule 210.27 did not require ALJs to allow discovery, to take evidence, or to make findings or recommendations to the Commission concerning the public interest in connection with the grant or denial of permanent relief. The Commission notes, however, that it has the option to order an ALJ to take evidence and make findings on the public interest in appropriate cases.⁴⁰

Paragraph (b) of final rule 210.27 does not differ substantively from the corresponding paragraph of the proposed rule. The final rules maintain the practice employed under the interim rules—i.e., of generally prohibiting the ALJ from addressing the public interest, in the absence of an express order from the Commission directing the ALJ to order discovery on the public interest in a particular investigation. See final rule 210.50(b)(1).

Paragraph (c). Paragraph (c) of proposed rule 210.27 pertained to the supplementation of a response to a discovery request, and corresponded to subdivision (e) of FRCP 26 as it read prior to December 1, 1993.

On December 1, 1993, subdivision (e) of FRCP 26 was amended to provide that the duty to supplement applies to disclosures required by the amended subdivision (a) of FRCP 26. The amended subdivision (e) also clarifies that the obligation to supplement formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not generally to deposition testimony.⁴¹

Because the Commission did not draft paragraph (a) of final rule 210.27 to incorporate the amended subdivision (a) of FRCP 26 concerning mandatory disclosures, the Commission also did not draft paragraph (c) of final rule 210.27 to cover such disclosures.

The ITCTLA commented that paragraph (c) of final rule 210.27 should be drafted to broaden the duty to supplement discovery responses. The ITCTLA explained that—

On a fast track, as parties develop their cases and muster their evidence, it is likely that relevant material is later discovered which was within an earlier discovery request but not found previously despite a diligent search. Thus, the duty to supplement should be imposed on the party in possession of the information. At a minimum, the rule should require parties to supplement their responses prior to hearing, without exception.

⁴⁰ See 19 CFR 201.4(b) (1993) regarding waiver of Commission rules and final rule 210.50(b) concerning the ALJ's ability to take evidence, hear argument, and make findings concerning the public interest.

⁴¹ See 146 F.R.D. at 442-443 and 641.

The Commission decided that paragraph (c) of final rule 210.27 should match subdivision (e) of FRCP 26 by clarifying that the obligation to supplement formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not generally to deposition testimony. Paragraph (c)(1) of final rule 210.27 specifically provides that a party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the ALJ or in the circumstances outlined in the rule. The presiding ALJ can therefore issue ground rules to either supplement or replace the requirements set forth in the rule.

Paragraph (d). Paragraph (d) of proposed rule 210.27 was based on subdivision (g) of FRCP 26 as it read prior to December 1, 1993. Paragraph (d) thus imposed signature and certification requirements for discovery requests, responses, and objections. Those requirements were similar to the signature and certification requirements imposed by FRCP 11 as it read prior to December 1, 1993, and in paragraph (b) of proposed Commission rule 210.4. Paragraph (d) of proposed rule 210.27 also provided for cost and fee sanctions like those authorized in FRCP 37 prior to December 1, 1993, and in paragraph (c) of proposed Commission rule 210.33.

As the 1992 preamble to proposed rule 210.27 explained, FRCP 26 was not cited in section 337(h) as one of the Federal Rules that the Commission is to use as a standard for imposing cost and fee sanctions in section 337 investigations. Section 337(h) does state, however, that the Commission may by rule prescribe sanctions for abuse of discovery to the extent authorized by FRCP 37,⁴² and FRCP 26 is derived from FRCP 37. The Commission decided that it was appropriate for the proposed rules to include a provision based on paragraph (g) of FRCP 26, as the Commission has the authority to adopt any rules it deems necessary to carry out its functions and duties,⁴³ and the ALJs had advised the Commission that there was a need for a Commission rule based on paragraph (g) of FRCP 26.

On December 1, 1993, subdivision (g) of FRCP 26 was amended to make the signature, certification, and sanction provisions applicable to disclosures required by subdivision (a) as amended. The sanction provisions were also

amended to be consistent with provisions of FRCP 37.⁴⁴

Since the Commission did not draft paragraph (a) of final rule 210.27 to cover disclosures, the Commission also did not draft paragraph (d) of that rule to make the signature, certification, and sanction provisions applicable to disclosures. The changes that the Commission did make in paragraph (d) of the proposed rule before adopting it as a final rule are described below.

First, the Commission revised the wording of the certification requirement in paragraph (d) to correspond more closely to the wording and substance of subdivision (g) of FRCP 26, as amended. For example, the certification provision was revised so that it no longer states that the signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection.

The Commission also changed the cross-references in paragraph (d). The revised paragraph (d) provides that a discovery response, request, or objection must be consistent with rule 210.5 and other relevant rules. The revised paragraph does not refer to Commission rule 201.8.⁴⁵ The Commission also revised paragraph (d) to omit a reference to "§ 210.4."⁴⁶ The Commission added a new paragraph (d)(1), however, containing provisions like those in paragraph (a) of proposed rule 210.4.⁴⁷

The sanction provisions of paragraph (d) were modified as well. Among other things, paragraph (d) was revised to indicate that a violation occurs and a sanction may be imposed when a request, response, or objection is certified *without substantial justification*, which is the standard used in subdivision (g) of FRCP 26 as amended. The sanction provisions also do not include a reference to "proposed

⁴² See 146 F.R.D. at 444-447 and at 644. The Committee Notes also point out that FRCP 11, as amended, does not apply to such violations. *Id.* at 644.

⁴³ Rule 201.8 (19 CFR 201.8) imposes requirements for the filing of documents. Responses to discovery requests are not normally filed with the ALJ or the Commission.

⁴⁴ The signature, certification, and sanction provisions of rule 210.4 are based on FRCP 11, and FRCP 11 as amended no longer applies to disclosures and discovery requests, responses, objections, or motions covered by FRCP 26.

⁴⁵ Paragraph (a) of proposed rule 210.4 was not based on FRCP 11, and simply stated that the front page of every written submission must contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, and the docket number or investigation number, if any, assigned to the investigation or related proceeding.

⁴² 19 U.S.C. § 1337(h).

⁴³ See 19 U.S.C. § 1335.

parties."⁴⁸ Finally, the revised paragraph (d) also omits a reference to the possible imposition of a fine as a sanction for violation of the certification requirement.⁴⁹

Section 210.30

Proposed rule 210.30 concerned requests for the production of documents and things and entry upon land.

Paragraph (b). Paragraph (b) of proposed rule 210.30 outlined the procedure for making, serving, and responding to requests for the production of documents and things and entry upon land. Paragraph (b) also provided that the presiding ALJ would determine the deadline for responding.

The ITCTLA commented that instead of leaving the response time to the discretion of the ALJ, there should be a minimum response period provided in the rule, which the ALJ has the authority to extend, but not diminish.

The Commission notes that the proposed discovery rules contained no prescribed deadlines because the Commission had deferred to Chief ALJ Saxon's view that discovery deadlines in each investigation should be established by the presiding ALJ and not by Commission rule. The ITCTLA did not offer any justification for the Commission to insert a deadline in paragraph (b) of the final rule. The Commission thus has not made the change that the ITCTLA requested; paragraph (b) of final rule 210.30 does not differ substantively from the corresponding paragraph of the proposed rule.

Section 210.32

Proposed rule 210.32 governed the issuance of subpoenas.

Paragraph (e). Paragraph (e) of proposed rule 210.32 was the same as the corresponding paragraph of interim rule 210.35 and discussed ex parte rulings on applications for subpoenas. Paragraph (e) provided that applications for the issuance of the subpoenas can be made ex parte, and, if so made, such applications and rulings thereon must remain ex parte unless otherwise ordered by the ALJ.

The ITCTLA commented that it is not clear whether the ex parte applications are discoverable by any party or person who wishes to try to quash the subpoena. The ITCTLA believes that

final rule 210.32 should expressly provide that such applications are discoverable by any party or person seeking to quash the subpoena if it is actually issued.

The Commission did not modify paragraph (e) in the manner the ITCTLA advocated. The Commission intends for paragraph (e) of final rule 210.32 to correspond to the FRCP 34 on the issuance of subpoenas. FRCP 34 does not contain a provision of the sort that the ITCTLA has requested. The issues of whether and when applications for subpoenas are discoverable by parties and subpoenaed persons accordingly will be left to the discretion of the presiding ALJ.

Section 210.33

Proposed rule 210.33 was based on FRCP 37 as it read prior to December 1, 1993, which provided sanctions for failure to make or cooperate in discovery.

Paragraph (a). Paragraph (a) of proposed rule 210.33 pertained to the filing of motions for orders compelling discovery. Paragraph (a) was based on the first sentence in subdivision (a) of FRCP 37, as it read prior to December 1, 1993.

On December 1, 1993, subdivision (a) of FRCP 37 was amended to be consistent with amended subdivision (a) of FRCP 26 (which requires disclosures of certain matters without a discovery request). It was also amended to provide that—

- a party dissatisfied with the disclosures made by an opposing party may move for an order to compel disclosure;
- litigants must seek to resolve discovery disputes by informal means before filing a motion with the court;
- evasive or incomplete disclosures and responses to interrogatories and production requests will be treated as failures to disclose or respond; and
- monetary sanctions can be imposed if the disclosure or requested discovery is provided after the motion to compel is filed with the court but before a hearing is held on the motion (except that a party may not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel).⁵⁰

The Commission decided against incorporating provisions of subdivision (b) of amended FRCP 37 into paragraph (a) of final rule 210.33 at this time. Paragraph (a) of final rule 210.33 is therefore the same as paragraph (a) of the proposed rule.

The Commission notes, however, that a presiding ALJ can issue his or her own ground rules to supplement the part 210 discovery rules (and hence those ground

rules may require that a movant must certify that there have been good faith efforts to resolve a discovery dispute by informal means prior to the filing of a motion to compel discovery). A presiding ALJ's ground rules also can provide that an evasive or incomplete disclosure, answer, or response will be treated as a failure to respond as provided in amended FRCP 37(a)(3).

Paragraph (b). Section 337(h) gives the Commission express authorization to impose sanctions for "abuse of discovery" to the extent provided in FRCP 37.⁵¹ Paragraph (b) of proposed rule 210.33 addressed non-monetary sanctions for failure to make or cooperate in discovery. Paragraph (b) was based on the non-monetary sanction provisions of FRCP 37(b) (as well as paragraph (b) of interim rule 210.36, which listed various kinds of sanctions that may be imposed if a party fails to comply with a discovery order).

The Federal Rule upon which paragraph (b) of proposed rule 210.33 was based—subdivision (b) of FRCP 37—was not amended on December 1, 1993. The Commission therefore did not consider making changes in paragraph (b) before adopting it as part of final rule 210.33.

Paragraph (c). Paragraph (c) of proposed rule 210.33 discussed monetary sanctions for failure to make or cooperate in discovery. It was based in part on subdivision (b)(2) of FRCP 37, which was not amended on December 1, 1993.

Subdivisions (c), (d), and (g) of amended FRCP 37 are also relevant to the question of monetary sanctions for failure to make or cooperate in discovery in section 337 investigations. Subdivision (c) authorizes cost and fee sanctions for failure to make the disclosures required by subdivision (a) of FRCP 26, as amended. Subdivision (c) also provides sanctions for false or misleading disclosures and refusals to admit.⁵² Subdivision (d) authorizes cost and fee sanctions for a party's failure to attend its own deposition or to serve answers to interrogatories or responses to requests for inspection. (Subdivision (d) also provides that when a party fails to file any response to interrogatories or a FRCP 34 request, the discovering party is required to try informally to obtain such responses before filing a motion for sanctions.)⁵³ Subdivision (g) authorizes cost and fee sanctions if a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery

⁴⁸ Proposed parties do not usually participate in discovery. The inclusion of that reference in the proposed rule was an error.

⁴⁹ Unlike the amended FRCP 11, the amended paragraph (g) of FRCP 26 does not provide for the imposition of monetary penalties other than costs or attorney's fees.

⁵⁰ See 146 F.R.D. at 467-470 and 689-691.

⁵¹ 19 U.S.C. § 1337(h).

⁵² See 146 F.R.D. at 470-472 and 691-692.

⁵³ See 146 F.R.D. at 472-473 and 691-692.

plan as required by amended subdivision (f) of FRCP 26.⁵⁴

The Commission has decided not to incorporate the provisions of subdivisions (a), (c), (d), and (g) of amended FRCP 37 into its final rules at this time. The only monetary sanctions available under paragraph (c) of final rule 210.33 will be those based on subdivision (b)(2) of amended FRCP 37 for failure to comply with an order to provide or permit discovery.

The Commission made several substantive revisions to paragraph (c), however. First, paragraph (c)(1) was revised by changing the citation to "Rule 37 of the Federal Rules of Civil Procedure" to "Rule 37(b)(2) of the Federal Rules of Civil Procedure." In addition, the language of paragraph (c)(1) was altered to conform more closely to that of subdivision (b)(2) of amended FRCP 37. The Commission added language indicating that monetary sanctions may not be awarded if the ALJ or the Commission finds that the uncooperative party's failure to comply with the order to provide or permit discovery was substantially justified or that other circumstances make an award of expenses unjust.

The Commission also deleted the references in paragraph (c)(1) to the imposition of an "appropriate monetary sanction" and the possibility of a fine being imposed in lieu of or in addition to cost and attorneys' fee sanctions. Unlike the sanction provisions of amended FRCP 11, the sanction provisions of amended FRCP 37 do not provide for monetary sanctions of any kind other than the payment of another party's costs and attorneys' fees.

The Commission also made some minor editorial changes in paragraph (c)(2) before adopting it as part of final rule 210.33.

Subpart F—Prehearing Conferences and Hearings

Section 210.35

Paragraph (d). Paragraph (d) of proposed rule 210.35 discussed prehearing orders, and stated that the ALJ's order shall control the subsequent course of the hearing, unless the ALJ modifies the order.

The ITCTLA commented that this provision gives the presiding ALJ wide latitude to modify his prehearing order. The ITCTLA believes, however, that while ALJs should have broad powers to modify pretrial orders, some sort of limit should be imposed. The ITCTLA accordingly requested that the last sentence of final rule 210.35 be drafted

to state that the ALJ can modify his pretrial order for "good cause." The ITCTLA noted that "good cause" is the standard that Federal judges must apply in modifying scheduling orders under FRCP 16(b).

The Commission does not see a need for the change the ITCTLA has advocated. The Commission assumes that the ALJs will not abuse their power to modify a pretrial order and will only make modifications when good cause exists for the change. That being the case, revising the last sentence to add the "good cause" proviso would seem to be unnecessary.

Section 210.36

Paragraph (d). Paragraph (d) of proposed rule 210.36 described the rights of the parties at evidentiary hearings. It stated, among other things, that every party will have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

The ITCTLA commented that the reference to "all other rights essential to a fair hearing" is vague and unnecessary, and should be omitted from the final rule. The Commission does not agree and has retained that phrase in paragraph (d) of final rule 210.36.

Section 210.37

Paragraph (b). Paragraph (b) of proposed rule 210.37 discussed the admissibility of evidence. It stated, in pertinent part, that immaterial or irrelevant parts of an admissible document will be segregated and excluded as far as practicable. The ITCTLA commented that in the final rule, this sentence should be written in the disjunctive, not in the conjunctive—i.e., the word "or" should be used in place of the word "and." The Commission believes that change is appropriate and has made it in the final rule.

Paragraph (e). Paragraph (e) of proposed rule 210.37 discussed objections to evidence, and stated that objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon.

The ITCTLA commented that the word "timely" is too vague and, for that reason, the final rule should state that objections must be made when the evidence is offered.

The Commission intends for the presiding ALJ in each case to decide at what point objections to evidence should be made. The Commission therefore has not drafted paragraph (e)

of final rule 210.37 to include the provision that the ITCTLA requested.

Section 210.38

Proposed rule 210.38 governed the reporting and transcription, correction, and certification of the administrative record of a section 337 investigation or related proceeding.

Paragraph (a). Paragraph (a) of the proposed rule identified the kinds of documents and materials that constitute such a record. Unlike paragraph (a) of the proposed rule, paragraph (a) of the final rule codifies longstanding Commission practice by indicating that all briefs and written statements are part of the record.

Subpart G—Determinations and Actions Taken

Section 210.42

Proposed rule 210.42 was the general rule concerning IDs.

Paragraph (a). Paragraph (a) of proposed rule 210.42 governed the issuance of an ID on "permanent relief," i.e., violation of section 337. The headings of the final rule differ from those in the proposed rule in the following manner:

1. The heading of paragraph (a)(1)(i) has been changed from "On issues concerning permanent relief" to "On issues concerning violation of section 337." This change was made because IDs issued pursuant to this paragraph pertain solely to violation of section 337 of the Tariff Act and do not address the issue of permanent relief.

2. Paragraph (a)(1)(ii) has been given the heading "Recommended determination on issues concerning permanent relief and bonding," as this paragraph requires the ALJ to issue, within 14 days after issuance of the violation ID, an RD on the issues of remedy and bonding by respondents.

The ITCTLA commented that apart from not detracting from the time allotted to the ALJ to adjudicate the question of a section 337 violation, there does not seem to be any justification for treating an ALJ's remedy and bonding decision differently from his decision on violation. The ITCTLA also believes that the only advantage to having the ALJ issue his remedy and bonding decision separately from the decision on violation is that the public gets an opportunity to comment on the remedy and bonding issues. The ITCTLA maintains, however, that such comment would be possible without utilizing the RD mechanism.

The ITCTLA accordingly suggested that—
1. final rule 210.42(a)(1)(ii) should require the ALJ to issue an ID on permanent relief

⁵⁴ See 146 F.R.D. at 473 and 692.

and bonding, instead of an RD, on the 14th day after issuance of the ID on violation of section 337;

2. processing of the ID should entail provision for petitions for review by parties and a 30-day deadline for comments on the ID by interested members of the public; and

3. the ID should have a 45-day effective date.

The Commission has not drafted paragraph (a)(1)(ii) of final rule 210.42 in the manner the ITCTLA has advocated. The Commission believes that having the ALJ issue an RD on remedy and bonding by respondents will give the Commission the greatest flexibility in reaching final determinations on those issues.⁵⁵

The Commission did make one substantive change in paragraph (a)(1)(ii) of proposed rule 210.42 before adopting it as a final rule. That paragraph was revised to require an ALJ to issue an RD on remedy and bonding in every case (and not just those in which the ALJ has found a violation of section 337).

Paragraph (d). Paragraph (d) of proposed rule 210.42 described the required content of an ID. It stated, among other things, that an ID would become the determination of the Commission unless a party filed a petition for review of the ID "pursuant to § 210.43(a) or § 210.46(a) or the Commission, pursuant to § 210.44 of § 210.46(a)(6), orders on its own motion a review of the initial determination or certain issues therein." Since the Commission has determined not to adopt the procedure set forth in proposed rule 210.46(a), the cross-references to that rule have been omitted from paragraph (d) of final rule 210.42.

Paragraph (h). Paragraph (h) of proposed rule 210.42 listed the effective dates of various kinds of IDs.

Paragraph (h)(1) provided that an ID under proposed rule 210.42(a)(2) granting a motion to declassify confidential information would become the determination of the Commission within 45 days after service of the ID unless the Commission ordered a review. The ITCTLA commented that the final version of this rule should provide a 30-day effective date for the ID, because IDs on declassification of confidential information "[seem] more like the type of decision which becomes effective within thirty (30) days (like amendment of the complaint, etc.). The ITCTLA also suggested that the 30-day period be measured from the date of

issuance of the ID, and not the date of service, to be consistent with proposed rules 210.43 ("Petitions for Review of IDs on Matters Other Than Temporary or Permanent Relief") and 210.46 ("Petitions for and Sua Sponte Review of IDs on Permanent or Temporary Relief").

The Commission notes that consistency in rules dealing with similar or related subject matter generally is desirable. In this case, however, the Commission does not think it necessary or desirable to revise the manner of measuring the effective date of an ID on declassification of confidential information. Calculating a prescribed period from the date of issuance of an ID (instead of the date of service) usually shortens the actual period. Expedited procedures are necessary, however, for IDs that must be processed before a statutory or regulatory deadline. Such urgency does not exist with respect to processing an ID concerning declassification of confidential information.

Paragraph (h)(2) of proposed rule 210.42 concerning IDs on permanent relief (i.e., violation of section 337) did not give an effective date for such IDs because they were to be processed in accordance with paragraph (a) of proposed rule 210.46, instead of being processed by the customary bifurcated process. Instead, paragraph (h)(2) simply stated that IDs on violation of section 337 would be processed in accordance with proposed rule 210.46.

Since the Commission has not adopted the procedure set forth in that proposed rule, paragraph (h)(2) of final rule 210.42 has been drafted to state that IDs on violation of section 337 have a 45-day effective date, unless the Commission orders otherwise or changes the deadline for determining whether to order a review. Paragraph (h)(2) also retains the provision from the corresponding paragraph of the proposed rule indicating that the findings and recommendations made by the ALJ in the RD on remedy and bonding by the respondents will be considered by the Commission in reaching determinations on those issues.

Section 210.43

Paragraph (b). Paragraph (b) of proposed rule 210.43 articulated (1) the standard for review and the grounds that must be asserted in a petition for review as justification for seeking review of specific issues, and (2) the consequence of a party's failure to petition for review of an issue decided adversely to the party. Like interim rule 210.54(b), upon which it was based, proposed rule 210.43(b) also stated that

any issue not raised in the petition for review will be deemed to have been abandoned by the party and may be disregarded by the Commission in reviewing the ID.

In the preamble to paragraph (b) of proposed rule 210.43, the Commission noted that the Federal Circuit has construed paragraph (a)(2) of interim rule 210.54 to mean that parties who petition the Commission for review waive their right to raise additional or different issues in a subsequent appeal to the Federal Circuit, while parties who do not file petitions for review may raise all issues on appeal.⁵⁶ The Commission went on to say that while interim rule 210.54(a)(2) and proposed rule 210.43(b) permit the parties to elect to bypass Commission review, and may thereby reduce the effectiveness of the Commission's review procedures, some persons may feel that the interim rule and proposed rule 210.43(b) effectively discourage the filing of petitions for review.⁵⁷

For those reasons, the Commission specifically requested public comment on whether it should adopt an *Alternative* provision to that in proposed rule 210.43(b) stating that: (1) A party is required to file a petition for review of an ID in which issues had been decided adversely to that party, in order to preserve the party's right to judicial review of any final Commission determination based on some or all of the same grounds as the ID; and (2) a party's failure to file a petition for review would be deemed to be abandonment of all issues decided adversely to that party in the ID.⁵⁸

The ITCTLA commented that it does not favor the proposed rule as written—or the alternative provision discussed in the preamble. The ITCTLA explained that—

The ITCTLA feels that the problem with the present arrangement is that it encourages overly comprehensive petitions, not that it discourages a party from filing at all. The ITCTLA doubts whether the decision to file a petition for review is influenced significantly by the fact that, to avoid any waiver, a party must petition for review of every issue lost before the ALJ. Parties that do not seek review most likely have other

⁵⁵ A Commission decision on whether to accept or reject the recommendations in an RD is not governed by the same subject matter limitations and deadlines as a decision on whether to review an ID.

⁵⁶ See *Warner Brothers, Inc. v. U.S. International Trade Commission*, 787 F.2d 562, 564 (Fed. Cir. 1986). (The Federal Circuit rejected the Commission's argument that parties waive the right to challenge Commission determinations by failing to petition for review of adversely decided IDs.) See also *Allied Corporation v. U.S. International Trade Commission*, 850 F.2d 1573, 1580 (Fed. Cir. 1988), cert. denied, 109 S.Ct. 791 (1989) ("Allied abandoned review of the claim construction in the ALJ's 1984 ID by failing to raise the issue in its petition for review of that ID").

⁵⁷ 57 FR at 52846.

⁵⁸ *Id.*

motivations (e.g., lack of interest in review of the issues lost, insufficient funds, etc.)

Thus the only effect of the Commission's suggested alternative to the Proposed Rules would be to force parties which did not want to file a petition for review to do so or else waive their right to appeal to the Federal Circuit. It would not discourage overly comprehensive petitions, but instead would ensure that all petitions were indeed overly comprehensive.

The ITCTLA suggested a second alternative—namely, elimination of the provision that issues not raised in a petition for review are waived. The ITCTLA believes that if the final rule were written in that manner, only legitimate issues would be raised in petitions for review. The ITCTLA also is of the opinion that such a rule would not deprive parties of fair notice of what might be raised on appeal, since the present arrangement in which parties routinely file "kitchen sink" petitions does not provide such notice anyway.

The Commission has not drafted paragraph (b) of final rule 210.43 in the manner that the ITCTLA advocated.

Section 337 investigations are conducted—and determinations from such investigations are appealable—in accordance with the APA.⁵⁹ The Supreme Court has held that Federal courts do not have the authority to require a plaintiff to exhaust administrative remedies before seeking judicial review under the APA when neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. *Darby v. Cisneros*, 113 S.Ct. 2539 (1993).

The relevant provisions of section 337 do not mandate exhaustion as a prerequisite to judicial review.⁶⁰ The interim Commission rules also do not require a complainant to exhaust the available administrative remedies before seeking judicial review.⁶¹ As the preamble to the proposed rules pointed out, the Federal Circuit previously decided that the Commission's interim rule 210.54(a)(2)—which is the same as proposed rule 210.43(b) on the issue of waiver—does not require an aggrieved party to file a petition for Commission review of an ID before seeking judicial review. See *Warner Brothers, Inc. v. U.S. International Trade Commission*, 787 F.2d 562, 564 (Fed. Cir. 1986).⁶²

To ensure that the doctrine of exhaustion of administrative remedies can properly be applied to section 337 proceedings (in light of *Warner Brothers and Darby*), the Commission has drafted paragraph (b) of final rule 210.43 to provide that:

(1) any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under final rule 210.44); and

(2) a party's failure to file a petition for review of an ID shall constitute abandonment of all issues decided adversely to that party in the ID.

The Commission notes that its goal under section 337 is to issue the best decision possible in the time available. That goal is furthered by encouraging all parties (prevailing as well as non-prevailing) to petition for review of any and all errors they perceive in the ID on violation of section 337. The Commission believes that a Commission rule providing for a waiver will achieve the desired effects of (1) discouraging deliberate flouting of administrative processes, (2) protecting agency autonomy by affording the agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors, (3) aiding judicial review by promoting the development of facts during the agency proceedings, and (4) promoting judicial economy by reducing duplication.

Contingent Petitions

The ITCTLA suggested that the Commission consider whether to adopt a rule expressly providing for contingent petitions for review—i.e., petitions in which the petitioning party is satisfied with the ID, but would like to have the Commission review certain issues if the Commission decides to review issues raised by an opposing party. The ITCTLA claimed that permitting the filing of contingent petitions for review "might spare the Commission significant work, and appears to have no down side."

The Commission notes that it occasionally receives contingent petitions for review of IDs. Owing to the administrative deadlines governing the ID/discretionary Commission review process, contingent petitions must be processed in the same time and manner as non-contingent petitions. Paragraph

not raised therein "will be deemed to have been abandoned." "There is no requirement", the Federal Circuit continued, "that a party file a petition for review or risk waiver of all adversely decided issues." 787 F.2d at 564.

(b) of final rule 210.43 accordingly clarifies this practice, by stating that any petition designated by the petitioner as a "contingent" petition for review shall be regarded as an ordinary (i.e., non-contingent) petition and shall be processed accordingly. The Commission thought that such clarification was necessary in light of the fact that a "contingent petition" is inconsistent with the requirement that all administrative remedies be exhausted before judicial review.

Section 210.44

Proposed rule 210.44 covered sua sponte Commission review of IDs on matters other than permanent or temporary relief. It bore the heading "Commission review on its own motion of IDs on matters other than permanent or temporary relief."

In view of the Commission's decision to retain the current manner of processing IDs on violation of section 337 and not to adopt the procedure set forth in proposed rule 210.46 (as discussed below), the heading of final rule 210.44 has been changed to "Commission review on its own motion of initial determinations on matters other than temporary relief."

Sections 210.45 and 210.46

Proposed rule 210.45 governed review of IDs on matters other than temporary or permanent relief. Paragraph (c) of proposed rule 210.45 described Commission decisions on review of an ID concerning a matter other than temporary or permanent relief. Paragraph (a)(7) of proposed rule 210.46 similarly described Commission decisions on review of an ID concerning permanent relief (i.e., violation of section 337). Paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 were essentially the same as interim rule 210.56(c) ("Determination on Review").⁶³

The ITCTLA commented that paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 should be amended to provide that the Commission's determination on review is made according to the same standard found in proposed rule 210.43(b), i.e., the standard by which the Commission determines whether to

⁵⁹ Interim rule 210.56(c) provides as follows:

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge and may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

19 CFR 210.56(c) (1993).

⁵⁹ See 19 U.S.C. § 1337(c).

⁶⁰ *Id.*

⁶¹ See 19 CFR 210.54(a), 210.53(h), 210.56(c), and 210.71 (1993).

⁶² In reaching that decision, the Federal Circuit noted that interim rule 210.54(a)(2) does not address situations where the petitioner appeals an ID of an ALJ directly to the court, without first petitioning for review. "As we read the current regulations", the Federal Circuit stated, "if a party does file a petition for review of the ID, any issue

review an ID.⁶⁴ The ITCTLA believes that the proposed change is warranted because the ALJs are highly experienced triers of fact and thus are entitled to have their opinions accorded the same deference called for under the standard set forth in proposed rule 210.43(b).

The Commission views the ITCTLA's comment as an attempt to obtain reversal of the Commission opinion in Inv. No. 337-TA-324, *Certain Acid-Washed Denim Garments and Accessories*, which held that the standard which the Commission applies in reviewing an ID (as opposed to determining whether to review the ID) is a de novo standard.⁶⁵ The Commission therefore declines to revise paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 in the manner that the ITCTLA suggested. (But see the discussion below concerning the Commission's decision not to adopt any part of proposed rule 210.46.)

In view of the Commission's decision to retain the current manner of processing IDs on violation of section 337 and not to adopt the procedure set forth in proposed rule 210.46 (as discussed below), the heading of final rule 210.45 has been worded to cover IDs on violation of section 337. The heading of proposed rule 210.45 was "Commission review on its own motion of initial determinations on matters other than temporary or permanent relief." The heading of final rule 210.45 is "Commission review on its own motion of initial determinations on matters other than temporary relief." The Commission also made a similar change in paragraph (a) of the final rule.

⁶⁴ The standard set forth in proposed rule 210.43(b) was:

1. that a finding or conclusion of material fact is clearly erroneous;
2. that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
3. that the determination is one affecting Commission policy.

⁶⁵ The opinion stated in pertinent part as follows:

In our view, the standard for review provided in interim rule 210.56 is clear—the Commission may "make any findings or conclusions that in its judgment are proper based on the record in the proceedings." Thus, once a sufficient basis for review has been shown and review has been ordered, the Commission examines for itself the record on the issues under review. It makes findings on those issues it believes are appropriate, unconstrained by the 'clearly erroneous' standard of interim rule 210.54. Contrary to respondents' claim, there is in our view no basis for grafting the 'clearly erroneous' standard from interim rule 210.54—which governs whether there is a basis for review—onto interim rule 210.56—which controls the Commission's decision upon review.

Certain Acid-Washed Denim Garments and Accessories, Inv. No. 337-TA-324, USITC Publication 2576, Opinion of the Commission at 4-5 (Nov. 1992).

Section 210.46

Paragraph (a). Paragraph (a) of proposed rule 210.46 set forth a new procedure for the processing of an ID on permanent relief (i.e., violation of section 337) and the accompanying RD on remedy and bonding by the respondents. The ITCTLA suggested changing various aspects of the new process. The ITCTLA's comments will not be discussed here, as the Commission has determined not to adopt, at least at this time, the procedure set forth in paragraph (a) of proposed rule 210.46 for processing IDs on violation of section 337.⁶⁶

Paragraph (a) of final rule 210.46 provides that IDs on violation of section 337 will be processed in the manner set forth in final rules 210.43 through 210.45.

The only provision that has been retained from paragraph (a) of proposed rule 210.46 is the one stating that the Commission will issue a notice setting deadlines for written submissions from the parties, other Federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents. In those submissions, the parties may assert their arguments concerning the RD issued by the ALJ pursuant to final rule 210.42(a)(ii) on remedy and bonding by respondents.

An additional issue raised by the ITCTLA concerned paragraph (a)(7) of proposed rule 210.46. That paragraph indicated that the Commission would issue a notice, on or before the statutory deadline in each investigation, setting forth its determinations on all issues, including whether the Commission had affirmed, modified, reversed, or set aside the ID in whole or in part.

The ITCTLA commented that paragraph (a)(7) should be revised to include a provision dealing with review of motions for summary determination and motions to terminate an investigation. The ITCTLA noted that as the interim and proposed rules are currently written, an ALJ can issue an ID granting a motion for summary determination or a motion to terminate, but the only time limit that the Commission has is the deadline for concluding the investigation. The ITCTLA noted further that as a consequence of that omission and a deadlocked vote, the Commission did

⁶⁶ The Commission has so far utilized the procedure set forth in paragraph (a) proposed rule 210.46 in one investigation, and will consider the experience gained in that case, when the Commission determines at a later date whether paragraph (a) of final rule 210.46 should be modified to incorporate some or all of the procedures set forth in the proposed rule.

not rule on whether to reverse the ALJ's ID granting summary determination in Inv. No. 337-TA-334, *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, until seven months after the ID was issued. The ITCTLA added that the Commission reversed the ALJ, and that the parties were left with very little time to prepare for a hearing even though the case was declared "more complicated."

To ensure that this does not happen again, the ITCTLA suggested that the following text be added to the end of proposed rule 210.46(a)(7):

In cases in which the initial determination results from the granting of a motion for summary determination under Rule 210.18 or a motion to terminate under Rule 210.21, the Commission will issue a notice stating whether the Commission has affirmed, modified, reversed, or set aside the initial determination in whole or part on or before the sixtieth day after the issuance of the ID.

The final rules do not contain a provision like that recommended by the ITCTLA. There has been no recurrence of delays of the sort that occurred in the *Condensers* investigation. The Commission thus does not believe it necessary for the final rules to impose a 60-day deadline for completing Commission review of IDs granting motions for summary determination or termination of an investigation in whole or part.

Rules Concerning Judicial Review

Interim rule 210.71 states that any person adversely affected by a final determination under section 337 can appeal to the Federal Circuit. The Commission omitted a comparable provision from the final rules on the grounds that it merely repeated what was set forth in the statute.

The ITCTLA commented that the final rules should contain provisions explaining when a determination is considered "final" and thus is ripe for appeal. The ITCTLA also wants the Commission to adopt rules stating that the period for filing an appeal begins to run for all issues at the same time. In the ITCTLA's opinion, such rules are needed in order to facilitate the Federal Circuit's consolidation of multiple appeals arising out of the same investigation, to prevent the parties from filing multiple notices of appeals because they are not certain how to calculate the deadline for filing, and to eliminate the need for the Federal Circuit "to sort out the mess."

The Commission believes that its promulgation of such rules would be ultra vires, would encroach upon the jurisdiction of the Federal Circuit, and

would not have the desired effect since the Federal Circuit would not be bound by them. The final rules for part 210 thus do not contain provisions of the sort the ITCTLA advocated.

Section 210.50

Paragraph (a). Paragraph (a) of proposed rule 210.50 stated that when the Commission is considering whether to grant some form of permanent relief, the submissions from parties, other Federal agencies, and interested members of the public concerning the issues of remedy, the public interest, and bonding shall be filed by the deadlines specified in "the Commission notice issued pursuant to § 210.46(a)(5) of this part." Since the Commission has determined not to adopt paragraph (a)(5) of proposed rule 210.46, the appropriate cross-references is to paragraph (a) of that rule. A cross-reference to "§ 210.46(a)" accordingly appears in paragraph (a) of final rule 210.50.

Paragraph (a) of proposed rule 210.50 also provided that any written submissions that the Commission receives from other Federal agencies or interested members of the public concerning remedy, the public interest, or bonding by respondents would be available for public inspection in the Commission Secretary's Office. Unlike the interim rule upon which it was based, paragraph (a) of proposed rule 210.50 did not require that such submissions be served on the parties to the investigation.⁶⁷ The preamble also noted that the parties could contact the Commission staff to learn whether any non-party submissions were expected or had been filed and that they could readily obtain copies of the submission from the Secretary's Office.⁶⁸

The ITCTLA commented that it is understandable that the Commission wishes to minimize the burden on nonparty submitters. The ITCTLA also speculated that eliminating the service requirement for such submissions might encourage more nonparties to file them. The ITCTLA also is of the opinion, however, that the Commission should be required to *notify* each party when a nonparty submission arrives, so that the parties will not be forced to unnecessarily monitor the Commission docket.

The Commission notes that the ITCTLA's argument presupposes that the parties (and/or their attorneys) would be entitled to see every nonparty submission that is filed. That may not be the case, however. The Commission occasionally receives written submissions from other agencies (such as the U.S. Customs Service) which contain information that is not to be disclosed to anyone other than the Commission and Commission staff who are assigned to the investigation.⁶⁹ The Commission also sometimes receives submissions from interested persons outside of the Federal government, who request that their submissions not be shown to the parties.

In addition, it would unduly burden the Docket Section staff of the Secretary's Office if those persons were required to monitor all remedy submissions and telephone each party when a nonparty submission is received.⁷⁰

Paragraph (a) of final rule 210.50 thus does not contain the notification requirement that the ITCTLA requested.

Subpart H—Temporary Relief

Section 210.52

Proposed rule 210.52 concerned the filing and content of motions for temporary relief.

Paragraph (a). Paragraph (a) of proposed rule 210.52 stated that a complaint requesting temporary relief must be accompanied by a motion for such relief containing information relevant to the four factors the Commission considers in determining whether to grant temporary relief. Paragraph (a) of proposed rule 210.52 also explained that in determining whether to grant temporary relief, the Commission would apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions and that the motion for temporary relief must contain a detailed statement of specific facts bearing on the factors the Federal Circuit would consider.

The ITCTLA commented that the proposed rule did not accurately reflect what the test is, and that the final rule should indicate that the motion for

temporary relief must contain a detailed statement of specific facts "bearing on the factors that the Federal Circuit [has] stated that a district court must consider in granting a preliminary injunction." The Commission has made that change in paragraph (a) of final rule 210.52.

The ITCTLA also commented that the Commission should rewrite the discussion in the preamble of the proposed rules which deals with articulation of the district court standards, because ambiguity is introduced concerning the burden of proof.

The Commission sees no reason to rewrite the commentary in question. Instead, the Commission recommends that, for purposes of drafting or ascertaining the validity of arguments for motions for temporary relief or responses thereto, parties and other interested persons should examine the most recent Commission and Federal Circuit decisions rather than the commentary to the proposed rules.

Paragraph (e). Paragraph (e) of proposed rule 210.52 described how the Commission would be likely to compute the amount of the complainant's bond (if one is required as a prerequisite to the issuance of a temporary exclusion order or a temporary cease and desist order. It provided a tiered bond schedule based on sales of the product at issue and licensing royalties from the intellectual property right at issue.

The ITCTLA commented that it was unclear whether the \$10,000 bond amount prescribed in the first tier of the schedule—i.e., for sales and licensing royalties of less than \$1 million—would apply if the complainant has had *no sales*. The ITCTLA noted that this question could arise if the domestic industry is in the process of being established or if the complainant has been unable to build up sales because of the respondents' presence in the market. The ITCTLA thus suggested that "the scale should be modified to reflect the recognition that such circumstances may exist."

The Commission does not see the need to make the change the ITCTLA has suggested. Proposed rule 210.52(e) explicitly stated that the table was likely to be applied "*in cases where a domestic industry exists and domestic sales of the product in question have commenced and have not been de minimis.*" This proviso precluded application of the schedule in situations of the sort that the ITCTLA has described.

The Commission also sees no need to revise any other provision of paragraph (e) of proposed rule 210.52 "to reflect recognition that [the circumstances the

⁶⁷ As the preamble to proposed rule 210.50(a) explained, the Commission thought it inappropriate to require another Federal agency to serve copies of its submission on the parties unless the agency also is a party to the proceeding (as, e.g., through intervention). The Commission also thought that the burden of serving parties should not be imposed on members of the public. See 57 FR at 52885.

⁶⁸ See 57 FR at 52885.

⁶⁹ The Commission has received, for example, submissions from the U.S. Customs Service, which Customs has explicitly requested not to be made available to anyone other than the Commission and the Commission staff (and personnel at other agencies who are involved in Presidential review of Commission remedial orders).

⁷⁰ Some section 337 investigations have large numbers of respondents. There were 112 respondents, for example, in Inv. No. 337-TA-112, *Certain Cube Puzzles* (1983).

ITCTLA cited] may exist." That paragraph expressly provided that "[i]n cases in which the aforesaid schedule would not be appropriate, the amount of the bond will be determined on a case-by-case basis." Paragraph (e) also indicated that in such cases, the motion for temporary relief should explain (1) why the prescribed schedule is not appropriate, and (2) the theory the complainant believes is appropriate for computing the amount of the bond.

The Commission thus has adopted paragraph (e) of proposed rule 210.52 as a final rule without making the changes the ITCTLA requested.

Section 210.55

Proposed rule 210.55 discussed redaction of confidential business information from the copies of the complaint and motion for temporary relief which the complainant is required to serve on each proposed respondent and the appropriate embassies.

Paragraph (b). Paragraph (b) of proposed rule 210.55 described the action that the Commission would take upon determining that the confidential designation had been abused in the preparation of sanitized service copies of the complaint and motion for temporary relief.

The ITCTLA commented that it was not clear whether paragraph (b) of proposed rule 210.55 provides the complainant with the right of appeal afforded under Commission rules 201.6(e) and (f).⁷¹ The ITCTLA also expressed the opinion that the final rule should provide the standard that the Commission intends to apply to determine whether there have been over-designations.

The Commission did not intend for paragraph (b) of proposed rule 210.55 (or the corresponding paragraph of the final rule) to provide the complainant with the right of appeal afforded under Commission rules 201.6(e) and (f). The Commission does not think it necessary for the final rule to provide a standard for determining whether the confidential designation has been abused. Such determinations are more appropriately made on a case-by-case basis.

Potential complainants should be aware that abuse of the confidential designation and the consequent over-redaction of confidential information

from the service copies of a complaint and motion for temporary relief may be sanctionable under final rule 210.4 depending on the facts.

Section 210.58

Proposed rule 210.58 indicates that the Commission will determine whether to provisionally accept a motion for temporary relief and institute an investigation in response to the complaint by a prescribed deadline, unless exceptional circumstances preclude adherence to that deadline.

The ITCTLA commented that it was not clear, under proposed rule 210.58 or proposed rule 210.10, what "exceptional circumstances" are. The ITCTLA questioned whether a definition of that term is desirable.

The Commission sees no need to add a definition of that term to the final rules. The fact that circumstances are "exceptional" strongly suggests that they are not susceptible to definition. Final rule 210.58 thus does not differ substantively from the proposed rule.

Section 210.70

Proposed rule 210.70 addressed the possible forfeiture of a complainant's temporary relief bond when the Commission determines, after issuing a temporary remedial order conditioned on a bond, that one or more respondents have not violated section 337.⁷²

Paragraph (c). Paragraph (c) of proposed rule 210.70 enumerated the criteria that the presiding ALJ and the Commission will consider in determining whether to grant a motion for forfeiture of a complainant's temporary relief bond in whole or part. Paragraph (c)(2) indicated that in determining whether to grant the motion, the ALJ and the Commission will consider whether the complainant's filing of the motion for temporary relief was justified under the standard set forth in proposed rule 210.4(b).

In final rule 210.70, paragraph (c)(2) incorporates—

1. the standards of conduct articulated in paragraph (c) of final rule 210.4, and
2. the guidelines in paragraph (d) of final rule 210.4 for determining whether those standards were violated.

Hence, the approach that the ALJ and the Commission will take in bond forfeiture proceedings will be the following:

1. The ALJ and the Commission will determine whether the complainant or its

attorneys, by presenting the motion for temporary relief (or a disputed portion thereof) to the presiding ALJ and the Commission (by signing, filing, submitting, or later advocating it), wrongfully certified that to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(a) the motion for temporary relief was not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation;

(b) the claims, defenses, and other legal contentions in the motion were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(c) the allegations and other factual contentions had evidentiary support or, if specifically so identified, were likely to have evidentiary support after reasonable opportunity for further investigation or discovery; and

(d) the denials of factual contentions were warranted on the evidence or, if specifically so identified, were reasonably based on a lack of information or belief.

2. The ALJ and the Commission will keep in mind that the presentation of the motion for temporary relief (or the relevant portion thereof) by the complainant and its attorneys need not have been frivolous in its entirety in order for the ALJ or the Commission to determine that the standard of conduct articulated above was violated. If the ALJ or the Commission determines that any aspect of the presentation was false, frivolous, misleading, or otherwise in violation of the standards of conduct articulated above, the complainant may be ordered to forfeit its temporary relief bond, in whole or part.

3. In determining whether any of the prescribed standards of conduct has been violated, the ALJ and the Commission will consider whether the presentation of the motion for temporary relief (or the disputed portion thereof) was objectively reasonable under the circumstances.⁷³

The Commission decided against drafting paragraph (c) of final rule 210.70 to incorporate the final rule 210.4(d) prohibition against imposing monetary sanctions on a party by reason of misconduct by the party's attorney in the presentation of legal arguments. In reaching a decision not to incorporate that prohibition, the Commission notes that adherence to the entire FRCP 11/final rule 210.4 standard is not required.⁷⁴

⁷³ Consideration 1 above incorporates the standards of conduct set forth in paragraph (c) of final rule 210.4. Considerations 2 and 3 are based on the guidelines that appear in paragraph (d) of rule 210.4 for determining whether the 210.4(c) standards have been violated.

⁷⁴ As interested persons may recall, the legislative history providing authorization for the forfeiture of complainants' temporary relief bonds did not direct the Commission to use a particular FRCP as a model. The legislative history simply stated that the forfeiture authority should operate in the same way that respondents' temporary relief bonds "revert" to

⁷¹ Commission rule 201.6(e) provides the procedure for discretionary appeals to the Commission from the Secretary's denial of confidential treatment for a submission or portion thereof, while Commission rule 201.6(f) governs appeals from the Secretary's granting of such treatment for a submission or portion thereof. See 19 CFR 201.6(e) and (f) (1993).

⁷² The forfeiture authority appears in the legislative history of the statute, but does not appear in the statute itself. See H.R. Rep. No. 576 at 635; 134 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

The Commission notes further that forfeiture of a temporary relief bond, in whole or in part, is a monetary sanction imposed on the complainant—not its attorneys. If the amended FRCP 11/final rule 210.4 provisions had been made applicable in their entirety to temporary relief bond forfeiture proceedings, the ALJ and the Commission would have to take into account the conduct of the complainant's lawyers, as well as that of the complainant, in determining whether the presentation of the motion for temporary relief (or the relevant portion thereof) violated any of the prescribed standards,⁷⁵ and the complainant would be exempt from forfeitures based on misconduct by its attorneys in connection with the presentation of legal arguments.⁷⁶

The Commission believes that a decision as to whether a complainant must forfeit its temporary relief bond in whole or part should be made on a case-by-case basis.⁷⁷ In a case in which the

the U.S. Treasury when the Commission determines that imported articles that were permitted to enter the United States under a bond violate section 337. See H.R. Rep. No. 576 at 635; 134 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

The Commission decided, on its own initiative, to use the FRCP 11 standard of conduct required by proposed rule 210.4(b) in determining whether a complainant should be ordered to forfeit its temporary relief bond in whole or part. The Commission agreed with commenters on the interim rules who suggested that the adoption of a single standard of conduct would eliminate the need to rationalize the differences between the rule governing forfeiture of a complainant's temporary relief bond as a sanction for abusing the temporary relief process and the general rule concerning sanctions for abuse of process. See 57 FR at 52860–52861 (the preamble to proposed rule 210.70).

⁷⁵ See amended FRCP 11(b) and final rule 210.4(c).

⁷⁶ See amended FRCP 11(c)(2)(B) and final rule 210.4(d). Both provide that monetary sanctions may not be imposed against a represented party for a violation of the requirement that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

⁷⁷ There may be cases in which the complainant's in-house counsel was equally—or primarily—responsible for the retained counsel's misconduct in the presentation of legal arguments concerning the motion for temporary relief. In such a case, it may be appropriate for the complainant to be penalized for its in-house counsel's actions, by having to forfeit all or a percentage of the temporary relief bond (depending on the degree of the in-house counsel's culpability and other relevant facts). On the other hand, if a forfeiture inquiry uncovers misconduct by complainant's retained counsel that did not involve the in-house counsel or any other officer or employee of the complainant, the complainant's lack of involvement may be a relevant equitable consideration under paragraph (c)(5) of final rule 210.70, and thus may be grounds for the Commission to either (a) decline to order forfeiture of the bond, or (b) order forfeiture of a smaller percentage than the Commission would

ALJ or the Commission finds misconduct by complainant's retained counsel, but decides that the misconduct should not be held against the complainant for purposes of bond forfeiture, separate proceedings can be initiated against such counsel.⁷⁸

Paragraph (d). Paragraph (d) of proposed rule 210.70 stated that motions to stay temporary relief bond forfeiture proceedings would not be granted.

The ITCTLA commented that the final rule should provide for automatic stay of all bond forfeitures. The ITCTLA explained that—

There are adequate safeguards throughout the rules to deter meritless section 337 temporary relief requests, making an absolute bar on staying forfeiture proceedings while an appeal is pending irrelevant to this concern. There is little inconvenience to respondents since they do not receive the bond amount, and the bond amount is of little significance to the U.S. Treasury. Complainants would prefer to keep the bond outstanding rather than paying the bond amount, especially since the bond may ultimately be returned. The current rule forces the complainant to incur additional legal expenses to recover the forfeited bond after winning on appeal. This is unnecessary and not an efficient allocation of the complainant's and the government's resources. Providing for an automatic stay of bond forfeiture would appear to better serve all parties.

The ITCTLA went on to say that if the Commission does not favor automatic stays of bond forfeitures, final rule 210.70(d) should provide for stays of forfeiture proceedings or the effective date of a forfeiture order on a case-by-case basis. The ITCTLA believes that in a case, for example, in which the complainant has based its appeal on a legal issue over which the Federal Circuit has not ruled, it would be appropriate for the Commission to stay forfeiture of the bond until the Federal Circuit has ruled.

The Commission notes that the legislative history of the bond forfeiture authority indicates that (1) the Commission's temporary relief bond forfeitures are to be effected in the same manner that the U.S. Customs Service collects liquidated damages on respondents' section 337 bonds, and (2) the implementing Customs regulations (19 CFR Part 172) do not provide for stays on the assessment of liquidated

have ordered if the complainant's in-house counsel (or other officers or employees) had been involved.

⁷⁸ Specifically, the ALJ or the Commission can issue an order directing the retained counsel to show cause why his conduct was not an abuse of process warranting the payment of a penalty and/or a nonmonetary sanction under final rule 210.4. See paragraphs (d)(1)(B) and (d)(2) of final rule 210.4.

damages pending the outcome of judicial review of the relevant Commission determination. The Customs procedures have not changed in that regard. The Commission accordingly has not drafted paragraph (d) of final rule 210.70 to provide for stays of bond forfeitures.

Paragraph (d) of proposed rule 210.70 also provided that if the complainant wins on appeal, the complainant can file a petition requesting a refund of the amount of the bond forfeited or that the Commission may determine to provide a refund sua sponte. The ITCTLA commented there is no reason for the Government to retain the forfeited bond amount and that a refund should be forthcoming as a matter of procedure, and should not be dependent upon the complainant filing for a refund or the Commission considering the issue sua sponte. The Commission agrees and has drafted paragraph (d) of the final rule to provide that if the complainant prevails on appeal, a refund will be forthcoming as a matter of procedure (so that the complainant will not have to file for a refund and the Commission will not have to consider the issue sua sponte).

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.71

Proposed rule 210.71 discussed the gathering of information relevant to the enforcement of Commission orders.

Paragraph (a). Paragraph (a) of proposed rule 210.71 authorized the Commission to require persons to report facts that will aid the Commission in determining whether a remedial or consent order is being complied with and whether conditions that led to the order have changed.

The ITCTLA objected to this rule in part, apparently because it provided that the Commission can require information to aid the Commission in policing compliance with exclusion orders, even though it is the Customs Service and not the Commission that enforces such orders. The Commission has drafted paragraph (a) of the final rule in a manner which should not create the impression that exclusion orders are enforced by the Commission and not by the Customs Service.

The ITCTLA also objected to paragraph (a) of the proposed rule on the grounds that it provides, in effect, that the Commission may require signatories to consent order agreements to make reports that were not part of their agreement. The ITCTLA explained that under proposed rule 210.21(c)(3), signatories to consent order agreements must agree not to impede or challenge

in court any Commission effort to gather information pursuant to subpart I of part 210 (the proposed rules governing enforcement procedures and advisory opinions). Thus, a respondent who consents and stipulates to the entry of a consent order is also stipulating to permitting the Commission to request any information it deems pertinent to assisting it in determining whether and to what extent the respondent is complying with the consent order. The ITCTLA pointed out that a respondent could consent to a certain form of consent order, but the Commission could subsequently add reporting requirements to that form and issue the order in a form that the respondent does not consent to, and the respondent will essentially be without recourse, because it has waived the right to challenge the order in court.

The ITCTLA did not specifically ask the Commission to revise the relevant aspects of proposed rule 210.71, and the Commission does not think that any change is warranted. The Commission expects parties who execute consent order settlements to have read and thought through the consequences and implications of final rules 210.21(c)(3) and 210.71(a) before signing the agreement and asking the Commission to terminate the investigation in whole or part on the basis of the agreed upon consent order. A settling respondent who consents and stipulates to the entry of a consent order thus should be aware that it is also stipulating to permitting the Commission to require any additional compliance reports the Commission deems necessary or appropriate to ascertain whether the respondent is complying with the consent order.

The Commission notes also that because consent orders must be enforced, if necessary, by the Commission, it is not unreasonable for the Commission to impose its own reporting requirements so that it can know if the consent order is being complied with by the party to whom it is directed.

Section 210.74

Proposed rule 210.74 concerned the modification of reporting requirements.

Paragraph (a). Paragraph (a) of proposed rule 210.74 governed modification of reporting requirements for section 337 remedial orders.

The ITCTLA commented that paragraph (a) contained the same kind of ambiguity that is present in proposed rule 210.71(a)—namely, it indicates that the Commission can modify reporting requirements of exclusion orders to aid the Commission in policing compliance

with such orders, even though it is the U.S. Customs Service and not the Commission that enforces exclusion orders.

The Commission has drafted paragraph (a) of the final rule in a manner which should not create the impression that exclusion orders are enforced by the Commission and not by the Customs Service.

Section 210.75

Proposed rule 210.75 set out the procedure to be used in proceedings to enforce exclusion orders, cease and desist orders, and consent orders.

Paragraph (c). Paragraph (c) of proposed rule 210.75 stated that the Commission need not give prior notice to any person before initiating civil action to enforce a remedial or consent order.

The ITCTLA commented that the court in which the civil action is initiated determines the type, timing, and sufficiency of the notice. For that reason, the ITCTLA suggested that final rule be drafted to state that the Commission need not give notice of its seeking judicial enforcement of an order, except as required by the court in which the civil action is initiated. The Commission has drafted paragraph (c) of final rule 210.75 in that manner.

Distribution Table

As stated above, the organization of the final rules differs significantly from that of the interim rules. To determine which final rule is replacing a particular interim rule, consult the following table.

Interim rule	Final rule
210.1	210.1
210.2	210.2
210.4	210.3
210.5(a)	210.4(a)
210.5(b)	210.4(b)–(e) (see also 210.25)
210.5(c)	210.4(f)
210.5(d)	210.4(g)
210.6	210.5(a) and (b) 210.5(c) 210.5(d)
210.7	210.6
210.8	210.7
210.10	210.8
210.11	210.9
210.12	210.10
210.13	210.11
210.20	210.12(a)–(g) 210.12(h)
210.21	210.13
210.22	210.14(a)–(c)
210.23	210.14(d)
210.24(a)–(d)	210.15
210.24(e)(1)	210.52
210.24(e)(2)	210.53(a)
210.24(e)(3)	210.53(b)
210.24(e)(4)	210.54
210.24(e)(5)	210.55
210.24(e)(6)	210.56
210.24(e)(7)	210.57
210.24(e)(8)	210.58
210.24(e)(9)	210.59
210.24(e)(10)	(see 210.58)
210.24(e)(11)	210.60
210.24(e)(12)	210.61
210.24(e)(13)	210.62
210.24(e)(14)	210.63
210.24(e)(15)	210.64
210.24(e)(16)	210.65
210.24(e)(17)	210.66
210.24(e)(18)	210.67
210.25	210.16 and 210.17
210.26	210.19
210.30 (a), (b), and (d)	210.27 (a), (b), and (c) (see 210.61)
210.30(c)	210.27(d) (see also 210.25)
210.31	210.28(a)–(h) 210.28(i)
210.32	210.29
210.33	210.30
210.34	210.31
210.35	210.32(a)–(e) 210.32(f) 210.32(g)
210.36	210.33 (a) and (b) 210.33(c) (see also 210.25)
210.37	210.34(a)–(c) (see also 210.25)
210.40	210.34(d)
210.41	210.35
210.42	210.36
210.43	210.37
210.44(a)–(d)	210.38
210.44(e)	210.39 210.20 (see also 210.42(a)(2))
210.50	210.18
210.51 (a) and (b)	210.21 (a) and (b)
210.51(c) ⁷⁹	210.21(c)
210.51(d)	210.21(d) and 210.41
210.52	210.40
210.53(a)	210.42(a)(i)
210.53(b)	210.42(b)
210.53(c)–(i)	210.42(c)–(i)
210.53(j)	210.42 (b) and (c) and 210.70(c)
2210.54	210.43 and 210.46(a)
210.55	210.44
210.56	210.45
210.57	210.49
210.58(a)	210.50(a)
210.58(b) (1) and (2)	210.50(b) (1) and (2)
210.58(b)(3)	210.68(a)
210.58(b)(4)	210.68(b)
210.58(b)(5)	210.68(c)
210.58(b)(6)	210.68(d)
210.58(b)(7)	210.69(a)–(c)
210.58(b)(8)	210.69(d)
210.58(c)(1)	210.70 (a) and (c)
210.58(c)(2)	210.70(b)
210.58(c)(3)	210.70(e)
210.58(c)(4)	210.70(c)
210.58(c)(5)	210.70(d)

Interim rule	Final rule	Final rule	Interim rule	Final rule	Interim rule
210.59(a)	210.22 (a) and (b), 210.23, and 210.51 (a) and (c)	210.21(d)	210.51(d)	210.70(d)	210.58(c)(5)
210.59(b)	210.22(c), 210.23, and 210.51(b) and (c)	210.22 (a) and (b)	210.59(a)	210.70(e)	210.58(c)(3)
210.60	210.47	210.22(c)	210.59(b)	210.71	211.51
210.61	210.48	210.23	210.59 (a) and (b)	210.72	211.52
210.70	210.24	210.24	210.70	210.73	211.53
210.71		210.25		210.74	211.55
211.01	(⁸⁰)	210.26	210.30 (a), (b), and (d)	210.75	211.56
211.10		210.27 (a), (b), and (c)		210.76	211.57
211.20	210.21(c)(1)	210.27(d)	210.31	210.77	211.58
211.21	210.21(c)(2)	210.28(a)-(h)		210.78	211.59
211.22	210.21(c)(3)	210.28(i)		210.79	211.54
211.50 (a) and (b)	(⁸¹)	210.29	210.32		
211.50(c)		210.30	210.33		
211.51	210.71	210.31	210.34		
211.52	210.72	210.32(a)-(e)	210.35		
211.53	210.73	210.32(f)			
211.54	210.79	210.32(g)			
211.55	211.74	210.33 (a) and (b)	210.36		
211.56	210.75	210.33(c)			
211.57	210.76	210.34 (a)-(c)	210.37		
211.58	210.77	210.34(d)			
211.59	210.78	210.35	210.40		
		210.36	210.41		
		210.37	210.42		
		210.38	210.43		
		210.39	210.44 (a)-(d)		
		210.40	210.52		
		210.41	210.51(d)		
		210.42(a)(i)	210.53(a)		
		210.42(a)(ii)			
		210.42(a)(2)	(but see 210.44(e))		
		210.42(b)	210.53 (b) and (j)		
		210.42(c)	210.53 (c) and (j)		
		210.42 (d)-(i)	210.53 (d)-(i)		
		210.43	210.54		
		210.44	210.55		
		210.45	210.56		
		210.46	210.54		
		210.47	210.60		
		210.48	210.61		
		210.49	210.57		
		210.50(a)	210.58(a)		
		210.50(b)	210.58(b) (1) and (2)		
			210.210.59(a)		
		210.51(a)	210.210.59(b)		
		210.51(b)	210.59 (a) and (b)		
		210.51(c)	210.24(e)(1)		
		210.52	210.24(e)(2)		
		210.53(a)	210.24(e)(3)		
		210.53(b)	210.24(e)(4)		
		210.54	210.24(e)(5)		
		210.55	210.24(e)(6)		
		210.56	210.24(e)(7)		
		210.57	210.24(e)(8)		
		210.58	210.24(e)(9)		
		210.59	210.24(e)(11)		
		210.60	210.24(e)(12)		
		210.61	210.24(e)(13)		
		210.62	210.24(e)(14)		
		210.63	210.24(e)(15)		
		210.64	210.24(e)(16)		
		210.65	210.24(e)(17)		
		210.66	210.24(e)(18)		
		210.67	210.58(b)(3)		
		210.68(a)	210.58(b)(4)		
		210.68(b)	210.58(b)(5)		
		210.68(c)	210.58(b)(6)		
		210.68(d)	210.210.58(b)(7)		
		210.69 (a)-(c)	210.58(b)(8)		
		210.69(d)	210.58(c)(1)		
		210.70(a)	210.58(c)(2)		
		210.70(b)	210.58(c) (1) and (4)		
		210.70(c)			

⁷⁹ See also the entries for interim rules 211.20 through 211.22.

⁸⁰ But see final rule 210.1 and the definition in final rule 210.3 of the term "related proceeding."

⁸¹ *Id.*

Derivation Table

To determine which interim rule is the basis, in whole or part, for a particular final rule, consult the following table:

Final rule	Interim rule
210.1	210.1
210.2	210.2
210.3	210.4
210.4(a)	210.5(a)
210.4(b)-(e)	210.5(b)
210.4(f)	210.5(c)
210.4(g)	210.5(d)
210.5 (a) and (b)	210.6
210.5(c)	
210.5(d)	
210.6	210.7
210.7	210.8
210.8	210.10
210.9	210.11
210.10	210.12
210.11	210.13
210.12(a)-(g)	210.20
210.12(h)	
210.13	210.21
210.14(a)-(c)	210.22
210.14(d)	210.23
210.15	210.24 (a)-(d)
210.16	210.25
210.17	210.25
210.18	210.50
210.19	210.26
210.20	210.44(e)
210.21 (a) and (b)	210.51 (a) and (b)
210.21(c)	210.51(c)
210.21(c)(1)	211.20
210.21(c)(2)	211.21
210.21(c)(3)	211.22

List of Subjects

19 CFR Part 210

Administrative practice and procedure, Advisory opinions, Business and industry, Customs duties and inspection, imports, and investigations, Enforcement, modification, or revocation of exclusion orders, cease and desist orders, or consent orders, Investigations of unfair acts and unfair methods of competition in U.S. import trade.

19 CFR Part 211

Administrative practice and procedure, Enforcement.

For the reasons set forth in the preamble, the U.S. International Trade Commission hereby removes Part 211 and revises Part 210 of Title 19 of the Code of Federal Regulations to read as follows:

SUBCHAPTER C—INVESTIGATIONS OF UNFAIR PRACTICES IN IMPORT TRADE

PART 210—ADJUDICATION AND ENFORCEMENT

Subpart A—Rules of General Applicability

- Sec.
- 210.1 Applicability of part.
- 210.2 General policy.
- 210.3 Definitions.
- 210.4 Written submissions; representations; sanctions.
- 210.5 Confidential business information.
- 210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.
- 210.7 Service of process and other documents.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

- 210.8 Commencement of preinstitution proceedings.
- 210.9 Action of Commission upon receipt of complaint.
- 210.10 Institution of investigation.
- 210.11 Service of complaint and notice of investigation.

Subpart C—Pleadings

- 210.12 The complaint.
- 210.13 The response.
- 210.14 Amendments to pleadings and notice; supplemental submissions.

Subpart D—Motions

- 210.15 Motions.
- 210.16 Default.
- 210.17 Failures to act other than the statutory forms of default.
- 210.18 Summary determinations.
- 210.19 Intervention.
- 210.20 Declassification of confidential information.
- 210.21 Termination of investigations.
- 210.22 Designating an investigation "more complicated."
- 210.23 Suspension of investigation.
- 210.24 Interlocutory appeals.
- 210.25 Sanctions.
- 210.26 Other motions.

Subpart E—Discovery and Compulsory Process

- 210.27 General provisions governing discovery.
- 210.28 Depositions.
- 210.29 Interrogatories.
- 210.30 Requests for production of documents and things and entry upon land.
- 210.31 Requests for admission.
- 210.32 Subpoenas.
- 210.33 Failure to make or cooperate in discovery; sanctions.
- 210.34 Protective orders.

Subpart F—Prehearing Conferences and Hearings

- 210.35 Prehearing conferences.
- 210.36 General provisions for hearings.
- 210.37 Evidence.
- 210.38 Record.
- 210.39 In camera treatment of confidential information.
- 210.40 Proposed findings and conclusions and briefs.

Subpart G—Determinations and Actions Taken

- 210.41 Termination of investigation.
- 210.42 Initial determinations.
- 210.43 Petitions for review of initial determinations on matters other than temporary relief.
- 210.44 Commission review on its own motion of initial determinations on matters other than temporary relief.
- 210.45 Review of initial determinations on matters other than temporary relief.
- 210.46 Petitions for and sua sponte review of initial determinations on violation of section 337 or temporary relief.
- 210.47 Petitions for reconsideration.
- 210.48 Disposition of petitions for reconsideration.
- 210.49 Implementation of Commission action.
- 210.50 Commission action, the public interest, and bonding by respondents.
- 210.51 Period for concluding investigation.

Subpart H—Temporary Relief

- 210.52 Motions for temporary relief.
- 210.53 Motion filed after complaint.
- 210.54 Service of motion by the complainant.
- 210.55 Content of service copies.
- 210.56 Notice accompanying service copies.
- 210.57 Amendment of the motion.

- 210.58 Provisional acceptance of the motion.
- 210.59 Responses to the motion and the complaint.
- 210.60 Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.
- 210.61 Discovery and compulsory process.
- 210.62 Evidentiary hearing.
- 210.63 Proposed findings and conclusions and briefs.
- 210.64 Interlocutory appeals.
- 210.65 Certification of the record.
- 210.66 Initial determination concerning temporary relief; Commission action thereon.
- 210.67 Remedy, the public interest, and bonding by respondents.
- 210.68 Complainant's temporary relief bond.
- 210.69 Approval of complainant's temporary relief bond.
- 210.70 Forfeiture of complainant's temporary relief bond.

Subpart I—Enforcement Procedures and Advisory Opinions

- 210.71 Information gathering.
- 210.72 Confidentiality of information.
- 210.73 Review of reports.
- 210.74 Modification of reporting requirements.
- 210.75 Proceedings to enforce exclusion orders, cease and desist orders, consent orders, and other Commission orders.
- 210.76 Modification or rescission of exclusion orders, cease and desist orders, and consent orders.
- 210.77 Temporary emergency action.
- 210.78 Notice of enforcement action to Government agencies.
- 210.79 Advisory opinions.

Authority: 19 U.S.C. 1333, 1335, and 1337, and sections 2 and 1342(d)(1)(B) of Pub. L. No. 100-418, 102 Stat. 1107.

Subpart A—Rules of General Applicability**§ 210.1 Applicability of part.**

The rules in this part apply to investigations under section 337 of the Tariff Act of 1930 and related proceedings. These rules are authorized by sections 333, 335, or 337 of the Tariff Act of 1930 (19 U.S.C. §§ 1333, 1335, and 1337) and sections 2 and 1342(d)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

§ 210.2 General policy.

It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, all investigations and related proceedings under this part shall be conducted expeditiously. The parties, their attorneys or other representatives, and the presiding administrative law judge shall make every effort at each stage of the investigation or related proceeding to avoid delay.

§ 210.3 Definitions.

As used in this part—

Administrative law judge means the person appointed under section 3105 of title 5 of the United States Code who presides over the taking of evidence in an investigation under this part. If the Commission so orders or a section of this part so provides, an administrative law judge also may preside over stages of a related proceeding under this part.

Commission investigative attorney means a Commission attorney designated to engage in investigatory activities in an investigation or a related proceeding under this part.

Complainant means a person who has filed a complaint with the Commission under this part, alleging a violation of section 337 of the Tariff Act of 1930.

Intervenor means a person who has been granted leave by the Commission to intervene as a party to an investigation or a related proceeding under this part.

Investigation means a formal Commission inquiry instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930. An investigation is instituted upon publication of a notice in the *Federal Register*. The investigation entails postinstitution adjudication of the complaint. An investigation can also involve the processing of one or more of the following: A motion to amend the complaint and notice of investigation; a motion for temporary relief; a motion to designate "more complicated" the temporary or the permanent relief stage of the investigation; an interlocutory appeal of an administrative law judge's decision on a particular matter; a motion for sanctions for abuse of process, abuse of discovery, or failure to make or cooperate in discovery, which if granted, would have an impact on the adjudication of the merits of the complaint; a petition for reconsideration of a final Commission determination; a motion for termination of the investigation in whole or part; and procedures undertaken in response to a judgment or judicial order issued in an appeal of a Commission determination or remedial order issued under section 337. Final termination of an investigation occurs when the Commission issues a nonappealable determination, order, or notice that ends the investigation, when any administrative or judicial review relating to the final Commission action has ended, or when the time for seeking such review has expired.

Party means each complainant, respondent, intervenor, or Commission investigative attorney.

Proposed intervenor means any person who has filed a motion to intervene in an investigation or a related proceeding under this part.

Proposed respondent means any person named in a complaint filed under this part as allegedly violating section 337 of the Tariff Act of 1930.

Related proceeding means preinstitution proceedings, sanction proceedings (for the possible issuance of sanctions that would not have a bearing on the adjudication of the merits of a complaint or a motion under this part), bond forfeiture proceedings, proceedings to enforce, modify, or revoke a remedial or consent order, or advisory opinion proceedings.

Respondent means any person named in a notice of investigation issued under this part as allegedly violating section 337 of the Tariff Act of 1930.

§ 210.4 Written submissions; representations; sanctions.

(a) *Caption; names of parties.* The front page of every written submission filed by a party or a proposed party to an investigation or a related proceeding under this part shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, the docket number or investigation number, if any, assigned to the investigation or related proceeding, and in the case of a complaint, the names of the complainant and all proposed respondents.

(b) *Signature.* Every pleading, written motion, and other paper of a party or proposed party who is represented by an attorney in an investigation or a related proceeding under this part shall be signed by at least one attorney of record in the attorney's individual name. A party or proposed party who is not represented by an attorney shall sign, or his duly authorized officer or agent shall sign, the pleading, written motion, or other paper. Each paper shall state the signer's address and telephone number, if any. Pleadings, written motions, and other papers need not be under oath or accompanied by an affidavit, except as provided in §§ 210.12(a)(1), 210.13(b), 210.18, 210.52(d), 210.59(b), or another section of this part or by order of the administrative law judge or the Commission. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after omission of the signature is called to the attention of the submitter.

(c) *Representations.* By presenting to the presiding administrative law judge or the Commission (whether by signing, filing, submitting, or later advocating) a

pleading, written motion, or other paper, an attorney or unrepresented party or proposed party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation or related proceeding;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) *Sanctions.* If, after notice and a reasonable opportunity to respond (see paragraphs (d)(1) (i) and (ii) of this section and § 210.25), the presiding administrative law judge or the Commission determines that paragraph (c) of this section has been violated, the administrative law judge or the Commission may, subject to the conditions stated below and in § 210.25, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (c) or are responsible for the violation. A representation need not be frivolous in its entirety in order for the administrative law judge or the Commission to determine that paragraph (c) has been violated. If any portion of a representation is found to be false, frivolous, misleading, or otherwise in violation of paragraph (c), a sanction may be imposed. In determining whether paragraph (c) has been violated, the administrative law judge or the Commission will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.

(1) *How initiated*—(i) *By motion.* A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate paragraph (c). It shall be served as provided in paragraph (g) of this section, but shall not be filed with or presented to the presiding administrative law judge or the Commission unless, within seven days after service of the motion (or such other

period as the administrative law judge or the Commission may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. See also § 210.25 (a) through (c). If warranted, the administrative law judge or the Commission may award to the party or proposed party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(ii) *On the administrative law judge's or the Commission's initiative.* The administrative law judge or the Commission may enter an order sua sponte describing the specific conduct that appears to violate paragraph (c) of this section and directing an attorney, law firm, party, or proposed party to show cause why it has not violated paragraph (c) with respect thereto.

(2) *Nature of sanctions; limitations.* A sanction imposed for violation of paragraph (c) of this section shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (d)(2) (i) through (iv) of this section, the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(i) Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(ii) Monetary sanctions may not be awarded against a represented party or proposed party for a violation of paragraph (c)(2) of this section.

(iii) Monetary sanctions may not be imposed on the administrative law judge's or the Commission's initiative unless—

(A) The Commission or the administrative law judge issues an order to show cause before the investigation or related proceeding is terminated, in whole or in relevant part, as to the party or proposed party which is, or whose attorneys are, to be sanctioned; and

(B) Such termination is the result of—

(1) A motion to withdraw the complaint, motion, or petition that was the basis for the investigation or related proceeding.

(2) A settlement agreement, or

(3) A consent order agreement.

(iv) Monetary sanctions imposed to compensate the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations will include reimbursement for some or all costs reasonably incurred as a direct result of the violation, but will not include attorney's fees.

(3) *Order.* When imposing sanctions, the administrative law judge or the Commission shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed. See also § 210.25 (d) and (f).

(e) *Inapplicability to discovery.* Paragraphs (c) and (d) of this section do not apply to discovery requests, responses, objections, and motions that are subject to provisions of §§ 210.27 through 210.34.

(f) *Specifications; filing of documents.*

(1) (i) Written submissions that are addressed to the Commission during an investigation or a related proceeding shall comply with § 201.8 of this chapter, except for the provisions regarding the number of copies to be submitted. The required number of copies shall be governed by paragraph (f)(2) of this section. Written submissions may be produced by standard typographic printing or by a duplicating or copying process which produces a clear black image on white paper. If the submission is produced by other than the standard typographical process used by commercial printers, typed matter shall not exceed 6½ by 9½ inches using 10-pitch (pica) or larger pitch type or 5½ by 8½ inches using 11-point or larger proportional spacing type, and shall be double-spaced between each line of text using the standard of 6 lines of type per inch. Text and footnotes shall be in the same size type. Quotations more than two lines long in the text or footnotes may be indented and single-spaced. Headings and footnotes may be single-spaced.

(ii) The administrative law judge may impose any specifications he deems appropriate for submissions that are addressed to the administrative law judge.

(2) Unless the Commission or another section of this part specifically states otherwise, the original and 6 true copies of each submission shall be filed if the investigation or related proceeding is before an administrative law judge, and the original and 14 true copies of each submission shall be filed if the investigation or related proceeding is before the Commission.

(3) Persons who file the following submissions that contain confidential

business information covered by an administrative protective order, or that are the subject of a request for confidential treatment, must file nonconfidential copies and serve them on the other parties to the investigation or related proceeding within 10 calendar days after filing the confidential version with the Commission:

(i) A complaint and all supplements and exhibits thereto;

(ii) A response to a complaint and all supplements and exhibits thereto;

(iii) All submissions relating to a motion to amend the complaint or notice of investigation; and

(iv) All submissions addressed to the Commission. Other sections of this part may require, or the Commission or the administrative law judge may order, the filing and service of nonconfidential copies of other kinds of confidential submissions. If the submitter's ability to prepare a nonconfidential copy is dependent upon receipt of the nonconfidential version of an initial determination, or a Commission order or opinion, or a ruling by the administrative law judge or the Commission as to whether some or all of the information at issue is entitled to confidential treatment, the nonconfidential copies of the submission must be filed within 10 calendar days after service of the Commission or administrative law judge document in question. The time periods for filing specified in this paragraph apply unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

(g) *Service.* Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, every written submission filed by a party or proposed party shall be served on all other parties in the manner specified in § 201.16(b) of this chapter.

§ 210.5 Confidential business information.

(a) *Definition and submission.*

Confidential business information shall be defined and identified in accordance with § 201.6(a) and (c) of this chapter. Unless otherwise ordered by the Commission or the administrative law judge, confidential business information shall be submitted in accordance with § 201.6(c).

(b) *Restrictions on disclosure.*

Information submitted to the Commission or exchanged among the parties in connection with an investigation or a related proceeding under this part, which is properly designated confidential under paragraph

(a) of this section and § 201.6(a) of this chapter, may not be disclosed to anyone other than the following persons without the consent of the submitter:

(1) Persons who are granted access to confidential information under § 210.39(a) or a protective order issued pursuant to § 210.34(a);

(2) An officer or employee of the Commission who is directly concerned with carrying out or maintaining the records of the investigation or related proceeding for which the information was submitted;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337(d) or (g) of the Tariff Act or an entry under bond under section 337(e) of the Tariff Act resulting from the investigation in connection with which the information was submitted.

(c) *Confidentiality determinations in preinstitution proceedings.* After a complaint is filed under section 337 of the Tariff Act of 1930 and before an investigation is instituted by the Commission, confidential business information designated confidential by the supplier shall be submitted in accordance with § 201.6(b) of this chapter. The Secretary shall decide, in accordance with § 201.6(d) of this chapter, whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as set forth in § 201.6(e) and (f) of this chapter.

(d) *Confidentiality determinations in investigations and other related proceedings.* (1) If an investigation is instituted or if a related proceeding is assigned to an administrative law judge, the administrative law judge shall set the ground rules for the designation, submission, and handling of information designated confidential by the submitter. When requested to do so, the administrative law judge shall decide whether information in a document addressed to the administrative law judge, or to be exchanged among the parties while the administrative law judge is presiding, is entitled to confidential treatment. The administrative law judge shall also decide, with respect to all orders, initial determinations, or other documents issued by the administrative law judge, whether information designated confidential by the supplier is entitled to confidential treatment. The supplier of the information or the person seeking

the information may, with leave of the administrative law judge, request an appeal to the Commission of the administrative law judge's unfavorable ruling on this issue, under § 210.24(b)(2).

(2) The Commission may continue protective orders issued by the administrative law judge, amend or revoke those orders, or issue new ones. All submissions addressed to the Commission that contain information covered by an existing protective order will be given confidential treatment. (See also § 210.72.) New information that is submitted to the Commission, designated confidential by the supplier, and not covered by an existing protective order must be submitted to the Secretary with a request for confidential treatment in accordance with § 201.6(b) and (c) of this chapter. The Secretary shall decide, in accordance with § 201.6(d) of this chapter, whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as provided in § 201.6(e) and (f) of this chapter. The Commission shall decide, with respect to all orders, notices, opinions, and other documents issued by or on behalf of the Commission, whether information designated confidential by the supplier is entitled to confidential treatment.

§ 210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.

Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, the computation of time and the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with §§ 201.14 and 201.16(d) of this chapter. Whenever a party has the right or is required to perform some act or to take some action within a prescribed period after service of a document upon it, and the document was served by mail, the deadline shall be computed by adding to the end of the prescribed period the additional time allotted under § 201.16(d), unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

§ 210.7 Service of process and other documents.

The service of process and all documents issued by or on behalf of the Commission or the administrative law judge—and the service of all documents issued by parties under §§ 210.27

through 210.34 of this part—shall be in accordance with § 201.16 of this chapter, unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

§ 210.8 Commencement of preinstitution proceedings.

(a) *Upon receipt of complaint.* A preinstitution proceeding is commenced by filing with the Secretary the original and 14 true copies of a complaint, plus one copy for each person named in the complaint as violating section 337 of the Tariff Act of 1930 and one copy for the government of each foreign country of any person or persons so named. If the complainant is seeking temporary relief, one additional copy of the motion for such relief also must be filed for each proposed respondent and for the government of the foreign country of the proposed respondent. The additional copies of the complaint and motion for temporary relief for each proposed respondent and the appropriate foreign government are to be provided notwithstanding the procedures applicable to a motion for temporary relief, which require service of the complaint and motion for temporary relief by the complainant.

(b) *Upon the initiative of the Commission.* The Commission may upon its initiative commence a preinstitution proceeding based upon any alleged violation of section 337 of the Tariff Act of 1930.

§ 210.9 Action of Commission upon receipt of complaint.

Upon receipt of a complaint alleging violation of section 337 of the Tariff Act of 1930, the Commission shall take the following actions:

(a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable sections of this chapter.

(b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.10 Institution of investigation.

(a)(1) The Commission shall determine whether the complaint is properly filed and whether an investigation should be instituted on the basis of the complaint. That determination shall be made within 30

days after the complaint is filed, unless—

(i) Exceptional circumstances preclude adherence to a 30-day deadline;

(ii) Additional time is allotted under other sections of this part in connection with the preinstitution processing of a motion by the complainant for temporary relief;

(iii) The complainant requests that the Commission postpone the determination on whether to institute an investigation; or

(iv) The complainant withdraws the complaint.

(2) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute an investigation on the basis of the complaint, the determination will be made as soon after that deadline as possible.

(3) If additional time is allotted in connection with the preinstitution processing of a motion by the complainant for temporary relief, the Commission will determine whether to institute an investigation and provisionally accept the motion within 35 days after the filing of the complaint or by a subsequent deadline computed in accordance with § 210.53(a), § 210.54, § 210.55(b), § 210.57, or § 210.58 as applicable.

(4) If the complainant desires to have the Commission postpone making a determination on whether to institute an investigation in response to the complaint, the complainant must file a written request with the Secretary. If the request is granted, the determination will be rescheduled for whatever date is appropriate in light of the facts.

(5)(i) The complainant may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an investigation. To effect such withdrawal, the complainant must file a written notice with the Commission. If the complaint is being withdrawn pursuant to a settlement agreement, a copy of the agreement must be filed with the Commission along with the notice of withdrawal. If the agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, at least one copy of the agreement with such information deleted shall accompany the motion, in addition to a copy of the confidential version.

(ii) If a motion for temporary relief was filed in addition to the complaint, the motion must be withdrawn along with the complaint, and the complainant must serve copies of the notice of withdrawal on all proposed respondents and on the embassies that

were served with copies of the complaint and motion pursuant to § 210.54.

(b) An investigation shall be instituted by the publication of a notice in the **Federal Register**. The notice will define the scope of the investigation and may be amended as provided in § 210.14 (b) and (c).

(c) If the Commission determines not to institute an investigation on the basis of the complaint, the complaint shall be dismissed, and the complainant and all proposed respondents will receive written notice of the Commission's action and the reason(s) therefor.

§ 210.11 Service of complaint and notice of investigation.

(a) Notwithstanding the provisions of § 210.54 requiring service of the complaint by the complainant, the Commission, upon institution of an investigation, shall serve copies of the complaint and the notice of investigation (and any accompanying motion for temporary relief) upon the following:

- (1) Each respondent;
- (2) The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other agencies and departments as the Commission considers appropriate; and
- (3) The embassy in Washington, DC of the government of each foreign country represented by each respondent.

All respondents named after an investigation has been instituted and the governments of the foreign countries they represent shall be served as soon as possible after the respondents are named.

(b) With leave from the presiding administrative law judge, a party may attempt to effect personal service of the complaint and notice of investigation upon a respondent, if the Secretary's efforts to serve the respondent by certified mail have been unsuccessful. If the party succeeds in serving the respondent by personal service, the party must notify the administrative law judge and file proof of such service with the Secretary.

Subpart C—Pleadings

§ 210.12 The complaint.

(a) *Contents of the complaint.* In addition to conforming with the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, the complaint shall—

(1) Be under oath and signed by the complainant or his duly authorized officer, attorney, or agent, with the name, address, and telephone number of

the complainant and any such officer, attorney, or agent given on the first page of the complaint;

(2) Include a statement of the facts constituting the alleged unfair methods of competition and unfair acts;

(3) Describe specific instances of alleged unlawful importations or sales, and shall provide the Tariff Schedules of the United States item number(s) for importations occurring prior to January 1, 1989, and the Harmonized Tariff Schedule of the United States item number(s) for importations occurring on or after January 1, 1989;

(4) State the name, address, and nature of the business (when such nature is known) of each person alleged to be violating section 337 of the Tariff Act of 1930;

(5) Include a statement as to whether the alleged unfair methods of competition and unfair acts, or the subject matter thereof, are or have been the subject of any court or agency litigation, and, if so, include a brief summary of such litigation;

(6)(i) If the complaint alleges a violation of section 337 based on infringement of a U.S. patent, or a federally registered copyright, trademark, or mask work, under section 337(a)(1) (B), (C), or (D) of the Tariff Act of 1930, include a description of the relevant domestic industry as defined in section 337(a)(3) that allegedly exists or is in the process of being established, including the relevant operations of any licensees. Relevant information includes but is not limited to:

- (A) Significant investment in plant and equipment;
- (B) Significant employment of labor or capital; or
- (C) Substantial investment in the exploitation of the subject patent, copyright, trademark, or mask work, including engineering, research and development, or licensing; or

(ii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition and unfair acts that have the threat or effect of destroying or substantially injuring an industry in the United States or preventing the establishment of such an industry under section 337(a)(1)(A) (i) or (ii), include a description of the domestic industry affected, including the relevant operations of any licensees; or

(iii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition or unfair acts that have the threat or effect of restraining or monopolizing trade and commerce in the United States under section

337(a)(1)(A)(iii), include a description of the trade and commerce affected.

(7) Include a description of the complainant's business and its interests in the relevant domestic industry or the relevant trade and commerce. For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property; and

(8) If the alleged violation involves an unfair method of competition or an unfair act other than those listed in paragraph (a)(6)(i) of this section, state a specific theory and provide corroborating data to support the allegation(s) in the complaint concerning the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. The information that should ordinarily be provided includes the volume and trend of production, sales, and inventories of the involved domestic article; a description of the facilities and number and type of workers employed in the production of the involved domestic article; profit-and-loss information covering overall operations and operations concerning the involved domestic article; pricing information with respect to the involved domestic article; when available, volume and sales of imports; and other pertinent data.

(9) Include, when a complaint is based upon the infringement of a valid and enforceable U.S. patent—

- (i) The identification of each U.S. letters patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complainant);
- (ii) The identification of the ownership of each involved U.S. letters patent and a certified copy of each assignment of each such patent (a legible copy thereof will suffice for each required copy of the complaint);
- (iii) The identification of each licensee under each involved U.S. letters patent;
- (iv) When known, a list of each foreign patent, each foreign patent application (not already issued as a patent), and each foreign patent application that has been denied corresponding to each involved U.S. letters patent, with an indication of the prosecution status of each such foreign patent application;
- (v) A nontechnical description of the invention of each involved U.S. letters patent;

(vi) A reference to the specific claims in each involved U.S. letters patent that allegedly cover the article imported or sold by each person named as violating section 337 of the Tariff Act of 1930, or the process under which such article was produced;

(vii) A showing that each person named as violating section 337 of the Tariff Act of 1930 is importing or selling the article covered by, or produced under the involved process covered by, the above specific claims of each involved U.S. letters patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies an exemplary claim of each involved U.S. letters patent to a representative involved domestic article or process and to a representative involved article of each person named as violating section 337 of the Tariff Act or to the process under which such article was produced; and

(viii) Drawings, photographs, or other visual representations of both the involved domestic article or process and the involved article of each person named as violating section 337 of the Tariff Act of 1930, or of the process utilized in producing the imported article, and, when a chart is furnished under paragraph (a)(9)(vii) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(10) Contain a request for relief, and if temporary relief is requested under section 337 (e) and/or (f) of the Tariff Act of 1930, a motion for such relief shall accompany the complaint as provided in § 210.52(a) or may follow the complaint as provided in § 210.53(a).

(b) *Submissions of articles as exhibits.* At the time the complaint is filed, if practicable, the complainant shall submit both the domestic article and all imported articles that are the subject of the complaint.

(c) *Additional material to accompany each patent-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letters patent the following:

(1) Three copies of each license agreement arising out of each involved U.S. letters patent, except that, to the extent that a standard license agreement is used, three copies of the standard license agreement and a list of the

licensees operating under such agreement will suffice;

(2) One certified copy of the U.S. Patent and Trademark Office prosecution history for each involved U.S. letters patent, plus three additional copies thereof; and

(3) Four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history of each involved U.S. letters patent.

(d) *Additional material to accompany each registered trademark-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a Federally registered trademark, one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the trademark, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(e) *Additional material to accompany each complaint based on a non-Federally registered trademark.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a non-Federally registered trademark the following:

(1) A detailed and specific description of the alleged trademark;

(2) Information concerning prior attempts to register the alleged trademark; and

(3) Information on the status of current attempts to register the alleged trademark.

(f) *Additional material to accompany each copyright-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a copyright one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the copyright, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of a semiconductor chip in a manner that constitutes infringement of a Federally registered mask work, one certified copy of the Federal registration and three additional copies, three copies of each

license agreement (if any) concerning use of the mask work, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(h) *Duty to supplement complaint.* Complainant shall supplement the complaint prior to institution of an investigation if complainant obtains information upon the basis of which he knows or reasonably should know that a material legal or factual assertion in the complaint is false or misleading.

§ 210.13 The response.

(a) *Time for response.* Except as provided in § 210.59(a) and unless otherwise ordered in the notice of investigation or by the administrative law judge, respondents shall have 20 days from the date of service of the complaint and notice of investigation, by the Commission under § 210.11(a) or by a party under § 210.11(b), within which to file a written response to the complaint and the notice of investigation. When the investigation involves a motion for temporary relief and has not been declared "more complicated," the response to the complaint and notice of investigation must be filed along with the response to the motion for temporary relief—i.e., within 10 days after service of the complaint, notice of investigation, and the motion for temporary relief by the Commission under § 210.11(a) or by a party under § 210.11(b). (See § 210.59.)

(b) *Content of the response.* In addition to conforming to the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response. Each respondent shall respond to each allegation in the complaint and in the notice of investigation, and shall set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission, denial, or explanation of each fact alleged in the complaint and notice, or if the respondent is without knowledge of any such fact, a statement to that effect. Allegations of a complaint and notice not thus answered may be deemed to have been admitted. Each response shall include, when available, statistical data on the quantity and value of imports of the involved article. Respondents who are importers must also provide the Harmonized Tariff Schedule item number(s) for

importations of the accused imports occurring on or after January 1, 1989, and the Tariff Schedules of the United States item number(s) for importations occurring before January 1, 1989. Each response shall also include a statement concerning the respondent's capacity to produce the subject article and the relative significance of the United States market to its operations. Respondents who are not manufacturing their accused imports shall state the name and address of the supplier(s) of those imports. Affirmative defenses shall be pleaded with as much specificity as possible in the response. When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. letters patent, the respondent is encouraged to make the following showing when appropriate:

(1) If it is asserted in defense that the article imported or sold by respondents is not covered by, or produced under a process covered by, the claims of each involved U.S. letters patent, a showing of such noncoverage for each involved claim in each U.S. letters patent in question shall be made, which showing may be made by appropriate allegations and, when practicable, by a chart that applies the involved claims of each U.S. letters patent in question to a representative involved imported article of the respondent or to the process under which such article was produced;

(2) Drawings, photographs, or other visual representations of the involved imported article of respondent or the process utilized in producing such article, and, when a chart is furnished under paragraph (b)(1) of this section, the parts of such drawings, photographs, or other visual representations, should be labeled so that they can be read in conjunction with such chart; and

(3) If the claims of any involved U.S. letters patent are asserted to be invalid or unenforceable, the basis for such assertion, including, when prior art is relied on, a showing of how the prior art renders each claim invalid or unenforceable and a copy of such prior art. For good cause, the presiding administrative law judge may waive any of the substantive requirements imposed under this paragraph or may impose additional requirements.

(c) *Submission of article as exhibit.* At the time the response is filed, if practicable, the respondent shall submit the accused article imported or sold by that respondent, unless the article has already been submitted by the complainant.

§ 210.14 Amendments to pleadings and notice; supplemental submissions.

(a) *Preinstitution amendments.* The complaint may be amended at any time prior to the institution of the investigation.

(b) *Postinstitution amendments generally.* (1) After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation. A motion for amendment must be made to the presiding administrative law judge. If the proposed amendment of the complaint would require amending the notice of investigation, the presiding administrative law judge may grant the motion only by filing with the Commission an initial determination. All other dispositions of such motions shall be by order.

(2) If disposition of the issues in an investigation on the merits will be facilitated, or for other good cause shown, the presiding administrative law judge may allow appropriate amendments to pleadings other than complaints upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.

(c) *Postinstitution amendments to conform to evidence.* When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice. Such amendments of the pleadings and notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time, and shall be effective with respect to all parties who have expressly or impliedly consented.

(d) *Supplemental submissions.* The administrative law judge may, upon reasonable notice and on such terms as are just, permit service of a supplemental submission setting forth transactions, occurrences, or events that have taken place since the date of the submission sought to be supplemented and that are relevant to any of the issues involved.

Subpart D—Motions

§ 210.15 Motions.

(a) *Presentation and disposition.* (1) During the period between the institution of an investigation and the assignment of the investigation to a

presiding administrative law judge, all motions shall be addressed to the chief administrative law judge. During the time that an investigation or related proceeding is before an administrative law judge, all motions therein shall be addressed to the administrative law judge.

(2) When an investigation or related proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. A motion to amend the complaint and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent. All motions shall be filed with the Secretary and shall be served upon each party.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Responses to motions.* Within 10 days after service of any written motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission, a nonmoving party, or in the instance of a motion to amend the complaint or notice of investigation to name an additional respondent after institution, the proposed respondent, shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) *Motions for extensions.* As a matter of discretion, the administrative law judge or the Commission may waive the requirements of this section as to motions for extension of time, and may rule upon such motions ex parte.

§ 210.16 Default.

(a) *Definition of default.* (1) A party shall be found in default if it fails to respond to the complaint and notice of investigation in the manner prescribed in § 210.13 or § 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default.

(2) A party may be found in default as a sanction for abuse of process, under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33(b).

(b) *Procedure for determining default.*

(1) If a respondent has failed to respond or appear in the manner described in paragraph (a)(1) of this section, a party may file a motion for, or the administrative law judge may issue upon his own initiative, an order directing that respondent to show cause why it should not be found in default. If the respondent fails to make the

necessary showing, the administrative law judge shall issue an initial determination finding the respondent in default. An administrative law judge's decision denying a motion for a finding of default under paragraph (a)(1) of this section shall be in the form of an order.

(2) Any party may file a motion for issuance of, or the administrative law judge may issue on his own initiative, an initial determination finding a party in default for abuse of process under § 210.4(c) or failure to make or cooperate in discovery. A motion for a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery shall be granted by initial determination or denied by order.

(3) A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.

(c) *Relief against a respondent in default.* (1) After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, and concluding that the order(s) should still be issued in light of the aforementioned public interest factors.

(2) In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order. The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a violation of section 337 of the Tariff Act is established by substantial, reliable, and probative evidence, and only after considering the aforementioned public interest factors.

§ 210.17 Failures to act other than the statutory forms of default.

Failures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw

adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party who fails to act. Such failures include, but are not limited to:

(a) Failure to respond to a motion that materially alters the scope of the investigation or a related proceeding;

(b) Failure to respond to a motion for temporary relief pursuant to § 210.59;

(c) Failure to respond to a motion for summary determination under § 210.18;

(d) Failure to appear at a hearing before the administrative law judge after filing a written response to the complaint or motion for temporary relief, or failure to appear at a hearing before the Commission;

(e) Failure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding;

(f) Failure to respond to a petition for review of an initial determination, a petition for reconsideration of an initial determination, or an application for interlocutory review of an administrative law judge's order;

(g) Failure to file a brief or other written submission requested by the administrative law judge or the Commission; and

(h) Failure to participate in temporary relief bond forfeiture proceedings under § 210.70.

The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.

§ 210.18 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after 20 days following the date of service of the complaint and notice instituting the investigation. Any other party or a respondent may so move at any time after the date of publication of the notice of investigation in the *Federal Register*. Any such motion by any party in connection with the issue of permanent relief, however, must be filed at least 30 days before the date fixed for any hearing provided for in § 210.36(a)(1). Any motion for summary determination filed in connection with the temporary relief phase of an investigation must be filed

on or before the deadline set by the presiding administrative law judge.

(b) *Opposing affidavits; oral argument; time and basis for determination.* Any nonmoving party may file opposing affidavits within 10 days after service of the motion for summary determination. The administrative law judge may, in his discretion or at the request of any party, set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The administrative law judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary determination is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response, by affidavits, answers to interrogatories, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of fact for the evidentiary hearing under § 210.36(a)(1) or (2). If the opposing party does not so respond, a summary determination, if appropriate, shall be rendered against the opposing party.

(d) *Refusal of application for summary determination; continuances and other orders.* Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the administrative law judge may refuse the application for summary determination, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) *Order establishing facts.* If on motion under this section a summary determination is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge, by examining the pleadings and the evidence and by interrogating counsel if necessary, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the investigation as are warranted. The facts so specified shall be deemed established.

(f) *Order of summary determination.* An order of summary determination shall constitute an initial determination of the administrative law judge.

§ 210.19 Intervention.

Any person desiring to intervene in an investigation or a related proceeding under this part shall make a written motion. The motion shall have attached to it a certificate showing that the motion has been served upon each party to the investigation or related proceeding in the manner described in § 201.16(b) of this chapter. Any party may file a response to the motion in accordance with § 210.15(c) of this part, provided that the response is accompanied by a certificate confirming that the response was served on the proposed intervenor and all other parties. The Commission, or the administrative law judge by initial determination, may grant the motion to the extent and upon such terms as may be proper under the circumstances.

§ 210.20 Declassification of confidential information.

(a) Any party may move to declassify documents (or portions thereof) that have been designated confidential by the submitter but that do not satisfy the confidentiality criteria set forth in § 201.6(a) of this chapter. All such motions, whether brought at any time during the investigation or after conclusion of the investigation shall be addressed to and ruled upon by the presiding administrative law judge, or if the investigation is not before a presiding administrative law judge, by the chief administrative law judge or such administrative law judge as he may designate.

(b) Following issuance of a public version of the initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 or an initial determination that would otherwise

terminate the investigation (if adopted by the Commission), the granting of a motion, in whole or part, to declassify information designated confidential shall constitute an initial determination, except as to that information for which no submissions in opposition to declassification have been filed.

§ 210.21 Termination of investigations.

(a) *Motions for termination.* (1) Any party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 for an order to terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein, or for good cause other than the grounds listed in paragraph (a)(2) of this section. The presiding administrative law judge may grant the motion in an initial determination upon such terms and conditions as he deems proper.

(2) Any party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement, or a consent order, as provided in paragraphs (b) and (c) of this section.

(b) *Termination by Settlement.* (1) An investigation before the Commission may be terminated as to one or more respondents pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement. A motion for termination by settlement shall contain copies of the licensing or other settlement agreement, any supplemental agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion.

(2) The motion and agreement(s) shall be certified by the administrative law judge to the Commission with an initial determination if the motion for termination is granted. If the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents. The Commission shall promptly publish a notice in the

Federal Register stating that an initial determination has been received, that nonconfidential versions of the initial determination and the agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within 10 days of the date of publication of the notice in the Federal Register. An order of termination by settlement need not constitute a determination as to violation of section 337 of the Tariff Act of 1930.

(c) *Termination by entry of consent order.* An investigation before the Commission may be terminated pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a consent order. An order of termination by consent order need not constitute a determination as to violation of section 337.

(1) *Opportunity to submit proposed consent order.* (i) *Prior to institution of an investigation.* Where time, the nature of the proceeding, and the public interest permit, any person being investigated pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. § 2482) shall be afforded the opportunity to submit to the Commission a proposal for disposition of the matter under investigation in the form of a consent order stipulation that incorporates a proposed consent order executed by or on behalf of such person and that complies with the requirements of paragraph (c)(3) of this section.

(ii) *Subsequent to institution of an investigation.* In investigations under section 337 of the Tariff Act of 1930, a proposal to terminate by consent order shall be submitted as a motion to the administrative law judge with a stipulation that incorporates a proposed consent order. If the stipulation contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the stipulation with such information deleted shall accompany the motion. The stipulation shall comply with the requirements of paragraph (c)(3)(i) of this section. At any time prior to commencement of the hearing, the motion may be filed by one or more respondents, and may be filed jointly with other parties to the investigation. Upon request and for good cause shown, the administrative law judge may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the administrative law judge unless the administrative law judge so orders. The administrative law judge shall promptly file with the Commission an initial determination regarding the

motion for termination if the motion is granted. If the initial determination contains confidential business information, a copy of the initial determination with such information deleted shall be filed with the Commission simultaneously with the filing of the confidential version of the initial determination. Pending disposition by the Commission of a consent order stipulation, a party may not, absent good cause shown, withdraw from the stipulation once it has been submitted pursuant to this section.

(2) *Commission disposition of consent order.* (i) If an initial determination granting the motion for termination based on a consent order stipulation is filed with the Commission, the Commission shall promptly serve copies of the nonconfidential version of the initial determination and the consent order stipulation on the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate.

(ii) The Commission, after considering the effect of the settlement by consent order upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, shall dispose of the initial determination according to the procedures of §§ 210.42 through 210.45. An order of termination by consent order need not constitute a determination as to violation of section 337. The Commission shall publish in the *Federal Register* and serve on all parties notice of its action. Should the Commission reverse the initial determination, the parties are in no way bound by their proposal in later actions before the Commission.

(3) *Contents of consent order stipulation.* (i) *Contents.*

(A) Every consent order stipulation shall contain, in addition to the proposed consent order, the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order;

(3) A statement that the signatories to the consent order stipulation will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of this part; and

(4) A statement that the enforcement, modification, and revocation of the consent order will be carried out

pursuant to subpart I of this part, incorporating by reference the Commission's Rules of Practice and Procedure.

(B) In the case of an intellectual property-based investigation, the consent order stipulation shall also contain—

(1) a statement that the consent order shall not apply with respect to any claim of any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and nonreviewable; and

(2) a statement that each signatory to the stipulation who was a respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order.

(C) The consent order stipulation may contain a statement that the signing thereof is for settlement purposes only and does not constitute admission by any respondent that an unfair act has been committed.

(ii) *Effect, interpretation, and reporting.* The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and this part for other Commission actions. The Commission may require periodic compliance reports pursuant to subpart I of this part to be submitted by the person entering into the consent order stipulation.

(d) *Effect of termination.* An order of termination issued by the administrative law judge shall constitute an initial determination.

§ 210.22 Designating an investigation "more complicated".

(a) *Definition.* A "more complicated" investigation is an investigation that is of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors.

(b) *Permanent relief.* Upon motion or sua sponte, the administrative law judge or the Commission may issue an order designating an investigation "more complicated" in order to have up to six months of additional time to adjudicate a complainant's request for permanent relief under section 337 of the Tariff Act of 1930. See § 210.51(a) of this part. The administrative law judge or the Commission shall publish a notice in the *Federal Register* announcing the designation and the reasons for it. If the designation is imposed by the

administrative law judge prior to issuance of an initial determination on violation of section 337 of the Tariff Act, any party aggrieved by the designation may file an application for interlocutory review under § 210.24(a)(2). If the designation is imposed by the administrative law judge in an order issued concurrently with the initial determination on violation of section 337, any party may contest the designation in a petition for review, as if the order were an initial determination issued under § 210.42(c). The extended deadline for concluding the permanent relief phase of an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c).

(c) *Temporary relief.* The Commission or the presiding administrative law judge, pursuant to § 210.60, may declare an investigation "more complicated" in order to have up to 60 days of additional time to adjudicate a motion for temporary relief. See also § 210.51(b). The Commission's or the administrative law judge's reasons for designating the investigation "more complicated" for that purpose shall be published in the *Federal Register*. The extended deadline for concluding an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c).

§ 210.23 Suspension of investigation.

Any party may move to suspend an investigation under this part, because of the pendency of proceedings in a court or agency of the United States involving questions concerning the subject matter of the investigation that are similar to the questions being adjudicated by the Commission. The administrative law judge or the Commission also may raise the issue sua sponte. An administrative law judge's decision granting a motion for suspension shall be in the form of an initial determination.

§ 210.24 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of an initial determination, except in the following circumstances:

(a) *Appeals without leave of the administrative law judge.* The Commission may in its discretion entertain interlocutory appeals, except as provided in § 210.64, when a ruling of the administrative law judge:

(1) Requires the disclosure of Commission records or requires the

appearance of Government officials pursuant to § 210.32(c)(2);

(2) Designates the permanent relief phase of an investigation "more complicated" pursuant to § 210.22(b); or

(3) Denies an application for intervention under § 210.19. Appeals from such rulings may be sought by filing an application for review, not to exceed 15 pages, with the Commission within five days after service of the administrative law judge's ruling. An answer to the application for review may be filed within five days after service of the application. The application for review should specify the person or party taking the appeal, designate the ruling or part thereof from which appeal is being taken, and specify the reasons and present arguments as to why review is being sought. The Commission may, upon its own motion, enter an order staying the return date of an order issued by the administrative law judge pursuant to § 210.32(c)(2) or may enter an order placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues that will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) Appeals with leave of the administrative law judge.

(1) Except as otherwise provided in paragraph (a) of this section, § 210.64, and paragraph (b)(2) of this section, applications for review of a ruling by an administrative law judge may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy.

(2) Applications for review of a ruling by an administrative law judge under § 210.5(d)(1) as to whether information designated confidential by the supplier is entitled to confidential treatment under § 210.5(b) may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof.

(3) A written application for review under paragraph (b)(1) or (b)(2) of this section shall not exceed 15 pages and may be filed within five days after service of the administrative law judge's determination. An answer to the

application for review may be filed within five days after service of the application for review. Thereupon, the Commission may, in its discretion, permit an appeal. Unless otherwise ordered by the Commission, Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral argument or further briefs.

(c) Investigation not stayed.

Application for review under this section shall not stay the investigation before the administrative law judge unless the administrative law judge or the Commission shall so order.

§ 210.25 Sanctions.

(a) (1) Any party may file a motion for sanctions for abuse of process under § 210.4(d)(1), abuse of discovery under § 210.27(d)(3), failure to make or cooperate in discovery under § 210.33 (b) or (c), or violation of a protective order under § 210.34(c). A motion alleging abuse of process should be filed promptly after the requirements of § 210.4(d)(1)(i) have been satisfied. A motion alleging abuse of discovery, failure to make or cooperate in discovery, or violation of a protective order should be filed promptly after the allegedly sanctionable conduct is discovered.

(2) The administrative law judge (when the investigation or related proceeding is before him) or the Commission (when the investigation or related proceeding is before it) also may raise the sanction issue sua sponte. (See also §§ 210.4(d)(1)(ii), 210.27(d)(3), 210.33(c), and 210.34(c).)

(b) A motion for sanctions shall be addressed to the presiding administrative law judge, if the allegedly sanctionable conduct occurred and is discovered while the administrative law judge is presiding in an investigation or in a related proceeding. During an investigation, the administrative law judge's ruling on the motion shall be in the form of an order, if it is issued before or concurrently with the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation. In a related proceeding, the administrative law judge's ruling shall be in the form of an order, regardless of the point in time at which the order is issued.

(c) A motion for sanctions shall be addressed to the Commission, if the allegedly sanctionable conduct occurred while the Commission is presiding or is filed after the subject investigation or related proceeding is terminated. The Commission may assign the motion to an administrative law judge for issuance

of a recommended determination. The deadlines and procedures that will be followed in processing the recommended determination will be set forth in the Commission order assigning the motion to an administrative law judge.

(d) If an administrative law judge's order concerning sanctions is issued before the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation, it may be appealed under § 210.24(b)(1) with leave from the administrative law judge, if the requirements of that section are satisfied. If the order is issued concurrently with the initial determination, the order may be appealed by filing a petition meeting the requirements of § 210.43(b). The periods for filing such petitions and responding to the petitions will be specified in the Commission notice issued pursuant to § 210.42(i), if the initial determination has granted a motion for termination of the investigation, or in the Commission notice issued pursuant to § 210.46(a), if the initial determination concerns violation of section 337. The Commission will determine whether to adopt the order after disposition of the initial determination concerning violation of section 337 or termination of the investigation.

(e) If the administrative law judge's ruling on the motion for sanctions is in the form of a recommended determination pursuant to paragraph (c) of this section, the deadlines and procedures for parties to contest the recommended determination will be set forth in the Commission order assigning the motion to an administrative law judge.

(f) If a motion for sanctions is filed with the administrative law judge during an investigation, he may defer his adjudication of the motion until after he has issued a final initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of investigation. If the administrative law judge defers his adjudication in such a manner, his ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after issuance of the aforesaid initial determination on violation of section 337 or termination of the investigation. To aid the Commission in determining whether to adopt a recommended determination, any party may file written comments with the Commission 14 days after service of the recommended determination. Replies to such comments may be filed within seven

days after service of the comments. The Commission will determine whether to adopt the recommended determination after reviewing the parties' arguments and taking any other steps the Commission deems appropriate.

§ 210.26 Other motions.

Motions pertaining to discovery shall be filed in accordance with § 210.15 and the pertinent provisions of subpart E of this part (§§ 210.27 through 210.34). Motions pertaining to evidentiary hearings and prehearing conferences shall be filed in accordance with § 210.15 and the pertinent provisions of subpart F of this part (§§ 210.35 through 210.40). Motions for temporary relief shall be filed as provided in subpart H of this part (see §§ 210.52 through 210.57).

Subpart E—Discovery and Compulsory Process

§ 210.27 General provisions governing discovery.

(a) *Discovery methods.* The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions.

(b) *Scope of discovery.* Regarding the scope of discovery for the temporary relief phase of an investigation, see § 210.61. For the permanent relief phase of an investigation, unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the following:

(1) The claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things;

(2) The identity and location of persons having knowledge of any discoverable matter;

(3) The appropriate remedy for a violation of section 337 of the Tariff Act of 1930 (see § 210.42(a)(1)(ii)(A)); or

(4) The appropriate bond for the respondents, under section 337(j)(3) of the Tariff Act of 1930, during Presidential review of the remedial order (if any) issued by the Commission (see § 210.42(a)(1)(ii)(B)).

It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Supplementation of Responses.* (1) A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the administrative law judge or the Commission or in the following circumstances: A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A duty to supplement responses also may be imposed by agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(d) *Signing of Discovery Requests, Responses, and Objections.* (1) The front page of every request for discovery or response or objection thereto shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, and the docket number or investigation number, if any, assigned to the investigation or related proceeding.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and shall state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the request, objection, or response is:

(i) Consistent with § 210.5(a) (if applicable) and other relevant provisions of this chapter, and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be

obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a request, response, or objection is certified in violation of paragraph (d)(2) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this part, may impose an appropriate sanction upon the person who made the certification, the party on whose behalf the request, response, or objection was made, or both.

(4) An appropriate sanction may include an order to pay to the other parties the amount of reasonable expenses incurred because of the violation, including a reasonable attorney's fee, to the extent authorized by Rule 26(g) of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(5) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

§ 210.28 Depositions.

(a) *When depositions may be taken.* Following publication in the Federal Register of a Commission notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. The presiding administrative law judge will determine the permissible dates or deadlines for taking such depositions.

(b) *Persons before whom depositions may be taken.* Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) *Notice of examination.* A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation. The administrative law judge shall determine the appropriate period for providing such notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the

deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing or the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reason therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is a correct writing of the recording. Thereafter, that person shall forward one copy to each party who was present or represented at the taking of the deposition. See paragraph (i) of this section concerning the effect of errors and irregularities in depositions.

(e) *Depositions of nonparty officers or employees of the Commission or of other Government agencies.* A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.32(c). Such a motion shall be granted only

upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.27(b) or § 210.61 and cannot be obtained without undue hardship by alternative means.

(f) *Service of deposition transcripts on the Commission staff.* The party taking the deposition shall promptly serve one copy of the deposition transcript on the Commission investigative attorney.

(g) *Admissibility of depositions.* The fact that a deposition is taken and filed with the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require exclusion of the evidence if the witness were then present and testifying.

(h) *Use of depositions.* A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(2) The deposition of a party may be used by an adverse party for any purpose;

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the part

introduced, and any party may introduce any other parts.

(i) *Effect of errors and irregularities in depositions.*

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving notice.

(2) *As to disqualification of person before whom the deposition is to be taken.* Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of depositions.* (i) Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written questions submitted under this section are waived unless served in writing upon the party propounding them. The presiding administrative law judge shall set the deadline for service of such objections.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the person before whom it is taken are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§ 210.29 Interrogatories.

(a) *Scope; use at hearing.* Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.27(b) or § 210.61, and the answers may be used to the extent permitted by the rules of evidence.

(b) *Procedure.* (1) Interrogatories may be served upon any party after the date of publication in the *Federal Register* of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within the time specified by the administrative law judge. The party submitting the interrogatories may move for an order under § 210.33(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) *Option to produce records.* When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained.

§ 210.30 Requests for production of documents and things and entry upon land.

(a) *Scope.* Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any

designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.27(b).

(b) *Procedure.* (1) The request may be served upon any party after the date of publication in the *Federal Register* of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within the time specified by the administrative law judge. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.33(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) *Persons not parties.* This section does not preclude issuance of an order against a person not a party to permit entry upon land.

§ 210.31 Requests for admission.

(a) *Form, content, and service of request for admission.* Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of

documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the *Federal Register* of the notice of investigation. The administrative law judge will determine the period within which a party may serve a request upon other parties.

(b) *Answers and objections to requests for admissions.* A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within the period specified by the administrative law judge, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request on that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Sufficiency of answers.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final

disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this part.

(d) *Effect of admissions; withdrawal or amendment of admission.* Any matter admitted under this section may be conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subverted thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issue of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

§ 210.32 Subpoenas.

(a) *Application for issuance of a subpoena.* (1) *Subpoena ad testificandum.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) *Subpoena duces tecum.* An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(3) The administrative law judge shall rule on all applications filed under paragraph (a)(1) or (a)(2) of this section and may issue subpoenas when warranted.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that

are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies.* (1) *Procedure.* An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship or by alternative means.

(2) *Ruling.* Such applications shall be ruled upon by the administrative law judge, and he may issue such subpoenas when warranted. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) *Application for subpoena grounded upon the Freedom of Information Act.* No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. § 552) shall be entertained by the administrative law judge.

(d) *Motion to limit or quash.* Any motion to limit or quash a subpoena shall be filed within such time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

(f) *Witness Fees.* (1) *Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same mileage as are paid witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at

whose instance they are summoned, shall be paid in accordance with the applicable Federal regulations.

(2) *Responsibility.* The fees and mileage referred to in paragraph (f)(1) of this section shall be paid by the party at whose instance deponents or witnesses appear. Fees due under this paragraph shall be tendered no later than the date for compliance with the subpoena issued under this section. Failure to timely tender fees under this paragraph shall not invalidate any subpoena issued under this section.

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(3) or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion or sua sponte, a request for such enforcement. The request shall be accompanied by copies of relevant papers and a written report from the administrative law judge concerning the purpose, relevance, and reasonableness of the subpoena. The Commission will subsequently issue a notice stating whether it has granted the request and authorized its Office of the General Counsel to seek such enforcement.

§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise

rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery.* (1) If a party or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and to the extent provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25, may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(2) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred

by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

§ 210.34 Protective orders.

(a) *Issuance of protective order.* Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge. If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The Commission also may, upon motion or sua sponte, issue protective orders or may continue or amend a protective order issued by the administrative law judge.

(b) *Unauthorized disclosure of information.* If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such

disclosure to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further disclosure of such information by the party or the recipient of such information.

(c) *Violation of protective order.* Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined to have violated the terms of the protective order, may be subject to one or more of the following:

(1) An official reprimand by the Commission;

(2) Disqualification from or limitation of further participation in a pending investigation;

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(5) Sanctions of the sort enumerated in § 210.33(b), or such other action as may be appropriate.

The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with § 210.25(a)(2). The Commission or the administrative law judge shall allow the parties to make written submissions and, if warranted, to present oral argument bearing on the issues of violation of a protective order and sanctions therefor. When the motion is addressed to the administrative law judge, he shall grant or deny a motion for sanctions by issuing an order.

(d) *Reporting requests for confidential business information.* (1) *Reporting Requirement.* Each person subject to protective order issued pursuant to paragraph (a) of this section shall report in writing to the Commission immediately upon learning that confidential business information disclosed to him or her pursuant to the protective order is the subject of a subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, agreement, or other written request seeking disclosure, by him or any other person, of that confidential business information to persons who are not, or may not be, permitted access to that information pursuant to either a Commission protective order or § 210.5(b).

(2) *Sanctions and other actions.* After providing notice and an opportunity to comment, the Commission may impose a sanction upon any person who willfully fails to comply with paragraph (d)(1) of this section, or it may take other action.

Subpart F—Prehearing Conferences and Hearings

§ 210.35 Prehearing conferences.

(a) *When appropriate.* The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Scope of the hearing;

(3) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.14 (b) and (c);

(4) Stipulations and admissions of either fact or the content and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to § 210.32(a)(3).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless the administrative law judge modifies the order.

§ 210.36 General provisions for hearings.

(a) *Purpose of hearings.* (1) An opportunity for a hearing shall be provided in each investigation under this part, in accordance with the

Administrative Procedure Act. At the hearing, the presiding administrative law judge will take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act of 1930, and for the purpose of making findings and recommendations, as described in § 210.42(a)(1)(ii), concerning the appropriate remedy and the amount of the bond to be posted by respondents during Presidential review of the Commission's action, under section 337(j) of the Tariff Act.

(2) An opportunity for a hearing in accordance with the Administrative Procedure Act shall also be provided in connection with every motion for temporary relief filed under this part.

(b) *Public hearings.* All hearings in investigations under this part shall be public unless otherwise ordered by the administrative law judge.

(c) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(d) *Rights of the parties.* Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §§ 554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(e) *Presiding official.* An administrative law judge shall preside over each hearing unless the Commission shall otherwise order.

§ 210.37 Evidence.

(a) *Burden of proof.* The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, or unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded as far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by the Commission investigative attorney when necessary in connection with investigations and may be offered in evidence by the Commission investigative attorney.

(d) *Official notice.* When any decision of the administrative law judge rests, in whole or in part, upon the taking of

official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of what he expects to prove by the answer of the witness, or the administrative law judge may in his discretion receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained with the record so as to be available for consideration by any reviewing authority.

§ 210.38 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, all briefs and written statements, and other documents and things properly filed with the Secretary, in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record, and any other items certified into the record by the administrative law judge or the Commission.

(b) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge, and the transcript shall be a part of the record.

(c) *Corrections.* Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be addressed to the administrative law judge, who may order that the transcript be changed to reflect such corrections as are warranted, after consideration of any objections that may be made. Such corrections shall be made by the official reporter by furnishing substitute typed pages, under the usual certificate of the reporter, for insertion in the transcript. The original uncorrected pages shall be retained in the files of the Commission.

(d) *Certification of record.* The record shall be certified to the Commission by the administrative law judge upon his filing of an initial determination or at such earlier time as the Commission may order.

§ 210.39 In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with §§ 210.5 and 210.34, confidential documents and testimony made subject to protective orders or orders granting in camera treatment are not made part of the public record and are kept confidential in an in camera record. Only the persons identified in a protective order, persons identified in § 210.5(b), and court personnel concerned with judicial review shall have access to confidential information in the in camera record. The right of the administrative law judge and the Commission to disclose confidential data under a protective order (pursuant to § 210.34) to the extent necessary for the proper disposition of each proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* The administrative law judge shall have authority to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera.

(c) *Part of confidential record.* In camera documents and testimony shall constitute a part of the confidential record of the Commission.

(d) *References to in camera information.* In submitting proposed findings, briefs, or other papers, counsel for all parties shall make an attempt in good faith to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "Business Confidential," which shall be placed in camera and become a part of the confidential record.

§ 210.40 Proposed findings and conclusions and briefs.

At the time a motion for summary determination under § 210.18(a) or a motion for termination under § 210.21(a) is made, or when it is found that a party is in default under § 210.16, or at the close of the reception of evidence in any hearing held pursuant to this part (except as provided in § 210.63), or within a reasonable time thereafter fixed by the administrative law judge, any party may file proposed findings of fact and conclusions of law, together with reasons therefor. When appropriate, briefs in support of the

proposed findings of fact and conclusions of law may be filed with the administrative law judge for his consideration. Such proposals and briefs shall be in writing, shall be served upon all parties in accordance with § 210.4(g), and shall contain adequate references to the record and the authorities on which the submitter is relying.

Subpart G—Determinations and Actions Taken

§ 210.41 Termination of investigation.

Except as provided in § 210.21(b)(2) and (c), an order of termination issued by the Commission shall constitute a determination of the Commission under § 210.45(c).

§ 210.42 Initial determinations.

(a)(1) (i) *On issues concerning violation of section 337.* Unless otherwise ordered by the Commission, the administrative law judge shall certify the record to the Commission and shall file an initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 within nine months after publication of the notice of investigation in an ordinary case or within 14 months after such publication in a "more complicated" case.

(ii) *Recommended determination on issues concerning permanent relief and bonding.* Unless the Commission orders otherwise, within 14 days after issuance of the initial determination on violation of section 337 of the Tariff Act of 1930, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning—

(A) The appropriate remedy in the event that the Commission finds a violation of section 337, and

(B) The amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j) of the Tariff Act.

(2) *On certain motions to declassify information.* Following issuance of the public version of an initial determination under paragraph (a)(1)(i) of this section, the decision of an administrative law judge granting a motion to declassify information, in whole or in part, shall be in the form of an initial determination as provided in § 210.20(b).

(b) *On issues concerning temporary relief or forfeiture of temporary relief bonds.* Certification of the record and the disposition of an initial determination concerning a motion for temporary relief are governed by §§ 210.65 and 210.66. The disposition of

an initial determination concerning possible forfeiture of a complainant's temporary relief bond, in whole or in part, is governed by § 210.70 of this section.

(c) *On other matters.* The administrative law judge shall grant by the following types of motions by issuing an initial determination or shall deny them by issuing an order: a motion to amend the complaint or notice of investigation pursuant to § 210.14(b); a motion for a finding of default pursuant to § 210.16; a motion for summary determination pursuant to § 210.18; a motion for intervention pursuant to § 210.19; a motion for termination pursuant to § 210.21; a motion to suspend an investigation pursuant to § 210.23; or a motion for forfeiture of a complainant's temporary relief bond pursuant to § 210.70.

(d) *Contents.* The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that, pursuant to § 210.42(h), the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.43(a) or the Commission, pursuant to § 210.44, orders on its own motion a review of the initial determination or certain issues therein.

(e) *Notice to and advice from other departments and agencies.* The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies 20 days after the service of an initial determination filed pursuant to § 210.42(a)(1)(i) or 10 days after the service of an initial determination filed pursuant to § 210.42(c) or § 210.66(a) to submit their comments.

(f) *Initial determination made by the administrative law judge.* An initial determination under this section shall be made and filed by the administrative law judge who presided over the

investigation, except when that person is unavailable to the Commission and except as provided in § 210.20(a).

(g) *Reopening of proceedings by the administrative law judge.* At any time prior to the filing of the initial determination, the administrative law judge may reopen the proceedings for the reception of additional evidence.

(h) *Effect.* (1) An initial determination filed pursuant to § 210.42(a)(2) shall become the determination of the Commission 45 days after the date of service of the initial determination, unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

(2) An initial determination under § 210.42(a)(1)(i) shall become the determination of the Commission 45 days after the date of service of the initial determination, unless the Commission, within 45 days after the date of such service shall have ordered review of the initial determination or certain issues therein or by order has changed the effective date of the initial determination. The findings and recommendations made by the administrative law judge in the recommended determination issued pursuant to § 210.42(a)(1)(ii) will be considered by the Commission in reaching determinations on remedy and bonding by the respondents pursuant to § 210.50(a).

(3) An initial determination filed pursuant to § 210.42(c) shall become the determination of the Commission 30 days after the date of service of the initial determination, except as provided in paragraph (h)(5) of this section and § 210.70(c), unless the Commission, within 30 days after the date of such service shall have ordered review of the initial determination or certain issues therein or by order has changed the effective date of the initial determination.

(4) The disposition of an initial determination granting or denying a motion for temporary relief is governed by § 210.66.

(5) The disposition of an initial determination concerning possible forfeiture of a complainant's temporary relief bond is governed by § 210.70(c).

(i) *Notice of determination.* A notice stating the Commission's decision on whether to review an initial determination will be issued by the Secretary, served on the parties, and published in the **Federal Register**.

§ 210.43 Petitions for review of initial determinations on matters other than temporary relief.

(a) *Filing of the petition.* (1) Except as provided in paragraph (a)(2) of this section, any party to an investigation may request Commission review of an initial determination issued under § 210.42(a)(1) or (c) or § 210.70(c) by filing a petition with the Secretary. A petition for review of an initial determination issued under § 210.42(a)(1) must be filed within 10 days after service of the initial determination. A petition for review of an initial determination issued under § 210.42(c) must be filed within five business days after issuance of the initial determination. A petition for review of an initial determination issued under § 210.70(c) must be filed within 10 days after issuance of the initial determination.

(2) A party may not petition for review of any issue as to which the party has been found to be in default. Similarly, a party or proposed respondent who did not file a response to the motion addressed in the initial determination may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the motion.

(b) *Content of the petition.* (1) A petition for review filed under this section shall identify the party seeking review and shall specify the issues upon which review of the initial determination is sought, and shall, with respect to each such issue, specify one or more of the following grounds upon which review is sought:

- (i) That a finding or conclusion of material fact is clearly erroneous;
- (ii) That a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) That the determination is one affecting Commission policy.

The petition for review must set forth a concise statement of the facts material to the consideration of the stated issues, and must present a concise argument providing the reasons that review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy.

(2) Any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under § 210.44).

(3) Any petition designated by the petitioner as a "contingent" petition for review shall be deemed to be a petition

under paragraph (a)(1) of this section and shall be processed accordingly.

(4) A party's failure to file a petition for review of an initial determination shall constitute abandonment of all issues decided adversely to that party in the initial determination.

(c) *Responses to the petition.* Any party may file a response to a petition for review within five business days after service of the petition, except that a party who has been found to be in default may not file a response to any issue as to which the party has defaulted.

(d) *Grant or denial of review.* (1) The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.42(a)(1) or § 210.70(c) within 45 days of the service of the initial determination on the parties, or by such other time as the Commission may order. The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.42(c) within 30 days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall decide whether to grant a petition for review, based upon the petition and response thereto, without oral argument or further written submissions unless the Commission shall order otherwise. A petition will be granted and review will be ordered if it appears that an error or abuse of the type described in paragraph (b)(1) of this section is present or if the petition raises a policy matter connected with the initial determination, which the Commission thinks it necessary or appropriate to address.

(3) The Commission shall grant a petition for review and order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition for review shall be served by the Secretary on all parties, the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate.

§ 210.44 Commission review on its own motion of initial determinations on matters other than temporary relief.

Within the time provided in § 210.43(d)(1), the Commission on its own initiative may order review of an initial determination, or certain issues in the initial determination, when at least one of the participating Commissioners votes for ordering review. A self-initiated Commission review of an initial determination will be ordered if it appears that an error or abuse of the kind described in § 210.43(b)(1) is present or the initial determination raises a policy matter which the Commission thinks is necessary or appropriate to address.

§ 210.45 Review of initial determinations on matters other than temporary relief.

(a) *Briefs and oral argument.* In the event the Commission orders review of an initial determination pertaining to issues other than temporary relief, the parties may be requested to file briefs on the issues under review at a time and of a size and nature specified in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of granting the request.

(b) *Scope of review.* Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

§ 210.46 Petitions for and sua sponte review of initial determinations on violation of section 337 or temporary relief.

(a) *Violation of section 337.* An initial determination issued under § 210.42(a)(1)(i) on whether respondents have violated section 337 of the Tariff Act of 1930 will be processed as provided in § 210.42(e), (h)(2), and (i) and §§ 210.43 through 210.45. The Commission will issue a notice setting deadlines for written submissions from the parties, other Federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents. In

those submissions, the parties may assert their arguments concerning the recommended determination issued by the administrative law judge pursuant to § 210.42(a)(ii) on the issues of remedy and bonding by respondents.

(b) *Temporary relief.* Commission action on an initial determination concerning temporary relief is governed by § 210.66.

§ 210.47 Petitions for reconsideration.

Within 14 days after service of a Commission determination, any party may file with the Commission a petition for reconsideration of such determination or any action ordered to be taken thereunder, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination or action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments. Any party desiring to oppose such a petition shall file an answer thereto within five days after service of the petition upon such party. The filing of a petition for reconsideration shall not stay the effective date of the determination or action ordered to be taken thereunder or toll the running of any statutory time period affecting such determination or action ordered to be taken thereunder unless specifically so ordered by the Commission.

§ 210.48 Disposition of petitions for reconsideration.

The Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 210.49 Implementation of Commission action.

(a) *Service of Commission determination upon the parties.* A Commission determination pursuant to § 210.45(c) or a termination on the basis of a licensing or other agreement or a consent order pursuant to § 210.21 (b) or (c), respectively, shall be served upon each party to the investigation.

(b) *Publication and transmittal to the President.* A Commission determination that there is a violation of section 337 of the Tariff Act of 1930 or that there is reason to believe that there is such a violation, together with the action taken relative to such determination, or Commission action taken pursuant to subpart I of this part, shall promptly be published in the Federal Register and transmitted to the President, together

with the record upon which the determination and the action are based.

(c) *Enforceability of Commission action.* Unless otherwise specified, any Commission action other than an exclusion order or an order directing seizure and forfeiture of articles imported in violation of an outstanding exclusion order shall be enforceable upon receipt by the affected party of notice of such action. Exclusion orders and seizure and forfeiture orders shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury.

(d) *Finality of affirmative Commission action.* If the President does not disapprove the Commission's action within a 60-day period beginning the day after a copy of the Commission's action is delivered to the President, or if the President notifies the Commission before the close of the 60-day period that he approves the Commission's action, such action shall become final the day after the close of the 60-day period or the day the President notifies the Commission of his approval, as the case may be.

(e) *Duration.* Final Commission action shall remain in effect as provided in subpart I of this part.

§ 210.50 Commission action, the public interest, and bonding by respondents.

(a) During the course of each investigation under this part, the Commission shall—

(1) Consider what action (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order), if any, it should take, and, when appropriate, take such action;

(2) Consult with and seek advice and information from the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order) under section 337 of the Tariff Act of 1930 shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers;

(3) Determine the amount of the bond to be posted by a respondent pursuant to section 337(j)(3) of the Tariff Act of 1930 following the issuance of temporary or permanent relief under

section 337 (d), (e), (f), or (g), of the Tariff Act taking into account, among other things, the amount that would offset any competitive advantage to the respondent resulting from its alleged unfair methods of competition and unfair acts in the importation or sale of the articles in question;

(4) Receive submissions from the parties, interested persons, and other Government agencies and departments with respect to the subject matter of paragraphs (a)(1), (a)(2), and (a)(3), of this section.

When the matter under consideration pursuant to paragraph (a)(1) of this section is whether to grant some form of permanent relief, the submissions described in paragraph (a)(4) of this section shall be filed by the deadlines specified in the Commission notice issued pursuant to § 210.46(a). When the matter under consideration is whether to grant some form of temporary relief, such submissions shall be filed by the deadlines specified in § 210.67(b), unless the Commission orders otherwise. Any submission from a party shall be served upon the other parties in accordance with § 210.4(g). The parties' submissions, as well as any filed by interested persons or other agencies shall be available for public inspection in the Office of the Secretary. The Commission will consider motions for oral argument or, when necessary, a hearing with respect to the subject matter of this section, except that no hearing or oral argument will be permitted in connection with a motion for temporary relief.

(b)(1) With respect to an administrative law judge's ability to take evidence or other information and to hear arguments from the parties and other interested persons on the issues of appropriate Commission action, the public interest, and bonding by the respondents for purposes of an initial determination on temporary relief, see §§ 210.61, 210.62, and 210.66(a). For purposes of the recommended determination required by § 210.42(a)(1)(ii), an administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons on the issues of appropriate Commission action and bonding by the respondents. Unless the Commission orders otherwise, and except as provided in paragraph (b)(2) of this section, an administrative law judge shall not address the issue of the public interest for purposes of an initial determination on violation of section 337 of the Tariff Act under § 210.42(a)(1)(i).

(2) Regarding settlements by agreement or consent order under § 210.21 (b) or (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative-law judge may hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

§ 210.51 Period for concluding investigation.

(a) *Permanent relief.* The permanent relief phase of each investigation instituted under this part shall be concluded and a final order issued no later than 12 months after the date of publication in the **Federal Register** of the notice instituting the investigation, unless the investigation has been designated "more complicated" pursuant to § 210.22(b). If that designation has been made, the deadline for concluding the investigation is 18 months after the publication of the notice of investigation.

(b) *Temporary relief.* The temporary relief phase of an investigation shall be concluded and a final order issued no later than 90 days after publication of the notice of investigation in the **Federal Register**, unless the temporary relief phase of the investigation has been designated "more complicated" by the Commission or the presiding administrative law judge pursuant to § 210.22(c) and § 210.60. If that designation has been made, the temporary relief phase of the investigation shall be concluded and a final order issued no later than 150 days after publication of the notice of investigation in the **Federal Register**.

(c) *Computation of time.* In computing the deadlines imposed in paragraphs (a) and (b) of this section, there shall be excluded any period during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

Subpart H—Temporary Relief

§ 210.52 Motions for temporary relief.

Requests for temporary relief under section 337 (e) or (f) of the Tariff Act of 1930 shall be made through a motion

filed in accordance with the following provisions:

(a) A complaint requesting temporary relief shall be accompanied by a motion setting forth the complainant's request for such relief. In determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions. The motion for temporary relief accordingly must contain a detailed statement of specific facts bearing on the factors the Federal Circuit has stated that a U.S. District Court must consider in granting a preliminary injunction.

(b) The motion must also contain a detailed statement of facts bearing on:

(1) Whether the complainant should be required to post a bond as a prerequisite to the issuance of temporary relief; and

(2) The appropriate amount of the bond, if the Commission determines that a bond will be required.

(c) The factors the Commission will consider in determining whether to require a bond as a prerequisite to the issuance of temporary relief include the following:

(1) The strength of the complainant's case;

(2) Whether posting a bond would impose an undue hardship on the complainant;

(3) Whether the respondent has responded to the motion for temporary relief (in the time and manner specified in § 210.59 or by order of the Commission or the administrative law judge);

(4) Whether the respondent will be harmed by issuance of the temporary relief sought by the complainant;

(5) Any other legal, equitable, or public interest consideration that is relevant to whether the complainant should be required to post a bond as a condition precedent to obtaining temporary relief, including whether the complainant is likely to use the temporary relief proceedings or the temporary relief order to harass the respondents or for some other improper purpose.

No single factor will be determinative. The Commission's general policy is to favor the posting of a bond in every case. Therefore, a complainant who believes that a bond should not be required has the burden of persuading the Commission.

(d) The following documents and information also shall be filed along with the motion for temporary relief:

(1) A memorandum of points and authorities in support of the motion;

(2) Affidavits executed by persons with knowledge of the facts asserted in the motion; and

(3) All documents, information, and other evidence in complainant's possession that complainant intends to submit in support of the motion.

(e) The complainant must also provide information and documents that will assist the presiding administrative law judge and the Commission in computing the amount of the bond, if a bond is to be required. (A complainant also may file, if it chooses, a draft of the bond it expects to submit if a bond is to be required.) In cases where a domestic industry exists and domestic sales of the product in question have commenced and have not been de minimis, the amount of the bond is likely to be the amount indicated on the following schedule based on the sales revenues from the domestic product at issue—and, if applicable, licensing royalties from the intellectual property right at issue—as reflected in the complainant's audited annual financial statements for the most recent fiscal year:

Complainant's sales and licensing royalties	Bond amount
Less than \$1 million	\$10,000
Greater than \$1 million but not more than \$10 million	100,000
Greater than \$10 million but not more than \$50 million	250,000
Greater than \$50 million but not more than \$100 million	500,000
Greater than \$100 million	1

¹ Million.

In cases in which the foregoing schedule applies, the complainant must provide the following documents:

(1) The audited financial statements (or the equivalent thereof, if audited statements do not exist) for the most recently completed fiscal year;

(2) The back-up income statements, work sheets, or other documents showing revenues for the domestic product at issue in the investigation, which are tied to the aggregate revenue listed on the financial statements; and

(3) A certification under oath by the complainant's chief financial officer indicating that the detail provided in the work sheets or other documents tied to the audited financial statements is correct.

The Commission retains the option to require bonds in higher or lower amounts than prescribed under the aforesaid schedule in exceptional cases. In cases in which the aforesaid schedule would not be appropriate, the amount of the bond will be determined on a case-by-case basis. In such cases, the motion

for temporary relief should state why the prescribed schedule is not appropriate (with supporting documentation where appropriate). The motion should also state the theory the complainant believes is appropriate for computing the amount of the bond (if the Commission determines to require a bond) and should provide supporting financial and economic data with certification under oath executed by the complainant's chief financial officer attesting to the veracity of the data provided. All complainants who are seeking temporary relief (including complainants who have provided the audited financial statements and back up data listed above) must be prepared to provide upon short notice any additional financial or economic data requested by the presiding administrative law judge in connection with the issue of bonding and the certification under oath by the complainant's chief financial officer that the information submitted is correct.

(f) If the complaint, the motion for temporary relief, and the supporting documentation contain confidential business information as defined in § 201.6(a) of this chapter, the complainant must follow the procedure outlined in §§ 210.5(a), 201.6 (a) and (c), and 210.55.

§ 210.53 Motion filed after complaint.

(a) A motion for temporary relief may be filed after the complaint, but must be filed prior to the Commission determination under § 210.10 on whether to institute an investigation. A motion filed after the complaint shall contain the information, documents, and evidence described in § 210.52 and must also make a showing that extraordinary circumstances exist that warrant temporary relief and that the moving party was not aware, and with due diligence could not have been aware, of those circumstances at the time the complaint was filed. When a motion for temporary relief is filed after the complaint but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted under § 210.58 for review of the complaint and informal investigatory activity will begin to run anew from the date on which the motion was filed.

(b) A motion for temporary relief may not be filed after an investigation has been instituted.

§ 210.54 Service of motion by the complainant.

Notwithstanding the provisions of § 210.11 regarding service of the complaint and motion for temporary

relief by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief with the Commission (see § 201.8(a) of this chapter), the complainant must serve nonconfidential copies of both documents (as well as nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of each country from which the allegedly unfair imports come. The complaint and motion shall be served by messenger, courier, express mail, or equivalent means. A signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service on each respondent and embassy (e.g., certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery)—or proof of a serious but unsuccessful effort to make such service—must be filed within 10 days after the filing of the complaint and motion. If the requirements of this section are not satisfied, the Commission may extend its 35-day deadline under § 210.58 for determining whether to provisionally accept the motion for temporary relief and institute an investigation on the basis of the complaint.

§ 210.55 Content of service copies.

(a) Any purported confidential business information that is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) of this chapter (which defines confidential information for purposes of Commission proceedings). For attachments to the complaint or motion that are confidential in their entirety, the complainant must provide a nonconfidential summary of what each attachment contains. Despite the redaction of confidential material from the complaint and motion for temporary relief, the nonconfidential service copies must contain enough factual information about each element of the violation alleged in the complaint and the motion to enable each proposed respondent to comprehend the allegations against it.

(b) If the Commission determines that the complaint, motion for temporary relief, or any exhibits or attachments thereto contain excessive designations of confidentiality that are not warranted under § 201.6(a) of this chapter, the

Commission may require the complainant to file and serve new nonconfidential versions of the aforesaid submissions and may determine that the 35-day period under § 210.58 for deciding whether to institute an investigation and to provisionally accept the motion for temporary relief for further processing shall begin to run anew from the date the new nonconfidential versions are filed with the Commission and served on the proposed respondents.

§ 210.56 Notice accompanying service copies.

(a) Each service copy of the complaint and motion for temporary relief shall be accompanied by a notice containing the following text:

Notice is hereby given that the attached complaint and motion for temporary relief will be filed with the U.S. International Trade Commission in Washington, DC on _____, 19____. The filing of the complaint and motion will not institute an investigation on that date, however, nor will it begin the period for filing responses to the complaint and motion pursuant to 19 CFR 210.13 and 210.59.

Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 201.8, 210.4, 210.5, 210.8, and 210.12. The Commission's Office of Unfair Import Investigations will conduct informal investigatory activity pursuant to 19 CFR 210.9 to identify sources of relevant information and to assure itself of the availability thereof. The motion for temporary relief will be examined for sufficiency and compliance with 19 CFR 201.8, 210.4, 210.5, 210.52, 210.53(a) (if applicable), 210.54, 210.55, and 210.56, and will be subject to the same type of preliminary investigatory activity as the complaint.

The Commission generally will determine whether to institute an investigation on the basis of the complaint and whether to provisionally accept the motion for temporary relief within 35 days after the complaint and motion are filed or, if the motion is filed after the complaint, within 35 days after the motion is filed—unless the 35-day deadline is extended pursuant to 19 CFR 210.53, 210.54, 210.55(b), 210.57, or 210.58. If the Commission determines to institute an investigation and provisionally accept the motion, the motion will be assigned to a Commission administrative law judge for issuance of an initial determination in accordance with 19 CFR 210.66. See 19 CFR 210.10 and 210.58.

If the Commission determines to conduct an investigation of the complaint and the motion for temporary relief, the investigation will be formally instituted on the date the Commission publishes a notice of investigation in the *Federal Register* pursuant to 19 CFR 210.10(b). If an investigation is instituted, copies of the complaint, the notice of investigation, the motion for temporary relief, and the

Commission's Rules of Practice and Procedure (19 CFR Part 210) will be served on each respondent by the Commission pursuant to 19 CFR 210.11(a). Responses to the complaint, the notice of investigation, and the motion for temporary relief must be filed within 10 days after Commission service thereof, and must comply with 19 CFR 201.8, 210.4, 210.5, 210.13, and 210.59. See also 19 CFR 201.14 and 210.6 regarding computation of the 10-day response period.

If, after reviewing the complaint and motion for temporary relief, the Commission determines not to institute an investigation, the complaint and motion will be dismissed and the Commission will provide written notice of that decision and the reasons therefor to the complainant and all proposed respondents pursuant to 19 CFR 210.10.

For information concerning the filing and processing of the complaint and its treatment, and to ask general questions concerning section 337 practice and procedure, contact the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Room 401, Washington, DC 20436, telephone 202-205-2560. Such inquiries will be referred to the Commission investigative attorney assigned to the complaint. (See also the Commission's Rules of Practice and Procedure set forth in 19 CFR Part 210.)

To learn the date that the Commission will vote on whether to institute an investigation and the publication date of the notice of investigation (if the Commission decides to institute an investigation), contact the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., room 112, Washington, DC 20436, telephone 202-205-2000.

This notice is being provided pursuant to 19 CFR 210.56.

(b) In the event that the complaint and motion for temporary relief are filed after the date specified in the above notice, the complainant must serve a supplementary notice to all proposed respondents and embassies stating the correct filing date. The supplementary notice shall be served by messenger, courier, express mail, or equivalent means. The complainant shall file a certificate of service and a copy of the supplementary notice with the Commission.

§ 210.57 Amendment of the motion.

A motion for temporary relief may be amended at any time prior to the institution of an investigation. All material filed to amend the motion (or the complaint) must be served on all proposed respondents and on the embassies in Washington, DC, of the foreign governments that they represent, in accordance with § 210.54. If the amendment expands the scope of the motion or changes the complainant's assertions on the issue of whether a bond is to be required as a prerequisite to the issuance of temporary relief or the appropriate amount of the bond, the 35-

day period under § 210.58 for determining whether to institute an investigation and provisionally accept the motion for temporary relief shall begin to run anew from the date the amendment is filed with the Commission. A motion for temporary relief may not be amended to expand the scope of the temporary relief inquiry after an investigation is instituted.

§ 210.58 Provisional acceptance of the motion.

The Commission shall determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint. That determination shall be made within 35 days after the complaint and motion for temporary relief are filed, unless the 35-day period is restarted pursuant to § 210.53(a), 210.54, 210.55, or 210.57, or exceptional circumstances exist which preclude adherence to the prescribed deadline. (See § 210.10(a)(1).) Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with §§ 210.52, 210.53(a) (if applicable), 210.54 through 210.56, as well as §§ 201.8, 210.4, and 210.5. The motion will be subject to the same type of preliminary investigatory activity as the complaint. (See § 210.9(b).) Acceptance of a motion pursuant to this paragraph constitutes provisional acceptance for referral of the motion to the chief administrative law judge, who will assign the motion to a presiding administrative law judge for issuance of an initial determination under § 210.66(a). Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint.

§ 210.59 Responses to the motion and the complaint.

(a) Any party may file a response to a motion for temporary relief. Unless otherwise ordered by the administrative law judge, a response to a motion for temporary relief in an ordinary investigation must be filed not later than 10 days after service of the motion by the Commission. In a "more complicated" investigation, the response shall be due within 20 days after such service, unless otherwise ordered by the presiding administrative law judge.

(b) The response must comply with the requirements of § 201.8 of this chapter, as well as §§ 210.4 and 210.5 of this part, and shall contain the following information:

(1) A statement that sets forth with particularity any objection to the motion for temporary relief;

(2) A statement of specific facts concerning the factors the U.S. Court of Appeals for the Federal Circuit would consider in determining whether to affirm lower court decisions granting or denying preliminary injunctions;

(3) A memorandum of points and authorities in support of the respondent's response to the motion;

(4) Affidavits, where possible, executed by persons with knowledge of the facts specified in the response. Each response to the motion must address, to the extent possible, the complainant's assertions regarding whether a bond should be required and the appropriate amount of the bond. Responses to the motion for temporary relief also may contain counter-proposals concerning the amount of the bond or the manner in which the bond amount should be calculated.

(c) Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with § 201.8 of this chapter, §§ 210.4 and 210.5 of this part, and any protective order issued by the administrative law judge under § 210.34 of this part.

§ 210.60 Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.

At the time the Commission determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to § 210.58, the Commission may designate the investigation "more complicated" pursuant to § 210.22(c) for the purpose of obtaining up to 60 additional days to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under § 210.66(a), the administrative law judge may issue an order, sua sponte or on motion, designating the investigation "more complicated" for the purpose of obtaining additional time to adjudicate the motion for temporary relief. Such order shall constitute a final determination of the Commission, and notice of the order shall be published in the *Federal Register*. As required by section 337(e)(2) of the Tariff Act of 1930, the notice shall state the reasons

that the temporary relief phase of the investigation was designated "more complicated." The "more complicated" designation may be conferred by the Commission or the presiding administrative law judge pursuant to this paragraph on the basis of the complexity of the issues raised in the motion for temporary relief or the responses thereto, or for other good cause shown.

§ 210.61 Discovery and compulsory process.

The presiding administrative law judge shall set all discovery deadlines. The administrative law judge's authority to compel discovery includes discovery relating to the following issues:

(a) Any matter relevant to the motion for temporary relief and the responses thereto, including the issues of bonding by the complainant; and

(b) The issues the Commission considers pursuant to sections 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930, viz.,

(1) The appropriate form of relief (notwithstanding the form requested in the motion for temporary relief);

(2) Whether the public interest precludes that form of relief; and

(3) The amount of the bond to be posted by the respondents to secure importations or sales of the subject imported merchandise while the temporary relief order is in effect. The administrative law judge may, but is not required to, make findings on the issues specified in sections 337 (e)(1), (f)(1), or (j)(3) of the Tariff Act of 1930. Evidence and information obtained through discovery on those issues will be used by the parties and considered by the Commission in the context of the parties' written submissions on remedy, the public interest, and bonding by respondents, which are filed with the Commission pursuant to § 210.67(b).

§ 210.62 Evidentiary hearing.

An opportunity for a hearing in accordance with the Administrative Procedure Act and § 210.36 of this part will be provided in connection with every motion for temporary relief. If a hearing is conducted, the presiding administrative law judge may, but is not required to, take evidence concerning the issues of remedy, the public interest, and bonding by respondents under section 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930.

§ 210.63 Proposed findings and conclusions and briefs.

The administrative law judge shall determine whether and, if so, to what extent the parties shall be permitted to

file proposed findings of fact, proposed conclusions of law, or briefs under § 210.40 concerning the issues involved in adjudication of the motion for temporary relief.

§ 210.64 Interlocutory appeals.

There will be no interlocutory appeals to the Commission under § 210.24 on any matter connected with a motion for temporary relief that is decided by an administrative law judge prior to the issuance of the initial determination on the motion for temporary relief.

§ 210.65 Certification of the record.

When the administrative law judge issues an initial determination concerning temporary relief pursuant to § 210.66(a), he shall also certify to the Commission the record upon which the initial determination is based.

§ 210.66 Initial determination concerning temporary relief; Commission action thereon.

(a) On or before the 70th day after publication of the notice of investigation in an ordinary investigation, or on or before the 120th day after such publication in a "more complicated" investigation, the administrative law judge will issue an initial determination concerning the issues listed in §§ 210.52 and 210.59. If the 70th day or the 120th day is a Saturday, Sunday, or Federal holiday, the initial determination must be received in the Office of the Secretary no later than 12:00 noon on the first business day after the 70-day or 120-day deadline. The initial determination may, but is not required to, address the issues of remedy, the public interest, and bonding by the respondents pursuant under sections 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930.

(b) If the initial determination on temporary relief is issued on the 70-day or 120-day deadline imposed in paragraph (a) of this section, the initial determination will become the Commission's determination 20 calendar days after issuance thereof in an ordinary case, and 30 calendar days after issuance in a "more complicated" investigation, unless the Commission modifies, reverses, or sets aside the initial determination in whole or part within that period. If the initial determination on temporary relief is issued before the 70-day or 120-day deadline imposed in paragraph (a) of this section, the Commission will add the extra time to the 20-day or 30-day deadline to which it would otherwise have been held. In computing the deadlines imposed by this paragraph, intermediary Saturdays, Sundays, and Federal holidays shall be included. If

the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the effective date of the initial determination shall be extended to the next business day.

(c) The Commission will not modify, reverse, or set aside an initial determination concerning temporary relief unless the Commission finds that a finding of material fact is clearly erroneous, that the initial determination contains an error of law, or that there is a policy matter warranting discussion by the Commission. All parties may file written comments concerning any clear error of material fact, error of law, or policy matter warranting such action by the Commission. Such comments must be limited to 35 pages in an ordinary investigation and 45 pages in a "more complicated" investigation. The comments must be filed no later than seven calendar days after issuance of the initial determination in an ordinary case and 10 calendar days after issuance of the initial determination in a "more complicated" investigation. In computing the aforesaid 7-day and 10-day deadlines, intermediary Saturdays, Sundays, and Federal holidays shall be included. If the initial determination is issued on a Friday, however, the filing deadline for comments shall be measured from the first business day after issuance. If the last day of the filing period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. The parties shall serve their comments on other parties by messenger, courier, express mail, or equivalent means.

(d) Nonconfidential copies of the initial determination also will be served on other agencies listed in § 210.50(a)(2). Those agencies will be given 10 calendar days to file comments on the initial determination.

(e) (1) Each party may file a response to each set of comments filed by another party. All such reply comments must be filed within 10 calendar days after issuance of the initial determination in an ordinary case and within 14 calendar days after issuance of an initial determination in a "more complicated" investigation. The deadlines for filing reply comments shall be computed in the manner described in paragraph (c) of this section, except that in no case shall a party have fewer than two calendar days to file reply comments.

(2) Each set of reply comments will be limited to 20 pages in an ordinary investigation and 30 pages in a "more complicated" case.

(f) If the Commission determines to modify, reverse, or set aside the initial

determination, the Commission will issue a notice and, if appropriate, a Commission opinion. If the Commission does not modify, reverse, or set aside the administrative law judge's initial determination within the time provided under paragraph (b) of this section, the initial determination will automatically become the determination of the Commission. Notice of the Commission's determination concerning the initial determination will be issued on the statutory deadline for determining whether to grant temporary relief or as soon as possible thereafter, will be published in the Federal Register, and will be served on the parties. If the Commission determines (either by reversing or modifying the administrative law judge's initial determination, or by adopting the initial determination) that the complainant must post a bond as a prerequisite to the issuance of temporary relief, the Commission may issue a supplemental notice setting forth conditions for the bond if any (in addition to those outlined in the initial determination) and the deadline for filing the bond with the Commission.

§ 210.67 Remedy, the public interest, and bonding by respondents.

The procedure for arriving at the Commission's determination of the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission, is as follows:

(a) While the motion for temporary relief is before the administrative law judge, he may compel discovery on matters relating to remedy, the public interest, and bonding by respondents (as provided in § 210.61). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in § 210.66(a). Such findings may be superseded, however, by Commission findings on that issue as provided in paragraph (c) of this section.

(b) On the 65th day after institution in an ordinary case or on the 110th day after institution in a "more complicated" investigation, all parties shall file written submissions with the Commission addressing those issues. The submissions shall refer to information and evidence already on the record, but additional information and evidence germane to the issues of appropriate relief, the statutory public

interest factors, and bonding by respondents may be provided along with the parties' submissions. Pursuant to § 210.50(a)(4), interested persons may also file written comments, on the aforesaid dates, concerning the issues of remedy, the public interest, and bonding by the respondents.

(c) On or before the 90-day or 150-day statutory deadline for determining whether to order temporary relief under section 337 (e)(1) and/or (f)(1) of the Tariff Act of 1930, the Commission will determine what relief is appropriate in light of any violation that appears to exist, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission. In the event that Commission's findings on the public interest pursuant to this paragraph are inconsistent with findings made by the administrative law judge in the initial determination pursuant to § 210.66(a), the Commission's findings are controlling.

§ 210.68 Complainant's temporary relief bond.

(a) In every investigation under this part involving a motion for temporary relief, the question of whether the complainant shall be required to post a bond as a prerequisite to the issuance of such relief shall be addressed by the parties, the presiding administrative law judge, and the Commission in the manner described in §§ 210.52, 210.59, 210.61, 210.62, and 210.66. If the Commission determines that a bond should be required, the bond may consist of one or more of the following:

(1) The surety bond of a surety or guarantee corporation that is licensed to do business with the United States in accordance with 31 U.S.C. 9304-9306 and 31 CFR Parts 223 and 224;

(2) The surety bond of an individual, a trust, an estate, or a partnership, or a corporation, whose solvency and financial responsibility will be investigated and verified by the Commission; or

(3) A certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation within the meaning of 31 U.S.C. 9301 and 31 CFR Part 225, which is owned by the complainant and tendered in lieu of a surety bond, pursuant to 31 U.S.C. 9303(c) and 31 CFR Part 225.

The same restrictions and requirements applicable to individual and corporate sureties on Customs bonds, which are

set forth in 19 CFR Part 113, shall apply with respect to sureties on bonds filed with the Commission by complainants as a prerequisite to a temporary relief under section 337 of the Tariff Act of 1930. If the surety is an individual, the individual must file an affidavit of the type shown in Appendix A to § 210.68. Unless otherwise ordered by the Commission, while the bond of the individual surety is in effect, an updated affidavit must be filed every four months (computed from the date on which the bond was approved by the Secretary or the Commission).

(b) The bond and accompanying documentation must be submitted to the Commission within the time specified in the Commission notice, order, determination, or opinion requiring the posting of a bond, or within such other time as the Commission may order. If the bond is not submitted within the specified period (and an extension of time has not been granted), temporary relief will not be issued.

(c) The corporate or individual surety on a bond or the person posting a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation in lieu of a surety bond must provide the following information on the face of the bond or in the instrument authorizing the Government to collect or sell the bond, certified check, bank draft, post office money order, cash, United States bond, Treasury note, or other Government obligation in response to a Commission order requiring forfeiture of the bond pursuant to § 210.70:

(1) The investigation caption and docket number;

(2) The names, addresses, and seals (if appropriate) of the principal, the surety, the obligee, as well as the "attorney in fact" and the registered process agent (if applicable) (see Customs Service regulations in 19 CFR Part 113 and Treasury Department regulations in 31 CFR Parts 223, 224, and 225);

(3) The terms and conditions of the bond obligation, including the reason the bond is being posted, the amount of the bond, the effective date and duration of the bond (as prescribed by the Commission order, notice, determination, or opinion requiring the complainant to post a bond); and

(4) A section at the bottom of the bond or other instrument for the date and authorized signature of the Secretary to reflect Commission approval of the bond.

(d) Complainants who wish to post a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other

Government obligation in lieu of a surety bond must notify the Commission in writing immediately upon receipt of the Commission document requiring the posting of a bond, and must contact the Secretary to make arrangements for Commission receipt, handling, management, and deposit of the certified check, bank draft, post office money order, cash, United States bond, Treasury note, or other Government obligation tendered in lieu of a surety bond, in accordance with 31 U.S.C. § 9303, 31 CFR Parts 202, 206, and 225 and other governing Treasury regulations and circular(s). If required by the governing Treasury regulations and circular, a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other government obligation tendered in lieu of a surety bond may have to be collateralized. See, e.g., 31 CFR 202.6 and the appropriate Treasury Circular.

Appendix A to § 210.68 Affidavit by Individual Surety

United States International Trade Commission Affidavit by Individual Surety
19 CFR 210.68

State of _____

County _____

SS: _____

I, the undersigned, being duly sworn, depose and say that I am a citizen of the United States, and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety; and that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States International Trade Commission to accept me as surety on the bond(s) filed or to be filed with the United States International Trade Commission pursuant to 19 CFR 210.68. I agree to notify the Commission of any transfer or change in any of the assets herein enumerated.

1. Name (First, Middle, Last) _____

2. Home Address _____

3. Type & Duration of Occupation _____

4. Name of Employer (If Self-Employed) _____

5. Business Address _____

6. Telephone No. _____

Home _____

Business _____

7. The following is a true representation of my assets, liabilities, and net worth and does not include any financial interest I have in the assets of the principal on the bond(s) on which I appear as surety.

- Fair value of solely owned real estate *
- All mortgages or other encumbrances on the real estate included in Line a
- Real estate equity (subtract Line b from Line a)
- Fair value of all solely owned property other than real estate
- Total of the amounts on Lines c and d
- All other liabilities owing or incurred not included in Line b
- Net worth (subtract Line f from Line e)

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. LOCATION AND DESCRIPTION OF REAL ESTATE OF WHICH I AM SOLE OWNER, THE VALUE OF WHICH IS IN LINE a, ITEM 7 ABOVE¹

Amount of assessed value of above real state for taxation purposes: _____

9. DESCRIPTION OF PROPERTY INCLUDED IN LINE d, ITEM 7 ABOVE (List the value of each category of property separately)²

10. ALL OTHER BONDS ON WHICH I AM SURETY (State character and amount of each bond; if none, so state)³

11. SIGNATURE

12. BOND AND COMMISSION INVESTIGATION TO WHICH THIS AFFIDAVIT RELATES

SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:

DATE OATH ADMINISTERED

MONTH DAY YEAR

CITY

STATE (Or Other Jurisdiction)

NAME & TITLE OF OFFICIAL

ADMINISTERING OATH

SIGNATURE

MY COMMISSION EXPIRES

INSTRUCTIONS

1. Here describe the property by giving the number of the lot and square or block, and addition or subdivision, if in a city, and, if in the country, after showing state, county, and township, locate the property by metes and bounds, or by part of section, township, and range, so that it may be identified.

2. Here describe the property by name so that it can be identified—for example "Fifteen shares of the stock of the "National Metropolitan Bank, New York City," or "Am. T. & T. s. f.5's 60."

3. Here state what other bonds the affiant has already signed as surety, giving the name and address of the principal, the date, and the amount and character of the bond.

§ 210.69 Approval of complainant's temporary relief bond.

(a) In accordance with 31 U.S.C. § 9304(b), all bonds posted by

complainants must be approved by the Commission before the temporary relief sought by the complainant will be issued. See also 31 U.S.C. § 9303(a) and 31 CFR 225.1 and 225.20. The Commission's bond approval officer for purposes of those provisions shall be the Secretary.

(b) The bond approval process may entail investigation by the Secretary or the Commission's Office of Investigations to determine the veracity of all factual information set forth in the bond and the accompanying documentation (e.g., powers of attorney), as well as any additional verification required by 31 CFR Parts 223, 224, or 225. The Secretary may reject a bond on one or more of the following grounds:

(1) Failure to comply with the instructions in the Commission determination, order, or notice directing the complainant to post a bond;

(2) Failure of the surety or the bond to provide information or supporting documentation required by the Commission, the Secretary, § 210.68 of this part, 31 CFR Parts 223 or 224, or other governing statutes, regulations, or Treasury circulars, or because of a limitation prescribed in a governing statute, regulation, or circular;

(3) Failure of an individual surety to execute and file with the bond, an affidavit of the type shown in Appendix A to § 210.68, which sets forth information about the surety's assets, liabilities, net worth, real estate and other property of which the initial surety is the sole owner, other bonds on which the individual surety is a surety (and which must be updated at 4-month intervals while the bond is in effect, measured from the date on which the bond is approved by the Secretary on behalf of the Commission or by the Commission);

(4) Any question about the solvency or financial responsibility of the surety, or any question of fraud, misrepresentation, or perjury which comes to light as a result of the verification inquiry during the bond approval process; and

(5) Any other reason deemed appropriate by the Secretary.

(c) If the complainant believes that the Secretary's rejection of the bond was erroneous as a matter of law, the complainant may appeal the Secretary's rejection of the bond by filing a petition with the Commission in the form of a letter to the Chairman, within 10 days after service of the rejection letter.

(d) After the bond is approved and temporary relief is issued, if any question concerning the continued solvency of the individual or the legality

or enforceability of the bond or undertaking develops, the Commission may take the following action(s), sua sponte or on motion:

(1) Revoke the Commission approval of the bond and require complainant to post a new bond; or

(2) Revoke or vacate the temporary remedial order for public interest reasons or changed conditions of law or fact (criteria that are the basis for modification or rescission of final Commission action pursuant to § 210.76(a)(1) and (b)); or

(3) Notify the Treasury Department if the problem involves a corporate surety licensed to do business with the United States under 31 U.S.C. §§ 9303-9306 and 31 CFR Parts 223 and 224; or

(4) Refer the matter to the U.S. Department of Justice if there is a suggestion of fraud, perjury, or related conduct.

§ 210.70 Forfeiture of complainant's temporary relief bond.

(a) If the Commission determines that one or more of the respondents whose merchandise was covered by the temporary relief order has not violated section 337 of the Tariff Act of 1930 to the extent alleged in the motion for temporary relief and provided for in the temporary relief order, proceedings to determine whether the complainant's bond should be forfeited in whole or part may be initiated upon the filing of a motion by a respondent or the Commission investigative attorney. Alternatively, such proceedings may be initiated by the Commission on its own initiative. A motion by a respondent or the Commission investigative attorney should be filed within 30 days after the service of the aforesaid Commission determination on violation.

(b) The complainant and any nonmoving party may file a response to the motion within 15 days after service of the motion, unless otherwise ordered by the presiding administrative law judge.

(c) A motion for forfeiture of a complainant's temporary relief bond in whole or part will be adjudicated by the administrative law judge in an initial determination with a 45-day effective date, which shall be subject to review under the provisions of §§ 210.42 through 210.45. In determining whether to grant the motion, the administrative law judge and the Commission will consider the following factors:

(1) The extent to which the Commission has determined that section 337 of the Tariff Act of 1930 has not been violated;

(2) Whether the presentation of the motion for temporary relief (or the

portions thereof corresponding to the portions of the complaint that were not sustained on the merits) was justified under the standards of conduct articulated in § 210.4(c) and the guidelines in § 210.4(d) for determining whether those standards were violated;

(3) Whether forfeiture would be consistent with the legislative intent of the forfeiture authority (which is to provide a "disincentive" to the abuse of temporary relief by complainants);

(4) Whether forfeiture would be in the public interest; and

(5) Any other legal, equitable, or policy considerations that are relevant to the issue of forfeiture.

(d) Motions to stay forfeiture proceedings or the effective date of a forfeiture order pending the outcome of judicial review of the violation determination will not be granted. If the negative violation determination supporting the forfeiture order is reversed on judicial review, the Secretary will refund the appropriate amount of the forfeited bond to the complainant as expeditiously as possible in accordance with the governing Treasury procedures and regulations.

(e) If the investigation is terminated on the basis of a settlement agreement or a consent order with no concurrent determination concerning the violation of section 337 of the Tariff Act of 1930, forfeiture of the complainant's bond will not be ordered.

Subpart I—Enforcement Procedures and Advisory Opinions

§ 210.71 Information gathering.

(a) *Power to require information.* (1) Whenever the Commission issues an exclusion order, the Commission may require any person to report facts available to that person that will help the Commission assist the U.S. Customs Service in determining whether and to what extent there is compliance with the order or whether and to what extent the conditions that led to the order are changed. Similarly, whenever the Commission issues a cease and desist order or a consent order, it may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the order or whether and to what extent the conditions that led to the order are changed.

(2) The Commission may also include provisions that exercise any other information-gathering power available to the Commission by law, regardless of whether the order at issue is an exclusion order, a cease and desist

order, or a consent order. The Commission may at any time request the cooperation of any person or agency in supplying it with information that will aid the Commission or the U.S. Customs Service in making the determinations described in paragraph (a)(1) of this section.

(b) *Form and detail of reports.* Reports under paragraph (a) of this section are to be in writing, under oath, and in such detail and in such form as the Commission prescribes.

(c) *Power to enforce informational requirements.* Terms and conditions of exclusion orders, cease and desist orders, and consent orders for reporting and information gathering shall be enforceable by the Commission by a civil action under 19 U.S.C. § 1333, or, at the Commission's discretion, in the same manner as any other provision of the exclusion order, cease and desist order, or consent order is enforced.

(d) *Term of reporting requirement.* An exclusion order, cease and desist order, or consent order may provide for the frequency of reporting or information gathering and the date on which these activities are to terminate. If no date for termination is provided, reporting and information gathering shall terminate when the exclusion order, cease and desist order, or consent order or any amendment to it expires by its own terms or is terminated.

§ 210.72 Confidentiality of information.

Confidential information (as defined in § 201.6(a) of this chapter) that is provided to the Commission pursuant to exclusion order, cease and desist order, or consent order will be received by the Commission in confidence. Requests for confidential treatment shall comply with § 201.6 of this chapter. The restrictions on disclosure and the procedures for handling such information (which are set out in §§ 210.5 and 210.39) shall apply and, in a proceeding under §§ 210.75 or 210.76, the Commission or the presiding administrative law judge may, upon motion or sua sponte, issue or continue appropriate protective orders.

§ 210.73 Review of reports.

(a) *Review to insure compliance.* The Commission, through the Office of Unfair Import Investigations, will review reports submitted pursuant to any exclusion order, cease and desist order, or consent order and conduct such further investigation as it deems necessary to insure compliance with its orders.

(b) *Extension of time.* The Director of the Office of Unfair Import Investigations may, for good cause

shown, extend the time in which reports required by exclusion orders, cease and desist orders, and consent orders may be filed. An extension of time within which a report may be filed, or the filing of a report that does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to compliance with such order.

§ 210.74 Modification of reporting requirements.

(a) *Exclusion and cease and desist orders.* The Commission may modify reporting requirements of exclusion and cease and desist orders as necessary:

(1) To help the Commission assist the U.S. Customs Service in ascertaining that there has been compliance with an outstanding exclusion order;

(2) To help the Commission ascertain that there has been compliance with a cease and desist order;

(3) To take account of changed circumstances; or

(4) To minimize the burden of reporting or informational access.

An order to modify reporting requirements shall identify the reports involved and state the reason or reasons for modification. No reporting requirement will be suspended during the pendency of such a modification unless the Commission so orders. The Commission may, if the public interest warrants, announce that a modification of reporting is under consideration and ask for comment, but it may also modify any reporting requirement at any time without notice, consistent with the standards of this section.

(b) *Consent orders.* Consistent with the standards set forth in paragraph (a) of this section, the Commission may modify reporting requirements of consent orders. The Commission shall publish a notice of any proposed change in the Federal Register, together with the reporting requirements to be modified and the reasons therefor, and serve notice on each party subject to the consent order. Such parties shall be given the opportunity to submit briefs to the Commission, and the Commission may hold a hearing on the matter.

§ 210.75 Proceedings to enforce exclusion orders, cease and desist orders, consent orders, and other Commission orders.

(a) *Informal enforcement proceedings.* Informal enforcement proceedings may be conducted by the Commission, through the Office of Unfair Import Investigations, with respect to any act or omission by any person in possible violation of any provision of an exclusion order, cease and desist order,

or consent order. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and insure compliance with the terms of an exclusion order, cease and desist order, or consent order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart.

(b) Formal enforcement proceedings.

(1) The Commission may institute an enforcement proceeding at the Commission level upon the filing by the complainant in the original investigation or his successor in interest, by the Office of Unfair Import Investigations, or by the Commission of a complaint setting forth alleged violations of any exclusion order, cease and desist order, or consent order. If a proceeding is instituted, the complaint shall be served upon the alleged violator and a notice of institution published in the Federal Register. Within 15 days after the date of service of such a complaint, the named respondent shall file a response to it. Responses shall fully advise the Commission as to the nature of any defense and shall admit or deny each allegation of the complaint specifically and in detail unless the respondent is without knowledge, in which case its answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted may be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered.

(2) Upon the failure of a respondent to file and serve a response within the time and in the manner prescribed herein the Commission, in its discretion, may find the facts alleged in the complaint to be true and take such action as may be appropriate without notice or hearing, or, in its discretion, proceed without notice to take evidence on the allegations set forth in the complaint, provided that the Commission (or administrative law judge, if one is appointed) may permit late filings of an answer for good cause shown.

(3) The Commission, in the course of a formal enforcement proceeding under this section may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The hearing will not be subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code. The Commission may delegate the hearing to the chief administrative law judge for designation

of a presiding administrative law judge, who shall certify an initial determination to the Commission. That initial determination shall become the determination of the Commission 90 days after the date of service of the initial determination, unless the Commission, within 90 days after the date of such service shall have ordered review of the initial determination on certain issues therein, or by order shall have changed the effective date of the initial determination.

(4) Upon conclusion of a formal enforcement proceeding under this section, the Commission may:

(i) Modify a cease and desist order, consent order, and/or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order;

(ii) Bring civil actions in a United States district court pursuant to paragraph (c) of this section (and section 337(f)(2) of the Tariff Act of 1930) requesting the imposition of a civil penalty or the issuance of injunctions incorporating the relief sought by the Commission; or

(iii) Revoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States.

(5) Prior to effecting any modification, revocation, or exclusion under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

(6) In lieu of or in addition to taking the action provided for in paragraph (b)(1) of this section, the Commission may issue, pursuant to section 337(i) of the Tariff Act of 1930, an order providing that any article imported in violation of the provisions of section 337 of the Tariff Act of 1930 and an outstanding final exclusion order issued pursuant to section 337(d) of the Tariff Act of 1930 be seized and forfeited to the United States, if the following conditions are satisfied:

(i) The owner, importer, or consignee of the article (or the agent of such person) previously attempted to import the article into the United States;

(ii) The article previously was denied entry into the United States by reason of a final exclusion order; and

(iii) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result

from any further attempt to import the article into the United States.

(c) *Court enforcement.* To enforce an exclusion order, a cease and desist order, a consent order, or a sanctions order, the Commission may initiate a civil action in the U.S. district court pursuant to section 337(f)(2) of the Tariff Act of 1930, requesting the imposition of such civil penalty or the issuance of such injunctions as the Commission deems necessary to enforce its orders and protect the public interest. The Commission may initiate a proceeding to obtain judicial enforcement without any other type of proceeding otherwise available under section 337 or this subpart or without prior notice to any person, except as required by the court in which the civil action is initiated.

§ 210.76 Modification or rescission of exclusion orders, cease and desist orders, and consent orders.

(a) *Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders.* (1) Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if its petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to section 337 (d), (e), (f), (g), or (i) of the Tariff Act of 1930, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with section 337(k)(2) of the Tariff Act, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) *Commission action upon receipt of petition.* The Commission may thereafter institute a proceeding to modify or rescind the exclusion order, cease and desist order, or consent order by publishing a notice of the proceeding in the Federal Register. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, and any information placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. The Commission may delegate any hearing under this section to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

§ 210.77 Temporary emergency action.

(a) Whenever the Commission determines, pending a formal enforcement proceeding under § 210.75(b), that without immediate action a violation of an exclusion order, cease and desist order, or consent order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice modify or revoke such order and, if it is revoked, replace the order with an appropriate exclusion order.

(b) Prior to taking any action under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission shall, if it has not already done so, institute a formal enforcement proceeding under § 210.75(b) at the time of taking action under this section or as soon as possible thereafter, in order to give the alleged violator and other interested parties a full opportunity to present information and views regarding the continuation, modification, or revocation of Commission action taken under this section.

§ 210.78 Notice of enforcement action to Government agencies.

(a) *Consultation.* The Commission may consult with or seek information from any Government agency when taking any action under this subpart.

(b) *Notification of Treasury.* The Commission shall notify the Secretary of the Treasury of any action under this subpart that results in a permanent or temporary exclusion of articles from entry, or the revocation of an order to

such effect, or the issuance of an order compelling seizure and forfeiture of imported articles.

§ 210.79 Advisory opinions.

(a) *Advisory opinions.* Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether the person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and

competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible. Advisory opinion proceedings are not subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code.

(b) *Revocation.* The Commission may at any time reconsider any advice given under this section and, where the public interest requires, revoke its prior advice. In such event the person will be given notice of the Commission's intent to revoke as well as an opportunity to submit its views to the Commission. The Commission will not proceed against a person for violation of an exclusion order, cease and desist order,

or consent order with respect to any action that was taken in good faith reliance upon the Commission's advice under this section, if all relevant facts were accurately presented to the Commission and such action was promptly discontinued upon notification of revocation of the Commission's advice.

PART 211—[REMOVED]

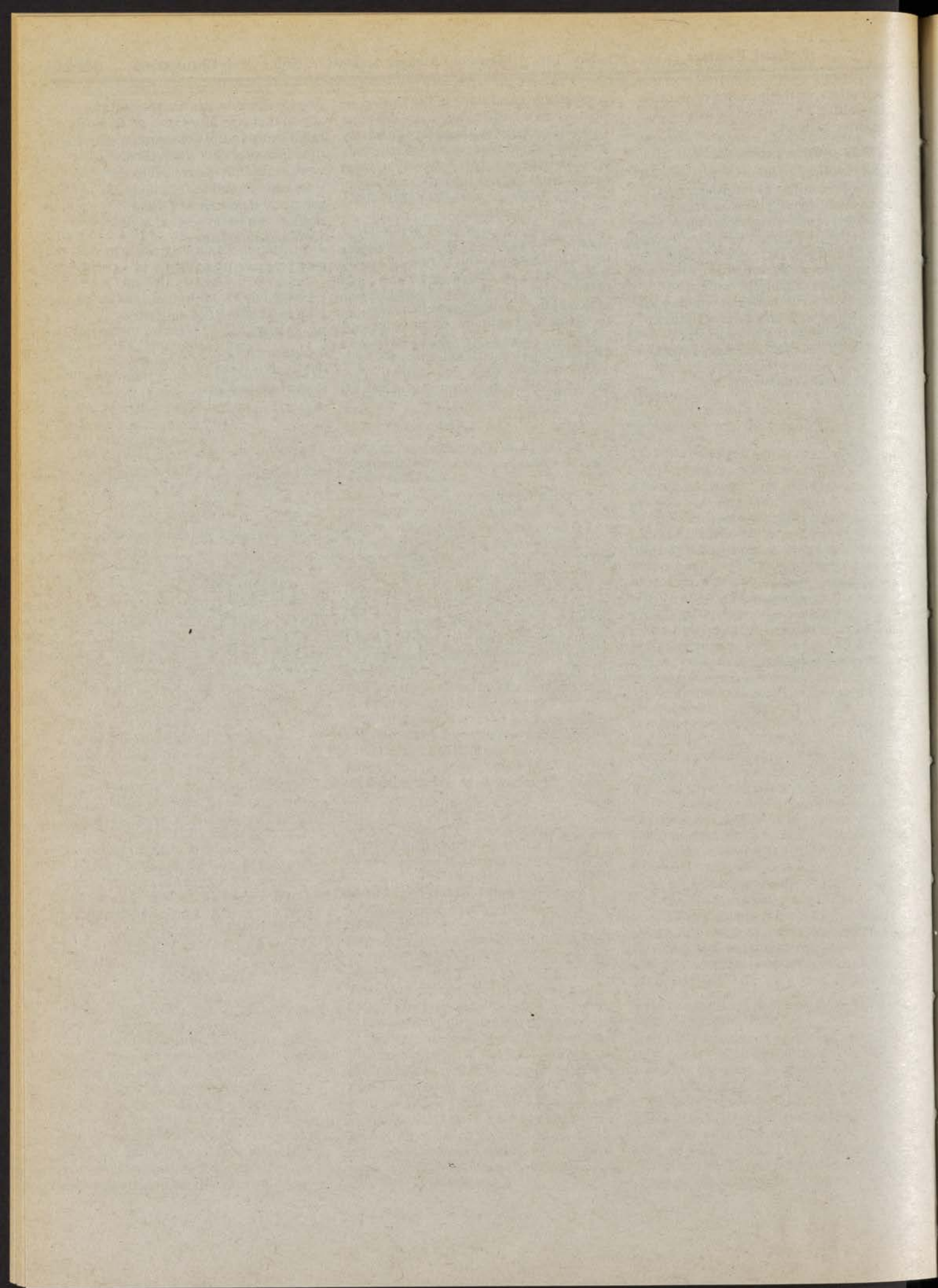
Issued: July 14, 1994.

By Order of The Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 94-17643 Filed 7-29-94; 8:45 am]

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Monday
August 1, 1994

Part III

**Department of
Housing and Urban
Development**

**Assistant Secretary for Public and Indian
Housing**

**24 CFR Parts 905 and 950
Indian Housing Program; Proposed Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 950

[Docket No. R-94-1742; FR-3646-P-01]

RIN 2577-AB43

Indian Housing Program: Proposed Amendments

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would add a new part 950 to HUD's regulations. New part 950 would contain the Indian Housing Consolidated regulations that are currently set forth in 24 CFR part 905. In addition to moving the Indian Housing Consolidated regulations from part 905 to part 950, the proposed rule would make a number of amendments to the Indian Housing Consolidated regulations to simplify program processes, reduce the number of regulatory requirements, and provide more flexibility to local Tribal and Indian housing authority officials in the administration of the Indian Housing program.

DATES: Comments due date: September 30, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. to 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Dominic Nesi, Director, Office of Native American Programs, Public and Indian Housing, Room 4140, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410, telephone (202) 708-1015, or (202) 708-0850 (these are not toll-free numbers). Hearing- or speech-impaired persons may use the TDD number by contacting the Federal Information Relay Service on 1-800-877-TDDY (1-800-877-8339) (a toll-free number) or 202-708-9300 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Burden

This proposed rule does not add to the information collection requirements currently contained in 24 CFR part 905, and that already have been approved and assigned OMB control numbers under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). These numbers are shown under the applicable sections.

II. Background

Title II of the United States Housing Act of 1937 (42 U.S.C. 1437aa) ("the Act"), as amended provides for the establishment of the Indian Housing program. The Indian Housing program includes the Rental program and the Mutual Help and Turnkey III Homeownership Opportunity Programs. A number of regulatory revisions have been made to the Indian Housing program in the past four years designed to provide IHAs with more administrative flexibility. Most recently, a final rule for "Indian Housing: Revised Consolidated Program Regulations" was published on June 24, 1992 (56 FR 28250) and became effective on October 3, 1992. This proposed rule published today continues that trend.

The move from part 905 to part 950 will allow HUD's Office of Native American Programs to consolidate all Native American program regulations in consecutive CFR parts. HUD's Community Development Block Grant regulations that are applicable to Indian tribes and currently codified in 24 CFR part 571 will eventually be moved to 24 CFR part 951.

III. Program Streamlining

A. Administrative Actions and Pre-Publication Comments

The primary goal in undertaking these revisions to the Indian Housing Program regulations is to provide greater discretion and responsibility to IHAs in carrying out their housing programs, thereby returning them to local control. Since September 1993, the six Native American Program Field Offices have been conducting an extensive consultation with IHAs and Tribal officials. A significant number of comments were submitted which constitute the basis for the revisions contained in this proposed rule.

A consultation session to discuss these changes and to provide for additional input was held in Washington, DC, with the National American Indian Housing Council, eight regional IHA associations, as well as a number of representatives from other IHAs. Additional verbal comments were

received from the Native American housing community at that time.

Each regional Indian housing association received a full set of the comments submitted by other IHAs. Interested parties should contact their respective regional associations for a copy of these comments.

Consistent with the principles of Executive Order 12866, HUD has reviewed the existing Indian Housing regulations, and has proposed modifications that are designed to make these regulations more effective, consistent, understandable and sensible.

B. Proposed Amendments

The following describes the amendments proposed to be made to the Indian Housing regulations. Unless otherwise indicated, the references to regulatory sections and subparts are to those in the existing regulations in 24 CFR part 905. Additionally, unless otherwise indicated, the section numbers in new part 950 will remain the same as currently set forth in part 905 (e.g., § 905.105 will be renumbered § 950.150).

SUBPART A—GENERAL

905.105 Types of low income housing projects. The types of low income housing projects contained in this section has been removed in an effort to streamline the regulations. The definitions will be included in the Indian Housing Management Handbook.

905.115 Applicability of civil rights. The civil rights requirements contained in this section would be amended to include a reference to title II of the Americans with Disabilities Act (42 U.S.C. 12131).

905.126 Establishment of IHAs by Tribal ordinance. The model Tribal Ordinance contained in this section have been removed and will be placed in a handbook for reference. The revised language will state, "The form of Tribal ordinance shall be determined by the Tribe and reviewed by the ONAP Administrator. The IHA must also demonstrate that it has the legal capacity to develop, own and operate a public housing project under the Act. A sample format will be provided by HUD."

905.135 Administrative capability. Verbal, as well as written comments, recommended that the system could be simplified to benefit both HUD and the IHAs. No specific written comments were given. Comments received during the Washington, D.C. consultation were mixed as to the need for change. Based on the discussions during the meeting, slight revisions have been made to the

language in new § 950.135(a) which could provide flexibility in the future regarding determinations of administrative capability. The appeal process contained in this section also has been revised based on HUD's recent reorganization.

905.140 Certification of housing managers. The certification of housing managers as a Federal requirement has been removed. HUD encourages the Indian housing community to continue the effort to professionalize the industry.

Subpart B—Procurement

General

In the current regulation, subparts B and C of part 905 contain numerous references to approval by HUD for "high risk" IHAs. This proposed rule provides for the assumption that procurement and development processing will be completed by IHAs that are not designated "high risk". Procedures addressing processing for "high risk" IHAs are contained in § 905.210. This modification has resulted in significant editing of subparts B and C but has no other impact on program requirements. Additionally, both subparts B and C have been reorganized to more closely follow processing steps.

905.160 Procurement standards. This section has been reworded to clarify that an IHA Board of Commissioners must assure that program requirements have been satisfied before execution of contracts. Previous wording required the Board to certify to compliance before a contract is executed. The proposed language allows compliance with this requirement if the IHA Board of Commissioners develops procurement policies in accordance with this subpart and 24 CFR part 85 and reviews compliance with these policies on a regular basis.

The requirement for submission of a bidding package or a certification of compliance prior to the solicitation of bids/proposals is proposed to be removed. Such certification is to be submitted after award of contract (see new § 950.260).

905.165 Indian preference requirements [Renumbered 950.175]. The Indian Preference (IP) part has been completely re-written and simplified. The re-written section closely follows the IP requirements included in the Indian CDBG regulations in 24 CFR part 571. It is anticipated that standardization of IP requirements between the Indian Housing, CDBG and HOME programs will provide improved flexibility to IHAs and tribes and will be

simpler to understand and comply with for both grantees and contractors/suppliers.

The proposed rule would remove HUD's involvement in the Indian Preference complaint process. Complaint resolution, including appeals and administrative hearings, is proposed to be contained at the IHA level. HUD will continue to monitor IHA compliance with Indian Preference requirements during periodic performance monitoring reviews. This proposal is made to expedite the complaint process and to vest full authority for compliance with Indian Preference with local officials.

905.175 Methods of procurement [Renumbered 950.165]. The "X" factor method has been removed and will be addressed in the program handbook. The section "Methods of procurement" was a continuation of the IP requirements of the program. With the simplification of IP (see new § 950.160) this part has been modified to recite the provisions of 24 CFR 85.36(d).

905.180 Training and employment requirements [Renumbered 950.175]. This section would be relocated to the Indian Preference section (noted earlier in this preamble) and simplified to enable IHAs to develop programs which can more adequately reflect local conditions and needs.

Subpart C—Development

905.210 Development priorities. The requirements for development priorities were removed from U.S. Housing Act of 1937, as amended, by the Housing and Community Development Act of 1992. Accordingly, the requirements currently contained in existing § 905.210 are not contained in the proposed rule.

905.212 Authority for proceeding without HUD approval [Renumbered 950.210]. As part of the revisions to subparts B and C of part 905, to remove specific requirements for "high risk" IHA processing, this section had been modified to provide for HUD to require an IHA to obtain approval for additional processing steps where it is determined necessary. The section includes three circumstances where HUD may impose additional requirements on an IHA during the development period.

905.215 Production methods and requirements [Retitled "Production methods"]. The explanations of the usual methods of development used by IHAs have been abbreviated in the proposed rule and a clarification has been made that an IHA can use whatever method of development it chooses so long as the method is not counter to the requirements of 24 CFR

part 85. HUD believes that this revision expands the opportunities for IHAs to utilize new and innovative means of producing housing and may result in lower cost housing developed in shorter time periods.

The listing of public advertisement requirements has been removed. These requirements are more fully covered in 24 CFR part 85 and the program handbooks.

905.220 Application procedures [Renumbered 950.225, and retitled "Application"]. Timeframes for beginning review of applications; initial review and request for supplemental information steps; and other processing instructions have been removed from this section. Processing steps such as these are more appropriately covered in the program handbook and, if necessary, in the program NOFA.

The term "ranked" in existing paragraph (c) of this section has been replaced with the correct term—"rated". Projects are rated by program type but ranked together to arrive at an ordered list for funding determinations.

The proposed rule clarifies that project funds cannot be used for expenses of another project except for comprehensive planning. This requirement is in the current regulations but is not clear.

The limitation on planning funds of 3 percent of the program reservation has been removed. Experience has shown that an arbitrary percentage is impractical with the result being that many IHAs either requesting a waiver of the 3 percent limitation or delaying payment of incurred expenses. The proposed language specifies that IHAs must justify the level of funding for planning regardless of the amount requested.

The word "cluster" has been removed from examples contained in the comprehensive housing plan section. The removal of this term clarifies that comprehensive planning is not limited to cluster or subdivision housing sites.

950.230 Project coordination [New section]. A new section has been added to address project coordination. The new section specifies that IHAs must plan for the development with the tribe, utility companies, and other state or Federal agencies and schedule completion of these activities. While IHAs have always participated in the coordination of project planning, HUD frequently took a leadership role in the past. With the removal of HUD from most aspects of planning coordination relative to all projects unless otherwise specified (§ 905.210), this section clarifies that the IHA is fully responsible for project coordination. The section

also requires that a project coordination schedule be provided to HUD for monitoring purposes.

905.225 IHA development program [Renumbered 950.260]. A clarification was made to this section to specify that the Development Program is to be submitted in accordance with the project schedule. This was added to emphasize that the IHA is responsible for planning its project and implementing the plan.

905.230 Site selection criteria [Renumbered 950.235]. The requirements contained in this section have been significantly modified to reduced regulatory requirements. These changes include (1) simplifying this section to state that all utilities needed for the project will be committed before final site approval; (2) removing requirements for topography, subsurface conditions and natural hazards, flooding, and multi-unit and scattered sites (these items are either addressed under other requirements of this part (flooding) or are more appropriately addressed in the program handbook); and (3) changing maximum site size from one acre to a local determination based on needs of housing occupants.

905.235 Types of interest in land [Renumbered 950.240]. A clarification was made to this section, to be consistent with the statute, that all property included in the project must be exempt from state or local real and personal property tax.

905.240 Appraisals [Renumbered 950.245]. This section was simplified to require compliance with the Uniform Relocation and Assistance Act. The part of this section which attempted to instruct the IHA on how to perform an appraisal was removed.

Additionally, clarification was provided that an appraisal is not required for any donated property that has a value of \$1,500 or less, regardless of the source of the donation.

The requirement for HUD approval of appraisals was removed. If a Field Office determines that a project should be processed under the "assisted" method, review of appraisals can be required.

905.245 Site approval [Renumbered 950.250]. This section has been restructured to clarify the site approval process. Revised provisions include (1) clarification that the IHA may submit a site approval certification with the development program in lieu of the supporting documents; (2) clarification of the method to be followed by the IHA in determining tentative site approval; and (3) clarification of the environmental clearance process and how it will be conducted jointly by

HUD and the IHA; and, removal of the requirement that HUD inspect all sites.

905.250 Design criteria [Renumbered 950.255]. This section was modified to include (1) Model Energy Code requirements; (2) IHA Board of Commissioners designation of applicable codes in the absence of tribal adoption; (3) clarification that designs must be approved by local or tribal regulatory agencies and the BIA and/or IHS, where applicable. Additionally, the moderate housing design requirement was moved to this section.

905.255 Total development cost standard [Renumbered 950.220 and retitled "Total development cost"]. HUD processing and procedure requirements were removed from this section. These requirements are more appropriately located in the program handbook or notices.

Wording was added to clarify that tenant training includes homebuyers and tenants. This has been previously authorized under the program with tenant counseling discussed here, and a parallel authorization for homebuyers under subpart E of part 905.

Provisions have been added to allow for the escrow of insurance premium funds to assist in closeout of development programs. Currently, a development program must be held open until all expenses have been incurred and paid. This change will allow for certain development programs to be closed in a shorter period.

905.260 Construction and inspections [Renumbered 950.265]. The submission requirements of plans, specifications, and other contract documents have been listed to clarify when the submissions must be made and what is to be included. Clarification also has been added that submissions are not due to be provided to HUD until after award of a contract by the IHA.

A new subsection has been added clarifying that the IHA has the responsibility to coordinate construction inspections with other agencies.

A new subsection, "Construction completion and settlement," has been added to distinguish between the construction period and the closeout period of project development. Provisions from existing § 905.260 that address completion and settlement will be addressed in this section. In addition the following has been modified to provide clarification and structure to the process:

HUD's involvement in the final inspection process for standard method IHAs has been removed. Other agencies who may be required to attend the final

inspection have been added to the participant list for the final inspection.

This section also has been revised to clarify the procedures for contract settlement to include an interim and final certificate of completion, and to clarify that IHAs may make payment to contractors without prior HUD approval.

Submittal requirements for completion documents to HUD have been included in this section.

905.265 Warranty inspections and enforcement [Renumbered 950.275]. This section was revised to clarify that two inspections are the minimum requirement during the warranty period; one within six months of the start of the warranty period and one prior to the expiration of the warranty. This is not a new requirement but the wording of this section was modified to remove possible confusion.

905.270 Correcting deficiencies [Renumbered 950.280]. This section was revised to clarify that modernization funds or IHA held funds may be used to correct design or construction deficiencies. This is not a new authority but serves to list in one place the potential funding sources to address design or construction deficiencies (DCDs). This section also was revised to clarify that HUD is under no obligation to fund correction of DCDs.

Subpart D—Operation

General Changes

The subpart has been generally revised to provide for a clearer organization of information.

Specific Changes

905.301 Admission policies. The "broad range of incomes" language in § 950.301(a)(2)(ii) would include reference to the statutory change in section 501 of National Affordable Housing Act (NAHA) that now requires adherence to the requirement to attain a tenant mix with a broad range of incomes "to the maximum extent feasible."

Additionally, § 950.301(a)(2)(iv) would include the increase from 10 percent to 30 percent of non-Federal preference holders eligible for admission to Indian housing programs as permitted under section 501 of the NAHA.

905.335 Rent and homebuyer payment collection policy. This section has been revised to include the phrase "and homebuyer" after the word "rent" to emphasize that collection payment policies apply to Mutual Help (MH).

Subpart E—Mutual Help Homeownership Opportunity Program

General Changes

HUD recognized that changes were needed to the Indian program, such as Mutual Help (MH), to assure that services provided to the Tribes and the residents continue to be in their best interests. Accordingly, the changes made to this subpart were directed to make the MH program more efficient.

905.404 Program framework. In an effort to streamline the regulation, this section has been removed. As commenters indicated, the information outlined here is already located in subparts C and E of part 905. This does not eliminate the necessity for an ACC, MHO Agreement or Construction Contract, however.

905.407 Application. This section has been removed. (See new § 905.225, Application, discussed earlier in this preamble.)

905.410 HUD review of application. This section has been removed.

905.416 Selection of MH homebuyers. The provisions of § 905.301(a)(3)(vi) would be contained in § 905.416(a)(3) and revised to reflect changes made in this subpart regarding the determination of purchase prices and the designation of a successor. Paragraph (a)(3) of new § 905.416 provides that the IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

- Ability to provide maintenance for the unit;
- Potential for maintaining at least the current income return—successor to a unit at the time of an "event." ("Event" should also be defined by the IHA in its policy); and
- Initial purchase price and the purchase price for a subsequent homebuyer.

Paragraph (e) of new § 905.416 would be strengthened and clarified to address the comments received. The following language has been added to this section: "Ownership or use of a decent, safe and sanitary residence other than the MH home at the time of occupancy or acquisition during occupancy would disqualify a family from the MH program."

905.419 MH Contribution. The requirement in existing § 905.419(3) for HUD approval has been removed in the new § 905.419(3).

905.425 Inspections, responsibility for items covered by warranty. The language in paragraph (a) of this section

has been revised in new § 905.425(a) to clarify that the homebuyer move-in inspection could be the final inspection with the contractor, IHA, and homebuyer or a separate inspection with the IHA and homebuyer.

Paragraph (c) of existing § 905.425 has been removed since it is contained in § 905.428.

905.427 Homebuyer payments—post-1976 projects. This section has been revised to eliminate HUD approval of the amount of monthly payment for New MH program developments and HUD approval of the specific percentage the IHA will use to determine the monthly payment in Mutual Help.

905.431 Operating reserve. The language in this section that requires HUD approval of unanticipated costs has been removed.

905.432 Operating budget submission and approval (New section). A new section has been added to this subpart to provide for the operating budget submission for Mutual Help. Subpart J does not apply to the Mutual Help program. Therefore, no guidance is given for IHAs submitting budgets for this program.

905.434 Operating subsidy. HUD is proposing a revision to the current method of determining subsidy for counseling and training. HUD proposes the use of a formula for providing subsidy to IHAs in these two areas, and seeks comment from the Indian housing community on the specific formula to be used. The formula approach will eliminate the need for IHAs to submit specific training and counseling budgets annually.

Subject to appropriations, an additional category of subsidy eligibility is also being added. Funding of up to \$25 per unit per year would be made available to an IHA with a duly elected resident organization for resident participation activities. Of this amount, \$15 per unit per year shall fund resident participation activities of the resident organization. IHAs should refer to 905.965, Funding Resident Participation and 905.967, Eligible TOP Activities.

905.437 Homebuyer reserves and accounts. The Voluntary Equity Payments Account (VEPA) has been removed from this section since it was not necessary and seldom used.

Substantial revision was made to the provision concerning reserves in this section. Several requests were made to revise the section on investment of equity funds to allow IHAs to utilize the homebuyer's monthly equity payments account (MEPA), provided that a portion is maintained as a reserve. It was suggested that a sufficient amount of funds should be maintained in a

secured investment for use if homebuyers terminate the mutual help and occupancy agreement (MHOA) and equity funds are to be disbursed. HUD agrees with the comment but also believes that HUD local office approval should be a part of the process to insure that the IHA has administrative capability prior to using the equity funds. Proposed regulatory language is as follows:

Notwithstanding other provisions of this subpart and subject to HUD Field Office approval, an IHA may use a portion of the homebuyers' equity accounts for low-income housing purposes provided that a reserve of homebuyers' MEPA is maintained. The reserve must be at a percentage established by the IHA and approved by the HUD Field Office.

905.440 Purchase of home. In paragraph (a) of this section, the reference to 24 CFR 203.43(h) was removed. In new § 905.440(b), the details on determining the purchase price have been streamlined. The proposed language is as follows: "(1) Initial purchase price. The initial purchase price of a home for a homebuyer shall be determined by the IHA."

In paragraph (b)(2) of this section, the reference to the prevailing interest rate for VA guaranteed mortgage loans at the time the schedule is established was removed because VA no longer sets this amount.

Paragraph (d) of this section concerning notice of eligibility for financing was removed. Section 905.443/905.443 already outlines the IHA homeownership financing guidelines. The need to notify families at the time of each reexamination is burdensome.

In paragraph (e)(7) of this section, the last sentence regarding the relationship with the homebuyer has been removed. It is repeated in § 905.443.

In paragraph (e)(8) of this section, the following language has been added, "Notwithstanding the above requirements, an IHA may complete emergency and statutorily or regulatorily required modernization work on a unit which is paid off but not conveyed, during the term of the repayment schedule."

Paragraph (e)(9)(ii) has been revised to read, "Upon repayment of the total delinquency, the IHA may, in accordance with § 905.602(e)(2), complete non-emergency modernization work on a unit prior to conveyance."

905.443 IHA homeownership financing. The homeownership financing requirements have been streamlined. Additional guidance on

IHA financing will be provided in a handbook.

905.449 Succession upon death or mental incapacity [Renamed "Succession"]. Revisions to this section are as follows:

In paragraph (a), language has been revised as follows, "'Event'" means the death, mental incapacity, or other conditions as determined by the IHA, of all of the persons who have executed the MHO Agreement as homebuyers."

In paragraph (b), language was added as follows: "A homebuyer may designate a successor who, at the time of the 'event' would assume the status of homebuyer, provided that the successor meets the conditions established by the IHA which shall include satisfying program eligibility requirements." The designation may be made at the time of execution of the MHO Agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

Paragraph (c) was revised to read, "Upon occurrence of an 'event', the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO Agreement if the designated successor meets the criteria established by the IHA which shall include program eligibility requirements."

Paragraphs (c)(i) through (iv) and (c)(2) of this section were removed. These paragraphs address current regulatory conditions applicable to HUD.

Paragraph (d) was revised. The clause "or if any of the conditions in paragraph (c) of this section are not met by the designated successor" has been removed.

905.453 Counseling of homebuyers. Funding of counseling has been modified to eliminate the \$500 maximum contained in the current regulation for development. Counseling cost will now be determined by the IHA with no minimum or maximum amount. The maximum amount will be a factor of the IHA's needs and the availability of funds within the development program.

Additionally, all portions of this section with the exception of (1) the requirement to submit a counseling program to the HUD Field Office for approval, (2) the requirement for an annual report and (3) the termination process have been removed. The IHA will have the flexibility to design a program to meet their needs.

Subpart F—Self-Help Development in the Mutual Help Homeownership Opportunity Program

905.463 Basic requirements [renumbered 950.475] Section 950.463(d) has been removed. A detailed discussion is already in the program handbook.

Paragraph (d) of this section has been removed. Construction tasks are more appropriately included in the program handbook.

Subpart G—Turnkey III Program

The revisions to this subpart are designed to streamline the Turnkey III program regulations as appropriate to the present status of the program, which is limited to the management, operation, conversion and sale of the remaining unsold Turnkey III units only. Accordingly, language concerning development and initial occupancy of new projects was removed.

At the present time, there are only about 30 IHAs with active Turnkey III programs, and the total inventory of Turnkey III homes still in management nationwide amounts to 1,749 units. It is anticipated that the remaining program inventory will be rapidly reduced, and the rest of the Turnkey III homes will be sold or converted to Mutual Help and the program completely closed out within the next few years.

905.501 Introduction. This section was streamlined to provide only essential elements of the Turnkey III program.

A new paragraph (5), "Program Overview," was added to provide a brief description of how the Turnkey III Program works. This paragraph is added for the orientation of the reader who wants basic information about the general nature of the program.

905.503 Conversions of Turnkey III units and transfer of occupants [Retitled "Conversion of Turnkey III developments"]. The requirements of this section have been streamlined. The conversion procedures are now similar to those in §§ 950.455 and 950.458 which cover conversions of rental and Mutual Help programs, and simplify the process and provide consistency from one program to another.

905.505 Selection of Turnkey III homebuyers [Retitled "Eligibility and selection of Turnkey III homebuyers"]. This section was retitled to clarify basic provisions on homebuyer requirements.

Paragraph (a) of this section was retitled "Applications" to clarify basic provisions on homebuyer requirements.

The "Turnkey III waiting list" provisions have been eliminated from this section, and replaced with

streamlined requirements in paragraph (b) titled "Selection and notification of homebuyers."

905.507 Homebuyer Ownership Opportunity Agreements (HOOA). Paragraph (c) of this section, "New agreements", has been removed because the information is adequately covered in other sections of the regulation.

905.511 Homebuyers' association and homeowners' association [Retitled "Homebuyers Association (HBA)"]. This section has been retitled to reflect that this section only addresses information on the HBA. Homeowners' associations are addressed in § 950.512.

Additionally, the requirements in paragraph (a) of this section have been streamlined.

950.512 Homeowners' association (HOA) [New section]. This section has been added to discuss HOAs.

905.513 Break-even amount and application of monthly payments. The requirements of this section have been streamlined and paragraph (d) has been revised to insert limits on EHPA/NRMR credits in circumstances specified.

905.515 Monthly operating expense. Paragraph (c) of this section titled "Provision for common property maintenance" has been removed.

905.517 Earned Home Payments Account (EHPA). Paragraphs (c)(1) (i), (ii), (iii) and (2) concerning exercise of option and required amount in EHPA have been removed for the purpose of expediting sale to subsequent homebuyers without their having to wait two years.

905.521 Operating reserve. Paragraph (b) of this section titled "Nonroutine maintenance—common property (contribution to operating reserve)" has been revised to remove all references to maximum operating reserve. Paragraph (c) of this section has been removed.

905.525 Achievement of Ownership [Retitled "Purchase price and methods of purchase"]. Revisions have been made to this section regarding the terms of sale to original and subsequent homebuyers. Based on comments received, the procedures for determining the purchase price and the term of the purchase price schedule have been changed to agree with the Mutual Help program.

A new subparagraph (c)(5) has been added to make clear that IHA financing is allowed, without the need for HUD approval, just like in the MH program (see § 950.440, Purchase of Home).

905.527 Payment upon resale at profit. A new paragraph (c) titled "Death of Homeowner" has been added to respond to any questions concerning the death of the homebuyer before the end

of the five-year period of the promissory note.

Subpart I—Modernization

The Comprehensive Grant Program (CGP) portion of this subpart has been revised in an effort to simplify and streamline the CGP process. The revised CGP regulation, which includes both the Indian housing and public housing CGP regulations, was published as a proposed rule on March 8, 1994 (59 FR 10876). The revisions were made in consultation with the housing authorities and interest groups which included representation from the National American Indian Housing Council (NAIHC). Additional changes to the proposed version of the CGP regulation are included in this proposed rule. Indian Housing Authorities (IHAs) are encouraged to provide any additional comments they may have on this program. Additionally, in this proposed part 950 rule, changes to the General Provisions and Comprehensive Improvement Assistance Program (CIAP) sections of subpart I are also proposed to be made.

A recommendation to remove the CIAP requirement that states that each development for which work is proposed must be at least three years old from the end of the initial operating period has been adopted in the proposed revisions to the CIAP regulation.

905.602 Special requirements for TKIII and Mutual Help developments. The requirements for TKIII homebuyers to be charged for the cost of modernization work have been removed.

This section also has been revised to allow IHAs to modernize Mutual Help units which are paid off but not conveyed.

Changes have been made to allow IHAs to do work necessary to meet statutory or regulatory requirements in TKIII units which are paid off, so long as the work is completed prior to conveyance.

Comprehensive Improvement Assistance Program (CIAP)

905.618 Procedures for obtaining approval of a modernization program. The following requirements have been removed from this section: (1) that developments proposed for work must be at least three years old from the date of EIOP; (2) that the submission of a fiscal audit is an eligibility requirement; and (3) the use of a Declaration of Trust as a requirement for Mutual Help units.

905.624 Resident and homebuyer participation. This section consolidates

homebuyer consultation requirements in one section by removing special consultation requirements for TKIII homebuyers where the cost of modernization work increased the amortization period of the home.

905.633 Special requirements for section 23 leased housing band-financed development [Removed]. This section has been removed since there is no longer any Section 23 housing management by IHAs.

905.635 Initiation of modernization activities. The requirement for prior HUD approval of force account work has been removed from this section.

Comprehensive Grant Program

Revisions have been made to make the \$75 million set-aside for emergencies and disasters available to CIAP housing authorities as well as CGP housing authorities.

Also, changes were made to continue the rolling base concept of the Five-Year Action Plan. The regulations now allow for full interchangeability of work items in any of the five years.

The following provisions have been removed from the CGP requirements:

1. The annual Statement by making the level of detail for describing work items the same for each year of the Five-Year Plan;
2. The concept of "major changes" has been eliminated since IHAs would be able to move work items within any of the five years of the plan; however, amendments to the Annual Work Statement would be required where any work items are added which are not in the Five-Year Action Plan;
3. The optional two-year Annual Statement;
4. The presumptive estimate by providing only a final formula amount;
5. The requirement for an initial notice and specific notification of democratically elected presidents of resident organizations but public notice is required prior to the advance meeting and public hearing;
6. The specified three week time frame for holding the advance meeting before the public hearing;
7. The requirement for use of a Declaration of Trust for Mutual help units;
8. The Executive Summary as a separate document; and
9. The requirement for prior approval of force account work.

The percentage limitation on management improvements from 10 to 20 percent has been increased for all IHAs. IHAs determined by the ONAP to be "high performing" would have no percentage limitation on management improvements.

The revisions proposed allow IHAs to hold the advance meeting for residents and the public hearing earlier in the year by using the formula amount for the current year as the planning level for the coming year.

905.666 Eligible costs. The charge to TKIII homebuyers for the cost of health and safety work items has been removed from this section. Also removed from this section is the requirement for IHAs to keep records by unit of the substantial rehabilitation of TKIII units, and the requirement for IHAs to demonstrate that the proposed substantial rehabilitation of vacant or non-homebuyer occupied TKIII units will bring the units into full compliance with the homeownership objectives of subpart G. Additionally, the proposed rule removes the language requiring that to the "maximum extent feasible" IHAs should use their management improvement funds to train residents.

Subpart J—Operating Subsidy

905.715 Computation of utilities expense level. Revisions have been made to this section to extend, for a period not to exceed an additional six (6) years, the existing arrangement under which an IHA may share equally with HUD any cost reductions due to the differences between projected and actual utility rates in the first year reductions occur. Similar changes were made in § 905.730, discussed below.

905.720 Other costs. Revisions were made to paragraph (b)(2) of this section. The revisions include removing the need for a waiver before operating subsidy may be paid for certain units approved for nondwelling use to promote economic self-sufficiency and anti-drug activities.

905.730 Adjustments. The 60 day deadline in this section for requesting a revision of an IHA's Allowable Expense Level in 905.730(f)(3) has been removed.

905.740 Operating reserves. The maximum operating reserve requirement has been removed from this section. IHAs will be required to maintain sufficient working capital for future nonroutine maintenance requirements, insurance premiums and unanticipated project requirements.

905.772 Operating subsidy eligibility for projects owned by IHAs in Alaska [Renumbered 905.774]. In the proposed rule, the provisions of this section are in § 905.774. Additionally, the provisions of subpart N have been incorporated into subpart J to address Alaska's non PFS status and the need for them to

comply with budget submission requirements.

950.772 Financial management systems, monitoring and reporting. In the existing regulations, these provisions are found in § 905.950 of subpart N. In the proposed rule, these provisions are in § 950.772 and apply to all programs.

Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances General Changes

In the majority of sections in this subpart, the examples of methodologies of performing energy audits have been removed. These examples will be placed, more appropriately, in the Indian Housing Management Handbook.

Descriptions of specific energy saving items, such as ceiling insulation and timers for hot water heaters, have been removed from this subpart and also will be addressed in the Handbook.

950.807 Energy conservation measures [Removed]. This section will be moved in its entirety to the Handbook.

950.810 Order of funding. Paragraphs (b) and (c) of this section have been removed, and their provisions will be addressed in the Handbook.

950.815 Energy conservation equipment (renamed Energy conservation equipment and practices). The list of energy conservation equipment has been removed and will be placed in the Handbook.

950.822 Compliance schedule, and 950.848 Compliance schedule. Both sections have been revised to eliminate dates that have passed, and therefore are no longer applicable.

950.842 Benefit/cost analysis. The methodology for performing a benefit/cost analysis has been removed and will be addressed in the Handbook.

950.870 Standards for allowances for utilities. This section has been edited to remove duplicative language.

Subpart L—Operation of Projects After Expiration of Initial ACC Term

No comments were received on this subpart from IHAs and Tribal officials, and no changes are proposed. Therefore, this subpart is not being published for comment.

Subpart M—Disposition or Demolition of Projects

General Changes

This subpart has been streamlined by removing sections and subsections that are more appropriate in a handbook (those regulatory provisions that merely

provide examples). The removed provisions will be incorporated in the Indian Housing Management Handbook.

Specific Changes

950.925 Relocation of displaced tenants [Removed]. This section was removed by a technical amendment and replaced by § 950.117.

950.925 Resident organization opportunity to purchase [New section]. A new § 950.925 which implements the new statutory requirements on this subject contained in the **Federal Register** of October 6, 1992 (57 FR 46074), has been added.

950.933 Use of Proceeds. Paragraph (a)(2) of this section titled "Proceeds of a Disposition" was revised to reflect the statutory requirement for application of a proportional ratio in scattered site housing when satisfying outstanding debt obligations of a project.

950.937 Reports and records [Removed]. This section was removed and the subject matter of this section will be addressed in the Handbook.

Subpart O—Resident Participation and Opportunities

General Changes

The proposed rule on Resident Participation and Opportunities in Indian Housing, 24 CFR 905, subpart O, was published in the **Federal Register** on April 19, 1994 (59 FR 18666). Comments were due May 19, 1994. HUD anticipates publishing a final rule on subpart O that takes into consideration public comment in the summer of 1994. Because the proposed rule on subpart O was recently published, this proposed rule does not republish subpart O.

Subpart P—Section 5(h) Homeownership Program

HUD is currently preparing the final rule on section 5(h) for publication. The interim rule was published September 20, 1991 (56 FR 47866), made effective October 21, 1991, and is codified at 24 CFR part 906, and part 905, subpart P. The final rule makes the following changes:

1. It streamlines the rules for the Section 5(h) Program;
2. It allows more flexibility in the regulatory requirements of the Section 5(h) Program; and
3. It requires only what is statutory according to the United States Housing Act of 1937 and provides additional technical guidance will be provided in a forthcoming handbook.

The major change to be made in the final rule is the clarification that the section 5(h) program applies to the Mutual Help and Turnkey III programs.

No comments were received from the Native American community during the comment period of the interim rule, or during the recent consultation with IHAs and Tribal officials. Accordingly, subpart P is not republished in this proposed rule for further comment.

Subpart R—Indian Housing Family Self-Sufficiency (FSS) Program

HUD proposes to make very few changes to the regulation implementing the FSS program because the current regulation reflects the statutory provisions of section 23 of the U.S. Housing Act of 1937 (42 U.S.C. 1437u). However, the following minor changes have been made to streamline the policies and procedures applicable to the FSS program under HUD's Indian housing program.

950.3012 Program Coordinating Committee (PCC). In paragraph (b)(1) of this section, the heading "Required Membership" has been removed as the statutory provision does not contain language that directs IHAs to have a required membership. In this paragraph, the word "must" in the phrase "The PCC must" has been removed and the word "may" has been substituted. The U.S. Housing Act of 1937 does not require IHA representatives or residents of the IHA to be members of the PCC. Paragraph (b)(2) states that "the PCC should . . .". The "should" has been removed and word "may" substituted for the same reasons stated above.

IV. Other Matters

Finding of No Significant Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection and copying during regular business hours (7:30 a.m. to 5:00 p.m. weekdays) in the Office of the Rules Docket Clerk, Room 10272, 451 Seventh Street, S.W., Washington, D.C. 20410.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this proposed rule does not have a significant economic impact on a substantial number of small entities. The proposed rule would make a number of amendments to the Indian Housing Consolidated regulations to simplify program processes, reduce the

number of regulatory requirements, and to provide more flexibility to local Tribal and Indian housing authority officials in the administration of the Indian Housing program.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the proposed rule is not subject to review under the order.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

Regulatory Agenda

This proposed rule was listed as sequence number 1681 in the Department's Semiannual Regulatory Agenda published on April 25, 1994 (59 FR 20424, 20468) in accordance with Executive Order 12866 and the Regulatory Flexibility Act.

The Catalog of Domestic Assistance numbers for the programs affected by this proposed rule are 14.146, 14.147, 14.850, 14.851, 14.852, and 15.141.

List of Subjects in 24 CFR Part 950

Aged, Grant programs—housing and community development, Grant programs—Indians, Disability, Homeownership, Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

Accordingly, and under the authority of 42 U.S.C. 3535(d), title 24 of the Code of Federal Regulations would be amended by:

1. Redesignating part 905 as part 950;
2. Revising the table of contents for the newly designated part 950;
3. Revising subparts A—G, I, J, K, and M;
4. Reserving subpart Q; and

5. Adding a new subpart R, consisting of §§ 950.3001 through 950.3030, as follows:

PART 950—INDIAN HOUSING PROGRAMS

Subpart A—General

- Sec.
- 950.101 Applicability and scope.
 - 950.102 Definitions.
 - 950.110 Assistance from Indian Health Service and Bureau of Indian Affairs.
 - 950.115 Applicability of civil rights requirements.
 - 950.117 Displacement, relocation, and acquisition.
 - 950.120 Compliance with other Federal requirements.
 - 950.125 Establishment of IHAs pursuant to State law.
 - 950.126 Establishment of IHAs by Tribal ordinance.
 - 950.130 IHA Commissioners who are tenants or homebuyers.
 - 950.135 Administrative capability.

Subpart B—Procurement

- 950.160 Procurement standards.
- 950.165 Methods of procurement.
- 950.170 Other requirements applicable to development contracts.
- 950.172 Wage rates.
- 950.175 Indian preference requirements.
- 950.190 Insurance.

Subpart C—Development

- 950.200 Roles and responsibilities of Federal agencies.
- 950.205 Allocation.
- 950.210 Authority for proceeding without HUD approval.
- 950.215 Production methods.
- 950.220 Total development cost.
- 950.225 Application.
- 950.230 Project coordination.
- 950.235 Site selection criteria.
- 950.240 Types of interest in land.
- 950.245 Appraisals.
- 950.250 Site approval.
- 950.255 Design criteria.
- 950.260 IHA development program.
- 950.265 Construction and inspections.
- 950.270 Construction completion and settlement.
- 950.275 Warranty inspections and enforcement.
- 950.280 Correcting deficiencies.
- 950.285 Fiscal closeout.

Subpart D—Operation

- 950.301 Admission policies.
- 950.305 Federal selection preferences.
- 950.310 [Reserved].
- 950.315 Initial determination, verification, and reexamination of family income and composition.
- 950.320 Determination of rents and homebuyer payments.
- 950.325 Total tenant payment—Rental and Turnkey III programs.
- 950.335 Rent and homebuyer payment collection policy.
- 950.340 Grievance procedures and leases.
- 950.345 Maintenance and improvements.
- 950.346 Fire safety.

950.360 IHA employment practices.

Subpart E—Mutual Help Homeownership Opportunity Program

- 950.401 Scope and applicability.
- 950.413 Special provisions for development of an MH project.
- 950.416 Selection of MH homebuyers.
- 950.419 MH contribution.
- 950.422 Commencement of occupancy.
- 950.425 Inspections, responsibility for items covered by warranty.
- 950.426 Homebuyer payments—pre-1976 projects.
- 950.427 Homebuyer payments—post-1976 projects.
- 950.428 Maintenance, utilities, and use of home.
- 950.431 Operating reserve.
- 950.432 Operating budget submission and approval.
- 950.434 Operating subsidy.
- 950.437 Homebuyer reserves and accounts.
- 950.440 Purchase of home.
- 950.443 IHA homeownership financing.
- 950.446 Termination of MHO agreement.
- 950.449 Succession.
- 950.452 Miscellaneous.
- 950.453 Counseling of homebuyers.
- 950.455 Conversion of rental projects.
- 950.458 Conversion of Mutual Help projects to Rental Program.

Subpart F—Self-Help Development in the Mutual Help Homeownership Program

- 950.470 Purpose and applicability.
- 950.475 Basic requirements.
- 950.480 Self-Help agreement.
- 950.485 Application.
- 950.490 Development program.
- 950.495 Default of self-help agreement.

Subpart G—Turnkey III Program

- 950.501 Introduction.
- 950.503 Conversion of Turnkey III developments.
- 950.505 Eligibility and selection of Turnkey III homebuyers.
- 950.507 Homebuyer Ownership Opportunity Agreements (HOOA).
- 950.509 Responsibilities of homebuyer.
- 950.511 Homebuyers' association (HBA).
- 950.512 Homeowners' association (HOA).
- 950.513 Breakeven amount and application of monthly payments.
- 950.515 Monthly operating expense.
- 950.517 Earned Home Payments Account (EHPA).
- 950.519 Nonroutine Maintenance Reserve (NRMR).
- 950.521 Operating reserve.
- 950.523 Operating subsidy.
- 950.525 Purchase price and methods of purchase.
- 950.527 Payment upon resale at profit.
- 950.529 Termination of Homebuyer Ownership Opportunity Agreement.

Subpart H—Lead-Based Paint Poisoning Prevention

- 950.551 Purpose and applicability.
- 950.553 Testing and abatement applicable to development.
- 950.555 Testing and abatement applicable to modernization.
- 950.560 Notification.

- 950.565 Maintenance obligation; defective paint surfaces.
 950.570 Procedures involving EBLs.
 950.575 Compliance with Tribal, State and local laws.
 950.580 Monitoring and enforcement.

Subpart I—Modernization Program

General Provisions

- 950.600 Purpose and applicability.
 950.601 Allocation of funds under Section 14.
 950.602 Special requirements for Turnkey III and Mutual Help developments.
 950.603 Modernization and energy conservation standards.

Comprehensive Improvement Assistance Program (for IHAs That Own or Operate Fewer Than 250 Indian Housing Units)

- 950.609 Purpose.
 950.615 Eligible costs.
 950.618 Procedures for obtaining approval of a modernization program.
 950.624 Resident and homebuyer participation.
 950.635 Initiation of modernization activities.
 950.639 Fund requisitions.
 950.642 Contracting requirements.
 950.645 On-site inspections.
 950.648 Budget revisions.
 950.651 Progress reports.
 950.654 HUD review of IHA performance.
 950.657 Fiscal closeout.

Comprehensive Grant Program (for IHAs That Own or Operate 250 or More Indian Housing Units)

- 950.660 Purpose.
 950.666 Eligible costs.
 950.667 Reserve for emergencies and disasters.
 950.669 Allocation of assistance.
 950.672 Comprehensive Plan (including Five-Year Action Plan).
 950.675 HUD review and approval of Comprehensive Plan (including action plan).
 950.678 Annual Submission of activities and expenditures.
 950.681 Conduct of modernization activities.
 950.684 IHA Performance and Evaluation Report.
 950.687 HUD review of IHA performance.

Subpart J—Operating Subsidy

- 950.701 Purpose and applicability.
 950.705 Determination of amount of operating subsidy under PFS.
 950.710 Computation of allowable expense level.
 950.715 Computation of utilities expense level.
 950.720 Other costs.
 950.725 Projected operating income level.
 950.730 Adjustments.
 950.735 Transition funding for excessive high-cost IHAs.
 950.740 Operating reserves.
 950.745 Operating budget submission and approval.
 950.750 Payment procedure for operating subsidy under PFS.

- 950.755 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.
 950.760 Determining actual occupancy percentage.
 950.770 Comprehensive Occupancy Plan requirements.
 950.772 Financial management systems, monitoring and reporting.
 950.774 Operating subsidy eligibility for projects owned by IHAs in Alaska.

Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances

- 950.801 Purpose and applicability.
 Energy Audits and Energy Conservation Measures
 950.805 Requirements for energy audits.
 950.810 Order of funding.
 950.812 Funding.
 950.815 Energy conservation equipment and practices.
 950.822 Compliance schedule.
 950.825 Energy performance contracts.

Individual Metering of Utilities

- 950.840 Individually metered utilities.
 950.842 Benefit/cost analysis.
 950.844 Funding.
 950.845 Order of conversion.
 950.846 Actions affecting residents.
 950.849 Waivers for similar projects.
 950.850 Reevaluations of mastermeter systems.

Resident Utility Allowances

- 950.860 Applicability.
 950.865 Establishment of utility allowances by IHAs.
 950.867 Categories for establishment of allowances.
 950.869 Period for which allowances are established.
 950.870 Standards for allowances for utilities.
 950.872 Surcharges for excess consumption of IHA-furnished utilities.
 950.874 Review and revision of allowances.
 950.876 Individual relief.

Subpart L—Operation of Projects After Expiration of Initial ACC Term

- 950.901 Purpose and applicability.
 950.903 Continuing eligibility for operating subsidy; ACC extension.
 950.905 ACC extension in absence of current operating subsidy.
 950.907 HUD approval of disposition or demolition.

Subpart M—Disposition or Demolition of Projects

- 950.921 Purpose and applicability.
 950.923 General requirements for HUD approval of disposition or demolition.
 950.925 Resident organization opportunity to purchase.
 950.927 Specific criteria for HUD approval of disposition requests.
 950.928 Specific criteria for HUD approval of demolition requests.
 950.931 IHA application for HUD approval.
 950.933 Use of proceeds.
 950.935 Replacement housing plan.

Subpart N—Miscellaneous

- 950.950 Operating subsidy eligibility for projects owned by IHAs in Alaska.

Subpart O—Resident Management and Participation

- 950.960 Purpose.
 950.961 Applicability and scope.
 950.962 Definitions.
 950.963 HUD's role in activities under this subpart.
 950.964 Resident participation requirements.
 950.965 Resident management requirements.
 950.966 Continued IHA responsibility to HUD.
 950.967 Management specialist.
 950.969 Modernization assistance.
 950.970 Operating subsidy, preparation of operating budget, operating reserves and retention of excess revenues.
 950.971 Waiver of HUD requirements.
 950.972 Audit and administrative requirements.
 950.973 Technical assistance.

Subpart P—Section 5(h) Homeownership Program

- 950.1001 Purpose.
 950.1002 Applicability.
 950.1003 General authority for sale.
 950.1004 Fundamental criteria for HUD approval.
 950.1005 Resident consultation and involvement.
 950.1006 Property that may be sold.
 950.1007 Methods of sale and ownership.
 950.1008 Purchase eligibility and selection.
 950.1009 Counseling, training, and technical assistance.
 950.1010 Nonpurchasing residents.
 950.1011 Maintenance reserve.
 950.1012 Purchase prices and financing.
 950.1013 Protection against fraud and abuse.
 950.1014 Limitation of resale profit.
 950.1015 Use of sale proceeds.
 950.1016 Replacement housing.
 950.1017 Records, reports, and audits.
 950.1018 Submission and review of homeownership plan.
 950.1019 HUD approval and IHA-HUD implementing agreement.
 950.1020 Content of homeownership plan.
 950.1021 Supporting documentation.

Subpart Q—[Reserved]

Subpart R—Family Self Sufficiency

- 950.3001 Purpose, scope and applicability.
 950.3002 Program objectives.
 950.3003 Definitions.
 950.3004 Basic requirements of the FSS program.
 950.3011 Action Plan.
 950.3012 Program Coordinating Committee (PCC).
 950.3013 FSS family selection procedures.
 950.3014 On-site facilities.
 950.3020 Program implementation.
 950.3021 Administrative fees.
 950.3022 Contract of participation.
 950.3024 Total tenant payment and increases in family income.
 950.3025 FSS account.
 950.3030 Reporting.

Authority: 25 U.S.C. 450e(b); 42 U.S.C. 1437aa-1437ee and 3535(d).

Subpart A—General

§ 950.101 Applicability and scope.

(a) *General.* (1) Under title II of the United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (42 U.S.C. 1437aa, *et seq.*), the U.S. Department of Housing and Urban Development (HUD) provides financial and technical assistance to Indian Housing Authorities (IHAs), for the development and operation of low income housing projects in Indian areas. This part is applicable to such projects developed or operated by an IHA in an Indian area, as defined in § 950.102.

(2) If assistance under this part is not available to a low income family because the family desires housing in an area within which no IHA is authorized to provide housing, or if for any other reason a family desires housing assistance other than under this part, a family may seek housing assistance under other HUD programs: (See 24 CFR part 203, chapter VIII of this title, as well as the remainder of chapter IX of this title.)

(b) *Other HUD regulations and requirements.* The provisions of this part are a complete statement of HUD regulations affecting the development and operation of low income housing by IHAs except as supplemented by parts in other chapters of this title, which are referenced in this part.

§ 950.102 Definitions.

ACC expiration date. The last day of the term during which a particular Indian housing project is subject to all or any of the provisions of the ACC.

Act. The United States Housing Act of 1937 (42 U.S.C. 1437-1440).

Action plan. A plan of the actions to be funded by an IHA over a period of five years (including an IHA's proposed allocation of its modernization funds to a reserve established under § 950.666(a)(3)) to make the necessary physical and management improvements identified in the IHA's comprehensive plan under subpart I of this part. The plan shall be based upon HUD's and the IHA's best estimates of the funding reasonably expected to become available over the next five-year period. The action plan is updated annually to reflect a rolling five-year base.

Adjusted income. Annual income less the following allowances, determined in accordance with HUD instructions:

- (1) \$480 for each dependent;
- (2) \$400 for any elderly family;
- (3) For any family that is not an elderly family but has a handicapped or

disabled member other than the head of household or spouse, handicapped assistance expenses in excess of three percent of annual income, but this allowance may not exceed the employment income received by family members who are 18 years of age or older as a result of the assistance to the handicapped or disabled person;

(4) For any elderly family—
(i) That has no handicapped assistance expenses (as defined in this section), an allowance for medical expenses (as defined in this section) equal to the amount by which the medical expenses exceed three percent of annual income;

(ii) That has handicapped assistance expenses greater than or equal to three percent of annual income, an allowance for handicapped assistance expenses computed in accordance with paragraph (3) of this definition, plus an allowance for medical expenses that is equal to the family's medical expenses;

(iii) That has handicapped assistance expenses that are less than three percent of annual income, an allowance for combined handicapped assistance expenses and medical expenses that is equal to the amount by which the sum of these expenses exceeds three percent of annual income; and

(5) Child care expenses, as defined in this section; and

(6) Excessive travel expenses, not to exceed \$25 per family per week, for employment- or education-related travel.

Administration charge. In Mutual Help projects, the amount budgeted per-unit per-month for operating expense, exclusive of the cost of HUD-approved expenditures for which operating subsidy is being provided in accordance with § 950.434 (see § 950.427(c)).

Administrative capability assessment (ACA). An annual evaluation of the IHA's administrative capability to administer programs in compliance with the Act and all applicable HUD regulations, contracts, HUD handbooks, and other applicable requirements (see § 950.135).

Allowable expense level. In rental projects, the per-unit per-month dollar amount of expenses (excluding utilities, and expenses allowed under § 950.720) computed in accordance with § 950.710, which is used to compute the amount of operating subsidy.

Allowable utilities consumption level (AUCL). In rental projects, the amount of utilities expected to be consumed per-unit per-month by the IHA during the requested budget year, which is equal to the average amount consumed per-unit per-month during the rolling base period. After the end of the

requested budget year, the AUCL of the utility (ies) used for space heating will be adjusted by a change factor, which is defined in this section.

Annual contributions contract (ACC). A contract under the Act between HUD and the IHA containing the terms and conditions under which HUD assists the IHA in providing decent, safe, and sanitary housing for low income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization and/or operation of a low income housing project under the Act, and the IHA agrees to develop, modernize and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

Annual income. Annual income is the anticipated total income from all sources received by the family head and spouse (even if temporarily absent) and by each additional member of the family, including all net income derived from assets, for the 12-month period following the effective date of the initial determination or reexamination of income, exclusive of certain types of income as provided in paragraph (2) of this definition.

(1) Annual income includes, but is not limited to:

(i) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(ii) The net income from operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(iii) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (1)(ii) of this definition. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of

cash or assets invested by the family. Where the family has net family assets in excess of \$5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate as determined by HUD;

(iv) The full amount of periodic payments received from social security, annuities, insurance policies, retirement funds, pensions, disability or death benefits and other similar types of periodic receipts, including a lump-sum payment for the delayed start of a periodic payment;

(v) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay (but see paragraph (2)(iii) of this definition);

(vi) Welfare assistance. If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of:

(A) The amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities, plus

(B) The maximum amount that the welfare assistance agency could, in fact, allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under paragraph (1)(vi)(B) of this definition shall be the amount resulting from one application of the percentage;

(vii) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the dwelling; and

(viii) All regular pay, special pay and allowances of a member of the Armed Forces (but see paragraph (2)(vii) of this section).

(2) Annual income does not include the following:

(i) Income from employment of children (including foster children) under the age of 18 years;

(ii) Payments received for the care of foster children;

(iii) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (but see paragraph (1)(v) of this definition);

(iv) Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;

(v) Income of a live-in aide;

(vi) Amounts of educational scholarships paid directly to the student or to the educational institution, and amounts paid by the Government to a veteran, for use in meeting the costs of tuition, fees, books, equipment, materials, supplies, transportation and miscellaneous personal expenses of the student. Any amount of such scholarship or payment to a veteran that is made available for subsistence is to be included in income;

(vii) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire;

(viii) (A) Amounts received under training programs funded by HUD;

(B) Amounts received by a disabled person that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan for Achieving Self-Support (PASS); or

(C) Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program;

(ix) Temporary, nonrecurring or sporadic income (including gifts);

(x) For all initial determinations and reexaminations of income carried out on or after April 23, 1993, reparation payments paid by a foreign government pursuant to claims filed under the laws of that government by persons who were persecuted during the Nazi era; or

(xi) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under the United States Housing Act of 1937. A notice is published from time to time in the Federal Register and distributed to IHAs identifying the benefits that qualify for this exclusion. Updates will be published and distributed when necessary.

(3) If it is not feasible to anticipate a level of income over a 12-month period, the income anticipated for a shorter period may be annualized subject to a redetermination at the end of the shorter period.

(4) Any family receiving the reparation payments referred to in paragraph (2)(x) of this definition of Annual Income that has been requested

to repay assistance under this part as a result of receipt of such payments shall not be required to make further repayments on or after April 23, 1993.

Applicable surface. All intact and nonintact interior and exterior painted surfaces of a residential structure.

Assisted dwelling unit. A dwelling unit assisted under the programs covered by this part 950.

Base year. The IHA's fiscal year immediately preceding its first fiscal year under PFS.

Base-year expense level. The expense level (excluding utilities, audits, and certain other items) for the year, computed as provided in §950.710(a).

Benefit/cost analysis. For purposes of subpart K of this part, a direct comparison of the present worth of any savings generated by a given system during the expected useful life of the system or the estimated remaining life of the project, whichever is the shortest number of years, to the cost of the change.

BIA. The Bureau of Indian Affairs in the Department of the Interior.

Change factor. The ratio of the affected IHA fiscal year heating degree days (HDD) divided by the average annual HDD of the rolling base period. (Affected year HDD divided by rolling base period average HDD).

Checkmeter. A device for measuring utility consumption of each individual dwelling unit where the utility service is supplied through a mastermeter system. The IHA pays the utility supplier on the basis of the mastermeter readings and uses the checkmeters to determine whether and to what extent utility consumption of each dwelling unit is in excess of the allowance for IHA-furnished utilities, established in accordance with subpart K of this part.

Chewable surface. All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

Chief executive officer (CEO). The CEO of a unit of general local government means the elected official or the legally designated official who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the CEO of a unit of general local government are: the elected mayor of a municipality; the elected county executive of a county; the chairperson of a county commission or board in a county that has no elected county executive; or the official designated pursuant to law by the governing body of a unit of general local

government (e.g., Tribal administrator). The CEO for an Indian Tribe is the Tribal governing official.

Child care expenses. Amounts anticipated to be paid by the family for the care of children under 13 years of age during the period for which annual income is computed, but only where such care is necessary to enable a family member to be gainfully employed or to further his or her education only to the extent such amounts are not reimbursed. The amount deducted shall reflect reasonable charges for child care, and, in the case of child care necessary to permit employment, the amount deducted shall not exceed the amount of income received from such employment.

Common property. The non-dwelling structures and equipment, common areas, community facilities, and in some cases certain component parts of dwelling structures, which are contained in the development. It also may include common property as defined in a cooperative form of ownership, as determined by the IHA.

Comprehensive grant number. A grant number that is unique to each work statement (under subpart I of this part) covering the improvements to one or more existing Indian housing projects.

Comprehensive Plan. A plan prepared by an IHA, and approved by HUD, under the Comprehensive Grant Program setting forth all of the physical and management improvement needs of the IHA and its Indian housing developments, indicating the relative urgency of needs, and which includes the IHA's action plan, cost estimates, and required local government and IHA certifications. The Comprehensive Plan may be revised, as necessary, but must be revised at least every sixth year. (See subpart I of this part.)

Construction contract. The contract for construction in the case of the conventional method, or the contract of sale in the case of the Turnkey method.

Cooperation agreement. An agreement between an IHA and a local governing (taxing) body that assures exemption from real and personal property taxes and provides for payments in lieu of taxes by the IHA; and that provides for cooperation with respect to the development and operation of low income housing owned by the IHA.

Cost effective. As used in subpart K of this part, an energy conservation measure with a pay-back period of fifteen years or shorter shall be considered cost effective.

Current budget year. The IHA fiscal year in which the IHA is operating.

Defective lead-based paint surface. Paint on applicable surfaces having a

lead content of greater than or equal to 1 mg/cm², that is cracking, scaling, chipping, peeling or loose.

Defective paint surface. Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

Demolition. The razing in whole, or in part, of one or more permanent buildings of an Indian housing project.

Dependent. A member of the family household (excluding foster children) other than the family head or spouse, who is under 18 years of age or is a disabled person or handicapped person; or is a full-time student.

Deprogramming. Removal from the IHA's inventory under the ACC, pursuant to the IHA's formal request and HUD's approval, of a dwelling unit no longer used for dwelling purposes or a nondwelling structure or a unit used for nondwelling purposes that the IHA has determined will no longer be used for IHA purposes.

Development. Any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low income housing project.

Disabled person. A person who is under a disability as defined in section 223 of the Social Security Act (42 U.S.C. 423), or who has a developmental disability as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(7)).

Displaced person. A person displaced by governmental action, or a person whose dwelling has been extensively damaged or destroyed as a result of a disaster declared or otherwise formally recognized under Federal disaster relief laws.

Disposition. The conveyance or other transfer by the IHA, by sale or other transaction, of any interest in the real estate of an Indian housing project, excluding transfers of property described in § 950.921(b)(1)(i) through (vii).

Earned home payments account (EHPA). In the Turnkey III program (subpart G of this part), this account is established and maintained pursuant to § 950.517 by the IHA based on a portion of the homebuyer's required monthly payment. The EHPA should equal the IHA's estimate of the monthly cost for routine maintenance of the home.

Elderly family. A family whose head or spouse (or sole member) is an elderly, disabled, or handicapped person, as defined in this section. It may include two or more elderly, disabled or handicapped persons living together, or one or more of these persons living with one or more live-in aides, as defined in this section.

Elderly person. A person who is at least 62 years of age.

Elevated blood lead level or EBL. Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

Emergency Modernization (CIAP). A type of modernization program for a development that is limited to physical work items of an emergency nature, posing an immediate threat to the health or safety of residents or related to fire safety, which must be corrected within one year of CIAP funding approval.

Emergency work. Physical work items of an emergency nature, posing an immediate threat to the health or safety of residents, which must be completed within one year of funding. Under the Comprehensive Grant program, management improvements are not eligible as emergency work and, therefore, must be covered by the Comprehensive Plan (including the action plan), before the IHA may carry them out. See subpart I of this part.

Energy audit. A process carried out in accordance with subpart K of this part, which identifies and specifies the energy and cost savings that are estimated to result from installing or accomplishing an energy conservation measure.

Energy conservation measures (ECMs). Physical improvements or modifications that, if undertaken for a building or facility, or its equipment, are likely to reduce the cost of energy in an amount sufficient to recover the installation costs in a period no longer than the useful life of the measure. (See subpart K of this part.)

Family. Family includes but is not limited to:

(1) An elderly family or single person as defined in this part;

(2) The remaining member of a tenant family; and

(3) A displaced person.

Family project. Any project assisted under section 9 of the Act (42 U.S.C. 1437g) that is not an elderly project. For this purpose, an elderly project is one that was designated for occupancy by the elderly at its inception (and has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project to elderly families. A building within a mixed-use project that meets these qualifications shall, for purposes of this definition, be excluded from any family project, as shall zero bedroom units.

Federally recognized tribe. Any Indian tribe, band, nation or other

organized group or community, including any Alaska Native village or regional corporation or village as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

FFY. Federal Fiscal Year (starting with October 1, and ending with September 30, and designated by the calendar year in which it ends).

Force account labor. Labor directly employed by the IHA on either a permanent or a temporary basis.

Formula. The formula prescribed by HUD to be used in the Performance Funding System to estimate the cost of operating an average unit in an IHA's inventory. (See subpart J of this part.)

Formula expense level. The per-unit per-month dollar amount of expenses (excluding utilities and audits) computed under the formula, in accordance with § 950.710.

Full-time student. A person who is carrying a subject load that is considered full-time for day students under the standards and practices of the educational institution attended. An educational institution includes a vocational school with a diploma or certificate program, as well as an institution offering a college degree.

Handicapped assistance expenses. Reasonable expenses that are anticipated, during the period for which annual income is computed, for attendant care and auxiliary apparatus for a handicapped or disabled family member and that are necessary to enable a family member (including the handicapped or disabled member) to be employed, provided that the expenses are neither paid to a member of the family nor reimbursed by an outside source.

Handicapped person. A person having a physical or mental impairment that:

- (1) Is expected to be of long-continued and indefinite duration;
- (2) Substantially impedes his or her ability to live independently; and
- (3) Is of such a nature that such ability could be improved by more suitable housing conditions.

Hard costs. The physical improvement costs in development accounts 1450 through 1475 of the Low-Rent Housing Accounting Handbook, 7510.1, as revised, which include: Account 1450 Site Improvements; Account 1460 Dwelling Structures; Account 1465.1 Dwelling Equipment—Nonexpendable; Account 1470 Nondwelling Structures; and Account 1475 Nondwelling Equipment.

Heating degree days (HDD). The annual arithmetic sum of the positive differences (those under 65 degrees) of the average of the lowest and highest daily outside temperature in degrees Fahrenheit, subtracted from 65 degrees Fahrenheit.

High-risk. See 24 CFR 85.12 and § 950.135.

Home. A dwelling unit covered by a homebuyer agreement.

Homebuyer. The member or members of a low income family who have executed a homebuyer agreement with the IHA and who have not yet achieved homeownership.

Homebuyer agreement. A Mutual Help and Occupancy Agreement or a Turnkey III Homebuyer's Ownership Opportunity Agreement.

Homebuyer Association. In the Turnkey III program this means an incorporated organization (as defined in § 950.511) composed of all of the families who are entitled to occupancy pursuant to a Homebuyer Ownership Opportunity Agreement or who are homeowners.

Homeowner. A former homebuyer who has achieved ownership of his or her home and acquired title to the home.

HUD. The Department of Housing and Urban Development, including the Field Offices that have been delegated authority under the Act to perform functions pertaining to this part for the area in which the IHA is located.

HUD Field Office. The HUD Offices in Chicago, Oklahoma City, Denver, Phoenix, Seattle, and Anchorage, which have been delegated authority to administer programs under the United States Housing Act of 1937 for the area in which the IHA is located.

IHA homeownership financing. IHA financing for purchase of a home by an eligible homebuyer who gives the IHA a promissory note and mortgage for the balance of the purchase price.

IHS. The Indian Health Service in the Department of Health and Human Services.

Indian. Any person recognized as being an Indian or Alaska Native by an Indian Tribe, the Federal Government, or any State.

Indian area. The area within which an Indian Housing Authority is authorized to provide low income housing.

Indian Housing Authority (IHA). An entity that is authorized to engage in or assist in the development or operation of low income housing for Indians that is established either:

- (1) By exercise of the power of self-government of an Indian Tribe independent of State law; or

- (2) By operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Indian Tribe. Any Tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

Interdepartmental agreement. The agreement among HUD, the Department of Health and Human Services, the Department of Interior, and other appropriate agencies, concerning assistance to projects developed and operated under the Act.

Latent defect. A design or construction deficiency that could not reasonably have been foreseen by the IHA or the Office of Indian Programs.

Lead-based paint. A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1.0 mg/cm², or .5 percent by weight.

Live-in aide. A person who resides with an elderly, disabled, or handicapped person or persons and who:

- (1) Is determined by the IHA to be essential to the care and well-being of the person(s);
- (2) Is not obligated for support of the person(s); and
- (3) Would not be living in the unit except to provide necessary supportive services. (See definition of annual income for treatment of a live-in aide's income.)

Local inflation factor. The weighted average percentage increase in local government wages and salaries for the area in which the IHA is located and non-wage expenses based upon the implicit price deflator for State and local government purchases of goods and services. This weighted average percentage will be supplied by HUD. HUD anticipates that it will update the local inflation factor each year.

Low-income family. A family whose annual income does not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 80 percent of the median income for an Indian area on the basis of its finding that such variations are necessary because of the prevailing levels of construction costs or unusually high or lower family incomes.

Management capability. (1) An IHA has management capability if it is:

- (i) Not designated as High Risk under § 950.135; or
- (ii) Designated as High Risk, but has a reasonable prospect of acquiring management capability which may

include modernization-funded management improvements.

(2) An IHA may be considered for funding of non-emergency physical improvements where it is making reasonable progress toward meeting the goals established in its management improvement plan under § 950.135.

Management improvement plan. A document developed by the IHA in accordance with § 950.135 which specifies the actions to be taken, including timetables, to correct deficiencies identified as a result of a management assessment.

Mastermeter system. A utility distribution system in which an IHA is supplied utility service by a utility supplier through a meter or meters and the IHA then distributes the utility to its tenants.

Medical expenses. Those medical expenses, including medical insurance premiums, that are anticipated during the period for which annual income is computed, and that are not covered by insurance.

Meter loop. A device provided to accommodate future installation of a utility meter. (See subpart K of this part.)

Modernization capability. An IHA has modernization capability for CIAP if it is capable of effectively carrying out the proposed modernization improvements. Where an IHA does not have a funded modernization program in progress, HUD will determine whether the IHA has a reasonable prospect of acquiring modernization capability through hiring staff or contracting for assistance. (See § 950.135.)

Modernization funds. Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements.

Modernization program. An IHA's program for carrying out modernization, as set forth in the approved CIAP budget for modernization funds. (See subpart I (CIAP) of this part.)

Modernization project. The improvement of one or more existing Indian housing developments under a new number designated for that modernization program (CIAP). For each modernization project, HUD and the IHA shall enter into an ACC amendment, requiring low-income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

Monthly adjusted income. One twelfth of adjusted income.

Monthly Equity Payments Account (MEPA). A homebuyer account in the Mutual Help Homeownership

Opportunity program credited with the amount by which each required monthly payment exceeds the administration charge.

Monthly income. One twelfth of annual income.

MH. Mutual Help.

MH Construction Contract. A construction contract for an MH project, which shall be on a form prescribed by HUD.

MH Contribution. Land, labor, cash, materials, or equipment—or a combination of these—contributed toward the development cost of a project in accordance with a homebuyer's MHO Agreement, credit for which is to be used toward purchase of a home.

MH Program. The MH Homeownership Opportunity Program.

MHO Agreement. A Mutual Help and Occupancy Agreement between an IHA and a homebuyer.

Near elderly family. A family whose head or spouse (or sole member) is at least 50 years of age but below the age of 62 years.

Net family assets. Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment, excluding interests in Indian trust land and excluding equity accounts in HUD homeownership programs. The value of necessary items of personal property such as furniture and automobiles are excluded, and, in the case of a family in which any member is actively engaged in a business or farming operation, the assets that are a part of the business or farming operation are excluded. In cases where a trust fund, such as individual Indian monies held by the BIA, has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. In determining net family assets, IHAs shall include the value of any business or family assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application for the program or reexamination, as applicable, in excess of the consideration received therefor. In the case of a disposition as part of a separation or divorce settlement, the disposition will not be considered to be for less than fair market value if the applicant or tenant receives important consideration not measurable in dollar terms.

Nonroutine maintenance. (1) For purposes of the Turnkey III Program (Nonroutine Maintenance Reserve), nonroutine maintenance refers to infrequent and costly items of maintenance and replacement, including dwelling equipment such as a range or refrigerator, or major components such as heating or plumbing systems or a roof. Specifically excluded are maintenance expenses attributable to homebuyer negligence or to defective materials or workmanship.

(2) For purposes of the CIAP and Comprehensive Grant Modernization Programs under subpart I of this part and the applicability of wage rates, nonroutine maintenance refers to work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

NRMR. The nonroutine maintenance reserve account in the Turnkey III Program established and maintained in accordance with § 950.519.

Operating budget. The IHA's operating budget (HUD form 52564) and all related documents, required by HUD to be submitted pursuant to the ACC.

Operating subsidy. Annual contributions for IHA operations made by HUD under the authority of section 9 of the Act. (See subpart J of this part with respect to rental projects. See also § 950.434 (Mutual Help Operating Subsidy) and § 950.523 (Turnkey III Operating Subsidy).)

Other income. Income to the IHA other than dwelling rental income and income from investments, except that, for purposes of determining operating subsidy eligibility, the following items are excluded: Grants and gifts for operations, other than for utility expenses, received from Federal, State, and local governments, individuals or private organizations; amounts charged to tenants for repairs for which the IHA incurs an offsetting expense; and legal fees in connection with eviction proceedings, when those fees are lawfully charged to tenants.

Other Modernization (modernization other than emergency). A type of modernization program under the

Comprehensive Improvement Assistance Program (CIAP) for a development that includes one or more physical work items, where HUD determines that the physical improvements are necessary and sufficient to extend substantially the useful life of the development, and/or one or more management work items (including planning costs), and/or testing, professional risk assessments, interim containment, and abatement of lead-based paint.

Partnership process. A specific and ongoing process that is designed to ensure that residents, resident groups, and the IHA work in a cooperative and collaborative manner to develop, implement and monitor the CIAP or Comprehensive Grant Program. At a minimum, an IHA shall ensure that the partnership process incorporates full resident participation in each of the required program components.

Pay-back period. The number of years required to accumulate net savings to equal the cost of an energy conservation measure.

Performance funding system (PFS). The standards, policies and procedures established by HUD for determining the amount of operating subsidy an IHA is eligible to receive for its owned rental projects, based on the costs of operating a comparable well-managed project.

Pilot. Payment in lieu of taxes. Includes all payments made by an IHA to the local governing body (or other taxing jurisdiction) for the provision of certain municipal services, including that portion of payments in lieu of taxes which is to be applied as a reimbursement of payments of offsite utilities. The amount charged is determined by the cooperation agreement which is generally defined as 10 percent of shelter rent. Shelter rent is defined as dwelling rentals less total utility expenses.

Program reservation. A written notification by HUD to an IHA, which is not a legal obligation, but which expresses HUD's determination, subject to fulfillment by an IHA of all legal and administrative requirements within a stated time, that HUD will enter into a new or amended ACC covering the stated number of housing units, or such other number as is consistent with funding reserved by HUD for the project.

Project. Housing developed, acquired, or assisted by an IHA under the Act, and the improvement of this housing.

Project for elderly families. A rental project or portion of a rental project assisted under the U.S. Housing Act of 1937 that was designated for occupancy by the elderly at its inception (and that

has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project, or for a portion of the units in the project, to elderly families.

Project units. All dwelling units of an IHA's projects.

Projected operating income level. The per unit per month dollar amount of dwelling rental income plus nondwelling income, computed as provided in § 950.725.

Reasonable cost. Total unfunded hard cost needs for a development that do not exceed 90 percent of the computed total development cost limit for a new development with the same structure type and number and size of units in the market area.

Requested budget year. The budget year (fiscal year) of an IHA following the current budget year.

Resident groups. Democratically elected resident groups such as IHA-wide resident groups, area-wide resident groups, single development resident groups, or RMCs.

Retail service. Purchase of utility service by IHA tenants directly from the utility supplier.

Rolling base period. The 36-month period that ends 12 months before the beginning of the IHA requested budget year, which is used to determine the allowable utilities consumption level used to compute the utilities expense level.

Single person. A person who lives alone or intends to live alone, and who does not qualify as:

- (1) An elderly family;
- (2) A displaced person (as defined in this section); or
- (3) The remaining member of a tenant family.

Soft costs. The non-physical improvement costs, which exclude any costs in development accounts 1450 through 1475.

State. Any of the several States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and Indian Tribes.

Subsequent homebuyer. Any homebuyer other than the homebuyer who first occupies a home pursuant to an MHO agreement.

Substantial rehabilitation. A modernization program for a project that provides for all physical and management improvements needed to meet the modernization and energy conservation standards and to ensure long-term physical and social viability.

Successor homebuyer. A person eligible to become a homebuyer who has

been designated by a current homebuyer to succeed to an interest under a homeownership agreement in the event of the current homebuyer's death or mental incapacity.

Surcharge. The amount charged by the IHA to a tenant, in addition to the Tenant Rent, for consumption of utilities in excess of the allowance for IHA-furnished utilities or for estimated consumption attributable to tenant-owned major appliances or to optional functions of IHA-furnished equipment. Surcharges calculated pursuant to subpart K, based on estimated consumption where checkmeters have not been installed, are referred to as "scheduled surcharges."

Tenant-purchased utilities. Utilities purchased by the tenant directly from a utility supplier.

Tenant rent. The amount payable monthly by the family as rent to the IHA. Where all utilities (except telephone) and other essential housing services are supplied by the IHA, tenant rent equals total tenant payment. Where some or all utilities (except telephone) and other essential housing services are not supplied by the IHA and the cost thereof is not included in the amount paid as rent, tenant rent equals total tenant payment less the utility allowance.

Total development cost. The sum of all HUD-approved costs for a project including all undertakings necessary for administration, planning, site acquisition, demolition, construction or equipment and financing (including the payment of carrying charges), and for otherwise carrying out the development of the project. The maximum total development cost excludes offsite water and sewer facilities development costs; costs normally paid for by other entities, but included in the development cost budget for the project for contracting or accounting convenience; and any donations received from public or private sources.

Total tenant payment. The monthly amount calculated under subpart D of this part. Total tenant payment does not include any surcharge for excess utility consumption or other miscellaneous charges (see subpart K of this part).

Unit approved for deprogramming. (1) A dwelling unit for which HUD has approved the IHA's formal request to remove the dwelling unit from the IHA's inventory and the Annual Contributions Contract but for which removal, i.e. deprogramming, has not yet been completed; or

(2) A nondwelling structure or a dwelling unit used for nondwelling purposes which the IHA has determined will no longer be used for IHA purposes

and which HUD has approved for removal from the IHA's inventory and Annual Contributions Contract.

Unit months available. Project units multiplied by the number of months the project units are expected to be available for occupancy during a given IHA fiscal year. Except as provided in the following sentence, for purposes of this part, a unit is considered available for occupancy from the date on which the end of the initial operating period for the project is established until the time it is approved by HUD for deprogramming and is vacated or approved for nondwelling use. On or after July 1, 1991, a unit is not considered available for occupancy in any IHA Requested Budget Year if the unit is located in a vacant building in a project that HUD has determined is nonviable.

Utilities. For purposes of determining utility allowances, utilities include electricity, gas, heating fuel, water, sewerage service, septic tank pumping/maintenance, sewer system hookup charges (after development), and trash and garbage collection. Telephone service is not included as a utility. For purposes of IHA accounting, PFS and non-PFS, trash and garbage collection and maintenance and repair of any systems are considered maintenance expenses and not utility expenses.

Utilities expense level. The per-unit per-month dollar amount of utilities expense used in calculation of operating subsidy, as provided in § 950.715.

Utility allowance. An allowance for IHA-furnished utilities represents the maximum consumption units (e.g., kilowatt hours of electricity), that may be used by a dwelling unit without a surcharge against the tenant for excess consumption. An allowance for tenant-purchased utilities is a fixed dollar amount that is deducted from the total tenant payment otherwise chargeable to a tenant who has retail service, whether the charges are more or less than the amounts of the allowance. (See §§ 950.865 and 950.870.)

Utility reimbursement. The amount, if any, by which the utility allowance for tenant-purchased utilities for the unit, if applicable, exceeds the family's total tenant payment.

Very low-income family. A low-income family whose annual income does not exceed 50 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 50 percent of the median income for an Indian area on the basis of its finding that such variations are

necessary because of unusually high or low family incomes.

Welfare assistance. Welfare or other payments to families or individuals, based on need, that are made under programs funded, separately or jointly, by Federal, State or local governments.

Work item. Any separately identifiable unit of work constituting a part of a modernization program.

§ 950.110 Assistance from Indian Health Service and Bureau of Indian Affairs.

Because HUD assistance under this part is not limited to IHAs of federally recognized Tribes, provisions in this part relating to assistance from BIA or IHS, or to required approvals, actions or determinations by these agencies in connection with such assistance, are applicable only to projects undertaken by IHAs of federally recognized Tribes or by regional housing authorities created by Alaska state law. These projects shall be developed promptly and operated in accordance with the provisions of this part and the Interdepartmental Agreement.

§ 950.115 Applicability of civil rights requirements.

(a) *Indian Civil Rights Act.* (1) The Indian Civil Rights Act (title II of the Civil Rights Act of 1968, 25 U.S.C. 1301-1303) provides, among other things, that "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The Indian Civil Rights Act (ICRA) applies to any tribe, band, or other group of Indians subject to the jurisdiction of the United States in the exercise of recognized powers of self-government. The ICRA is applicable in all cases where an IHA has been established by exercise of Tribal powers of self-government.

(2) In the case of IHAs established pursuant to State law, determinations by HUD of the applicability of the ICRA on a case-by-case basis may consider such factors as the existence of recognized powers of self-government; the scope and jurisdiction of such powers; and the applicability of such powers to the area of operation of a particular IHA. Generally, determinations by HUD of the existence of recognized powers of self-government and the jurisdiction of such powers will be made in consultation with the Department of Interior-Bureau of Indian Affairs, and may consider applicable legislation, treaties and judicial decisions. The area of operation of an IHA may be determined by the jurisdiction of the

governing body creating the IHA, any limitations within the enabling legislation, and judicial decisions.

(3) Projects of IHAs subject to the ICRA shall be developed and operated in compliance with its provisions and all HUD regulations and handbooks thereunder.

(b) *Nonapplicability of Title VI, the Fair Housing Act, and title II of the Americans with Disabilities Act.* Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), which prohibits discrimination on the basis of race, color or national origin in federally assisted programs, the Fair Housing Act (42 U.S.C. 3601-3619), which prohibits discrimination based on race, color, religion, sex or national origin in the sale or rental of housing, and title II of the Americans with Disabilities Act (42 U.S.C. 12131) do not apply to IHAs established by exercise of a Tribe's powers of self-government. HUD regulations implementing Title VI and the Fair Housing Act (24 CFR parts 1 and 100) and 49 CFR part 24 which implements title II of the Americans with Disabilities Act shall not be applicable to development or operation of projects by such IHAs. Any determination by HUD of the applicability of Title VI, the Fair Housing Act and title II of the Americans with Disabilities Act on a case-by-case basis shall consider the applicability of the Indian Civil Rights Act under paragraph (a) of this section. Actions taken by an IHA to implement the statutory admission restriction in favor of Indian families in the MH program, as set forth in § 950.416, shall not be considered a violation of any provision of either Title VI, the Fair Housing Act, or title II of the Americans with Disabilities Act.

(c) *Indian Housing Act of 1988—Mutual Help program admissions.* For provisions generally limiting admission to the Mutual Help Homeownership Opportunity program to Indians and requiring findings of need for admission of non-Indians, see § 950.416.

(d) *Disability.* (1) Under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended, HUD is required to assure that no otherwise-qualified disabled person is excluded from participation, denied benefits, or discriminated against under any program or activity receiving Federal financial assistance, solely by reason of his or her disability. IHAs must comply with implementing instructions in 24 CFR part 8.

(2) The IHA shall comply with the Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157), and HUD

implementing regulations (24 CFR part 40).

(e) *Minority Business Enterprise Development and Women's Business Enterprise Policy.* Executive Orders 12432 (3 CFR, 1983 Comp., p. 198) and 12138 (3 CFR, 1979 Comp. p. 39), respectively, apply to Indian Housing Authorities.

§ 950.117 Displacement, relocation, and acquisition.

(a) *Minimizing displacement.*

Consistent with the other goals and objectives of this part, IHAs shall assure that they have taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of a project assisted under this part.

(b) *Temporary relocation.* Residents who will not be required to move permanently, but who must relocate temporarily (e.g., to permit rehabilitation), shall be provided:

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporary housing and any increase in monthly rent/utility costs.

(2) Appropriate advisory services, including reasonable advance written notice of:

(i) The date and approximate duration of the temporary relocation;

(ii) The location of the suitable, decent, safe and sanitary housing to be made available for the temporary period;

(iii) The terms and conditions under which the resident may lease and occupy a suitable, decent, safe, and sanitary dwelling in the development following its completion; and

(iv) The provisions of paragraph (b)(1) of this section.

(c) *Relocation assistance for displaced persons.* (1) A "displaced person" (defined in paragraph (g) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) (42 U.S.C. 4601-4655) and implementing regulations at 49 CFR part 24.

(2) A comparable Indian housing unit, project-based Section 8 housing or a privately-owned dwelling made affordable by a Section 8 Rental Certificate or Rental Voucher, may qualify as a comparable replacement dwelling for a person displaced from an Indian housing unit.

(d) *Real property acquisition requirements.* The acquisition of real

property for a development is subject to the URA and the requirements described in 49 CFR part 24, subpart B, whether the acquiring entity is organized under State law or Tribal law.

(e) *Appeals.* A person who disagrees with the IHA's determination concerning whether the person qualifies as a "displaced person," or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the IHA. A lower-income person who is dissatisfied with the IHA's determination on his or her appeal may submit a written request for review of that determination to the HUD Field Office.

(f) *Responsibility of IHA.* (1) The IHA shall certify (i.e., provide assurance of compliance, as required by 49 CFR part 24) that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section, and shall ensure such compliance notwithstanding any third party's contractual obligation to the IHA to comply with those provisions.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. However such assistance also may be paid from funds available from other sources.

(3) The IHA shall maintain records in sufficient detail to demonstrate compliance with the requirements of this section.

(g) *Definition of displaced person.* (1) For purposes of this section, the term "displaced person" means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property, permanently, as a direct result of acquisition, rehabilitation, demolition, or conversion of a unit to homeownership (Mutual Help Homeownership Opportunity (MH) Program) for a project assisted under this part or as a direct result of disposition in accordance with subpart M of this part. This includes any permanent, involuntary move for an assisted project including any permanent move from the development that is made:

(i) After notice to the person by the IHA or property owner to move permanently from the property, if the move occurs on or after:

(A) For the comprehensive improvement assistance program (CIAP) and the comprehensive grant program (CGP) under subpart I of this part, 45 calendar days from before;

(1) The IHA issues the invitation for bids for the project, or

(2) The start of force account work, whichever is applicable; or

(B) For the disposition or demolition of Indian housing under subpart M of this part, the date of HUD approval of the IHA's proposal; or

(C) For other projects subject to this section, the date HUD approves the site for the project; or, if HUD site approval is not required, the date the IHA approves the site for the project;

(ii) Before the date described in paragraph (g)(1)(i) of this section, if the IHA or HUD determines that the displacement resulted directly from acquisition, rehabilitation, demolition, or conversion for the assisted project; or

(iii) By a resident of a dwelling unit, if any one of the following three situations occurs:

(A) The resident moves after the "initiation of negotiations" and the move occurs before the resident is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same development, under reasonable terms and conditions, upon its completion. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the amount determined in accordance with § 950.325; or

(B) The resident is required to relocate temporarily, does not return to the development, and either:

(1) The resident is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, or

(2) Other conditions of the temporary relocation are not reasonable; or

(C) The resident is required to move to another dwelling unit in the same development but is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move, or other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (g)(1) of this section, a person does not qualify as a "displaced person" (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person has been evicted for serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable Federal, State, tribal, or local law, or other good cause, and HUD determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance;

(ii) The person moved into the property after the date described in paragraph (g)(1)(i) of this section and,

before commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated, or suffer a rent increase) and the fact that he or she will not qualify as a "displaced person" (or for assistance under this section) as a result of the project:

(iii) The person is ineligible under 49 CFR 24.2(g)(2); or

(iv) HUD determines that the person was not displaced as a direct result of acquisition, rehabilitation, demolition, or conversion for the project.

(3) The IHA may, at any time, ask HUD to determine whether a displacement is or would be covered by this section.

(b) *Definition of initiation of negotiations.* For purposes of determining the formula for computing the replacement housing assistance to be provided to a resident, the term "initiation of negotiations" means the following action:

(1) For the comprehensive improvement assistance program (CIAP) or comprehensive grant program (CGP) under subpart I of this part, 45 calendar days before:

(i) The IHA's issuance of the invitation for bids for the project; or

(ii) The start of force account work, whichever is applicable;

(2) For an IHA purchase through an arm's-length transaction as described in 49 CFR 24.101(a)(1), the seller's acceptance of the IHA's written offer to purchase the property;

(3) For an IHA purchase that does not qualify as an arm's-length transaction, the delivery of the initial written purchase offer from the IHA to the Owner of the property. However, if the IHA issues a notice of intent to acquire the property, and a person moves after that notice, but before the initial written purchase offer, the "initiation of negotiations" is the actual move of the person from the property;

(4) For disposition or demolition of Indian housing under subpart M of this part, HUD approval of the IHA's proposal; or

(5) For other programs under this part 950, the notice to the occupant that he or she must move permanently, or, if there is no notice, the person's actual move from the property.

(Approved by the Office of Management and Budget under control number 2506-0121)

§ 950.120 Compliance with other Federal requirements.

(a) *Environmental clearance.* Before approving a proposed development program or modernization project, HUD

will comply with the requirements of 24 CFR part 50.

(b) *Flood insurance protection.* HUD will not approve financial assistance for acquisition, construction, reconstruction, repair, or improvement of a building located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

(1) Flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(a)); and

(2) The community in which the area is situated is participating in the National Flood Insurance Program in accord with section 202(a) of the Act (42 U.S.C. 4106(a)), or less than a year has passed since FEMA notification regarding such flood hazards. For this purpose, the "community" is the jurisdiction, such as an Indian Tribe or authorized Tribal organization, an Alaska native village or authorized native organization, or a municipality or county, that has authority to adopt and enforce flood plain management regulations for the area.

(c) *Wage rates for laborers and mechanics.* (1) With respect to construction work on a project, including a modernization project (except for nonroutine maintenance work, as described in paragraph (2) of the definition of "nonroutine maintenance" in § 950.102), the IHA and its contractors shall pay not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a through 276a-5), to all laborers and mechanics who are employed by an IHA or its contractors for work or contracts over \$2,000.

(2) With respect to all maintenance work on a project, including nonroutine maintenance work (as described in paragraph (2) of the definition of "nonroutine maintenance" in § 950.102) on a modernization project, the IHA and its contractors shall pay not less than the wages prevailing in the locality, as determined or adopted (after a determination under State, Tribal or local law) by HUD pursuant to section 12 of the United States Housing Act of 1937 (42 U.S.C. 1437j), to all laborers and mechanics who are employed by an IHA or its contractors.

(3) Prevailing wage rates determined under State or Tribal law are inapplicable under the circumstances set out in § 950.172(b).

(d) *Professional and technical wage rates.* All architects, technical engineers, draftsmen and technicians employed in

the development of a project shall be paid not less than the wages prevailing in the locality, as determined or adopted (after a determination under applicable State, Tribal, or local law) by HUD.

(e) *Access to records: audits.* (1) HUD and the Comptroller General of the United States shall have access to all books, documents, papers, and other records that are pertinent to the activities carried out under this part, in order to make audit examinations, excerpts, and transcripts, in accordance with 24 CFR 85.42.

(2) IHAs that receive financial assistance under this part must comply with the audit requirements of 24 CFR part 44. If an IHA has failed to submit an acceptable audit on a timely basis in accordance with that part, HUD may arrange for, and pay the costs of, the audit. In such circumstances, HUD may withhold, from assistance otherwise payable to the IHA under this part, amounts sufficient to pay for the reasonable costs of conducting an acceptable audit, including, when appropriate, the reasonable costs of accounting services necessary to place the IHA's books and records into auditable condition. The costs to place the IHA's books and records into auditable condition do not generate additional subsidy eligibility under this part.

(f) *Uniform administrative requirements.* The Uniform Administrative Requirements for Grants and Cooperative Agreements to States, Local, and Federally Recognized Indian Tribal Governments, as set forth in 24 CFR part 85, are applicable to grants under this part, except as specified in this part. However, the provisions of 24 CFR 85.36 have been incorporated in the procurement subpart (subpart B) of this part.

(g) *Lead based paint poisoning prevention.* See 24 CFR part 35 and subpart H of this part.

(h) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act (16 U.S.C. 3501), no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(i) *Economic opportunities for low and very low-income persons.* IHAs shall comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the regulations in part 135, as provided in part 135, to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). (See also 24 CFR 950.170(c).)

§ 950.125 Establishment of IHAs pursuant to State law.

An IHA may be established pursuant to a State law that provides for the establishment of IHAs by State or federally recognized Indian tribes with all necessary legal powers to carry out low-income housing projects for Indians.

§ 950.126 Establishment of IHAs by Tribal ordinance.

(a) *Legal capacity of Tribe to establish IHA.* Where an Indian Tribe has governmental police power to promote the general welfare, including the power to create a housing authority, an IHA may be established by Tribal ordinance enacted by the governing body of the Tribe.

(b) *Form of ordinance.* The form of Tribal ordinance shall be determined by the Tribe and reviewed by the ONAP Administrator. The IHA must also demonstrate that it has the legal authority to develop, own, and operate a public housing project under the Act. A sample format will be provided by HUD.

(c) *Approval or review of ordinance.* HUD shall not enter into an undertaking for assistance to an IHA formed by Tribal ordinance unless such ordinance has been submitted to HUD, accompanied by evidence that the Tribe's enactment of the ordinance either has been approved by the Department of the Interior or has been reviewed and not objected to by that Department.

(d) *Submission to HUD of documents establishing IHA.* The Tribal ordinance, evidence of Department of the Interior approval or review, and the following documentation relating to the initial organization of the IHA shall be submitted to HUD prior to receiving financial assistance. This includes:

- (1) Certificate of appointment of Commissioners;
- (2) Commissioner's oath of office;
- (3) Notice of organization;
- (4) Consent to meeting;
- (5) Minutes of meeting;
- (6) Resolutions establishing the IHA, adopting the by-laws, adopting the seal, designating a regular place of meeting, and designating officers;
- (7) By-Laws;
- (8) Certificate of Secretary as to authenticity of documents; and
- (9) General certificate of Housing Authority.

§ 950.130 IHA Commissioners who are tenants or homebuyers.

(a) *Tenant or homebuyer commissioners.* No person shall be barred from serving on an IHA's Board

of Commissioners because he or she is a tenant or homebuyer in a housing project of the IHA. A Commissioner who is a tenant or homebuyer shall be entitled to participate fully in all meetings concerning matters that affect all of the tenants or homebuyers, even though such matters affect him or her as well. However, no such Commissioner shall be entitled or permitted to participate in or be present at any meeting (except in his or her capacity as a tenant or homebuyer), or be counted or treated as a member of the Board, concerning any matter involving his or her individual rights, obligations, or status as a tenant or homebuyer.

(b) *Commissioner as IHA employee.* A member of the IHA's Board of Commissioners shall not be eligible for employment by the IHA, except under extremely unusual circumstances where it is documented that no one except the commissioner is qualified for the position and where the HUD Field Office approves in advance of the hiring.

§ 950.135 Administrative capability.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA, including remote reviews, on-site limited and full reviews, audits, surveys, and a formal annual review or risk analysis assessment, as may be necessary or appropriate to make the determinations required by this section, taking into consideration all available evidence. HUD will evaluate an IHA's compliance in the areas of development, modernization, and operations, including such functions as administration, financial management, occupancy, and maintenance.

(b) *Obligation to maintain.* (1) An IHA must maintain administrative capability at all times throughout the term of the ACC. In order to be considered administratively capable, an IHA must administer the Indian housing program in accordance with applicable statutory requirements, HUD regulations, contracts, HUD handbooks and other program requirements with no serious deficiencies. If any of the following conditions exist, it shall be considered a serious deficiency:

(i) The IHA is not financially stable, based on the most recent Administrative Capability Assessment, annual audit, technical assistance visit, or other reliable information;

(ii) An audit, conducted in accordance with 24 CFR part 44 and with § 950.120, or HUD reviews (including monitoring findings) reveal deficiencies that HUD reasonably believes require corrective action and/or

that corrective actions are not taken in accordance with established timeframes;

(iii) The IHA has management systems that do not meet the standards as set forth in 24 CFR part 85, and the lack of such systems may result in mismanagement or misuse of Federal funds;

(iv) The IHA has not conformed to the terms and conditions of previous awards, including for new construction, the Comprehensive Improvement Assistance Program or the use of Operating Subsidies;

(v) The IHA lacks properly trained and competent personnel at key management positions of the IHA; or

(vi) The IHA is in violation of the terms of applicable statutes, regulations, Annual Contributions Contracts or handbooks.

(2) If an IHA has serious deficiencies, HUD shall take any or all of the following actions:

- (i) Issue a notice of deficiency;
- (ii) Issue a corrective action order; or
- (iii) Classify the IHA as "high risk" (see 24 CFR part 85).

(c) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in paragraph (b)(1) of this section, HUD may issue to the IHA a notice of deficiency, stating the specific program requirements that the IHA has violated and requesting the IHA to take appropriate action. The notification shall be in writing and contain the following:

(1) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(2) Recommended actions that may be taken by the IHA and a timeframe for completion;

(3) The documentation necessary for evidence that all actions have been completed.

(d) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies described in paragraph (b)(1) of this section, HUD may issue to the IHA a corrective action order. An order may be issued, whether or not a notice of deficiency previously has been issued with regard to the specific deficiency on which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements that the IHA has violated, and by specifying the corrective actions that must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, and

prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the ACC grant agreement.

(4) The order shall be in writing and shall contain the following:

(i) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(ii) The corrective action(s) that must be taken by the IHA and the time allowed for completing the corrective action(s);

(iii) The method of requesting reconsideration of the HUD action and the documentation necessary to evidence that all corrective actions have been completed.

(e) *Management improvement plan.*

(1) When an IHA receives a corrective action order, it must respond to the determination, in writing. This response must include a management improvement plan to correct existing deficiencies. The plan shall describe in detail the method to be used and the time schedule to be maintained, shall be approved by the IHA Board of Commissioners, and is subject to HUD approval.

(2) After receiving the response from the IHA, HUD may direct the IHA to take one or more of the following actions:

(i) Submit additional information: (A) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for the IHA having deficiencies, as described in paragraph (b)(1) of this section;

(B) Explaining any steps the IHA is taking to correct the deficiencies;

(C) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable statutes, regulations, or program requirements;

(ii) Submit schedules for completing the work identified in the MIP;

(iii) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's MIP;

(iv) Not incur financial obligations, or to suspend payments for one or more activities;

(v) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended; or

(vi) Take such other corrective actions as HUD determines appropriate to correct the IHA deficiencies.

(3) HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the management improvement plan.

(4) If the IHA does not satisfy the terms of the plan or does not act in good faith to meet the timeframes included in its MIP, HUD may impose additional restrictions. In addition, existing projects may be terminated, or other action may be instituted, as appropriate.

(f) *High risk determination.* An IHA may be classified as "high risk" and determined ineligible for certain types of future funding related to the classification of risk, or may be determined eligible for future funding but subject to special conditions or restrictions corresponding to the high risk classification. A corrective action order listing the specific violation shall accompany the "high risk" designation.

(1) If an IHA is determined to be high risk, the conditions that form the basis for that determination shall be sufficiently serious to warrant a determination to exclude the IHA from future funding of a particular type. The determination of high risk shall state the cause for that finding.

(2) An IHA may continue to be eligible for funding despite a finding that it is high risk—subject to special conditions and/or restrictions corresponding to the deficiencies found—if it has submitted a management improvement plan that was approved by HUD, and it has exhibited substantial compliance with the plan or a good faith effort to comply with the plan. If HUD determines that it is necessary to impose special conditions or restrictions, it will notify the IHA in writing of the applicable conditions or restrictions. One or more of the following special conditions or restrictions may be imposed:

(i) Submission to HUD of additional documentation;

(ii) Submission to HUD of additional or more detailed financial reports;

(iii) Additional project monitoring from the HUD Field Office;

(iv) Additional requirements for technical assistance, from HUD or another entity approved by HUD;

(v) Establishing additional approvals by HUD;

(vi) Withholding some or all of the IHA's grant;

(vii) Declaring a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(viii) Any other sanction authorized by law or regulation.

(g) *Appeals.* (1) An IHA may appeal a corrective action order or a determination of high risk status to the local HUD Administrator, Office of Native American Programs (ONAP). All appeals must be made in writing, within 30 calendar days of notice to the IHA of the HUD action and must state clearly any justification or evidence that the action is unwarranted or too severe. If an appeal is filed concerning one or more action(s), the action(s) shall not take effect until HUD makes a final determination on the appeal or notifies the IHA that special circumstances exist that warrant giving immediate effect to the announced HUD action. The HUD Administrator must respond to the appeal within 30 days of receipt of the appeal.

(2) An IHA may appeal a decision of the Administrator to the ONAP, Headquarters, only if the case involves actions related to a determination of ineligibility of funding for the upcoming funding cycle. An appeal of the Administrator's decision must be made to ONAP, Headquarters in writing, stating the justification or evidence, and must be received within 21 days of the date of the Administrator's decision. Decisions reviewed by Headquarters will be evaluated based on the facts as presented to the Administrator and on any aggravating or extenuating circumstances.

(3) The IHA's Board of Commissioners must notify the Tribal government of HUD's final determination to withhold or suspend funds or declare a breach of the ACC grant agreement, as well as the basis for, and consequences resulting from, such a determination.

Subpart B—Procurement

§ 950.160 Procurement standards.

(a) *HUD standards.* (1) *Applicability.* This subpart sets forth Federal requirements to be followed by IHAs in the procurement of services, supplies, and goods.

(2) *Contracting authorization.* An IHA may execute contracts without HUD approval for the procurement of work, materials, equipment and/or professional services, in accordance with paragraph (a)(3)(ii) of this section. Before the execution of contracts, the IHA Board of Commissioners will insure that systems are in place to ensure program requirements are satisfied before the execution of contracts and will periodically review compliance with such systems.

(3) *Limitations.* (i) An IHA shall not award a contract for the project until the prospective contractor has demonstrated, to the satisfaction of the

IHA, the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the contract. The IHA shall not award a contract to a person or firm on the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* compiled, maintained and distributed by the General Services Administration (GSA) or to a person or firm that is subject to a limited denial of participation issued by the HUD Office of Native American Programs. (See 24 CFR part 24.)

(ii) The IHA may execute or approve any agreement or contract for personnel, management, legal, or other services with any person or firm without the prior written approval of HUD, except under the following circumstances:

(A) Where the term of the agreement or contract (including renewal) is in excess of two years; or

(B) Where the amount of the agreement or contract is in excess of the amount included for such purpose in the HUD-approved development cost budget, or operating budget or an amount specified from time to time by HUD, as the case may be; or

(C) Where the agreement or contract is for legal or other services in connection with litigation if the estimated cost exceeds \$25,000; or

(D) For contracts in excess of \$25,000 in the aggregate where the IHA proposes to award a contract based upon a single bid or proposal received.

(4) *Records.* An IHA shall maintain records sufficient to detail the significant history of a procurement. The IHA shall maintain evidence in its files:

(i) That the solicitation and award procedures were conducted in compliance with State, Tribal, or local laws and Federal requirements, including requirements for Indian preference and wage rates;

(ii) That the award does not exceed the approved budget amount and is not being made on the basis of a single bid or proposal; and

(iii) That the IHA reviewed the contractor's qualifications; checked to ensure that the contractor is not listed on the GSA *List of Parties Excluded from Federal Procurement and Nonprocurement Programs*; and determined that the contractor has the capacity to successfully complete the work or services under the terms and conditions of the contract. This determination shall consider the contractor's record of past performance, integrity, compliance with public policy, and financial and technical resources.

(5) *Contract administration.* An IHA is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement.

(6) *Competition.* All procurement transactions must be conducted in a manner providing full and open competition.

(7) *Contract cost and price.* An IHA must perform a cost or price analysis in connection with every procurement action, including contract modifications.

(b) *IHA standards—(1) IHA procedures.* Each IHA shall adopt, promulgate, and comply with, rules or regulations for the procurement and administration of supplies, materials, services and equipment in connection with the development and operation of projects. Upon adoption or modification, the IHA will promptly furnish a copy of these rules or regulations to HUD. These rules or regulations shall contain provisions on at least the following subjects:

(i) Procedures to ensure that all procurement transactions are conducted in a full and open competitive manner, consistent with the standards of 24 CFR 85.36;

(ii) Identification (by position title) of IHA officials authorized to enter into and approve contracts on a competitive basis as authorized by 24 CFR 85.36(d)(4);

(iii) Procedures for inventory control;

(iv) Procedures for storage and protection of goods and supplies;

(v) Procedures for issuance of, or other disposition of, supplies and equipment;

(vi) Procedures for implementing Indian preference requirements;

(vii) Procedures for handling complaints and protests regarding procurement;

(viii) Standards of conduct governing IHA directors, board members, officers and employees; and

(ix) Conflict of interest provisions governing directors, officers, employees, contractors/developers and others doing business with the IHA.

(2) *Contract administration system.* An IHA shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts and purchase orders.

(c) *Government-wide contract requirements.* A HUD regulation found at 24 CFR part 85 embodies government-wide administrative requirements for grants to State, local and Federally recognized Indian Tribal governments (including grants received by IHAs). The

contract provisions listed in 24 CFR 85.36(i) of that regulation are to be included in any IHA contracts.

§ 950.165 Methods of procurement.

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than \$25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(b) *Procurement by sealed bids (Invitations for Bid (IFB)).* Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 950.165(b)(1) apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(c) *Procurement by competitive proposals (Request for Proposals (RFP)).* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when

conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(2) Proposals will be solicited from an adequate number of qualified sources;

(3) IHAs will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) IHAs may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(d) *Procurement by noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or where after solicitation of a number of sources, competition is determined inadequate.

(1) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(iii) HUD authorizes noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(2) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

§ 950.170 Other requirements applicable to development contracts.

(a) *Bonding requirements.* For construction contracts for more than \$100,000, each contractor shall be required to provide bid guarantees and

adequate assurance of performance and payment acceptable to HUD in accordance with 24 CFR 85.36(h). The following methods may be used to provide performance and payment assurance:

(1) Performance and payment bonds for 100 percent of the total contract price.

(2) Deposit with the IHA of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk.

(3) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the IHA, subject to reduction during the warranty period commensurate with potential risk.

(4) Letter of credit for 10 percent of the total contract price and compliance with the procedures for monitoring of disbursements by the contractor. In the case of a Mutual Help project, the term total contract price as used with respect to each of the above assurance methods includes the value of all Mutual Help contributions for work, materials, or equipment to be provided to the contractor for use in performing the contract work.

(b) *Executive Order 11246 (equal employment opportunity).* Contracts for construction work in connection with Projects under this part are subject to Executive Order 11246 (3 CFR, 1964-65 Comp., p. 339), and Executive Order 11375 (3 CFR, 1966-70 Comp., p. 684), and to applicable implementing regulations (24 CFR part 130; 41 CFR chapter 60), rules, and orders of HUD and the Office of Federal Contract Compliance Programs of the Department of Labor. Executive Order 11246 prohibits discrimination and requires affirmative action to ensure that employees or applicants for employment are treated without regard to their race, color, religion, sex, or national origin. Compliance with E.O. 11246, and related regulations, orders and requirements shall be to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act.

(c) *Local area residents.* In accordance with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the implementing regulations in 24 CFR part 135, IHAs, their contractors and subcontractors shall make best efforts, consistent with existing Federal, State, and local laws and regulations (including section 7(b) of the Indian Self-Determination and Education Assistance Act, to give low-

and very low-income persons the training and employment opportunities generated by section 3 covered assistance (as this term is defined in 24 CFR 135.7) and to give section 3 business concerns the contracting opportunities generated by section 3 covered assistance.

§ 950.172 Wage rates.

(a) *Determination of prevailing wage rates.* For the applicable method of determination of the prevailing wage rates to be paid laborers and mechanics, see § 950.120(c).

(b) *Preemption of prevailing wage rates.* (1) A prevailing wage rate determined under State or Tribal law shall be inapplicable to a contract or IHA-performed work item for the development, maintenance or modernization of a project whenever:

(i) The contract or the work item is otherwise subject to State or Tribal law requiring the payment of wage rates determined by a State, local, or Tribal government or agency to be prevailing and is for a project assisted with funds for low-income housing under the Act; and

(ii) The wage rate (the basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed in the development, maintenance, or improvement of a project exceeds whichever of the following Federal wage rates is applicable:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, et seq.) to be prevailing in the locality with respect to such trade;

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(D) The wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(2) For the purpose of ascertaining whether a wage rate determined under State or Tribal law for a trade or position exceeds the Federal wage rate:

(i) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or Tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the

Secretary of Labor or apprentice or trainee wage rate; and

(ii) Where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or Tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(3) Whenever paragraph (b)(1)(i) of this section is applicable:

(i) Any solicitation issued by the IHA and any contract executed by the IHA for development, maintenance or modernization of the project shall include a statement as prescribed in this paragraph and failure to include this statement may constitute grounds for requiring re-solicitation. The statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract must be included whenever either of the following occurs:

(A) Such nonfederal prevailing wage rate exceeds:

(1) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*) to be prevailing in the locality with respect to such trade;

(2) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or

(3) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(B) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(ii) The IHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section to any of its own employees who may be engaged in the development, maintenance or modernization of the project; and

(iii) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section shall be enforced against the IHA or any of its contractors or subcontractors with respect to employees engaged in the

contract or IHA-performed work item for development, maintenance or modernization of the project.

(4) Nothing in paragraph (b) of this section shall affect the applicability of any wage rate established in a collective bargaining agreement with an IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (b)(1)(ii) of this section, nor does paragraph (b) of this section impose a ceiling on wage rates an IHA or its contractors or subcontractors may choose to pay independent of State law.

(5) The provisions of paragraph (b) of this section shall apply to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of an IHA on or after October 6, 1988.

§ 950.175 Indian preference requirements.

(a) *Applicability.* HUD has determined that grants under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)), which requires that, to the greatest extent feasible:

(1) Preference and opportunities for training and employment shall be given to Indians; and

(2) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(b) *Definitions.* Indian organizations and Indian-owned economic enterprises include both of the following:

(1) Any economic enterprise as defined in section 3(e) of the Indian Financing Act of 1974 (25 U.S.C. 1452); that is, "any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit provided that such Indian ownership and control shall constitute not less than 51 percent of the enterprise"; and

(2) Any "Tribal organizations" as defined in section 4(c) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 1453); that is, "the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organizations and which includes the maximum participation of Indians in all phases of its activities."

(c) *Preference employment and training.* To the greatest extent feasible, IHAs and their contractors and

subcontractors shall give preference and opportunities for training and employment in connection with the administration of grants awarded under this part to Indians and Alaskan natives.

(d) *Preference in contracting.* To the greatest extent feasible, IHAs shall give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises.

(1) Each IHA shall: (i) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(ii) Use a two-stage preference procedure, as follows:

(A) *Stage 1.* Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement limited to Indian-owned firms.

(B) *Stage 2.* If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises; or

(iii) Develop and incorporate into their procurement policy, subject to HUD Field Office one-time approval, the IHA's method of providing preference. In no instance shall HUD approve a method which provides preference based upon affiliation or membership in a particular tribe or group of tribes.

(2) If the IHA selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or a proposal to perform the contract at a reasonable cost, then the IHA shall:

(i) Re-compete the contract, using any of the methods described in paragraph (e)(1) of this section; or

(ii) Re-compete the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(iii) If only one bid or proposal is received, request Field Office review and approval of the proposed contract and related procurement documents, in accordance with 24 CFR 85.36, in order to award the contract to the single source.

(3) Procurements that are within the dollar limitations established for small purchases under 24 CFR 85.36(d)(1) need not follow the formal requirements for public announcement and advertising for bids or proposals as provided in paragraph (d)(1) of this section. However, an IHA small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(4) All preferences shall be publicly announced in the advertisement and in the solicitation and the contract documents.

(5) An IHA, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. IHAs may require prospective contractors to submit information prior to submitting a bid or proposal, or at the time of submission. Information requested by the IHA may include but is not limited to the following:

(i) Evidence showing fully the extent of Indian ownership, control, and interest;

(ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; and management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(iii) Evidence sufficient to demonstrate to the satisfaction of the IHA that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(6) The IHA shall incorporate the following clause (referred to as the Section 7(b) clause) in each contract awarded in connection with a project funded under this part:

(i) The work to be performed under this contract is on a project subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (Indian Act). Section 7(b) requires that to the greatest extent feasible:

(A) Preferences and opportunities for training and employment shall be given to Indians, and

(B) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(ii) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.

(iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians and Alaskan natives.

(iv) The contractor shall include this Section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the IHA, take

appropriate action pursuant to the subcontract upon a finding by the IHA or HUD that the subcontractor has violated the Section 7(b) clause of the Indian Act.

(e) *Additional Indian preference requirements.* An IHA may, with prior HUD approval, provide for additional Indian preference requirements as conditions for the award of, or in the terms of, any contract in connection with a project funded under this part. The additional Indian preference requirements shall be consistent with the objectives of the Section 7(b) clause of the Indian Act and shall not result in a significantly higher cost or greater risk of non-performance or longer period of performance. The additional Indian preference requirements permitted by this part do not include the imposition of geographic preferences or restrictions to the procurement process.

(f) *Complaint procedures.* The following complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this subpart, including alternate methods enacted and approved in the manner described in this subpart.

(1) Each complaint shall be in writing, signed, and filed with the IHA.

(2) A complaint must be filed with the IHA no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the IHA shall promptly stamp the date and time of receipt upon the complaint, and immediately acknowledge its receipt.

(4) Within 20 calendar days of receipt of a complaint, the IHA shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. The IHA shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of submittal of the complaint to the IHA. The decision of the IHA shall constitute final administrative action on the complaint.

§ 950.190 Insurance.

(a) *Purpose.* This section implements policies concerning insurance coverage required under the Annual Contributions Contract (ACC) or Mutual Help Annual Contributions Contract (MHACC) between HUD and an IHA. These contracts require (in section 305 of the ACC and Article IX of the MHACC) that IHAs maintain specified insurance coverage for property and casualty losses that would jeopardize the financial stability of the IHAs. The insurance coverage is required to be obtained under procedures that provide

"for open and competitive bidding."

The HUD Appropriations Act for Fiscal Year 1992 (Pub.L. 102-368) provided that an IHA could purchase insurance coverage without regard to competitive selection procedures when it purchases it from a nonprofit insurance entity owned and controlled by IHAs approved by HUD in accordance with standards established by regulation. This section specifies the standards.

(b) *Method of selection of insurance coverage.* While 24 CFR part 85 requires that grantees solicit full and open competition for their procurements, the HUD Appropriations Act for Fiscal Year 1992 (Pub.L. 102-368) provides an exception to this requirement. IHAs are authorized to obtain any line of insurance from a nonprofit insurance entity that is owned and controlled by IHAs and approved by HUD in accordance with this section, without regard to competitive selection procedures. Procurement of insurance from other entities is subject to competitive selection procedures.

(c) *Approval of a nonprofit insurance entity.* Under the following conditions, HUD will approve a nonprofit self-funded insurance entity created by IHAs that limits participation to IHAs (and to nonprofit entities associated with IHAs that engage in activities or perform functions only for housing authorities or housing authority residents):

(1) An insurance company (including a risk retention group).

(i) The insurance company maintains a current license or is authorized to do business in the State or Tribal area by the State Insurance Commissioner or Indian Tribal governing body and has submitted documentation of this authority to HUD and

(ii) The insurance company has not been suspended from providing insurance coverage in the State or Tribal area or been suspended or debarred from doing business with the federal government. The insurance company is obligated to send to HUD a copy of any action taken by the authorizing official to withdraw the license or authorization.

(2) An entity not organized as an insurance company.

(i) The entity has competent underwriting staff (hired directly or engaged by contract with a third party), as evidenced by professionals with an average of at least five years of experience in large risk (exceeding \$100,000 in annual premiums) commercial underwriting or at least five years of experience in the underwriting of risks for public entity risk pools. This standard may be satisfied by submission of evidence of competent underwriting

staff, including copies of resumes of underwriting staff for the entity;

(ii) The entity has efficient and qualified management (hired directly or engaged by contract with a third party), as evidenced by the report submitted to HUD in accordance with paragraph (d)(3) of this section and by having at least one senior staff person who has a minimum of five years of experience:

(A) At the management level of Vice President of a property/casualty insurance entity;

(B) As a senior branch manager of a branch office with annual property/casualty premiums exceeding \$5 million; or

(C) As a senior manager of a public entity risk pool. Documentation for this standard must include copies of resumes of key management personnel responsible for oversight and for the day-to-day operation of the entity;

(iii) The entity maintains internal controls and cost containment measures, as evidenced by an annual budget;

(iv) The entity maintains sound investments consistent with:

(A) The State insurance commissioner's requirements for licensed insurance companies, or other State statutory requirements controlling investments of public entities in the State in which the entity is organized, investing only in assets that qualify as "admitted assets"; or

(B) Any applicable provisions of Indian Tribal law concerning investments, in the case of an IHA that is not subject to such State law;

(v) The entity maintains adequate surplus and reserves for undischarged liabilities of all types, as evidenced by a current audited financial statement and an actuarial review conducted in accordance with paragraph (d) of this section; and

(vi) Upon application for initial approval, the entity has proper organizational documentation, as evidenced by copies of the articles of incorporation, by-laws, business plans, copies of contracts with third party administrators, and an opinion from legal counsel that establishment of the entity conforms with all legal requirements under Federal and State, or Tribal law. Any material changes made to these documents after initial approval must be submitted for review and approval before becoming effective.

(d) *Professional evaluations of performance.* Audits and actuarial reviews are required to be prepared and submitted annually to the HUD Office of Public and Indian Housing, for review and appropriate action, by nonprofit insurance entities that are not insurance

companies approved under paragraph (c)(1) of this section. Selection of entities to perform such reviews shall comply with the competitive requirements of 24 CFR 85.36. In addition, an evaluation of other management factors is required to be performed by an insurance professional every three years. For fiscal years ending on or after December 31, 1993, the initial audit, actuarial review, and insurance management review required for a nonprofit insurance entity must be submitted to HUD within 90 days after the end of entity's fiscal year.

(1) The annual financial statement prepared in accordance with generally accepted accounting principles (including any supplementary data required by GASB 10) is to be audited by an independent auditor (see 24 CFR part 44), in accordance with generally accepted auditing standards. The independent auditor shall express an opinion on whether the entity's financial statement is presented fairly in accordance with generally accepted accounting principles. A copy of this audit must be submitted to HUD.

(2) The actuarial review must be done consistent with requirements established by the National Association of Insurance Commissioners and must be conducted by an independent property/casualty actuary who is an Associate or Fellow of a recognized professional actuarial organization, such as the Casualty Actuary Society. The report issued, a copy of which must be submitted to HUD, must include an opinion on any over or under reserving and the adequacy of the reserves maintained for the open claims and for incurred but unreported claims.

(3) A review must be conducted, a copy of which must be submitted to HUD, by an independent insurance consulting firm that has at least one person on staff who has received the professional designation of chartered property/casualty underwriter (CPCU), associate in risk management (ARM), of associate in claims (AIC), of the following:

(i) Efficiency of any Third Party Administrator;

(ii) Timeliness of the claim payments and reserving practices; and

(iii) The adequacy of reinsurance coverage.

(e) *Revocation of approval of a nonprofit insurance entity.* HUD may revoke its approval of a nonprofit insurance entity under this section when it no longer meets the requirements of this section. The nonprofit insurance entity will be notified in writing of the proposed revocation of its approval, and the

manner and time in which to request a hearing to challenge the determination. The procedure to be followed is specified in 24 CFR part 26.

Subpart C—Development

§ 950.200 Roles and responsibilities of Federal agencies.

HUD, IHS, BIA, and other appropriate agencies shall coordinate functions in accordance with the Interdepartmental Agreement. HUD shall take the lead role in any area specifically related to the construction of Indian housing under this part.

§ 950.205 Allocation.

HUD will allocate funds to Indian Field Offices using a systematic process that considers the relative need for housing in each HUD area or other geographic area, based on the most recent and reliable data available. (See 24 CFR part 791, subpart D.)

§ 950.210 Authority for proceeding without HUD approval.

(a) *IHA authority to proceed.* An IHA may proceed with development functions without obtaining HUD approval as otherwise specified in this part.

(b) *Rescinding authorization.* At any time during the development process, HUD may make a determination that an IHA, due to performance deficiencies, shall obtain HUD approval of additional processing steps. If such a determination is made, HUD shall explain in writing the reasons for the determination and specify any processing steps which are subject to additional technical assistance and prior approval by HUD. Processing under this "assisted" method of development may result from:

(1) A request from an IHA to receive additional assistance in the development process but only to the extent that HUD agrees that such assistance is necessary and has the resources available to provide such assistance;

(2) The result of monitoring an IHA's development performance pursuant to § 950.135. When identified deficiencies are corrected to the satisfaction of HUD, the IHA's development processing will return to the "standard" method of development or, with the agreement of the IHA and HUD, may continue to be processed under the "assisted" method of development in accordance with § 950.210(b).

(3) The IHA staff is inexperienced in or has had no recent experience in the development of new housing.

§ 950.215 Production methods.

Choice and approval of production method. The IHA may utilize any production method or combination of production methods to develop its projects as long as the production method(s) is not in conflict with the procurement requirements of 24 CFR 85.36 and subpart B of this part. The IHA shall advise HUD on the application for a project of its choice of production methods. Prior HUD approval is required if the method selected is force account or if the IHA proposes to utilize a noncompetitive procurement method. If HUD disapproves the IHA's preferred development method, it will furnish a statement of its reasons to the IHA. Historically, production methods utilized in the Indian Housing program are:

(a) *Conventional method.* Under the Conventional method, the IHA plans the project and prepares drawings and specifications. The IHA solicits competitive bids through public advertisement and awards the contract to the lowest responsible bidder.

(b) *Turnkey method.* Under the Turnkey method, the IHA advertises for developers to submit proposals to build a project described in the IHA's invitation for proposals. The invitation for proposals may prescribe the sites to be used. The IHA evaluates the proposals and selects the best proposal after considering price, design, site, the developer's experience and other evidence of the developer's ability to complete the project. Upon completion of the project (or stages thereof) in accordance with the contract of sale, the IHA purchases the project (or stage) from the developer.

(c) *Modified Turnkey.* Under this modified method, the procedure is similar to the conventional method, except that the developer/contractor usually receives no progress payments from the IHA and is responsible for acceptable completion before receiving any payment from the IHA.

(d) *Self-Help.* The Self-Help method is applicable only to the Mutual Help Homeownership Opportunity program. Under this method, with technical assistance and supervision and materials provided by the IHA, a small group of families build a substantial portion of the homes to be purchased by the families in the group. Their work is supplemented by skilled labor obtained under contract. See subpart F of this part for more details concerning this method.

(e) *Acquisition of existing housing (with or without rehabilitation).* Under the Acquisition method, the IHA

purchases existing housing that may need only minor repairs or that may require substantial rehabilitation. Repair or rehabilitation may be accomplished before acquisition using Turnkey procedures or after acquisition using Conventional or Force Account procedures. An ACC may be executed before site approval, provided the IHA has documented evidence that adequate sites are available to accommodate the units contained in the program reservation.

(f) *Force account method.* (1) Under the Force Account method, an IHA performs construction or rehabilitation using its own work force, either entirely or in combination with contractors.

(2) The Force Account method may be used only if justified by the IHA and approved by the HUD Field Office. The IHA must demonstrate that it has the technical and administrative capabilities to complete the project within the projected time and budget. The HUD Field Office shall require that a Tribe or IHA agree in writing: to cover any costs in excess of the HUD-estimated construction costs; demonstrate that it has the financial resources to meet the excess costs up to a specified amount; and provide some form of security acceptable to HUD to cover excess costs. For this purpose, an IHA may use attachable assets including funds maintained in its reserve for replacements received from the sale of Mutual Help units.

§ 950.220 Total development cost.

(a) *Total development cost standard.* The total development cost (TDC) standard, which limits the allowable cost for developing Indian housing projects, is determined as a per unit cost for various unit sizes, structure types and geographic areas. It is developed by HUD by applying a simple multiplier to an average construction cost. The costs covered by the TDC approved for a project, which is subject to the TDC standard, include all costs associated with the project, except for costs of off-site water and sanitation facilities infrastructure and donations received from any public or private source. Costs for off-site water and sanitation facilities infrastructure and any donations received must be included in the project development cost budget but will be excluded from the calculation of the project TDC.

(b) *Creation of TDC areas.* HUD Field Offices shall periodically assess the adequacy of the existing TDC areas. The geographical area used as a TDC area shall be a single contiguous physical area with a clearly identified boundary line. TDC areas shall have a relatively

consistent construction bidding environment, and they shall not overlap. An IHA may request or the HUD Field Office Administrator may initiate preparation of a recommendation for changing the TDC areas.

(c) *Approval of total development cost for a project.* The total development cost, as defined in § 950.102, is the amount approved by HUD for development of a particular project, and it will not exceed the TDC limit except as follows:

(1) The Secretary may provide that the TDC for a project may exceed the TDC limit by up to 10 percent of the published TDC for special situations such as, but not limited to, required relocation costs, start-up costs for on-site solid waste removal, and energy efficient housing design.

(2) In unusual circumstances, where the Secretary makes a written determination that there is good cause to exceed the limit of 110 percent of the maximum allowable TDC, the Secretary may approve a higher amount. An example of a circumstance that might form the basis for this type of determination is an unforeseen site improvement cost that is on-site only (not including any cost related to roads or driveways).

(3) Any approval to exceed the TDC limit for a development that is based on the published TDC standard shall be subject to fund availability.

(d) *In approving the total development cost,* HUD will approve a reasonable amount for preliminary planning.

(e) *Program reservations.* (1) Funds reserved for initial program reservations shall be based on reasonable costs for developments.

(2) After initial funding, the IHA may propose any reasonable housing design in their development program, as long as the building codes and other standards adopted by the IHA are not compromised and the cost of the units to HUD will not exceed the funds reserved.

(3) The IHA must commence construction within 30 months from the program reservation date. An IHA's failure to commence construction within 30 months constitutes grounds for termination of the project. Excluded from this computation is delay in construction caused by the failure of HUD to process such project within a reasonable period of time, any environmental review requirement, any legal action affecting the project, or any other factor beyond the control of the IHA.

(f) *Cost review.* HUD will review the development budget of each project for compliance with the maximum allowable TDC based on published TDC standards and with reasonable development costs, determined by a cost estimate prepared using HUD data on Indian housing developments actually constructed. The review will consider any conditions that may affect the cost analysis, such as logistical problems associated with developments of remote location, low density or scattered sites, the unavailability of skilled labor and acceptable materials, local customs, abnormal climatic conditions, and alternative heat sources, such as wood or coal.

(g) *Construction at reasonable cost.* The IHA shall complete development of each project at the lowest possible cost of construction and long-term operation of the project, and in no event may the cost of the project exceed the approved total development cost.

(h) *Training of residents.* The development cost budget submitted with the development program shall include an estimated amount for costs of a HUD-approved tenant counseling program. This counseling shall be subject to the provisions of § 950.453, substituting renter and prospective renter for Homebuyer, where applicable. Those provisions which by their nature are only applicable to MH projects are applicable only to a MH counseling program.

(i) *Initial insurance premiums.* The insurance premiums for the first three years may be included in development costs, with no obligation for reimbursement from operating receipts. The anticipated cost of such premiums may be charged to the development and placed in escrow by the IHA to enable closeout of the development program.

(Approved by the Office of Management and Budget under control number 2577-0101.)

§ 950.225 Application.

(a) *Submission to HUD.* (1) An IHA may submit an application for a project after HUD issues a general notification that funds are available.

(2) The application shall be on the form prescribed by HUD and shall be accompanied by all the legal and administrative attachments required by the form. The application must include comments by the Chief Executive Officer on behalf of the unit of local government where the project is to be located.

(3) Where the provisions for the necessary local government cooperation are not contained in the ordinance or other enactment creating the IHA, the IHA shall submit an executed

cooperation agreement (or a copy of an existing one) for the location involved, which is sufficient to cover the number of units in the application.

(4) For an IHA that administers the Indian housing program for more than one specific Tribal government, or in the case of Alaska, more than one village, the IHA may submit an application on behalf of each distinct Tribal entity or village. An IHA administering the program in this manner is an "umbrella" IHA.

(5) An application which contains rental housing shall include:

(i) A certification that the IHA has reviewed the expected income and expenses of the proposed development and that the development is financially feasible at the current subsidy expense level; or

(ii) A request for an allowable expense level which will enable the project to be feasibly operated.

(6) An application which contains mutual help housing shall include a certification that there is a sufficient number of eligible homebuyers to ensure the viability of the project.

(b) In order to submit an application, the IHA must be eligible and have satisfied any requirements imposed in accordance with § 950.135. If an ineligible IHA submits an application, the HUD Field Office will return the application and will outline the specific reasons for the determination of ineligibility.

(c)(1) Applications will be rated and points will be awarded for the following categories:

(i) The relative unmet need for housing;

(ii) The relative IHA occupancy rate compared to the occupancy rates of other eligible IHAs submitting applications;

(iii) Length of time since the last program reservation date for each IHA compared to other eligible IHAs submitting applications;

(iv) Current IHA development pipeline activity; and

(v) Other factors identified in a notice of funding availability.

(2) After the completion of the rating process, applications will be listed together to produce an ordered ranking. An IHA that has not previously received housing assistance under this part will be given a preference over all previously funded IHAs. The application with the highest point total will be funded first; the next highest will be funded second; and the process will continue until funds are exhausted.

(d) *Program reservation.* (1) The program reservation will specify housing type, household type,

development method, the funds reserved, the minimum and maximum number of total units, and units of each bedroom size to be developed. The program reservation will limit the total project development cost to the TDC level.

(2) As long as the total project development cost limit is not exceeded, the number of units may be changed by the IHA. If an IHA desires to change the number of units to be developed, it must submit to HUD a request to amend the program reservation, including documentation supporting the request. HUD will either approve the request or notify the IHA of the reason the request is not approved. Amendment funds may not be used to increase the project size.

(e) *Execution of ACC.* (1) Upon issuance of the program reservation by HUD, the IHA and HUD may execute an ACC to cover the costs of surveys and other HUD-approved planning activities with respect to the number of units covered by the program reservation. HUD may execute an ACC for an amount which the IHA demonstrates to the satisfaction of the HUD Field Office is required for the planning of the project. In support of a request for an ACC for planning, the IHA shall submit for HUD approval a preliminary budget showing anticipated expenditures and any needed supporting documentation. A preliminary budget for planning may include costs for comprehensive planning. (See paragraph (g) of this section).

(2) Funds for planning shall in no event be provided or used for purposes, or in amounts, that would not be approvable for inclusion in a development cost budget.

(3) Use of development funds of projects under ACC to cover costs for another project is strictly prohibited except as provided for under paragraph (g) of this section.

(f) *ACC amendment for construction and operation.* An amendment to the ACC to cover development and operation of a project shall not be executed until the IHA has adopted, and HUD has approved, the development program for the project. In no event may an IHA execute a contract for construction or development before the execution of an ACC amendment for construction or development.

(g) *Comprehensive housing plan.* At the request of an IHA, HUD may approve up to an additional one percent of the program reservation above the amount approved in accordance with paragraph (d)(1) of this section to establish and/or update a master housing plan for its area of operation. The plan should contain such elements

as proposed housing sites, existing and proposed off-site roads, existing and proposed water and sewer facilities. In addition, the plan should address geographical and topographical features, as well as socio-economic and cultural factors such as employment opportunities, schools and services which have an impact on the placement of residential housing. The plan should be approved by resolution of the Tribal council. The one percent cost for the comprehensive housing plan may be charged to the development and placed in an escrow or revolving fund account by the IHA to enable closeout of the development program and/or pooling of planning resources.

§ 950.230 Project coordination.

(a) *Project coordination meeting.* Upon notification of a Program Reservation, the IHA shall schedule a project coordination meeting to plan and schedule the steps needed to develop the project. The IHA will invite to the project coordination meeting the project designer (if known) and any Tribal, state or Federal officials who will participate in the development of the project. At the project coordination meeting, the IHA shall establish a schedule of planning activities including target date(s) for completion of key activities including the submission of the complete development program to HUD. The schedule, including any amendments thereto, shall be provided to meeting participant and to HUD to be used in planning and monitoring activities.

(b) *Citizen participation.* The IHA shall hold at least one public meeting at which comments are solicited on both the proposed sites and project design from potential occupants, as well as from other persons interested in the project. Such meeting may be held in conjunction with a regularly scheduled board meeting or may be held separately after adequate notice is provided to the public to enable full participation by interested parties. The IHA should give maximum consideration to all public comments in the design of the project. Minutes from the meeting and a summary of the IHA's action on public comments shall be included in the submission of the development program to HUD. Failure to hold a public meeting or to include the minutes of the meeting in the development program shall be grounds for disapproval of the development program.

§ 950.235 Site selection criteria.

(a) *Relation to Tribal, local and regional plans.* Selected sites must

comply with all applicable Tribal, local and/or regional plans.

(b) *Access roads.* Access roads up to the boundaries of multi-unit sites shall be provided by the BIA, the Tribe or other appropriate agency and shall not be an eligible cost of the project. Access roads up to the boundaries of individual homesites in a scattered site project shall be provided by the homebuyer, the Tribe, or other appropriate agency and shall not be an eligible cost of the project. Access roads shall be maintained by a responsible local entity to provide safe and suitable vehicular access at all times. No site may be approved unless such access roads exist, or a written assurance has been obtained from the responsible entity that roads will be constructed before commencement of project construction.

(c) *Utilities.* Before final site approval, the IHA must demonstrate that all utility services necessary for the operation of the project are available or will be available at the time of project occupancy and that no legal, political, geographical, or contractual obstacles exist that will prevent access to these utility services.

(d) *Physical characteristics of site.* The physical characteristics of a site shall facilitate overall economy in site preparation, construction, and management. Only reasonable costs for surveys, planning, test borings, and test wells shall be included in the development cost of the project.

(e) *Size of sites.* An individual homesite, whether a scattered site or included in a multi-unit site, shall not exceed the size determined by the IHA or by Tribal or local policy to be necessary for the use and occupancy by the resident of the dwelling unit.

(f) *Alternate sites.* In order to minimize delay to the project in the event of the withdrawal of a selected homebuyer or an approved site, the IHA should have a reasonable number of alternates available. Each homesite shall be legally and practicably available for use by another homebuyer. If a site is part of other land owned by the prospective homebuyer, the lease or other conveyance to the IHA shall include the legal right of access to the site by any substitute homebuyer.

§ 950.240 Types of interest in land.

(a) *Trust or restricted land.* Sites on Tribally or individually owned trust or restricted land (as defined in 25 CFR 151.2) shall be leased to the IHA for a term of not less than 50 years (25 years, automatically renewable for an additional term of 25 years) on a HUD approved form of lease, which will provide that the lease cannot be

terminated before its expiration without the consent of the IHA, or, while the site remains under the ACC, by HUD.

(b) *Unrestricted land.* Sites on unrestricted land shall be either conveyed to the IHA in fee or leased to the IHA on a HUD approved form of lease for a term of not less than 50 years.

(c) *Other.* Notwithstanding the type of interest in land, all project property shall be exempt from local or state imposed real or personal property tax in accordance with section 6(d) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(d)).

§ 950.245 Appraisals.

(a) When the cost of a site is to be charged to the IHA's development cost, an appraisal shall be made in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601-4655). Government-wide implementing regulations are at 49 CFR part 24. The cost of donated land may be assumed to be \$1,500 per unit. An appraisal of donated land must be performed only if the IHA determines that the value to be attributed to the site exceeds \$1,500.

(b) When the interest to be appraised is a leasehold interest in Tribally or individually owned trust or restricted land and comparable leasehold transactions are not available, the appraiser shall estimate the value of the land as if alienable in fee, based on a comparison of the land being valued with sales of fee interests in comparable land in the same or competing market areas.

§ 950.250 Site approval.

(a) *IHA certification.* Prior to or concurrent with the submission of the Development Program, the IHA shall submit a written certification to HUD that all conditions which would prevent the site from being included in the project have been satisfactorily addressed and there are no legal or physical reasons which would interfere with the occupancy and use of the site during the term of the ACC. Such certification shall be conditioned only upon final acquisition or execution of a lease on the property.

(b) *Tentative site approval.* (1) When a site is proposed for use, the IHA shall inspect the property to ascertain its suitability for development. Where appropriate, the IHA shall request an inspection of any proposed site by utility suppliers, the BIA, the IHS, and a representative of the local governing body and shall include each agency's comments in a list of potential site approval concerns. If the IHA

determines that a site does not contain any legal or physical conditions which would exclude it from consideration for acquisition, the IHA shall prepare a listing of all conditions which must be corrected or addressed prior to acquisition of the site. The determination by the IHA and the preparation of the list of conditions shall be considered the tentative approval of the site.

(2) Tentative site approval will not be determined until the requirements for compliance with local governmental approval have been met. (See 24 CFR part 791.)

(3) Upon determination of tentative site approval, the IHA shall request environmental review by HUD. HUD may request the IHA to provide information or conduct surveys or studies which will assist in the determination by HUD of the environmental suitability of the site for development. Upon completion of the environmental review, HUD will provide the IHA with a copy of its Environmental Assessment, environmental review, Finding of No Significant Impact (FONSI) and/or with the reasons why the site was not environmentally satisfactory. The cost of completing environmental surveys or studies is an eligible project cost. Until HUD issues a FONSI, eligible planning costs are limited to those activities necessary to aid in the completion of the environmental assessment.

(c) *Final site approval.* (1) Final site approval occurs when a site satisfies all of the conditions stated in the tentative approval and, with respect to trust land or restricted land over which the BIA has authority, the BIA has given either unconditional concurrence for final site approval or concurrence conditioned only on subsequent execution of site leases or right-of-way easements. If the BIA has given final site approval conditioned on subsequent execution of site leases of rights-of-way, the IHA shall obtain from the BIA written assurance that a valid lease, executed by all the necessary parties, can be obtained within a reasonable time and before start of construction.

(2) Final site approval on all sites for the project must occur:

(i) Before execution of an ACC for construction and operation, except for a project developed under the acquisition method or for restricted land sites, in accordance with paragraph (c)(3) of this section;

(ii) Before any commitment is made to acquire or lease any site; and

(iii) Before construction is started. In addition, leases and necessary rights-of-way must be obtained before solicitation

of construction bids or before construction may begin on any units.

(3) With respect to trust or restricted land sites, HUD may execute the ACC for construction and operation before final site approval of all sites only when the following conditions have been met:

(i) All sites for the project have tentative site approval;

(ii) At least 50 percent of the sites have final site approval;

(iii) HUD is satisfied that the balance of the sites will meet the requirements for final site approval no later than one year from execution of the construction contract; and

(iv) The construction contract provides that if all sites, finally approved and with executed leases, have not been delivered by the IHA to the contractor within one year from execution of the construction contract (or HUD-approved extension), the construction contract shall be reduced by the amount attributable to the units to be developed on the undelivered sites.

§ 950.255 Design criteria.

(a) *Applicable building code.* (1) *General.* For purposes of housing assisted under chapter IX of this title, the IHA must use the applicable Tribal or other local building code where it meets or exceeds standards of model national building codes; or if there is none, it must use a model building code, or a State or other locality's building code. Newly constructed housing shall meet or exceed the requirements of the latest Model Energy Code published by the Council of American Building Officials. The IHA must coordinate with the Tribe, or local government, if appropriate, to assure adoption of a code that satisfies the standards specified in paragraph (a)(2) of this section. The code may make special provisions for traditional and culturally oriented design features. In the absence of tribally adopted codes, the IHA shall determine, by Resolution of the Board of Commissioners, building codes to be followed in the development of its housing.

(2) *Required standards.* The code used must provide sufficient flexibility to permit the use of different designs and materials; must include standards for reasonable site designs; must include cost-effective energy conservation performance standards designed to ensure the lowest total construction and operating costs; must give proper consideration to the needs of physically handicapped persons for ready access to, and use of, housing assisted under this chapter (see 24 CFR part 8); and

must be sufficient to produce a decent, safe and sanitary home.

(b) *Fuel and energy consumption.* In selecting from among design options for heating, cooking, and electrical systems, maximum attention shall be given to cost, adequacy, maintenance of the system, and the long term reliability of fuel supplies. Where fuel is not locally available at low cost, alternate systems such as wind, solar, or coal, may be used and included in the project cost.

(c) *Moderate housing design.* The design chosen by the IHA must be of moderate design standard taking into consideration anticipated long term operating costs.

(d) *Water provisions for Alaska.* Alaska Native housing assisted under this part shall be designed and constructed to include water storage tanks when the housing is not served by or scheduled to be served by piped utilities. These tanks shall be no less than 100 gallons in capacity and be constructed to be accessed from outside the house.

(e) *Design approval.* The IHA shall obtain the approval of project designs by all local or tribal regulatory agencies, by the BIA for on-site streets, and the IHS, where appropriate, for community water and/or sewer facilities. The IHA shall assure the design meets applicable building codes, that the project can be constructed within the amount of funds reserved for the development, and that the project is financially feasible including ongoing maintenance cost considerations.

§ 950.260 IHA development program.

An IHA development program is required for all development methods, and must be approved by HUD.

(a) *IHA submission.* (1) Submission of the development program shall be in accordance with the schedule established at the project coordination meeting. The IHA's failure to submit the complete development program in the form prescribed by HUD by the date established will be a factor in HUD's evaluation of an IHA's administrative capability in accordance with § 950.135.

(2) In order to achieve construction start within 30 months from the program reservation date (see § 950.220(e)(3)), the development program should be submitted to HUD not later than 18 months from the program reservation date.

(b) *HUD review.* HUD will review the IHA development program upon receipt. HUD will advise the IHA of any deficiencies and will provide the IHA an opportunity to make corrections within 30 days of receipt of the notice of deficiencies. To be approvable, the

development program must demonstrate legal sufficiency, the financial feasibility of the project, and its compliance with all program requirements. Upon conclusion of HUD's review, the development program will be either approved or disapproved. If the development program is approved, the ACC will be executed or amended, as necessary, and the IHA will be authorized to acquire the units or prepare final plans for construction. If the initial submission is disapproved, HUD will notify the IHA of the reasons and allow the IHA to amend and resubmit the development program.

§ 950.265 Construction and inspections.

Following approval of the development program, the IHA shall commence final planning and begin construction within 12 months of the development program approval date. Unless there are circumstances beyond the IHA's control, as defined in § 950.220(e)(3), failure to commence construction within 30 months from the time of program reservation constitutes cause for HUD termination of the ACC and recapture of the reserved funds.

(a) *Conventional projects.* The IHA shall prepare the plans, advertise for bids, and award a construction contract. Within 10 days of the award of a construction contract, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition; the preparation of final plans and specifications; and the bidding, evaluation and award of the construction contract. Included in the submission to HUD, the IHA shall submit a copy of the set of construction plans and specifications, the bid advertisement, the construction contract, the notice to proceed and the contract award development cost budget.

(b) *Turnkey and modified turnkey projects.* The IHA shall execute the contract of sale. Within 10 days of execution of the contract of sale, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition; the review and acceptance of the final plans and specifications; and the execution of the contract of sale. The IHA shall submit a copy of the set of construction plans and specifications and the Contract of Sale and the contract award development cost budget with the certification to HUD.

(c) *Force account.* The IHA shall prepare the final construction plans and specifications; a detailed plan for constructing the project including the scope of work to be performed by the

IHA staff or by subcontractors; and begin work. Within 10 days of the date construction activities begin, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition, the proper preparation of final plans and specifications and the preparation of its work plan. Included in the submission to HUD, the IHA shall provide a copy of the set of construction plans and specifications, the work plan developed to complete construction of the project, and the contract award development cost budget.

(d) *Inspections and monitoring.* (1) *IHA construction inspections.* Whatever the development method used, the IHA shall be responsible for obtaining inspections throughout the construction period. The frequency of inspections and the procedures to be used shall assure completion of quality housing in accordance with the contract documents. Inspections shall be performed by an architect, engineer, or other qualified person selected by the IHA.

(2) *Coordination of inspections.* The IHA shall coordinate inspections with tribal or local regulatory agencies and, where applicable, the BIA and/or IHS, to assure that all governing codes and other requirements are met.

(3) *HUD construction monitoring.* HUD representatives or agents may visit construction sites to evaluate the IHA's contract administration. These visits should not be construed by the IHA as construction inspections.

§ 950.270 Construction completion and settlement.

(a) *Final inspection.* The IHA shall assure that all work is satisfactorily completed, in accordance with the terms of the construction contract, prior to scheduling a final inspection. The final inspection shall be made jointly by the IHA and the contractor. Where appropriate, the IHA shall notify tribal or local regulatory agencies, the BIA, the IHS, and HUD before this inspection to provide them with the opportunity to participate in the final inspection of all or part of the work. In a MH project, homebuyers shall also be invited to participate in the inspection of their homes, but acceptance shall be by the IHA. Maximum consideration shall be given to all homebuyer concerns.

(b) *Contract settlement.* (1) If the final inspection discloses no deficiencies other than punch list items or seasonal completion items, the IHA shall, as soon as practical, develop an interim Certificate of Completion to enable partial settlement of the contract. The interim Certificate will detail the items

remaining and set forth a schedule for their completion, and will allow the IHA to accept the units (or stage) for occupancy. Upon completion of the interim Certificate and receipt of the contractors Certificate and Release, the IHA shall release the monies due the contractor less withholdings in accordance with the construction contract.

(2) The contractor shall complete the punch list items in accordance with the time schedule contained in the interim Certificate of Completion. The IHA may pay the contractor for such items which are completed to the satisfaction of the IHA. If the IHA is satisfied that the applicable requirements of the construction contract and the interim Certificate have been met, the IHA shall prepare a final Certificate of Completion and release the amounts withheld to the contractor/developer.

(c) *Notification to HUD.* (1) Within 10 days of acceptance of the project or any part thereof, the IHA shall notify HUD of such action. Upon acceptance of all units within a project, the IHA shall provide a notification to HUD of the date the project was fully available for occupancy by residents.

(2) The IHA shall provide HUD notice of the end of the rent-up period within 10 days of such occurrence.

(3) The IHA shall provide HUD with a copy of all interim and final certificates of completion within 10 days of their execution.

§ 950.275 Warranty inspections and enforcement.

(a) The construction contract shall specify the warranty periods applicable to items completed as part of the contract. It shall also provide for assignment to the IHA of manufacturers' and suppliers' warranties covering equipment or supplies.

(b) The IHA shall conduct an inspection of each dwelling unit at least once not later than six months after the start of the contractor's warranty period. A separate or final warranty inspection shall be made in time to exercise the IHA's rights before expiration of the contractor's warranties. Each inspection shall cover all items under warranty at the time of the inspection, including items covered by manufacturers' and suppliers' warranties. At each inspection, the IHA shall obtain a signed statement from the occupants as to any deficiencies in the structure, equipment, grounds, etc., so that it may enforce any rights under applicable warranties.

§ 950.280 Correcting deficiencies.

(a) *Responsibility.* The IHA shall pursue correction of any deficiencies against the responsible party (e.g., architect, contractor or the MH homebuyer) as soon as possible after discovering the deficiencies. Where the costs of correcting deficiencies cannot be recovered from the responsible party and/or the deficiency requires immediate correction to protect life or safety or to avoid further damage to the project unit(s), the IHA may apply to HUD for amendment of the development budget to provide the funds required, or may request that operating receipts or other funds be authorized to be used to cover the costs. In any case, program funds shall not be used for this purpose without prior HUD approval. The IHA shall be responsible for correction of any deficiencies which could have been detected and/or corrected during the warranty period if the IHA had inspected at the appropriate time or had pursued correction of deficiencies against the responsible parties.

(b) *Amendments.* (1) HUD may, but is not obligated to provide additional funding to the IHA to correct deficiencies. The ACC may be amended to provide amounts needed to correct deficiencies (and any damage resulting therefrom) in design, construction, and equipment only where there is substantial evidence that it is not possible to obtain timely correction or payment by the responsible parties, including the source of the performance bond.

(2) In the case of a MH home, the additional cost for correcting deficiencies in design, construction or equipment (and any damage resulting therefrom) shall not result in an increase in the homebuyer's purchase price. If a homebuyer is not in compliance with the MHO Agreement, HUD shall require the IHA to reach agreement with the homebuyer to correct the noncompliance before approving the work.

§ 950.285 Fiscal closeout.

The IHA shall submit the actual development cost certificate within 24 months of the date of full availability (see § 950.270(c)(1)), or such later date as may be approved by HUD, in a form prescribed by HUD, to the HUD office for review, audit verification and approval. The audit shall follow the requirements of 24 CFR part 44 (Single Audit Act of 1984). If the audited development cost indicates that excess funds have been approved, the IHA shall dispose of the excess as HUD directs. If the audited development cost

certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD directs.

Subpart D—Operation**§ 950.301 Admission policies.**

(a) *Admission policies.* (1) The IHA shall adopt written policies for admission of participants. The policies shall cover all programs operated by the housing authority and, as applicable, will address the programs individually to meet their specific requirements (i.e., Rental, MH, or Turnkey III). A copy of the policies shall be posted prominently in the IHA's office for examination by prospective participants, and shall be submitted to the HUD Field Office promptly after adoption by the IHA. (See § 950.416 with respect to Mutual Help admission policies.)

(2) The policies shall include tenant and homebuyer selection criteria designed to:

(i) Avoid concentrations of the most economically and socially deprived families in any one or all of the IHA's projects;

(ii) Ensure that, to the maximum extent feasible, the projects of the IHA include families with a broad range of incomes which generally reflect the range of incomes of those low-income families in the Indian area who would be qualified for admission to the type of project;

(iii) Preclude admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the participants or the project environment; and

(iv) For not less than 70 percent of the units made available for occupancy in a given fiscal year, to give a preference in the selection of participants (in accordance with § 950.305) who at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(3) The IHA admission policies shall include the following:

(i) Requirements for applications and waiting lists, including requirement for selection from the top of the list;

(ii) Procedures governing participant transfer between units, projects, and programs;

(iii) Other IHA priorities, if any, and a requirement that a participant is not eligible for voluntary transfer unless all obligations under the current program have been met, including payment of charges to the IHA and completion of maintenance requirements;

(iv) Compliance with 24 CFR part 750, which requires applicants and

participants to disclose and verify social security numbers at the time eligibility is determined and at later income reexaminations; and

(v) Compliance with 24 CFR part 760, which requires applicants and participants to sign and submit consent forms for the obtaining of wage and claims information from State wage and information collection agencies.

(b) *Income limits.* (1) A family must be a Low-income Family, as defined in § 950.102, to be eligible for admission. (With respect to eligibility for the Mutual Help program, see special provisions of § 950.416.)

(2) In extremely unusual circumstances, the IHA may request that HUD increase or decrease income limits for low-income families or for very low-income families in the Indian area because of unusually high or low family incomes. Such a request can be granted only by joint approval of HUD's Assistant Secretary for Housing and Assistant Secretary for Public and Indian Housing, after consultation with the Secretary of Agriculture (if the income limits are being established for a "rural area" as defined in section 520 of the Housing Act of 1949 (42 U.S.C. 1490)).

(c) *Standards for IHA tenant/homebuyer selection criteria.* (1) The criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant, and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member. The IHA's tenant/homebuyer selection criteria must be in accordance with HUD guidelines and submitted to the HUD Field Office. (With respect to the Mutual Help program, see special provisions of § 950.416.)

(2) In the event of any unfavorable information regarding an applicant, the IHA must take into consideration the time, nature, and extent of the past occurrence and reasonable probability of future favorable performance.

(d) *Admission of single persons—priority to elderly and displaced persons.* An IHA shall extend preference to elderly families (including disabled persons and handicapped persons) and displaced persons over single persons.

(e) *Selection preference with respect to projects for elderly families.* (1) In determining priority for admission to projects for elderly families, an IHA must give a preference to elderly families. When selecting applicants for admission from among elderly families, an IHA must follow its policies and

procedures for applying the Federal preferences contained in § 950.305.

(2) An IHA may give a preference to near elderly families in determining priority for admission to projects for elderly families when the IHA determines that there are not enough eligible elderly families to fill all the units that are currently vacant or expected to become vacant in the next 12 months. In no event may an IHA admit a near elderly family if there are eligible elderly families on the IHA's waiting list that would be willing to accept an offer for a suitable vacant unit in that project.

(3) Before electing the discretionary preference in paragraph (e)(2) of this section, an IHA must conduct outreach to attract eligible elderly families, including, where appropriate, elderly families residing in projects not designated as being for elderly families.

(4) If an IHA elects the discretionary preference in paragraph (e)(2) of this section, the IHA must follow its policies and procedures for applying the Federal preferences contained in § 950.305 when selecting applicants for admission from among near elderly families. Near elderly families that do not qualify for a Federal preference and that are given preference for admission under this section over other non-elderly families that qualify for such a Federal preference are not subject to the 30 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 950.305(b)(2)(ii). If a near elderly applicant is a single person, the near elderly single person may be given a preference for admission over other single persons to projects for the elderly.

(f) *Verification of information and notification to applicants.*

(1) *Verification.* Adequate procedures shall be developed to obtain and verify information with respect to each applicant. Information relative to the acceptance or rejection of an applicant shall be documented and placed in the applicant's file.

(2) *Notification to applicants.* (i) If an applicant is determined to be ineligible for admission to a project, the IHA shall promptly notify the applicant of the basis for such determination and shall provide the applicant, upon request and within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination; and

(ii) When a determination has been made that an applicant is eligible and satisfies all requirements for admission including the tenant selection criteria,

the applicant shall be notified of the approximate date of occupancy insofar as that date can be reasonably determined.

(Approved by the Office of Management and Budget under control number 2577-0063.)

§ 950.305 Federal selection preferences.

(a) *General.* (1) In selecting applicants for admission to its projects, each IHA must give preference to applicants who are otherwise eligible for assistance and who, at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(2)(i) The IHA must inform all applicants of the availability of the Federal preferences, and must give all applicants an opportunity to show that they qualify for a preference. For purposes of this paragraph (a)(2)(i) of this section, applicants include families on any waiting list maintained by the IHA when this section is implemented or thereafter.

(ii) If the IHA determines that the notification to all applicants on a waiting list required by paragraph (a)(2)(i) of this section is impracticable because of the length of the list, the IHA may provide this notification to fewer than all applicants on the list at any given time. The IHA must, however, have notified a sufficient number of applicants at any given time that, on the basis of the IHA's determination of the number of applicants on the waiting list who already claim a Federal preference, and the anticipated number of project admissions:

(A) There is an adequate pool of applicants who are likely to qualify for a Federal preference; and

(B) It is unlikely that, on the basis of the IHA's framework for applying the preferences under paragraph (b) of this section and the preferences claimed by those already on the waiting list, any applicant who has not been so notified would receive assistance before those who have received notification.

(3) An IHA must apply the definitions of "standard, permanent replacement housing"; "involuntary displacement"; "substandard housing" and "homeless family"; "family income"; and "rent" set forth in paragraphs (c)(5), (d), (f), (h), and (i), respectively, of this section, unless the IHA submits alternative definitions for HUD's review and approval. An IHA may apply the verification procedures found in paragraphs (e), (g), and (j) of this section, or it may, in its own discretion and without HUD approval, adopt verification procedures of its own.

(4) For purposes of this section, the term "Federal preference" means a tenant selection preference provided under this section. The term "preference" means a Federal preference, unless the context indicates otherwise.

(b) *Applying the Federal preferences.*

(1) Each IHA must include the Federal preferences in its tenant selection policies and procedures. The IHA must apply the Federal preferences in a manner that is consistent with the provisions of this section, and other applicable requirements.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the IHA must establish a system for applying the Federal preferences that provides that an applicant who qualifies for any of the Federal preferences is to be admitted before any other applicant who is not so qualified without regard to the other applicant's qualification for one or more preferences or priorities that are not provided by Federal law, place on the waiting list, or the time of submission of an application for admission.

(ii) The IHA's system for applying the Federal preferences may provide for circumstances in which applicants who do not qualify for a Federal preference are admitted before other applicants who are so qualified. Not more than 10 percent of the applicants who initially are admitted in any one-year period (or such shorter period selected by the IHA before the beginning of its first full year under this paragraph (b)(2)(ii)) of this section may be applicants referred to in the preceding sentence.

(iii) In applying the preferences under paragraph (b)(2) of this section, the IHA may determine the relative weight to be accorded the Federal preferences, through means such as:

(A) Applying non-Federal preferences or priorities (such as local residency preferences) as a way of ranking applicants who qualify (or claim qualification) for a Federal preference;

(B) Aggregating the Federal preferences (i.e., two Federal preferences outweigh one and three outweigh two);

(C) Ranking the Federal preferences (e.g., provide that an applicant living in substandard housing has greater need for housing than (and, therefore, would be considered for admission before) an applicant paying more than 50 percent of income for rent); or

(D) Ranking the Federal preferences definitional elements (e.g., provide that those living in housing that is dilapidated or has been declared unfit for habitation by an agency or unit or government have a greater need for housing than, and take precedence over,

those whose housing is substandard only because it does not have a usable bathtub or shower inside the unit for the exclusive use of the family).

(3) To the extent that title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601-3619) apply to a Tribal government, any selection preferences or priorities used by an IHA within such a Tribe's jurisdiction must be established and administered in a manner that is consistent with HUD's affirmative fair housing objectives and that is not incompatible with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601-3620); Executive Order 11063 on Equal Opportunity in Housing, (3 CFR, 1959-63 Comp., p. 652), as amended by Executive Order 12259 (3 CFR, 1980 Comp., p. 307); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101-07); and HUD's regulations and requirements issued under these authorities.

(c) *Qualifying for a Federal preference.* (1) An applicant qualifies for a Federal preference if:

(i) The applicant has been involuntarily displaced and is not living in standard, permanent replacement housing, or within no more than six months from the date of certification under paragraph (c)(2) of this section or verification under paragraph (c)(3) of this section (as appropriate), the applicant will be involuntarily displaced;

(ii) The applicant is living in substandard housing; or

(iii) The applicant is paying more than 50 percent of family income for rent.

(2) Applicants may claim qualification for a Federal preference when they apply for admission to a project (or thereafter until they are offered a unit in the project) by certifying to the IHA that they qualify for a preference under paragraph (c)(1) of this section by virtue of the applicant's current status. The applicant's current status must be determined without regard to whether there has been a change in the applicant's qualification for a preference between the certification under paragraph (c)(2) of this section and admission to a project, including a change from one Federal preference category to another.

(3) Once an applicant's qualification for a Federal preference under paragraph (c)(1) of this section has been verified, an IHA need not require the applicant to verify such qualification again, unless, as determined by the IHA,

such a long time has elapsed since verification as to make reverification desirable, or the IHA has reasonable grounds to believe that the applicant no longer qualifies for a Federal preference.

(4) For purposes of this paragraph (c), "standard, permanent replacement housing" is housing:

(i)(A) That is decent, safe, and sanitary;

(B) That is adequate for the family size; and

(C) That the family is occupying pursuant to a lease or occupancy agreement.

(ii) Such housing does not include transient facilities, such as motels, hotels, or temporary shelters for victims of domestic violence or homeless families, and in the case of domestic violence referred to in paragraph (d)(2) of this section, does not include the housing unit in which the applicant and the applicant's spouse or other member of the household who engages in such violence live.

(5) An applicant may not qualify for a Federal preference under paragraph (c)(1)(ii) of this section if the applicant is paying more than 50 percent of family income to rent a unit because the applicant's housing assistance under the United States Housing Act of 1937 (42 U.S.C. 1437-1440) or section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s) with respect to that unit has been terminated as a result of the applicant's refusal to comply with applicable program policies and procedures with respect to the occupancy of underoccupied and overcrowded units.

(d) *Definition of involuntary displacement.* (1) An applicant is or will be involuntarily displaced if the applicant has vacated or will have to vacate his or her housing unit as a result of one or more of the following actions:

(i) A disaster, such as a fire or flood, that results in the uninhabitability of an applicant's unit;

(ii) Activity carried on by an agency of the United States or by any State or local governmental body or agency in connection with code enforcement or a public improvement or development program; or

(iii) Action by a housing owner that results in an applicant's having to vacate his or her unit, where:

(A) The reason for the owner's action is beyond an applicant's ability to control or prevent;

(B) The action occurs despite an applicant's having met all previously imposed conditions of occupancy; and

(C) The action taken is other than a rent increase.

(2) An applicant also is involuntarily displaced if:

(i)(A) The applicant has vacated his or her housing unit as a result of actual or threatened physical violence directed against the applicant or one or more members of the applicant's family by a spouse or other member of the applicant's household; or

(B) The applicant lives in a housing unit with such an individual who engages in such violence.

(ii) For purposes of paragraph (d)(2) of this section, the actual or threatened violence must, as determined by the IHA in accordance with HUD's administrative instructions, have occurred recently or be of a continuing nature.

(3) For purposes of paragraph (d)(1)(iii) of this section, reasons for an applicant's having to vacate a housing unit include, but are not limited to, conversion of an applicant's housing unit to non-rental or non-residential use; closure of an applicant's housing unit for rehabilitation or for any other reason; notice to an applicant that he or she must vacate a unit because the owner wants the unit for the owner's personal or family use or occupancy; sale of a housing unit in which an applicant resides under an agreement that the unit must be vacant when possession is transferred; or any other legally authorized act that results or will result in the withdrawal by the owner of the unit or structure from the rental market. Such reasons do not include the vacating of a unit by a tenant as a result of actions taken because of the tenant's refusal:

(i) To comply with applicable program policies and procedures under this title with respect to the occupancy of underoccupied and overcrowded units, or

(ii) To accept a transfer to another housing unit in accordance with a court decree or in accordance with such policies and procedures under a HUD-approved desegregation plan.

(e) *Verification procedures for applicants involuntarily displaced.* Verification of an applicant's involuntary displacement is established by the certification, in a form prescribed by the Secretary:

(1) Made by a unit or agency of government that an applicant has been or will be displaced as a result of a disaster, as defined in paragraph (d)(1)(i) of this section;

(2) Made by a unit or agency of government that an applicant has been or will be displaced by government action, as defined in paragraph (d)(1)(ii) of this section;

(3) Made by an owner or owner's agent that an applicant had to, or will have to, vacate a unit by a date certain because of an owner action referred to in paragraph (d)(1)(iii) of this section; or

(4) Made by the local police department, social services agency, or court of competent jurisdiction, or a clergyman, physician, or public or private facility that provides shelter or counseling to the victims of domestic violence, that an applicant has been or is being displaced because of domestic violence, as described in paragraph (d)(2) of this section.

(f) Definition of substandard housing.

(1) A unit is substandard if it:

(i) Is dilapidated;

(ii) Does not have operable indoor plumbing;

(iii) Does not have a usable flush toilet inside the unit for the exclusive use of a family;

(iv) Does not have a usable bathtub or shower inside the unit for the exclusive use of a family;

(v) Does not have electricity, or has inadequate or unsafe electrical service;

(vi) Does not have a safe or adequate source of heat;

(vii) Should, but does not, have a kitchen; or

(viii) Has been declared unfit for habitation by an agency or unit of government.

(2) For purposes of paragraph (f)(1) of this section, a housing unit is dilapidated if it does not provide safe and adequate shelter, and in its present condition endangers the health, safety, or well-being of a family, or it has one or more critical defects, or a combination of intermediate defects in sufficient number or extent to require considerable repair or rebuilding. The defects may involve original construction, or they may result from continued neglect or lack of repair or from serious damage to the structure.

(3) For purposes of paragraph (f) of this section, an applicant who is a "homeless family" is living in substandard housing. For purposes of the preceding sentence, a "homeless family" includes any individual or family who:

(i) Lacks a fixed, regular, and adequate nighttime residence; and

(ii) Has a primary nighttime residence that is:

(A) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. A "homeless family" does not include any individual imprisoned or otherwise detained pursuant to an Act of the Congress or a State law.

(4) For purposes of paragraph (f)(1) of this section, single room occupancy (SRO) housing, as defined in 24 CFR 882.102, is not substandard solely because it does not contain sanitary or food preparation facilities (or both).

(g) *Verification procedures for applicants living in substandard housing.* Verification that an applicant is living in substandard housing consists of certification, in a form prescribed by the Secretary, from a unit or agency of government or from an applicant's present landlord that the applicant's unit has one or more of the deficiencies listed in, or the unit's condition is as described in, paragraph (f)(1) or (f)(2) of this section. In the case of a "homeless family" (as described in paragraph (f)(3) of this section), verification consists of certification, in a form prescribed by the Secretary, of this status from a public or private facility that provides shelter for such individuals, or from the local police department or social services agency.

(h) *Definition of family income.* For purposes of this section, family income is "monthly income", which is one-twelfth of "annual income" as defined in § 950.102.

(i) *Definition of rent.* (1) For purposes of this section, rent is defined as:

(i) The actual amount due, calculated on a monthly basis, under a lease or occupancy agreement between a family and the family's current landlord; and

(ii) In the case of utilities purchased directly by tenants from utility providers;

(A) The IHA's reasonable estimate of tenant-purchased utilities (except telephone) and the other housing services that are normally included in rent; or

(B) If the family chooses, the average monthly payments that it actually made for these utilities and services for the most recent 12-month period or, if information is not obtainable for the entire period, for an appropriate recent period.

(2) For purposes of calculating rent under paragraph (i) of this section, amounts paid to or on behalf of a family under any energy assistance program must be subtracted from the otherwise applicable rental amount to the extent that they are not included in the family's income.

(3) In the case of an applicant who owns a manufactured home, but who rents the space upon which it is located, rent under paragraph (i) of this section includes the monthly payment to amortize the purchase price of the home, as calculated in accordance with HUD's requirements.

(4) In the case of members of a cooperative, rent under paragraph (i) of this section means the charges under the occupancy agreement between the members and the cooperative.

(j) *Verification of an applicant's income, rent, and utilities payments.* The IHA must verify that an applicant is paying more than 50 percent of family income for rent, as follows:

(1) The IHA must verify the family's income in accordance with the standards and procedures that it uses to verify income for the purpose of determining applicant eligibility and total tenant payment.

(2)(i) An IHA must verify the amount due to the family's landlord (or cooperative) under the lease or occupancy agreement:

(A) By requiring the family to furnish copies of its most recent rental (or cooperative charges) receipts (which may include cancelled checks or money order receipts) or a copy of the family's current lease or occupancy agreement; or

(B) By contacting the landlord (or cooperative) or its agent directly.

(ii) An IHA must verify the amount paid to amortize the purchase price of a manufactured home:

(A) By requiring the family to furnish copies of its most recent payment receipts (which may include cancelled checks or money order receipts) or a copy of the family's current purchase agreement; or

(B) By contacting the lienholder directly.

(3) To verify the actual amount that a family paid for utilities and other housing services, the IHA must require the family to provide copies of the appropriate bills or receipts, or must obtain the information directly from the utility or service supplier.

(k) *Notice and opportunity for a meeting where Federal preference is denied.* If the IHA determines that an applicant does not meet the criteria for receiving a Federal preference, the IHA must promptly provide the applicant with written notice of the determination. The notice must contain a brief statement of the reasons for the determination, and state that the applicant has the right to meet with the IHA's designee to review it. If requested, the meeting must be conducted by a person or persons designated by the

IHA. Those designated may be an officer or employee of the IHA, including the person who made or reviewed the determination, or his or her subordinate. The procedures specified in this paragraph must be carried out in accordance with HUD's requirements. The applicant may exercise other rights if the applicant believes that he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap.

(l) *Closure of waiting list.*

Notwithstanding the fact that the IHA may not be accepting additional applications because of the length of the waiting list, the IHA may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for admission and claims that he or she qualifies for a Federal preference under this section, unless the IHA determines, on the basis of the number of applicants who are already on the waiting list and who claim a Federal preference, and the anticipated number of project admissions, that:

(1) There is an inadequate pool of applicants who are likely to qualify for a Federal preference; and

(2) It is unlikely that, on the basis of the IHA's system for applying the Federal preferences, the preference or preferences that the applicant claims, and the preferences claimed by applicants on the waiting list, the applicant would qualify for admission before other applicants on the waiting list.

§ 950.310 [Reserved]

§ 950.315 Initial determination, verification, and reexamination of family income and composition.

(a) *Income, family composition, and eligibility.* The IHA is responsible for determination of annual income and adjusted income, for determination of eligibility for admission and total tenant payment or homebuyer required monthly payment; and for reexamination of family income and composition at least annually for all tenants and homebuyers. The "effective date" of an examination or reexamination refers to:

(1) In the case of an examination for admission, the effective date of initial occupancy; and

(2) In the case of a reexamination of an existing tenant or homebuyer, the effective date of any change in tenant payment or required monthly payment resulting from the reexamination.

(3) If there is no change, the effective date is the date a change would have taken place if the reexamination had resulted in a change in payment.

(b) *Verification.* As a condition of admission to, or continued occupancy of, any assisted unit, the IHA shall require the family head and other such family members as it designates to execute a HUD-approved release and consent form (including any release and consent as required under 24 CFR part 760) authorizing any depository or private source of income, or any Federal, State, or local agency, to furnish or release to the IHA and to HUD such information as the IHA or HUD determines to be necessary. The IHA also shall require the family to submit directly the documentation determined to be necessary, including any information required under 24 CFR part 750. Information or documentation shall be determined to be necessary if it is required for purposes of determining or auditing a family's eligibility to receive housing assistance, for determining the family's adjusted income or tenant rent or required monthly payment, for verifying related information, or for monitoring compliance with equal opportunity requirements. The use or disclosure of information obtained from a family or from another source pursuant to this release and consent shall be limited to purposes directly connected with administration of this part or an application for assistance.

(c) *Rent and homebuyer payment adjustments.* After consultation with the family and upon verification of the information, the IHA shall make appropriate adjustments in the rent or homebuyer payment amount. The tenant or homebuyer shall comply with the IHA's policy regarding required interim reporting of changes in the family's income.

§ 950.320 Determination of rents and homebuyer payments.

(a) *Rental and Turnkey III projects.* The amount of rent required of a tenant in a rental project or the Turnkey III homebuyer payment amount for a homebuyer in a Turnkey III project for Turnkey III contracts executed after August 1, 1982, shall be equal to the total tenant payment as determined in accordance with § 950.325. For Turnkey III contracts executed on or before August 1, 1982, the Turnkey III homebuyer payment is determined in accordance with the contract. If the utility allowance exceeds the rent or required monthly payment, the IHA will pay the utility reimbursement as provided in § 950.325(b). In the case of a Turnkey III homebuyer, payment of a utility reimbursement may affect the IHA's evaluation of the Turnkey III homebuyer's homeownership potential.

(See §§ 950.503(c)(3) and 950.529 regarding loss of homeownership potential and § 950.523 regarding funds to cover such reimbursements.)

(b) *MH projects.* The amount of the required monthly payment for a homebuyer in an MH project is determined in accordance with subpart E of this part.

§ 950.325 Total tenant payment—Rental and Turnkey III programs.

(a) *Total tenant payment.* Total tenant payment shall be the highest of the following, rounded to the nearest dollar:

- (i) 30 percent of monthly adjusted income;
- (ii) 10 percent of monthly income; or
- (iii) If the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the monthly portion of such payments which is so designated.

(2) If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under paragraph (a)(3) of this section shall be the amount resulting from one application of the percentage.

(b) *Utility reimbursement.* If the utility allowance exceeds the total tenant payment, the difference (the utility reimbursement) shall be due to the family. If the utility company consents, an IHA may, at its discretion, pay the utility reimbursement directly to the utility company.

§ 950.335 Rent and homebuyer payment collection policy.

Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies sufficient to assure the prompt payment and collection of rent and homebuyer payments. A copy of the written policies shall be posted prominently in the IHA office, and shall be provided upon request. Such policies must be in accordance with HUD guidelines and will be reviewed by HUD. Unless HUD has issued a corrective action order in accordance with § 950.135, HUD approval of the policy is not required.

§ 950.340 Grievance procedures and leases.

(a) *Grievance procedures.* (1) *General.* Each IHA shall adopt grievance procedures that are appropriate to local circumstances. These procedures shall comply with the Indian Civil Rights Act, if applicable, and section 6(k) of the Act, as applicable, and shall assure that tenants and homebuyers will:

(i) Be advised of the specific grounds of any proposed adverse action by the IHA;

(ii) Have an opportunity for a hearing before an impartial party upon timely request;

(iii) Have a reasonable opportunity to examine any documents, records or regulations related to the proposed action before the hearing (or trial in court);

(iv) Be entitled to be represented by another person of their choice at any hearing;

(v) Be entitled to ask questions of witnesses and have others make statements on their behalf; and

(vi) Be entitled to receive a written decision by the IHA on the proposed action.

(2) *Expedited grievance procedure.* An IHA may establish an expedited grievance procedure for any grievance concerning a termination of tenancy or eviction that involves:

(i) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the Indian housing development by other residents or employees of the IHA or;

(ii) Any drug-related criminal activity on or near the premises.

(3) *Exclusion of certain grievances.* (i) *General.* An IHA may pursue termination of tenancy or eviction without offering a grievance procedure where the termination or eviction is based on one of the grounds stated in paragraph (a)(2) of this section if applicable. Tribal or State law requires that, before eviction, a tenant (including a homebuyer under a homeownership agreement) be given a hearing in court, if HUD has determined that the Tribal or State procedures provide the basic elements of due process.

(ii) *Basic elements of due process.* The elements of due process against which the jurisdiction's procedures are measured by HUD are the following:

(A) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;

(B) Right of the tenant to be represented by counsel;

(C) Opportunity for the tenant to refute the evidence presented by the IHA, including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense that the tenant might have; and

(D) A decision on the merits.

(4) *Notice to post office of certain evictions.* When an IHA evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the IHA shall notify the local post office serving that dwelling unit that the

evicted individual or family is no longer residing in the dwelling unit (so that the post office will terminate delivery of mail for such persons at the unit, and that such persons will not return to the unit to pick up mail).

(5) *Notice of procedures.* A copy of the grievance procedures shall be posted prominently in the IHA office, and shall be provided to any tenant, homebuyer, or applicant upon request.

(b) *Leases.* Each IHA shall use leases that:

(1) Do not contain unreasonable terms and conditions;

(2) Obligate the IHA to maintain the project in a decent, safe, and sanitary condition;

(3) Require the IHA to give adequate written notice of termination of the lease which shall not be less than—

(i) A reasonable time, but not to exceed 30 days, when the health or safety of other tenants or IHA employees is threatened;

(ii) Fourteen days in the case of nonpayment of rent; and

(iii) Thirty days in any other case;

(4) Require that the IHA may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(5) Provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity, on or near the premises, engaged in by an Indian housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. For purposes of this section, the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); and

(6) Specify that respect to any notice of termination of tenancy or eviction, notwithstanding any applicable Tribal or State law, an Indian housing tenant shall be informed of the opportunity, before any hearing or trial, to examine any relevant documents, records or regulations directly related to the termination or eviction.

(Approved by the Office of Management and Budget under control number 2577-0171)

§ 950.345 Maintenance and improvements.

(a) *General.* Each IHA shall adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective

maintenance responsibilities of the IHA and tenants. A copy of such policies shall be posted prominently in the IHA office, and shall be provided to an applicant or tenant upon entry into the program and upon request.

(b) *Provisions for rental projects.* For rental projects, the maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of tenants for normal care and maintenance of their dwelling units, and of the common property, if any;

(2) Procedures for handling maintenance service requests from tenants;

(3) Procedures for IHA inspections of dwelling units and common property;

(4) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(5) Procedures for charging tenants for damages for which they are responsible.

(Approved by the Office of Management and Budget under control number 2577-0114)

§ 950.346 Fire safety.

(a) *Applicability.* This section applies to all IHA-owned or leased housing, including Mutual Help and Turnkey III.

(b) *Smoke detectors.* (1) After October 30, 1992, each unit must be equipped with at least one battery-operated or hard-wired smoke detector, or such greater number as may be required by applicable State, local or Tribal codes, in working condition, on each level of the unit. In units occupied by hearing-impaired residents, smoke detectors must be hard-wired.

(2) After October 30, 1992, the public areas of all housing covered by this section must be equipped with a sufficient number, but not less than one for each area, of battery-operated or hard-wired smoke detectors to serve as adequate warning of fire. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

(3) The smoke detector for each individual unit must be located, to the extent practicable, in a hallway adjacent to the bedroom or bedrooms. In units occupied by hearing-impaired residents, hard-wired smoke detectors must be connected to an alarm system designed for hearing-impaired persons and installed in the bedroom or bedrooms occupied by the hearing-impaired residents. Individual units that are jointly occupied by both hearing and hearing-impaired residents must be equipped with both audible and visual types of alarm devices.

(4) If needed, battery-operated smoke detectors, except in units occupied by

hearing-impaired residents, may be installed as a temporary measure where no detectors are present in a unit. Temporary battery-operated smoke detectors must be replaced with hard-wired electric smoke detectors in the normal course of an IHA's planned CIAP or CGP program to meet the HUD Modernization Standards of applicable State, local or Tribal codes, whichever standard is stricter. Smoke detectors for units occupied by hearing-impaired residents must be installed in accordance with the acceptability criteria in paragraph (b)(3) of this section.

(5) IHAs shall use operating funds to provide battery-operated smoke detectors in units that do not have any smoke detectors in place. If operating funds or reserves are insufficient to accomplish this, IHAs may apply for emergency CIAP funding. IHAs may apply for CIAP or CGP funds to replace battery-operated smoke detectors with hard-wired smoke detectors in the normal course of a planned modernization program.

§ 950.360 IHA employment practices.

(a) *Indian preference.* Each IHA shall adopt written policies with respect to the IHA's own employment practices, which shall be in compliance with its obligations under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)), and E.O. 11246 (3 CFR, 1964-65 Comp., p. 339) as amended by Executive Order 11375 (3 CFR, 1966-70 Comp., p. 684), where applicable. A copy of these policies shall be posted in the IHA office, and a copy shall be submitted to HUD promptly after adoption by the IHA. (Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), as amended, which prohibits discrimination in employment by making it unlawful for employers to engage in certain discriminatory practices, excludes Indian Tribes from the nondiscrimination requirements of Title VII. See also § 950.165(b)(2)(ii).)

(b) *Wage rates.* See § 950.120 (c) and (d) with respect to the wage rates applicable to IHA employees.

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Subpart E—Mutual Help Homeownership Opportunity Program

§ 950.401 Scope and applicability.

(a) *Scope.* This subpart sets forth the requirements that are applicable to the MH Homeownership Opportunity Program. For any matter not covered in this subpart, see the provisions of the other subparts contained in this part.

Projects developed under the Self-Help development method must comply with the requirements of subparts E and F of this part.

(b) *Applicability.* The provisions of this subpart are applicable to all MH projects placed under ACC on or after March 9, 1976, and to any projects converted in accordance with §§ 950.455 or 950.503.

§ 950.413 Special provisions for development of an MH project.

(a) *MH construction contracts.* (1) *Special provisions to be included in advertisements.* The advertisement for a construction contract other than one used in Self-Help shall state that:

- (i) The project is an MH project;
- (ii) The contractor may obtain a copy of the proposed MH construction contract; and
- (iii) The contractor may obtain a list of the sites.

(2) *Responsibility of contractor.* The construction contract shall provide that the contractor is responsible for acceptable completion of all the homes.

(b) *Consultation with homebuyers.* The IHA shall provide for soliciting comments from homebuyers and other interested parties, as provided in § 950.225(c), concerning the planning and design of the homes. Any changes resulting from such consultation shall be consistent with project standards and cost limitations.

(c) *Financial feasibility.* The application shall be supported by signed applications maintained in the IHA's office of a sufficient number of selected homebuyers who are able and willing to pay the projected administration charge, meet the other obligations under MHO Agreements (see § 950.416(b)), and enter into MHO Agreements. HUD may request submission of the applications, as necessary.

(d) *Rights under MHO agreement if project fails to proceed.* Any MHO Agreement shall be subject to revocation by the IHA if the IHA or HUD decides not to proceed with the development of the project in whole or in part. In such event, any contribution made by the homebuyer or Tribe shall be returned. If the contribution was a land contribution, it will be returned to the contributor.

(e) *Mutual Help contribution.* See § 950.419.

(f) *Insurance.* Upon occupancy, the homebuyer is responsible for payment of insurance coverage as part of its administration charge (see § 950.427(b)).

§ 950.416 Selection of MH homebuyers.

(a) *Admission policies.* (1) *Low-income families.* An IHA's written

admission policies for the MH program, adopted in accordance with § 950.301, must limit admission to low-income families.

(i) An IHA may provide for admission of applicants whose family income exceeds the levels established for low-income families to the MH program operated on an Indian reservation or in an Indian area, if the IHA demonstrates to HUD's satisfaction that there is a need for housing for such families that cannot reasonably be met except under this program.

(ii) An IHA may provide for admission of a non-Indian applicant to the MH program operated on an Indian reservation or in an Indian area, if the IHA determines that the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families and the need for housing for the family cannot reasonably be met except under this program. If the IHA permits admission of non-Indians to its MH program, the IHA must specify the criteria it uses to determine whether a family's presence is essential in its admission policies.

(2) *Limitation on number of units for non-low income families.* The number of dwelling units in any project assisted under the MH program that may be occupied by or reserved for families on Indian reservations and other Indian areas whose incomes exceed the levels established for low-income families (i.e., applicants admitted under paragraph (a)(1)(i) of this section) may not exceed whichever of the following is higher:

- (i) Ten percent of the dwelling units in the project; or
- (ii) Five dwelling units.

(3) *Different standards for MH program.* The IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

- (i) Ability to provide maintenance for the unit;
- (ii) Potential for maintaining at least the current income level;
- (iii) Successor to a unit at the time of an "event" ("event" should also be defined by the IHA in its policy); and
- (iv) Initial purchase price and the purchase price for a subsequent homebuyer.

(b) *Ability to meet homebuyer obligations.* A family shall not be selected for MH housing unless, in addition to meeting the income limits and other requirements for admission (see § 950.301), the family is able and willing to meet all obligations of an MHO Agreement, including the obligations to perform or provide the

required maintenance, to provide the required MH Contribution and its own utilities, and to pay the administration charge.

(c) *MH waiting list.* (1) Families who wish to be considered for selection for MH housing shall apply specifically for such housing. A family on any other IHA waiting list, or a tenant in a rental project of the IHA, must also submit an application for selection in order to be considered for an MH project; and

(2) The IHA shall maintain a waiting list, separate from any other IHA waiting list, of families that have applied for MH housing and that have been determined to meet the admission requirements. The IHA shall maintain an MH waiting list in accordance with requirements prescribed by HUD and shall make selections in the order in which they appear on the list.

(d) *Making the selections.* Within 30 days after HUD approval of the application for a project, the IHA must proceed with preliminary selection of as many Homebuyers as there are homes in the project. Preliminary selection of homebuyers must be made from the MH waiting list in accordance with the date of application, qualification for a Federal preference in accordance with § 950.305, other pertinent factors under the IHA's admissions policies established in accordance with § 950.301, and all admissions are subject to 24 CFR part 750. Final selection of a homebuyer will be made only after the site for that homebuyer has received final site approval, and the form of MH contribution to be made by that homebuyer (or donated for that homebuyer) has been determined.

(e) *Principal residence.* A condition for selection as a homebuyer is that the family agrees to use the home as their principal residence during the term of the MHO Agreement. Ownership or use of a decent, safe and sanitary residence other than the MH home at the time of occupancy or acquisition during occupancy would disqualify a family from the MH program. However, there are two situations that are deemed not to violate the principal residence requirement. First, ownership or use of a secondary home that is necessary for the family's livelihood or for cultural preservation, as described in the IHA's admission and occupancy policy, is acceptable. Second, a family's temporary absence from its MH home, and related subleasing of it is acceptable if it is done for reasons and time periods prescribed in the IHA's admission and occupancy policy.

(f) *Notification of applicants.* The IHA shall give families prompt written notice of whether or not they have been

selected. If a family is not selected, the notice must state the basis for the determination and that the family is entitled to an informal hearing by the IHA on the determination, if a request for a hearing is made within a reasonable time (as specified in the notice). Such a hearing should be held within a reasonable time. (Informal review provisions applicable to denial of an application for a Federal preference under § 950.305 are contained in paragraph (k) of that section.)

(g) *Change in income.* (1) If a family's income changes after selection but before execution of the MHO agreement in such a way as to make it ineligible (either too high or too low), the IHA may reject the family for this program. However, even a family with an income above the low-income limits may be admitted to this program, provided that the number of such families admitted does not exceed the limit stated in paragraph (a)(2) of this section.

(2) If a family's income changes after the MHO agreement is executed but before the unit is occupied so that it no longer qualifies for the program, the IHA may reject the family for this program. If it becomes evident that a family's income is inadequate to meet its obligations, the IHA may counsel the family about other housing options, such as its rental program. Inability of the family to meet its obligations under the homebuyer agreement is grounds for termination of the agreement.

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§ 950.419 MH contribution.

(a) *Amount and form of contribution.* As a condition of occupancy, the MH homebuyer will be required to provide an MH contribution. Contributions other than labor may be made by an Indian Tribe on behalf of a family.

(1) The value of the contribution must be \$1500.

(2) The MH contribution may consist of land, labor, cash, materials, equipment, or any combination thereof. Land contributed to satisfy this requirement must be owned in fee simple by the homebuyer or must be assigned or allotted to the homebuyer for his or her use before application for an MH unit. Contributions of land donated by another person on behalf of the homebuyer will satisfy the requirement for an MH contribution. A homebuyer may provide cash to satisfy the MH contribution requirement where the cash is used for the purchase of land, labor, or materials or equipment for the homebuyer's home.

(3) The amount of credit for an MH contribution in the case of land, labor, or materials or equipment shall be based upon the market value at the time of the contribution, but in no case will the credit exceed \$1500. In the case of labor, materials or equipment, market value shall be determined by the contractor and the IHA. In the case of land, market value shall be determined by the IHA, but in no case will the credit exceed \$1,500 per homesite. The use of labor, materials or equipment as MH contributions must be reflected by a reduction in the Total Contract Price stated in the Construction Contract.

(b) *Execution of agreements.* For projects other than Self-Help development projects, MHO Agreements must be signed for all units before execution of the construction contract for the project, unless the IHA obtains approval by the HUD Field Office of an exception. Land leases for trust land must be signed and approved by BIA before construction start. The MHO Agreement must include the homebuyer's agreement to satisfy the MH contribution requirement before occupancy of the unit.

(c) *Total contribution to be furnished before occupancy.* The homebuyer cannot occupy the unit until the entire MH contribution is provided to the IHA. If the homebuyer is unable or unwilling to provide the MH contribution before occupancy of the project, the MHO Agreement for the homebuyer shall be terminated, any MH contribution paid by the homebuyer shall be refunded in accordance with § 950.446, and the IHA shall select a substitute homebuyer from its waiting list.

(d) *MH contribution in event of substitution of homebuyer.* If an MHO Agreement is terminated and a substitute homebuyer is selected, the amount of MH contribution to be provided by the substitute homebuyer shall be in accordance with paragraph (a) of this section. The substitute homebuyer may not occupy the unit until the complete MH contribution has been made.

(e) *Disposition of contribution.* If an MHO Agreement is terminated by the IHA or the homebuyer before the date of occupancy, the homebuyer may receive reimbursement of the value of the MH contribution made plus other amounts contributed by the homebuyer, in accordance with § 950.446.

§ 950.422 Commencement of occupancy.

(a) *Notice.* (1) Upon acceptance by the IHA from the contractor of the home as ready for occupancy, the IHA shall determine whether the homebuyer has met all requirements for occupancy,

including satisfaction in full of the MH contribution, and fulfillment of mandatory homebuyer counseling requirements. (See § 950.453.) The IHA shall notify the homebuyer in writing that the home is available for occupancy as of a date specified in the notice, which is called the date of occupancy.

(2) If the IHA determines that the homebuyer has not fully provided the MH contribution or met any of the other conditions for occupancy by the date of occupancy, the homebuyer shall be sent a notice in writing. This notice must specify the date by which all requirements must be satisfied and shall advise the homebuyer that the MHO Agreement will be terminated and a substitute homebuyer selected for the unit if the requirements are not satisfied. (See §§ 950.446 and 950.419(d).)

(b) *Credits to MH accounts and reserves.* Promptly after the date of occupancy, the IHA shall credit the amount of the MH contribution to the homebuyer's accounts and reserves in accordance with § 950.437 and shall give the homebuyer a statement of the amounts so credited.

§ 950.425 Inspections, responsibility for items covered by warranty.

(a) *Inspection before move-in and identification of warranties.*

(1) To establish a record of the condition of the home on the date of occupancy, the homebuyer (including a subsequent homebuyer) and the IHA shall make an inspection of the home as close as possible to, but not later than, the date the homebuyer takes occupancy. This inspection may be the final inspection required by § 950.270 or may be a separate inspection with the homebuyer and IHA. After the inspection, the IHA representative shall give the homebuyer a signed statement of the condition of the home and equipment and a full written description of all homebuyer responsibilities. The homebuyer shall sign a copy of the statement, acknowledging concurrence or stating objections; and any differences shall be resolved by the IHA and a copy of the signed inspection report shall be kept at the IHA. This written statement of the condition of the home shall not limit the homebuyer's right to claim latent defects in construction that may be covered by warranties referenced in paragraph (a)(2) of this section.

(2) Within 30 days of commencement of occupancy of each home, the IHA shall furnish the homebuyer with a list of applicable contractors', manufacturers' and suppliers' warranties, indicating the items covered

and the periods of the warranties, and stating the homebuyer's responsibility for notifying the IHA of any deficiencies that would be covered under the warranties.

(b) *Inspections during contractors' warranty periods, responsibility for items covered by contractors', manufacturers' or suppliers' warranties.* In addition to the inspection required under paragraph (a) of this section, the IHA will inspect the home regularly in accordance with paragraph (c) of this section. However, it is the responsibility of the homebuyer during the period of the applicable warranties, to promptly inform the IHA in writing of any deficiencies arising during the warranty period (including manufacturers' and suppliers' warranties) so that the IHA may enforce any rights under the applicable warranties. If a homebuyer fails to furnish such a written report in time, and the IHA is subsequently unable to obtain redress under the warranty, correction of the deficiency shall be the responsibility of the homebuyer.

(c) *Inspection upon termination of agreement.* If the MHO Agreement is terminated for any reason after commencement of occupancy, the IHA shall inspect the home after notifying the homebuyer of the time for inspection and shall give the homebuyer a written statement of the cost of any maintenance work required to put the home in satisfactory condition for the next occupant (see § 950.446).

(d) *Homebuyer permission for inspections; participation in inspections.* The homebuyer shall permit the IHA to inspect the home at reasonable hours and intervals during the period of the MHO Agreement in accordance with rules established by the IHA. The homebuyer shall be notified of the opportunity to participate in the inspection made in accordance with this section.

§ 950.426 Homebuyer payments—pre-1976 projects.

The amount of the required monthly payment for a homebuyer in an MH project placed under ACC before March 9, 1976 is determined in accordance with the MH Agreement and provisions of §§ 950.315 and 950.102 concerning income. Utility reimbursements are not applicable to the Mutual Help program.

§ 950.427 Homebuyer payments—post-1976 projects.

(a) *Applicability.* The amount of the required monthly payment for a homebuyer in an MH project placed under ACC on or after March 9, 1976, and a homebuyer admitted to

occupancy in an existing project on or after the conversion of the project in accordance with § 950.455 is determined in accordance with this section.

(b) *Establishment of payment.* (1) Each homebuyer shall be required to make a monthly payment ("required monthly payment") as determined by the IHA. The minimum required monthly payment must equal the administration charge.

(2) Subject to the requirement for payment of at least the administration charge, each homebuyer shall pay an amount of required monthly payment computed by:

(i) Multiplying adjusted income (determined in accordance with § 950.315) by a specified percentage; and

(ii) Subtracting from that amount the utility allowance determined for the unit. The specific percentage shall be no less than 15 percent and no more than 30 percent, as determined by the IHA.

(3) The IHA shall provide that the required monthly payment may not be more than a maximum amount. The maximum shall not be less than the sum of:

(i) The administration charge; and
(ii) The monthly debt service amount shown on the homebuyer's purchase price schedule.

(4) If the "required monthly payment" exceeds the administration charge, the amount of the excess shall be credited to the homebuyer's monthly equity payments account (see § 950.437(b)).

(c) *Administration charge.* The administration charge should reflect differences in expenses attributable to different sizes or types of units. It is the amount budgeted by the IHA for monthly operating expenses covering the following categories (and any other operating expense categories included in the IHA's HUD-approved operating budget for a fiscal year or other period, excluding any operating cost for which operating subsidy is provided):

(1) Administrative salaries, payroll taxes, etc.; travel, postage, telephone and telegraph, office supplies; office space, maintenance and utilities for office space; general liability insurance or risk protection costs; accounting services; legal expenses; and operating reserve requirements (§ 950.431); and

(2) General expenses, such as premiums for fire and related insurance, payments in lieu of taxes, if any, and other similar expenses.

(d) *Adjustments in the amount of the required monthly payment.* (1) After the initial determination of a homebuyer's required monthly payment, the IHA shall increase or decrease the amount of

such payment in accordance with HUD regulations to reflect changes in adjusted income (pursuant to a reexamination by the IHA in accordance with § 950.315), adjustment's in the administration charge, or in any of the other factors affecting computation of the homebuyer's required monthly payment.

(2) In order to accommodate wide fluctuations in required monthly payments due to seasonal conditions, an IHA may agree with the homebuyer for payments to be made in accordance with a seasonally adjusted schedule which assures full payment of the required amount for each year.

(e) *Homebuyer payment collection policy.* Each IHA shall establish and adopt written policies, and use its best efforts to obtain compliance to assure the prompt payment and collection of required homebuyer payments. A copy of the policies shall be posted prominently in the IHA office, and shall be provided to a homebuyer upon request. Unless HUD has issued a corrective action order with respect to this function, in accordance with § 950.135, HUD approval is not required.

§ 950.428 Maintenance, utilities, and use of home.

(a) *General.* Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and homebuyers. A copy of such written policies shall be posted prominently in the IHA office, and shall be provided to an applicant or homebuyer upon entry into the program and upon request.

(b) *Provisions for MH projects.* For MH Projects, the written maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of homebuyers for maintenance and care of their dwelling units and common property;

(2) Procedures for providing advice and technical assistance to homebuyers to enable them to meet their maintenance responsibilities;

(3) Procedures for IHA inspections of homes and common property;

(4) Procedures for IHA performance of homebuyer maintenance responsibilities (where homebuyers fail to satisfy such responsibilities), including procedures for charging the homebuyer's proper account for the cost thereof;

(5) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(6) Procedures for charging homebuyers for damage for which they are responsible.

(c) *IHA responsibility in MH projects.* The IHA shall enforce those provisions of a Homebuyer's Agreement under which the homebuyer is responsible for maintenance of the home. The IHA has overall responsibility to HUD for assuring that the housing is being kept in decent, safe, and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and tear excepted. Failure of a homebuyer to meet the obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, except as may be otherwise provided in this section, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the homebuyer's obligations under the homebuyer's agreement. The IHA may inspect the home once every three years, in lieu of an annual inspection where the homebuyer is in full compliance with the original terms of the homebuyer's agreement, including payments, and the home is maintained in decent, safe, and sanitary condition, as reflected by the last inspection by the IHA. However, if at any time the IHA determines that the homebuyer is not in compliance with the homebuyer's agreement, it must reinstate annual inspections.

(d) *Homebuyer responsibility in MH program.* (1) The homebuyer shall be responsible for routine and nonroutine maintenance of the home, including all repairs and replacements (including those resulting from damage from any cause). The IHA shall not be obligated to pay for or provide any maintenance of the home other than the correction of warranty items reported during the applicable warranty period.

(2) *Homebuyer's failure to perform maintenance.* (i) Failure of the homebuyer to perform maintenance obligations constitutes a breach of the MHO Agreement and grounds for its termination. Upon a determination by the IHA that the homebuyer has failed to perform its maintenance obligations, the IHA shall require the homebuyer to agree to a specific plan of action to cure the breach and to assure future compliance. The plan shall provide for maintenance work to be done within a reasonable time by the homebuyer, with such use of the homebuyer's account as

may be necessary, or to be done by the IHA and charged to the homebuyer's account, in accordance with § 950.437. If the homebuyer fails to carry out the agreed-to plan, the MHO agreement shall be terminated in accordance with § 950.446.

(ii) If the IHA determines that the condition of the property creates a hazard to the life, health, or safety of the occupants, or if there is a risk of damage to the property if the condition is not corrected, the corrective work shall be done promptly by the IHA with such use of the homebuyer's accounts as the IHA may determine to be necessary, or by the homebuyer with a charge of the cost to the homebuyer's accounts in accordance with § 950.437.

(iii) Any maintenance work performed by the IHA shall be accounted for through a work order stating the nature of and charge for the work. The IHA shall give the homebuyer copies of all work orders for the home.

(e) *Homebuyer's responsibility for utilities.* The homebuyer is responsible for the cost of furnishing utilities for the home. The IHA shall have no obligation for the utilities. However, if the IHA determines that the homebuyer is unable to pay for the utilities for the home, and that this inability creates conditions that are hazardous to life, health, or safety of the occupants or threatens damage to the property, the IHA may pay for the utilities on behalf of the homebuyer and charge the homebuyer's accounts for the costs, in accordance with § 950.437. When the homebuyer's account has been exhausted, the IHA shall pursue termination of the homebuyer agreement and may offer the homebuyer a transfer into the rental program if a unit is available.

(f) *Obligations with respect to home and other persons and property.*

(1) The homebuyer shall agree to abide by all provisions of the MHO Agreement concerning homebuyer responsibilities, occupancy and use of the home.

(2) The homebuyer may request IHA permission to operate a small business in the unit. An IHA shall grant this authority where the homebuyer provides the following assurances and may rescind this authority upon violation of any of the following assurances:

(i) The unit will remain the homebuyer's principal residence;

(ii) The business activity will not disrupt the basic residential nature of the housing site; and

(iii) The business will not require permanent structural changes to the unit that could adversely affect a future

homebuyer's use of the unit. The IHA may rescind such authority whenever any of the above assurances are violated.

(g) *Structural changes.* (1) A homebuyer shall not make any structural changes in or additions to the home unless the IHA has determined that such change would not:

(i) Impair the value of the home, the surrounding homes, or the project as a whole; or

(ii) Affect the use of the home for residential purposes.

(2) (i) Additions to the home include, but are not limited to, energy-conservation items such as solar panels, wood-burning stoves, flues and insulation. Any changes made in accordance with this section shall be at the homebuyer's expense, and in the event of termination of the MHO Agreement the homebuyer shall not be entitled to any compensation for such changes or additions.

(ii) If the homebuyer is in compliance with the terms of the MHO agreement, the IHA may agree to allow the homebuyer to use the funds in the MEPA for betterments and additions to the MH home. In such event, the IHA shall determine whether the homebuyer will be required to replenish the MEPA or if the funds are to be loaned to the homebuyer at an interest rate determined by the IHA. The homebuyer cannot use MEPA funds for luxury items, as determined by the IHA.

(Information collection requirement contained in paragraph (c) has been approved by the Office of Management and Budget under control number 2577-0114.)

§ 950.431 Operating reserve.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities and common property, for the payment of advance premiums for insurance, for unanticipated project requirements and for other eligible uses as determined by the IHA. A contribution to this reserve shall be determined by the IHA and included in the administration charge. The amount of this contribution shall be increased or decreased annually to reflect the needs of the IHA for working capital and for reserves for anticipated future expenditures and shall be included in the operating budget submitted to the HUD Field Office for approval. If the IHA fails to maintain an adequate operating reserve level, HUD may issue a corrective action order prescribing specific actions that the IHA must take to improve its financial condition. (See § 950.135).

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating expenses of the project for the budget period; or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period.

§ 950.432 Operating budget submission and approval.

In addition to other budget documentation required by HUD, each operating budget or operating budget revision shall include a certified copy of a resolution of the board of commissioners stating that the board has reviewed and approved the operating budget or operating budget revision.

§ 950.434 Operating subsidy.

(a) *Scope.* This section authorizes the use of operating subsidy for Mutual Help projects; establishes eligible costs; and provides for determination of operating subsidy on a uniform basis for all MH projects.

(b) *Eligible costs.* The reasonable cost of an annual independent audit is an eligible cost for operating subsidy. Operating subsidy may also be paid to cover proposed expenditures approved by the HUD Field Office for the following purposes:

(1) Administration charges for vacant units where the IHA submits evidence to the HUD Field Office's satisfaction that it is making every reasonable effort to fill the vacancies;

(2) Collection losses due to payment delinquencies on the part of homebuyer families whose MHO Agreements have been terminated and who have vacated the home, and the actual cost of any maintenance (including repairs and replacements) necessary to put the vacant home in a suitable condition for a subsequent homebuyer family. Operating subsidy may be made available for these purposes only after the IHA has previously used all available homebuyer credits. Every reasonable effort shall be made to collect charges from a vacated homebuyer, including court judgments, professional collection services, etc., as appropriate;

(3) A formula amount for the cost of a HUD-approved counseling program;

(4) A formula amount for training and related travel of IHA staff and Commissioners;

(5) The costs of a HUD-approved professional management contract; and

(6) Operating costs resulting from other unusual circumstances justifying

payment of operating subsidy, if approved by HUD.

(7) Subject to appropriations, and in accordance with the provisions of subpart O of this part and procedures determined by HUD, each IHA with a duly elected resident organization shall receive \$25 per unit per year for resident participation activities. Of this amount, \$15 per unit per year shall fund resident participation activities of the RO. Ten dollars per unit per year shall fund IHA costs incurred in carrying out resident participation activities.

(c) *Ineligible costs.* No operating subsidy shall be paid for utilities, maintenance, or other items for which the homebuyer is responsible except, as necessary, to put a vacant home in condition for a subsequent family as provided in paragraph (b)(2) of this section.

§ 950.437 Homebuyer reserves and accounts.

(a) *Refundable and nonrefundable MH reserves.* The IHA shall establish separate refundable and nonrefundable reserves for each homebuyer effective on the date of occupancy.

(1) The refundable MH reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's cash MH contribution or the value of the labor, materials or equipment MH contribution.

(2) The nonrefundable MH reserve also represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's share of any credits for land contributed to the project and the homebuyer's share of any credit for non-land contributions by a terminated homebuyer.

(b) *Equity accounts.* (1) *Monthly equity payments account ("MEPA").* The IHA shall maintain a separate MEPA for each homebuyer. The IHA shall credit this account with the amount by which each required monthly payment exceeds the administration charge. Should the homebuyer fail to pay the required monthly payment, the IHA may elect to reduce the MEPA by the amount owed each month towards the administration charge, until the MEPA has been fully expended. The MEPA balance must be comprised of an amount backed by cash actually received in order for any such reduction to be made.

(2) *Investment of equity funds.* (i) Funds held by the IHA in the equity

accounts of all the homebuyers in the project shall be invested in HUD-approved investments. Income earned on the investments of such funds shall periodically, but at least annually, be prorated and credited to each homebuyer's equity accounts in proportion to the amount in each such account on the date of proration. If HUD determines that accounts are not properly managed and has issued a corrective action order pursuant to § 950.135, it may ultimately remove responsibility of the IHA for managing such accounts to a HUD-approved escrow agent.

(ii) Notwithstanding other provisions of this subpart and subject to HUD Field Office approval, an IHA may use a portion of the homebuyers' equity accounts for low-income housing purposes provided that a reserve of homebuyers' MEPA is maintained. The reserve must be at a percentage established by the IHA and approved by the HUD Field Office. (Interest must continue to be credited to the homebuyer's account based on the MEPA balance and the rate of interest that would have been earned if the funds were invested.)

(c) *Charges for maintenance.* (1) If the IHA has maintenance work done in accordance with § 950.428(a), the cost thereof shall be charged to the homebuyer's MEPA.

(2) At the end of each fiscal year, the debit balance, if any in the MEPA shall be charged, first to the refundable MH reserve; and second, to the nonrefundable MH reserve, to the extent of the credit balances in that account and those reserves.

(3) In lieu of charging the debit balance in the MEPA to the homebuyer's refundable MH reserve and/or nonrefundable MH reserve, the IHA may allow the debit balance to remain in the MEPA pending replenishment from subsequent credits to the homebuyer's MEPA.

(4) The IHA shall at no time permit the accumulation of a debit balance in the MEPA in excess of the sum of the credit balances in the homebuyer's refundable and nonrefundable MH reserves, unless the expenditure is required to alleviate a hazard to the life, health or safety of the occupants, or to alleviate risk of damage to the property.

(d) *Disposition of reserves and accounts.* When the homebuyer purchases the home, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 950.440. If the MHO agreement is terminated by the homebuyer or the IHA, the balances in the homebuyer's

reserves and accounts shall be disposed of in accordance with § 950.446.

(e) *Use of reserves and accounts; nonassignability.* The homebuyer shall have no right to receive or use the funds in any reserve or account except as provided in the MHO agreement, and the homebuyer shall not, without approval of the IHA and HUD, assign, mortgage or pledge any rights in the MHO agreement or to any reserve or account.

§ 950.440 Purchase of home.

(a) *General.* The IHA provides the family an opportunity to purchase the dwelling under the Mutual Help and Occupancy Agreement (a lease with an option to purchase), under which the purchase price is amortized over the period of occupancy, in accordance with a purchase price schedule. For acquisition under the MHO agreement, see paragraph (e) of this section. If a homebuyer wants to acquire ownership in a shorter period than that shown on the purchase price schedule, the homebuyer may exercise his or her option to purchase the home on or after the date of occupancy, but only if the homebuyer has met all obligations under the MHO agreement. The homebuyer may obtain financing, from the IHA or an outside source, at any time, to cover the remaining purchase price. The financing may be provided using such methods as a mortgage or a loan agreement. If the homebuyer is able to obtain financing from an outside source, the IHA will release the homebuyer from the MHO agreement and terminate the homebuyer's participation in this program. For acquisition under methods other than under the MHO agreement, see § 950.443.

(b) *Purchase price and purchase price schedule.* (1) *Initial purchase price.* The initial purchase price of a home for a homebuyer shall be determined by the IHA.

(2) *Purchase price schedule.* Promptly after execution of the construction contract, the IHA shall furnish to the homebuyer a statement of the initial purchase price of the home, and a purchase price schedule that will apply, based on amortizing the balance (purchase price less the MH contribution) over a period, not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA. The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Purchase price schedule for subsequent homebuyer.* (1) *Initial purchase price.* When a subsequent

homebuyer executes the Mutual Help and Occupancy Agreement, the purchase price for the subsequent homebuyer shall be determined by the IHA.

(2) *Purchase price schedule.* Each subsequent homebuyer shall be provided with a purchase price schedule, showing the monthly declining purchase price over a period, not less than 15 years or more than 25 years as determined by the IHA, at an interest rate determined by the IHA.

(d) [Reserved].

(e) *Conveyance of home.* (1) *Purchase procedure.* In accordance with the MHO agreement, the IHA shall convey title to the homebuyer when the balance of the purchase price can be covered from the amount in the equity account. The homebuyer may supplement the amount in the equity account with reserves or any other funds of the homebuyer. Notwithstanding the requirement for prompt conveyance, an IHA may delay conveyance long enough to modernization a paid off unit in accordance with its Comprehensive Plan or CIAP application.

(2) *Amounts to be paid.* The purchase price shall be the amount shown on the purchase price schedule for the month in which the settlement date falls.

(3) *Settlement costs.* Settlement costs shall be paid by the homebuyer who may use equity accounts or reserves available for the purchase in accordance with paragraph (e)(4) of this section.

(4) *Disposition of homebuyer accounts and reserves.* When the homebuyer purchases the home, the net credit balances in the homebuyer's equity account as described in § 950.437, supplemented by the nonrefundable MH reserve and then the refundable MH reserve, shall be applied in the following order:

(i) For the initial payment for fire and extended coverage insurance on the home after conveyance if the IHA finances purchase of the home in accordance with § 950.443;

(ii) For settlement costs, if the homebuyer so directs;

(iii) For the purchase price; and

(iv) The balance, if any, for refund to the homebuyer.

(5) *Settlement.* A home shall not be conveyed until the homebuyer has met all the obligations under the MHO Agreement, except as provided in § 950.440(e)(8). The settlement date shall be mutually agreed upon by the parties. On the settlement date, the homebuyer shall receive the documents necessary to convey to the homebuyer the IHA's right, title, and interest in the home, subject to any applicable restrictions or covenants as expressed in

such documents. The required documents shall be approved by the attorneys representing the IHA, and by the homebuyer or the homebuyer's attorney.

(6) *IHA investment and use of purchase price payments.* After conveyance, all homebuyer funds held or received by the IHA from the sale of a unit in a project financed with grants shall be held separate from other project funds, and shall be used for purposes related to low-income housing use, as approved by HUD. Homebuyer funds held or received by the IHA from the sale to a homebuyer of a unit in a project financed by loans are subject to loan forgiveness. Homebuyer funds include the amount applied to payment of the purchase price from the equity account, any cash paid by the homebuyer for application to the purchase price and, if the IHA finances purchase of the home in accordance with § 950.446, any portion of the mortgage payments by the homeowner attributable to payment of the debt service (principal and interest) on the mortgage.

(7) *Removal of home from MH program.* When a home has been conveyed to the homebuyer, whether or not with IHA financing, the unit is removed from the IHA's MH project under its ACC with HUD.

(8) *Homebuyers with delinquencies.* (i) If a homebuyer has a delinquency at the end of the amortization period, the unit is no longer available for assistance from HUD or the IHA, even though the unit has not been conveyed. The IHA must take action to terminate the MHOA or to develop a repayment schedule for the remaining balance to be completed in a reasonable period, but not longer than three years. The payment should be equal to a monthly pro-rated share of the remaining balance owed by the homebuyer, plus an administrative fee consisting of the cost of insurance and the IHA's processing cost. If the homebuyer fails to meet the requirements of the repayment schedule, the IHA should proceed immediately with eviction.

(ii) Notwithstanding the requirements in paragraphs (e)(1) through (8), an IHA may complete emergency and statutorily or regulatorily required modernization work on a unit which is paid off but not conveyed, during the term of the repayment schedule.

(iii) Upon repayment of the total delinquency, the IHA may, in accordance with § 950.602(b)(2), complete non-emergency modernization work on a unit prior to conveyance.

§ 950.443 IHA homeownership financing.

(a) *Eligibility.* The IHA may offer a form of homeownership financing, similar to a purchase money mortgage. The IHA shall set standards for determining eligibility, developing promissory notes, mortgages and other financial instruments necessary to carry out the transaction. Further guidance is provided in HUD Handbooks.

(b) *HUD review and approval.* Unless HUD has issued a corrective action order with respect to this function, in accordance with § 950.135, the IHA may proceed with providing IHA financing without prior HUD approval. IHAs without prior experience in IHA financing should consult with the HUD Field Office.

§ 950.446 Termination of MHO agreement.

(a) *Termination upon breach.* (1) In the event the homebuyer fails to comply with any of the obligations under the MHO agreement, the IHA may terminate the MHO agreement by written notice to the homebuyer, enforced by eviction procedures applicable to landlord-tenant relationships. Foreclosure is an inappropriate method for enforcing termination of the homeownership agreement, which constitutes a lease (with an option to purchase). The homebuyer is a lessee during the term of the agreement and acquires no equitable interest in the home until the option to purchase is exercised.

(2) Misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a breach of the homebuyer's obligations under the MHO agreement.

"Termination", as used in the MHO agreement, does not include acquisition of ownership by the homebuyer.

(b) *Notice of termination of MHO agreement by the IHA, right of homebuyer to respond.* Termination of the MHO agreement by the IHA for any reason shall be by written notice of termination. Such notice shall be in compliance with the terms of the MHO agreement and, in all cases, shall afford a fair and reasonable opportunity to have the homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act, if applicable, and shall incorporate all the steps and provisions needed to comply with State, local, or Tribal law, with the least possible delay. (See § 950.340.)

(c) *Termination of MHO agreement by homebuyer.* The homebuyer may terminate the MHO Agreement by giving the IHA written notice in accordance with the agreement. If the homebuyer

vacates the home without notice to the IHA, the homebuyer shall remain subject to the obligations of the MHO agreement, including the obligation to make monthly payments, until the IHA terminates the MHO agreement in writing. Notice of the termination shall be communicated by the IHA to the homebuyer to the extent feasible and the termination shall be effective on the date stated in the notice.

(d) *Disposition of funds upon termination of the MHO agreement.* If the MHO agreement is terminated, the balances in the homebuyer's accounts and reserves shall be disposed of as follows:

(1) The MEPA shall be charged with:

(i) Any maintenance and replacement cost incurred by the IHA to prepare the home for the next occupant;

(ii) Any amounts the homebuyer owes the IHA, including required monthly payments;

(iii) The required monthly payment for the period the home is vacant, not to exceed 60 days from the date of receipt of the notice of termination, or if the homebuyer vacates the home without notice to the IHA, for the period ending with the effective date of termination by the IHA; and

(iv) The cost of securing a vacant unit, the cost of notification and associated termination tasks, and the cost of storage and/or disposition of personal property.

(2) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a debit balance in the MEPA, the IHA shall charge that debit balance, first to the refundable MH reserve; and second, to the nonrefundable MH reserve, to the extent of the credit balances in these reserves and account. If the debit balance in the MEPA exceeds the sum of the credit balances in these reserves and account, the homebuyer shall be required to pay to the IHA the amount of the excess.

(3) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a credit balance in the MEPA, this amount shall be refunded.

(4) Any credit balance remaining in the refundable MH reserve after making the charges described in paragraph (d)(2) of this section shall be refunded to the homebuyer.

(5) Any credit balance remaining in the nonrefundable MH reserve after making the charges described in paragraph (d)(2) of this section shall be retained by the IHA for use by the subsequent homebuyer.

(e) *Settlement upon termination.* (1) *Time for settlement.* Settlement with the homebuyer following a termination shall be made as promptly as possible

after all charges provided in paragraph (d) of this section have been determined and the IHA has given the homebuyer a statement of such charges. The homebuyer may obtain settlement before determination of the actual cost of any maintenance required to put the home in satisfactory condition for the next occupant, if the homebuyer is willing to accept the IHA's estimate of the amount of such cost. In such cases, the amounts to be charged for maintenance shall be based on the IHA's estimate of the cost thereof.

(f) Responsibility of IHA to terminate.

(1) The IHA is responsible for taking appropriate action with respect to any noncompliance with the MHO agreement by the homebuyer. In cases of noncompliance that are not corrected as provided further in this paragraph, it is the responsibility of the IHA to terminate the MHO agreement in accordance with the provisions of this section and to institute eviction proceedings against the occupant.

(2) As promptly as possible after a noncompliance comes to the attention of the IHA, the IHA shall discuss the matter with the homebuyer and give the homebuyer an opportunity to identify any extenuating circumstances or complaints which may exist. A plan of action shall be agreed upon that will specify how the homebuyer will come into compliance, as well as any actions by the IHA that may be appropriate. This plan shall be in writing and signed by both parties.

(3) Compliance with the plan shall be checked by the IHA not later than 30 days from the date thereof. In the event of refusal by the homebuyer to agree to such a plan or failure by the homebuyer to comply with the plan, the IHA shall issue a notice of termination of the MHO agreement and evict the homebuyer in accordance with the provisions of this section on the basis of the noncompliance with the MHO agreement.

(4) A record of meetings with the homebuyer, written plans of action agreed upon and all other related steps taken in accordance with paragraph (f) of this section shall be maintained by the IHA for inspection by HUD.

(g) *Subsequent use of unit.* After termination of a homebuyer's interest in the unit, it remains as part of the MH project under the ACC. The IHA must follow its policies for selection of a subsequent homebuyer for the unit under the MH program. (See § 950.449(g) for use of unit if no qualified subsequent homebuyer is available.)

§ 950.449 Succession.

(a) *Definition of "event."* "Event" means the death, mental incapacity, or other conditions as determined by the IHA, of all of the persons who have executed the MHO agreement as homebuyers.

(b) *Designation of successor by homebuyer.* A homebuyer may designate a successor who, at the time of the "event", would assume the status of homebuyer, provided that at the time of the event, the successor meets the conditions established by the IHA which shall include satisfying program eligibility requirements. The designation may be made at the time of execution of the MHO agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

(c) *Succession by persons designated by homebuyer.* Upon occurrence of an "event", the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO agreement if the designated successor meets the criteria established by the IHA which shall include program eligibility requirements.

(d) *Designation of successor by IHA.* If at the time of the event there is no successor designated by the homebuyer, the IHA may designate, in accordance with its occupancy policy, any person who qualifies under paragraph (c) of this section.

(e) *Occupancy by appointed guardian.* If at the time of the event there is no qualified successor designated by the homebuyer or by the IHA in accordance with paragraphs (a) through (d) of this section, and a minor child or children of the homebuyer are living in the home, the IHA may, in order to protect their continued occupancy and opportunity for acquiring ownership of the home, approve as occupant of the home an appropriate adult who has been appointed legal guardian of the children with a duty to perform the obligations of the MHO agreement in their interest and behalf.

(f) *Succession and occupancy on trust land.* In the case of a home on trust land subject to restrictions on alienation under federal law (including federal trust or restricted land and land subject to trust or restriction under State law), or under State or Tribal law where such laws do not violate federal statutes, a person who is prohibited by law from succeeding to the IHA's interest on such land may, nevertheless, continue in occupancy with all the rights, obligations and benefits of the MHO agreement, modified to conform to these restrictions on succession to the land.

(g) *Termination in absence of qualified successor.* If there is no qualified successor in accordance with the IHA's approved Admissions and Occupancy policy, the IHA shall terminate the MHO agreement and select a subsequent homebuyer from the top of the waiting list to occupy the unit under a new MHO agreement. If a new homebuyer is unavailable or if the home cannot continue to be used for low-income housing in accordance with the Mutual Help program, the IHA may submit an application to HUD to convert the unit to the Rental program in accordance with § 950.458 or to approve a disposition of the home, in accordance with subpart M of this part.

§ 950.452 Miscellaneous.

(a) *Annual statement to homebuyer.*

The IHA shall provide an annual statement to the homebuyer that sets forth the credits and debits to the homebuyer equity accounts and reserves during the year and the balance in each account at the end of each IHA fiscal year. The statement shall also set forth the remaining balance of the purchase price.

(b) *Insurance before transfer of ownership, repair or rebuilding.*

(1) *Insurance.* The IHA shall carry all insurance prescribed by HUD, including fire and extended coverage insurance upon the home.

(2) *Repair or rebuilding.* In the event the home is damaged or destroyed by fire or other casualty, the IHA shall consult with the homebuyers as to whether the home shall be repaired or rebuilt. The IHA shall use the insurance proceeds to have the home repaired or rebuilt unless there is good reason for not doing so. In the event the IHA determines that there is good reason why the home should not be repaired or rebuilt and the homebuyer disagrees, the matter shall be submitted to the HUD Field Office for final determination. If the final determination is that the home should not be repaired or rebuilt, the IHA shall terminate the MHO agreement, and the homebuyer's obligation to make required monthly payments shall be deemed to have terminated as of the date of the damage or destruction.

(3) *Suspension of payments.* In the event of termination of a MHO Agreement because of damage or destruction of the home, or if the home must be vacated during the repair period, the IHA will use its best efforts to assist in relocating the homebuyer. If the home must be vacated during the repair period, required monthly payments shall be suspended during the vacancy period.

(c) *Notices.* Any notices by the IHA to the homebuyer required under the MHO Agreement or by law shall be delivered in writing to the homebuyer personally or to any adult member of the homebuyer's family residing in the home, or shall be sent by certified mail, return receipt requested, properly addressed, postage prepaid. Notice to the IHA shall be in writing and either delivered to an IHA employee at the office of the IHA, or sent to the IHA by certified mail, return receipt requested, properly addressed, postage prepaid.

§ 950.453 Counseling of homebuyers.

(a) *General.* (1) The IHA shall provide counseling to Homebuyers in accordance with this section. The purpose of the counseling program shall be to develop:

- (i) A full understanding by homebuyers of their responsibilities as participants in the MH Project;
- (ii) Ability on their part to carry out these responsibilities; and
- (iii) A cooperative relationship with the other Homebuyers.

(2) All homebuyers shall be required to participate in and cooperate fully in all official pre-occupancy and post-occupancy counseling activities. Failure without good cause to participate in the program shall constitute a breach of the MHO Agreement.

(b) The IHA shall submit to the local HUD Office a copy of its counseling program with its request for funding for approval.

(c) *Progress reports.* Unless otherwise required in a corrective action order, IHAs shall submit an annual progress report with the annual budget submission to the HUD Field Office.

(d) *Termination of counseling program.* If HUD determines that an IHA's counseling program is not being properly implemented, the program may be terminated after notice to the IHA stating the deficiencies in program implementation, and giving the IHA 90 days from the date of notification to take corrective action, and in the event of termination the amount included in the Development Cost Budget for the program shall be reduced so as not to exceed expenses already incurred at the time of termination.

§ 950.455 Conversion of rental projects.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the local HUD Office for approval to convert any or all of the units in an existing rental project to the MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be in decent, safe and sanitary condition. The project(s) which possess the proposed conversion units must have received an approved actual development cost certificate.

(2) Tenants or other applicants to be homebuyers of the proposed conversion units must qualify for the program under § 950.416(b). The entire MH contribution required of the homebuyer must be made before the rental unit occupied by a tenant can be converted to the MH program.

(3) In the case of conversion of apartments or rowhouses to condominium or cooperative ownership, all units in a structure must be converted, with all occupants at the time of the application qualified, in accordance with paragraph (b)(2) of this section. Any occupants who do not qualify or desire to convert must be satisfactorily relocated and replaced with qualified occupants before application for conversion of the structure.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The local HUD Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2) of this section; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining rental units must not be adversely affected.

§ 950.458 Conversion of Mutual Help projects to Rental Program.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the local HUD Office for approval to convert any or all Mutual Help project units to the rental program, wherever or whenever a homebuyer or homebuyers have lost the potential for ownership because of the inability to meet the cost of their homebuyer responsibilities.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the project must have received an approved ADCC.

(2) The remaining balances in any reserve accounts shall be accounted for individually for each unit converted in

a manner consistent with project intent and in a manner prescribed by HUD

(3) The balance remaining in the MEPA, if any, is applied first to outstanding tenant accounts receivable, then to repair of homebuyer maintenance items, and finally returned to the homebuyer.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The local HUD Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining units must not be adversely affected.

Subpart F—Self-Help Development in the Mutual Help Homeownership Program

§ 950.470 Purpose and applicability.

(a) *Purpose.* The purpose of the Self-Help program is to provide an alternate method of developing dwelling units that will be less costly than other methods of development, will engender community pride and cooperation, and will provide training in construction skills that will have lasting value to participants. If an IHA is interested in pursuing Self-Help development, it organizes a small group of families (six to ten) to build a substantial portion of the homes for all the families in the group, with technical assistance and supervision and materials provided by the IHA, augmented by skilled labor obtained under contract. The participants are individuals and/or families who qualify for participation in the Mutual Help Homeownership Opportunity program who have the ability to furnish their share of the required labor and who agree to participate in the cooperative effort to build homes for all members of the group.

(b) *Applicability.* Any IHA eligible for development funds may submit an application for a Self-Help Mutual Help Homeownership Opportunity project.

§ 950.475 Basic requirements.

(a) *Contracts.* A Self-Help Mutual Help Homeownership Opportunity project also involves three basic contracts in a form approved by HUD: an ACC for a Mutual Help project executed by HUD and the IHA after approval of the SH project application and after HUD approval of the development program, a Self-Help agreement executed by the participating families and the IHA before

construction begins, and a Mutual Help and Occupancy agreement executed by the participating families and the IHA after construction completion. In addition, there may be organizational documents for the organization created by the participating families.

(b) *Family participation.* The project is to be organized so that a small number of families (six to ten) build a substantial portion of their homes and contract for other skilled labor and supplies. Each family must show the desire to work with other families in building their own homes and must have the time to contribute the labor necessary to perform a substantial number of the tasks required in the construction of the homes. Each family must sign a Self-Help agreement with the IHA.

(c) *IHA capacity.* The IHA must have the capacity to provide for the financial, legal, administrative, and technical responsibilities of the program. The IHA is required to provide assurance that the project will be completed, in the form of a letter of credit or its equivalent in an amount equal to ten percent of the estimated Total Development Cost Standard. The IHA may manage the project itself if it has staff with the necessary background and proven ability to perform responsibly in the field of mutual self-help and in construction; or it may contract with an organization that has this type of experience and ability for a fee that fits within the Total Development Cost Standard. Once an IHA has experience with this method of development, it is encouraged to have several groups of families participating in its Self-Help program for more cost-effective use of the construction supervisors, although each family will work only on the homes of its group.

(d) *Funding.* The funding for technical training and supervision of participating families will be provided through development funds, and the cost will be included in the Total Development Cost of the project. The cost of construction supervision and technical assistance shall generally be no more than 15 percent, but may not exceed 20 percent of the TDC of these self-help homes.

(e) *Applicability of Indian preference.* In the selection of contractors to perform construction supervision, skilled labor, or other work under this program, the provisions concerning preference for Indians (§ 950.165) apply. In the selection of participating families, the provisions of § 950.416 apply.

(f) *Building code.* The building code used by the IHA in accordance with § 950.255 will apply to the homes constructed under this program.

§ 950.480 Self-Help agreement.

(a) *Timing.* The obligations under the Self-Help agreement, executed by the IHA and the families in a group selected by the IHA to participate in a Self-Help program, will be contingent upon approval of the development program by HUD. Each family will be obligated to be available to commence work at a time that fits the IHA's schedule for completion of prior tasks by skilled labor, but generally within 120 days of approval of the IHA's Self-Help project development program by HUD and to complete the work within a period not to exceed two years.

(b) *Pre-construction period.* The Self-Help agreement will provide that, before construction begins, the participating families will be required to organize themselves, with the assistance of the IHA, and to participate in construction skills training.

(c) *Labor contribution.* (1) The Self-Help agreement will specify the construction tasks to be performed by the participating families as their labor contribution and the construction tasks to be performed under contract by skilled laborers. The number of tasks to be performed by the participating families must constitute the vast majority of the tasks. Generally, the construction will be done in stages, with each stage of construction finished with respect to all the homes in the project before moving to the next stage.

(2) The labor performed is not subject to the labor standards specified in section 12 of the United States Housing Act of 1937 (42 U.S.C. 1437j).

(3) The Self-Help agreement will specify the circumstances under which it may be terminated.

(d) *Insurance requirements.* The families are working for themselves, and not the IHA, during the performance of their labor contribution. The Self-Help agreement will provide that the families waive any liability claim against the IHA for any injury that might occur during the development of the project. It is in the best interests of participating families to have their own insurance coverage to cover the possibility of injury. If the IHA is able to obtain insurance coverage at reasonable cost with reimbursement from the families, at their request, to cover this risk, it is encouraged to do so.

(e) *Standard provisions.* The Self-Help agreement will include provisions prohibiting kickbacks and conflict of interest.

(f) *Completion.* The Self-Help agreement will provide that upon successful completion of the family's obligations under it, the family and the

IHA will execute a Mutual Help and Occupancy agreement.

§ 950.485 Application.

(a) *General.* The application for a Self-Help development method of Mutual Help project must comply with the general requirements of § 950.225.

(b) *Need for Self-Help housing.* Evidence of the need for Self-Help housing must be submitted, including the following:

(1) The names, addresses, number of persons in the household, and annual incomes of the families selected to participate;

(2) The Self-Help agreement;

(3) Certification by the IHA that the participating families are believed to have the time and ability to fulfill their obligations under the Self-Help agreement; and

(4) Such information as the incomes and sizes of other interested families who appear to be eligible.

(c) *Ability of IHA to administer Self-Help housing.* The IHA must demonstrate its ability to administer the program by identifying the staff members who will supervise construction and provide technical assistance, and describe their experience. If the IHA plans to contract with an outside entity to perform these functions, it must follow the requirements concerning Indian preference. Regardless of the identity of the firm selected to perform this function, the IHA should identify the firm and briefly describe its experience. The IHA also must demonstrate its capacity to administer the program, in accordance with § 950.475.

§ 950.490 Development program.

(a) In addition to complying with the requirements of § 950.260, the IHA's development program for a Self-Help project submitted to HUD must include the following:

(1) *IHA coordination plan.* The plan for organizing and implementing the development, including elements comparable to those covered in the standard Mutual Help construction contract, and the method of coordinating work of participating families and skilled contractors.

(2) *Difference in cost.* A description of how the development cost differs from the cost for a project constructed under a construction contract. This difference should reflect the labor contribution, after considering the construction supervision cost.

(3) *Special provisions for acquisition with rehabilitation projects.* A description of the repair or rehabilitation work needed on each

home to be acquired. The work needed on all the homes should be reasonably comparable in the amount of labor exchange that is required. The estimated number of hours of labor and a description of the work to be done must be provided.

(4) *Certification of participation.* Certification by the IHA that the participating families have signed the Self-Help agreement and remain able to fulfill their obligations under the Self-Help agreement.

(5) *Changes since application stage.* Statement of any changes in the data submitted in the application.

(b) HUD will review the development program submitted by an IHA for a Self-Help project with particular attention to the elements listed in paragraph (a) of this section.

§ 950.495 Default of self-help agreement.

(a) *Default in a Self-Help project.* (1) If the IHA determines that a participating family is failing to provide its labor contribution, as required in accordance with its Self-Help agreement, it shall counsel the family about its obligations and encourage fulfillment of its responsibilities. If the failure of the family is jeopardizing the progress of the project, the IHA shall declare the family in default and terminate its participation in the project. Upon termination of the participation of one family, the IHA shall move expeditiously to select an alternate family to take over the responsibilities of the terminated family. If another qualified family cannot be found to assume the responsibilities of the terminated family, the unit may be converted to some other development method (e.g., force account, conventional bid, etc.) under the Mutual Help Homeownership Opportunity program.

(2) If the IHA determines that an entire group is unable to continue its work to completion of construction, the IHA shall first counsel the group about its obligations and encourage fulfillment of its responsibilities. If counseling is unsuccessful in bringing about satisfactory progress toward completion, the IHA shall declare the families in default and convert the project to a regular Mutual Help Homeownership Opportunity project. The IHA's plan for completing the project must be submitted to HUD for review and consult prior to terminating the self-help project. Availability of additional HUD funding for this purpose is not assured.

(b) [Reserved]

Subpart G—Turnkey III Program

§ 950.501 Introduction.

(a) *Purpose.* This subpart sets forth the essential elements of the HUD Homeownership Opportunities Program for low income families, which is administered by HUD as part of the Indian Housing Program under the United States Housing Act of 1937. In its present form, this part covers only those matters pertinent to the management, operation, conversion and sale of existing Turnkey III homes that remain in Indian housing authority (IHA) ownership. IHAs are encouraged to consider the conversion of Turnkey III units to some other form of operation where compliance with the requirements of the Turnkey III Program has become infeasible.

(b) *Applicability.* (1) This part is applicable to the operation of all Turnkey III developments operated by IHAs.

(2) *Program framework.* All Turnkey III projects shall be operated in accordance with an executed Annual Contributions Contract (ACC), which includes the "Special Provisions for Turnkey III Homeownership Opportunity Project" and Homebuyer Ownership Opportunity Agreements (Homebuyer Agreement) between the IHA and the Homebuyer.

(3) A Turnkey III development may only include units that are to be operated for the purpose of providing homeownership opportunities for eligible low-income families pursuant to this part and the special Turnkey III provisions of the ACC including units occupied temporarily by former homebuyers who, as a result of losing homeownership potential, have been transferred to rental status in place, pending the availability of a suitable rental unit. If for any reason it is determined that certain units should be converted to operation as conventional rental units, Mutual Help units, or some other form of operation, such units must be made a part of a conventional rental project, Mutual Help project, or such other project. However, when a homebuyer is converted to rental status while remaining in the same unit, pending availability of a satisfactory rental unit or approval of a request to convert the unit in accordance with § 950.503, the unit remains under the Turnkey III project.

(4) An IHA may, at its discretion and without HUD approval, establish for its Turnkey III developments any policies, procedures and requirements that are not contrary to the ACC, this part, other applicable Federal, State, and local statutes and regulations, and the rights

of homebuyers under existing homebuyer agreements.

(5) *Program overview.* The Turnkey III Program allows IHAs to provide homeownership opportunities for eligible low-income families who meet the specified standard for homeownership potential, through purchase of homes in those Indian housing developments that were established by certain IHAs under the Turnkey III Program. The program uses a lease-purchase arrangement, whereby the homebuyer family initially takes occupancy on a rental basis, under a homebuyer agreement that constitutes a lease with an option to purchase the home as soon as the family reaches the point where they can afford to buy and assume the responsibilities of homeownership. The purchase price is set at the time of initial occupancy, and then, for a subsequent homebuyer who takes occupancy after turnover. The purchase price for a subsequent homebuyer is determined by the IHA. During the period of rental tenancy, the homebuyer makes monthly rental payments based on an affordable percentage of family income and is responsible for routine maintenance. A portion of the homebuyer monthly payment is used to establish an Earned Home Payments Account (EHPA) and a Nonroutine Maintenance Reserve (NMR). To the extent that these funds are not used by the IHA to perform maintenance relating to the home, the funds will be available to apply to the purchase price at the time the homebuyer is in a position to exercise the option to purchase. At closing, the homebuyer pays the IHA the balance of the purchase price due (or may be permitted by the IHA to finance all or a portion of that amount through a purchase-money mortgage) and the IHA deeds the home over to the homebuyer. The home becomes the privately-owned property of the homebuyer (now a homeowner), no longer Indian housing, and subject only to a restriction on the amount of resale profit that the homeowner is permitted to keep if the property is resold in five years.

(c) [Reserved].

(d) *Contracts, agreements, other documents.* All contracts, agreements and other documents referred to in this subpart must be in a form approved by HUD and changes must be made with the approval of the ONAP Field Office. Contracts, agreements and other documents include but are not limited to:

(1) The Annual Contributions Contract (ACC), including the Special Provisions for Turnkey III Projects;

(2) The Homebuyer Ownership Opportunity Agreement (Homebuyer Agreement);

(3) Certification of Homebuyer Status;

(4) Promissory Note for Payment Upon Resale by Homebuyer at Profit;

(5) Articles of Incorporation and By-Laws of the Homebuyer Association (HBA), if any; and

(6) Recognition Agreement Between Indian Housing Authority and the Homebuyer Association, if any.

§ 950.503 Conversion of Turnkey III developments.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD Field Office for approval to convert any or all of the units in an existing Turnkey III development to the rental or MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be decent, safe and sanitary condition. If the units are not decent, safe and sanitary, the IHA shall submit a plan to correct unit deficiencies. The developments which possess the proposed conversion units must have received and approved actual development cost certificate.

(2) For conversion to MH, applicants must qualify for the program under § 950.416(b). The entire MH contribution required of the homebuyer must be made before the Turnkey III unit occupied by a tenant can be converted to the MH program. In determining the purchase price, the homebuyer may receive credit for the period of time they have been residing in a Turnkey III homeownership unit.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD Field Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2) of this section; and financial feasibility. Where not all units in a development are proposed for conversion, the IHA's ability to operate the remaining Turnkey III units must not be adversely affected.

§ 950.505 Eligibility and selection of Turnkey III homebuyers.

(a) *Applications.* The availability of housing under Turnkey III shall be announced to the community at large, unless there is already a sufficient number of eligible applicants on the IHA's Turnkey III waiting list. Families who wish to be considered for Turnkey III, including, but not limited to existing occupants of the IHA's rental housing units and those on the waiting list for IHA rental housing must apply specifically for that program and a separate list of eligible applicants for Turnkey III shall be maintained. Applications shall be dated as received. The submission of an application for Turnkey III by a family which is also an applicant for conventional rental public housing or is an occupant of such housing shall in no way affect its status with regard to such rental housing. A family shall not lose its place on the waiting list until it is selected for Turnkey III and shall not receive any different treatment or consideration with respect to other rental housing programs because of its having applied for Turnkey III. In order to be considered for selection, a family must be determined to meet at least all of the following standards of potential for homeownership:

(1) Sufficient income to cover the EHPA, NRM, and the estimated cost of utilities with its required monthly payment (see § 950.315);

(2) Ability to meet all obligations under the Homebuyer Agreement; and

(3) At least one member who is gainfully employed, or who has an established source of continuing income.

(b) *Selection and notification of homebuyers.* Homebuyers shall be selected from those families determined to have potential for homeownership. Such selection shall be made in sequence from the waiting list.

§ 950.507 Homebuyer Ownership Opportunity Agreements (HOOA).

(a) *General.* The HOOA must be executed between the IHA and the homebuyer as a condition for occupancy of a Turnkey III unit. The HOOA is a lease agreement which also provides the homebuyer with an option to purchase the home, subject to the homebuyer's compliance with certain conditions. The homebuyer acquires no equity in the home before purchase.

(b) *Pre-Existing Agreements.* (1) Turnkey III Projects in operation on the effective date of this subpart shall be governed by this subpart, except to the extent that the terms of any pre-existing Homebuyer Agreements shall govern the

relationship of an IHA and occupant until the termination or cancellation of such agreement(s). If the agreement establishes a maximum or a minimum monthly payment, the terms of the agreement shall govern. However, in no event will the monthly payment charged exceed the Total Tenant Payment determined in accordance with subpart D of this part.

(2) *Pre-existing Homebuyer Agreements* that determined the required monthly payment in accordance with a "Schedule" developed by the IHA and approved by HUD should continue to determine the monthly payment in accordance with the schedule. This schedule is determined as follows:

(i) The operating budget for the project is based on estimated expenses for a given period of time. The amount needed to operate a particular project is called the breakeven amount. This is comprised of the Operating Expenses, the total amount needed for EHPA, and the total needed for NRM.

(ii) The aggregate of all homebuyers' incomes is determined. (If no definition of income is stated in the homebuyer's contract, the definition in subpart A of this part is used.)

(iii) The percentage of aggregated income needed to cover 110 percent of the breakeven amount is determined. This percentage is the one that appears in the schedule.

§ 950.509 Responsibilities of homebuyer.

(a) *Repair, maintenance and use of home.* The homebuyer shall be responsible for the routine maintenance of the home to the satisfaction of the HBA and the IHA. This routine maintenance includes the work (labor and materials) of keeping the dwelling structure, grounds, and equipment in good repair, condition, and appearance. In addition, the home must conform with the requirements of local housing codes and applicable regulations and guidelines of HUD. It includes repairs (labor and materials) to the dwelling structure, plumbing fixtures, dwelling equipment (such as range and refrigerator), shades and screens, water heater, heating equipment, and other component parts of the dwelling. It also includes all interior painting and the maintenance of grounds (lot) on which the dwelling is located. It does not include maintenance and replacements provided for by the NRM.

(b) *Repair of damage.* In addition to the obligation for routine maintenance, the homebuyer shall be responsible for repair of any damage caused by the homebuyer, other occupants, or visitors.

(c) *Care of home.* A homebuyer shall keep the home in a sanitary condition; cooperate with the IHA and the HBA in keeping and maintaining the common areas and property, including fixtures and equipment, in good condition and appearance; and follow all rules of the IHA and of the HBA concerning the use and care of the dwellings and the common areas and property.

(d) *Inspections.* A homebuyer shall agree to permit officials, employees, or agents of the IHA and of the HBA to inspect the home at reasonable hours and intervals in accordance with rules established by the IHA and the HBA.

(e) *Use of home.* (1) A homebuyer shall not:

(i) Sublet the home without the prior written approval of the IHA;

(ii) Use or occupy the home for any unlawful purpose nor for any purpose deemed hazardous by insurance companies on account of fire or other risks; or

(iii) Provide accommodations (unless approved by the HBA and the IHA) to boarders or lodgers.

(2) The homebuyer shall agree to use the home primarily as a place to live for the family (as identified in the initial application or by subsequent amendment with the approval of the IHA), for children thereafter born to or adopted by members of such family, and for aged or widowed parents of the homebuyer or spouse who may join the household.

(f) *Obligations with respect to other persons and property.* Neither the homebuyer nor any other member of the family shall interfere with rights of other occupants of the development, or damage the common property or the property of others, or create physical hazards.

(g) *Structural changes.* A homebuyer shall not make any structural changes in or additions to the home unless the IHA has first determined in writing that such change would not:

(1) Impair the value of the unit, the surrounding units, or the development as a whole; or

(2) Affect the use of the home for residential purposes; or

(3) Violate HUD requirements as to construction and design.

(h) *Statements of condition and repair.* When each homebuyer moves in, the IHA shall inspect the home and shall give the homebuyer a written statement, to be signed by the IHA and the homebuyer, of the condition of the home and the equipment in it. Should the homebuyer vacate the home, the IHA shall inspect it and give the homebuyer a written statement of the repairs and other work, if any, required

to put the home in good condition for the next occupant. The homebuyer or the homebuyer's representative and a representative of the HBA may join in any inspections by the IHA.

(i) *Maintenance of common property.* The homebuyer may participate in nonroutine maintenance of the home and in maintenance of common property.

(j) *Assignment and survivorship.* Until such time as the homebuyer obtains title to the home, the following conditions apply:

(1) A homebuyer shall not assign any right or interest in the home or any interest under the Homebuyer Ownership Opportunity Agreement without the prior written approval of the IHA;

(2) In the event of death or mental incapacity, the person designated as the successor in the Homebuyer Ownership Opportunity Agreement shall succeed to the rights and responsibilities under the agreement if that person is a family member and is determined by the IHA to meet all of the standards of potential for homeownership, including the requirement to make the home the person's principal residence. Such person shall be designated by the homebuyer at the time the Homebuyer Ownership Opportunity Agreement is executed. This designation may be changed by the homebuyer at any time. If there is no such designation, or the designee is not a family member or does not meet the standards of potential for homeownership, the IHA may consider as the homebuyer any family member who meets the standards of potential for homeownership;

(3) If there is no qualified successor in accordance with paragraph (j)(2) of this section, and no minor child of the homebuyer's family is in occupancy, the IHA shall terminate the agreement and another family shall be selected. Where a minor child or children of the homebuyer's family is in occupancy, and an appropriate adult(s) who has been appointed legal guardian of the children is able and willing to perform the obligations of the Homebuyer Ownership Opportunity Agreement in their interest and on their behalf, then in order to protect continued occupancy and opportunity for acquisition of ownership of the home, the IHA may approve the guardian(s) as occupants of the unit with a duty to fulfill the homebuyer obligations under the agreement.

(Approved by the Office of Management and Budget under control number 2577-0114)

§ 950.511 Homebuyers' association (HBA).

(a) *General.* (1) The homebuyers' association (HBA) is an incorporated organization composed of all homebuyers and homeowners. Except where the homes are on scattered sites (noncontiguous lots throughout a multi-block area with no common property), or where the number of homes in the development may be too few to support an HBA, each Turnkey III development shall have an HBA. For such cases, a modified form of homebuyers association may be called for or a less formal organization may be desirable. This decision shall be made jointly by the IHA and the homebuyers, acting on the recommendation of HUD.

(2) The functions of the HBA shall be set forth in its articles of incorporation and by-laws. The IHA shall assist the HBA in its organization and operation to the extent possible.

(b) *Funding.* The IHA may provide non-cash contributions to the HBA, such as office space, as well as cash contributions, which shall be provided for in the annual operating budgets of the IHA. The cash contributions shall be in an amount provided for in the IHA budget and approved by HUD and shall be subject to any HUD restrictions on funding.

§ 950.512 Homeowner's association (HOA).

A homeowners' association means an association comprised of homeowners, to which the IHA conveys ownership of common property, and which thereafter has responsibilities with respect to the common property. Only residents who have acquired title to their homes are members of the HOA.

§ 950.513 Breakeven amount and application of monthly payments.

(a) *Definition.* The term "break-even amount" as used herein means the minimum average monthly amount required to provide funds for the amounts budgeted for operating expenses, the EHPA, and the NRMH. A separate breakeven amount is established for each size and type of dwelling unit, as well as for the project as a whole. The breakeven amount for EHPA and NRMH will vary by size and type of dwelling unit. Similar variations may occur for operating expenses. The breakeven amount does not include the monthly allowance for utilities for which the homebuyer pays directly.

(b) *Application of monthly payments.* The IHA shall apply the homebuyer's monthly payment as follows:

(1) To the credit of the homebuyer's EHPA;

(2) To the credit of the homebuyer's NRMR; and

(3) For payment of monthly operating expense, including contributions to the operating reserve.

(c) *Excess over breakeven.* When the homebuyer's required monthly payment exceeds the applicable breakeven amount, the excess shall constitute additional project income and shall be deposited and used in the same manner as other project income.

(d) *Deficit in monthly payment.* When the homebuyer's required monthly payment is less than the applicable breakeven amount, the deficit shall be applied as a reduction of that portion of the monthly payment designated for operating expense (*i.e.*, as a reduction of project income). In all cases, the homebuyer payment must be sufficient to cover the EHPA and the NRMR, which shall be credited with the amount included in the breakeven amount for these accounts.

§ 950.515 Monthly operating expense.

(a) *Definition and categories of monthly operating expense.* The term "monthly operating expense" means the monthly amount needed for the following purposes:

(1) *Administration.* Administrative salaries, travel, legal expenses, office supplies, etc.;

(2) *Homebuyer services.* IHA expenses in the achievement of social goals, including costs such as salaries, publications, payments to the HBA to assist its operation, contract and other costs;

(3) *Utilities.* Those utilities (such as water), if any, to be furnished by the IHA as part of operating expense;

(4) *Routine maintenance—common property.* For community building, grounds and other common areas, if any. The amount required for routine maintenance of common property depends upon the type of common property included in the development and the extent of the IHA's responsibility for maintenance;

(5) *Protective services.* The cost of supplemental protective services paid by the IHA for the protection of persons and property;

(6) *General expense.* Premiums for fire and other insurance, payments in lieu of taxes to the local taxing body, collection losses, payroll taxes, etc.;

(7) *Nonroutine maintenance—common property (contribution to operating reserve).* Extraordinary maintenance of equipment applicable to the community building and grounds, and unanticipated items for non-dwelling structures.

(b) Monthly operating expense rate.

(1) The monthly operating expense rate to be included in the breakeven amount for each fiscal year shall be established on the basis of the IHA's HUD-approved operating budget for that fiscal year. The operating budget may be revised during the course of the fiscal year in accordance with HUD regulations, contracts, and handbooks.

(2) If it is subsequently determined that the actual operating expense for a fiscal year was more or less than the amount provided by the monthly operating expense established for that fiscal year, the rate of monthly operating expenses to be established for the next fiscal year may be adjusted to account for the differences.

(c) *Posting of monthly operating expense statement.* A statement showing the budgeted monthly amount allocated in the current operating expense category shall be provided to the HBA and copies shall be provided to homebuyers upon request.

§ 950.517 Earned Home Payments Account (EHPA).

(a) *Credits to the account.* The IHA shall establish and maintain a separate EHPA for each homebuyer. Since the homebuyer is responsible for maintaining the home, a portion of the required monthly payment equal to the IHA's estimate, of the monthly cost for such routine maintenance, taking into consideration the relative type and size of the homeowner's home, shall be set aside in the EHPA. In addition, this account shall be credited with:

(1) Any voluntary payments made pursuant to paragraph (f) of this section; and

(2) Any amount earned through the performance of maintenance as provided in paragraph (c) of this section.

(b) *Charges to the account.* (1) If for any reason the homebuyer is unable or fails to perform any item of required maintenance, the IHA shall arrange to have the work done in accordance with the procedures established by the IHA and the HBA, and the cost thereof shall be charged to the homebuyer's EHPA. Inspections of the home shall be made jointly by the IHA and HBA.

(2) To the extent NRMR expense is attributable to the negligence of the homebuyer as determined by the HBA and approved by the IHA (see § 950.519), the cost thereof shall be charged to the EHPA.

(c) *Additional equity through maintenance of common property.* Homebuyers may earn addition EHPA credits by providing in whole or in part any of the maintenance necessary to the

common property of the development. When such maintenance is to be provided by the homebuyer, this may be done and credit earned therefore only pursuant to a prior written agreement between the homebuyer and the IHA (or the homeowners' association, depending on who has responsibility for maintenance of the property involved), covering the nature and scope of the work and the amount of credit the homebuyer is to receive. In such cases, the agreed amount shall be charged to the appropriate maintenance account and credited to the homebuyer's EHPA upon completion of the work.

(d) *Investment of excess.* (1) When the aggregate amount of all EHPA balances exceeds the estimated reserve requirements for 90 days, the IHA shall notify the HBA and shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD and in accordance with any recommendations made by the HBA. If the HBA wishes to participate in the investment program, it should submit periodically to the IHA a list of HUD-approved securities, bonds, or obligations which the association recommends for investment by the IHA of the funds in the EHPAs. Interest earned on the investment of such funds shall be prorated and credited to each homebuyer's EHPA in proportion to the amount in each such reserve account.

(2)(i) Periodically, but not less often than annually, the IHA shall prepare a statement showing:

(A) The aggregate amount of all EHPA balances;

(B) The aggregate amount of investments (savings accounts and/or securities) held for the account of all the homebuyers' EHPAs; and

(C) The aggregate uninvested balance of all the homebuyers' EHPAs.

(ii) This statement shall be made available to any authorized representative of the HBA.

(e) *Voluntary payments.* To enable the homebuyer to acquire title to the home within a shorter period than anticipated under the original schedule, the homebuyer may, either periodically or in a lump sum, voluntarily make payments over and above the required monthly payments. Such voluntary payments shall be credited to the homebuyer's EHPA.

(f) *Delinquent monthly payments.* Under exceptional circumstances as determined by the HBA and the IHA, a homebuyer's EHPA may be used to pay the delinquent required monthly payments, provided the amount used for this purpose does not seriously deplete the account and provided that the

homebuyer agrees to cooperate in such counseling as may be made available by the IHA or the HBA.

(g) *Annual statement to homebuyer.* The IHA shall provide an annual statement to each homebuyer specifying at least the amounts in the EHPA, and the NRMR. Any maintenance or repair done on the dwelling by the IHA which is chargeable to the EHPA or to the NRMR shall be accounted for through a work order, a copy of which shall be sent to the homebuyer.

(h) *Withdrawal and assignment.* The homebuyer shall have no right to assign, withdraw, or in any way dispose of the funds in its EHPA except as provided in this section or in § 950.525.

(i) *Application of EHPA upon vacating of dwelling.* (1) In the event a homebuyer agreement is terminated the IHA shall charge against the homebuyer's EHPA the amounts required to pay:

(i) The amount due the IHA, including the monthly payments the homebuyer is obligated to pay up to the date the homebuyer vacates;

(ii) The monthly payment for the period the home is vacant, not to exceed 60 days from the date of notice of intention to vacate, or, if the homebuyer fails to give notice of intention to vacate, 60 days from the date the home is put in good condition for the next occupant; and

(iii) The cost of any routine maintenance, and of any nonroutine maintenance attributable to the negligence of the homebuyer, required to put the home in good condition for the next occupant.

(2) If the EHPA balance is not sufficient to cover all of these charges, the IHA shall require the homebuyer to pay the additional amount due. If the amount in the account exceeds these charges, the excess shall be paid to the homebuyer.

(3) Settlement with the homebuyer shall be made promptly after the actual cost of repairs to the dwelling has been determined provided that the IHA shall make every effort to make such settlement within 30 days from the date the homebuyer vacates.

§ 950.519 Nonroutine Maintenance Reserve (NRMR).

(a) *Purpose of reserve.* The IHA shall establish and maintain a separate NRMR for each home, using a portion of the homebuyer's monthly payment. The purpose of the NRMR is to provide funds for the nonroutine maintenance of the home, which consists of the infrequent and costly items of maintenance and replacement shown on the Nonroutine Maintenance Schedule

for the home. Such maintenance may include the replacement of dwelling equipment (such as range and refrigerator), replacement of roof, exterior painting, major repairs to heating and plumbing systems, etc. The NRMR shall not be used for nonroutine maintenance of common property, or for nonroutine maintenance relating to the home to the extent such maintenance is attributable to the Homebuyer's negligence or to defective materials or workmanship.

(b) *Amount of reserve.* The amount of the monthly payments to be set aside for NRMR shall be determined by the IHA, on the basis of the Nonroutine Maintenance Schedule showing the amount likely to be needed for nonroutine maintenance of the home during the term of the Homebuyer Ownership Opportunity Agreement, taking into consideration the type of construction and dwelling equipment. This schedule shall be prepared by the IHA and reexamined annually.

(c) *Charges to NRMR.* (1) The IHA shall provide the nonroutine maintenance necessary for the home and the cost thereof shall be funded as provided in paragraph (c)(2) of this section. Such maintenance may be provided by the homebuyer but only pursuant to a prior written agreement with the IHA covering the nature and scope of the work and the amount of credit the homebuyer is to receive. The amount of any credit shall, upon completion of the work, be credited to the homebuyer's EHPA and charged as provided in paragraph (c)(2) of this section.

(2) The cost of nonroutine maintenance shall be charged to the NRMR for the home except that:

(i) To the extent such maintenance is attributable to the fault or negligence of the homebuyer, the cost shall be charged to the homebuyer's EHPA after consultation with the HBA if the homebuyer disagrees, and

(ii) To the extent such maintenance is attributable to defective materials or workmanship not covered by the warranty, or even though covered by the warranty if not paid for thereunder through no fault or negligence of the homebuyer, the cost shall be charged to the appropriate operating expense account of the Project.

(3) In the event the amount charged against the NRMR exceeds the balance therein, the difference (deficit) shall be made up from continuing monthly credits to the NRMR based upon the homebuyer's monthly payments. If there is still a deficit when the homebuyer acquires title, the homebuyer shall pay

such deficit at settlement (see paragraph (d)(2) of this section).

(d) *Transfer of NRMR.* (1) In the event the homebuyer agreement is terminated, the homebuyer shall not receive any balance or be required to pay any deficit in the NRMR. When a subsequent homebuyer moves in, a credit balance in the NRMR shall continue to be applicable to the home in the same amount as if the preceding homebuyer had continued in occupancy.

(2) In the event the homebuyer purchases the home, and there remains a balance in the NRMR, the IHA shall pay such balance to the homeowner at settlement. In the event the homebuyer purchases and there is a deficit in the NRMR, the homebuyer shall pay such deficit to the IHA at settlement.

(e) *Investment of excess.* (1) When the aggregate amount of the NRMR balances for all the homes exceeds the estimated reserve requirements for 90 days the IHA shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD. Income earned on the investment of such funds shall be prorated and credited to each homebuyer's NRMR in proportion to the amount in each reserve account.

(2)(i) Periodically, but not less often than annually, the IHA shall prepare a statement showing:

(A) The aggregate amount of all NRMR balances;

(B) The aggregate amount of investments (savings accounts and/or securities) held for the account of the NRMRs; and

(C) The aggregate uninvested balance of the NRMRs.

(ii) A copy of this statement shall be made available to any authorized representative of the HBA.

§ 950.521 Operating reserve.

(a) *Purpose of the reserve.* To the extent that total operating receipts (including subsidies for operations) exceed total operating expenditures of the project, the IHA shall establish an operating reserve in connection with its approval of the annual operating budgets for the project. The purpose of this reserve is to provide funds for:

(1) The infrequent but costly items of nonroutine maintenance and replacements of common property, taking into consideration the types of items which constitute common property, such as nondwelling structures and equipment, and in certain cases, common elements of dwelling structures;

(2) Nonroutine maintenance for the homes to the extent such maintenance

is attributable to defective materials or workmanship not covered by warranty;

(3) Working capital, including funds to cover a deficit in a homebuyer's NRMR until such deficit is offset by future monthly payments by the homeowner or a settlement in the event the homebuyer should purchase; and

(4) A deficit in the operation of the project for a fiscal year, including any deficit resulting from monthly payments totaling less than the breakeven amount for the project; and

(5) Funds needed for nonroutine maintenance of vacated homes with insufficient NRMR balances to put them in suitable condition for reoccupancy by subsequent homeowners.

(b) *Nonroutine maintenance—common property (contribution to operating reserve).* The amount under this heading to be included in operating expense (and in the breakeven amount) established for the fiscal year shall be determined by the IHA, on the basis of estimates of the monthly amount needed to accumulate an adequate reserve for the items described in paragraph (a)(1) of this section. This amount shall be subject to revision in the light of experience. This contribution to the operating reserve shall be made only during the period the IHA is responsible for the maintenance of any common property; and during such period, the amount shall be determined on the basis of the requirements of all common property in the development.

(c) *Transfer to homeowners' association.* Where a Turnkey III development includes common property, the IHA shall be responsible for and shall retain custody of the operating reserve until the homeowners acquire voting control of the homeowners' association. When the homeowners acquire voting control, the homeowners' association shall then assume full responsibility for management and maintenance of common property under a plan, agreed upon by the IHA and the homeowners association and there shall be transferred to the homeowners' association a portion of the operating reserve then held by the IHA. This provision shall not apply where there is no common property or where there is no duly organized and functioning homeowners association.

(d) *Disposition of reserve.* If, at the end of a fiscal year, there is an excess over the maximum operating reserve, this excess shall be applied to the operating deficit of the project, if any, and any remainder shall be used for such purposes as approved by HUD under an ACC. Following the end of the

fiscal year in which the last home has been conveyed by the IHA, the balance of the operating reserve held by the IHA shall be paid to HUD, or retained by the IHA in a replacement reserve if an ACC amendment has been executed implementing loan forgiveness, provided that the aggregate amount of payments by the IHA under this paragraph shall not exceed the aggregate amount of annual contributions paid by HUD with respect to the development.

§ 950.523 Operating subsidy.

Operating subsidy may be paid by HUD, subject to the availability of funds for this purpose and at HUD's sole discretion, to cover an operating deficit as approved by HUD in an operating budget submitted by an IHA for a Turnkey III project. However, operating subsidy or project funds may not be used to establish or maintain the homebuyer reserve accounts. Project funds may be used on a temporary basis to pay the cost of utilities for an individual unit by way of a utility reimbursement when a homebuyer has insufficient tenant income to cover even the utilities. In such a case, the inability of the homebuyer to pay utilities constitutes a loss of homeownership potential and continuing eligibility for the Turnkey III program.

§ 950.525 Purchase price and methods of purchase.

(a) *Purchase price.* The purchase price for the initial and subsequent homebuyer shall be determined by the IHA.

(b) *Purchase price schedule.* On the date when the homebuyer agreement is signed, the IHA shall provide the homebuyer with a Purchase Price Schedule, showing the monthly declining purchase price over the term of the HOOA agreement (a period not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA.) The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Methods of purchase.* (1) The homebuyer may achieve ownership when the amount in the EHPA, plus such portion of the NRMR as the homebuyer wishes to use for the purchase, is equal to the unamortized balance purchase price as shown at that time on the homebuyer's purchase price schedule plus all incidental costs (the costs incidental to acquiring ownership, including, but not limited to, the costs for a credit report, field survey, title examination, title insurance, and inspections, the fees for attorneys other than the IHA's attorney, mortgage

application, closing and recording, and the transfer taxes and loan discount payment, if any). If for any reason title to the home is not conveyed to the homebuyer during the month in which the combined total in the EHPA and designated portion of the NRMR equals the purchase price, the balance of the purchase price shall be fixed as the amount specified for that month and the homebuyer shall be refunded:

(i) The net additions, if any, credited to the EHPA after that month, and

(ii) Such part of the monthly payments made by the homebuyer after the balance of the purchase price has been fixed which exceeds the breakeven amount attributable to the unit.

(2) Where the sum of the unamortized balance of the purchase price and incidental costs is greater than the amounts in the homebuyer's EHPA and NRMR, the homebuyer may achieve ownership by obtaining financing for or otherwise paying the excess amount. The unamortized balance of the purchase price shall be the amount shown on the homebuyer's purchase price schedule for the month in which the settlement date for the purchase occurred.

(3) *Period required to achieve ownership.* The maximum period for achieving ownership shall be 30 years, but depending upon increases in the homebuyer's income and the amount of credit which the homebuyer can accumulate in the EHPA and NRMR the period may be shortened accordingly.

(4) *Residual receipts.* After payment in full of the IHA's debt, if there are any subsequent homebuyers who have not acquired ownership of their homes, the IHA shall retain all residual receipts from the operation of the development in a replacement reserve.

(5) *IHA financing.* The IHA may, at its discretion, provide financing for purchases by homebuyers, or assist with financing, by such methods and on such terms and conditions as be agreeable to the IHA and the homebuyer, without any requirement for prior HUD approval. The financing may be provided using such methods as a mortgage or a loan agreement.

(6) *Transfer of title to homebuyer.* When the homebuyer is to obtain ownership, a closing date shall be mutually agreed upon by the parties. On the closing date the homebuyer shall pay the required amount of money to the IHA, sign the promissory note in accordance with § 950.527, and receive a deed for the home.

§ 950.527 Payment upon resale at profit.

(a) *Promissory note.* (1) When a homebuyer achieves ownership, the

homebuyer shall sign a note obligating him or her to make payment to the IHA, subject to the provisions of paragraph (a)(2) of this section, in the event the homebuyer resells the home at a profit within five years of actual residence in the home after becoming a homeowner. If, however, the homeowner should purchase and occupy another home within one year (18 months in the case of a newly constructed home) of the resale of the Turnkey III home, the IHA shall refund to the homeowner the amount previously paid under the note, less the amount, if any, by which the resale price of the Turnkey III home exceeds the acquisition price of the new home, provided that application for such refund shall be made no later than 30 days after the date of acquisition of the new home.

(2)(i) The note to be signed by the homebuyer pursuant to paragraph (a)(1) of this section shall be a noninterest-bearing promissory note to the IHA. The note shall be executed at the time the homebuyer becomes a homeowner and shall be secured by a second mortgage. The initial amount of the note shall be computed by taking the appraised value of the home at the time the homebuyer becomes a homeowner and subtracting:

(A) The homebuyer's purchase price plus incidental costs (as described in § 950.525(c);) and

(B) The increase in value of the home as determined by appraisal, caused by improvements paid for by the homebuyer with funds from sources other than the EHPA or NRMR.

(ii) The note shall provide that this initial amount shall be automatically reduced by 20 percent thereof at the end of each year of residency as a homeowner, with the note terminating at the end of the five-year period of residency, as determined by the IHA. To protect the homeowner, the note shall provide that the amount payable under it shall in no event be more than the net profit on the resale, that is, the amount by which the resale price exceeds the sum of:

(A) The homebuyer's purchase price plus incidental costs,

(B) The costs of the resale, including commissions and mortgage prepayment penalties, if any, and

(C) The increase in value of the home, determined by appraisal, due to improvements paid for as a homebuyer (with funds from sources other than the EHPA or NRMR) or as a homeowner.

(3) Amounts collected by the IHA under such notes shall be retained by the IHA for use in making refunds pursuant to paragraph (a)(1) of this section. After expiration of the period for the filing of claims for such refunds,

any remaining amounts shall be used for such purposes as may be authorized or approved by HUD under such Annual Contributions Contract as the IHA may then have with HUD.

(b) *Residency requirements.* The five-year note period does not end if the homeowner rents or otherwise does not use the home as the homeowner's principal place of residence for any period within the first five years after achieving ownership. Only the actual amount of time the homeowner is in residence is counted, and the note shall be in effect until a total of five years time of residence has elapsed, at which time the homeowner may request that the IHA release him or her from the note, and the mortgage securing the note. The IHA shall release the homeowner upon such a request.

(c) *Death of homeowner.* In the event of the death of the homeowner, or last surviving co-owner, prior to the end of the five-year period of the promissory note, the IHA may, at its sole discretion, cancel the note and release the encumbrance of the mortgage, in whole or in part.

§ 950.529 Termination of Homebuyer Ownership Opportunity Agreement.

(a) *Termination by IHA.* (1) In the event the homebuyer should breach the Homebuyer Ownership Opportunity Agreement by failure to make the required monthly payment within ten days after its due date, by misrepresentation or withholding of information in applying for admission or in connection with any subsequent reexamination of income and family composition, by failure to comply with any of the other homebuyer obligations under the agreement, by loss of homeownership potential (beyond a temporary, unforeseen change in circumstances) (see § 950.503(c)(3)), an income that requires outright purchase (see § 950.525(b)), the IHA may terminate the agreement 30 days after giving the homebuyer notice of its intention to do so in accordance with paragraph (a)(2) of this section.

(2) Notice of termination by the IHA shall be in writing. Such notice shall state:

(i) The reason for termination;

(ii) That the homebuyer may respond to the IHA, in writing or in person, within a specified reasonable period of time regarding the reason for termination;

(iii) That in such response the homebuyer may be represented by the HBA;

(iv) That the IHA will consult the HBA concerning this termination;

(v) That unless the IHA rescinds or modifies the notices, the termination shall be effective at the end of the 30-day notice period; and

(vi) That, in the case of termination as a result of loss of homeownership potential when the homebuyer is otherwise in compliance with the agreement, the family will be offered a transfer to a rental unit (whether or not in concert with a conversion of that unit to the rental program). If a rental unit of appropriate size is available, the family will be notified of a transfer to that unit. If no other unit is then available and the homebuyer's current unit is not to be converted to rental, the family will be notified that it may remain in place until an appropriate rental unit becomes available (in which case the unit remains under the Turnkey III project). Otherwise, the notice shall state that the transfer shall occur as soon as a suitable rental unit is available for occupancy, but no earlier than 30 days from the date of the notice. The notice shall also state that if the homebuyer should refuse to move under such circumstances, the family may be required to vacate the homebuyer unit, without further notice.

(b) *Termination by the homebuyer.* The homebuyer may terminate the Homebuyer Ownership Opportunity Agreement by giving the IHA 30 days notice in writing of this intention to terminate and vacate the home. In the event that the homebuyer vacates the home without notice to the IHA, the agreement shall be terminated automatically and the IHA may dispose of, in any manner deemed suitable by it, any items of personal property left by the homebuyer in the home.

(c) *Transfer to the rental program.* In the event of termination of the Homebuyer Ownership Opportunity Agreement by the IHA or by the homebuyer with adequate notice, the homebuyer may be transferred to a suitable unit in the rental program, in accordance with § 950.503(c)(3)(ii) or terminated from occupancy. If the homebuyer is transferred to the rental program, the amount in the homeowner's EHPA shall be paid in accordance with § 950.517(i).

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Subpart I—Modernization Program

General Provisions

§ 950.600 Purpose and applicability.

(a) *Purpose.* The purpose of this section is to set forth the policies and procedures for the Modernization program, authorizing HUD to provide financial assistance to Indian Housing Authorities (IHAs) to:

(1) Improve the physical condition and upgrade the management and operation of existing Indian housing developments;

(2) Assure that such developments continue to be available to serve low-income families;

(3) Assess the risks of lead-based paint poisoning through the use of professional risk assessments that include dust and soil sampling and laboratory analysis in all developments constructed before 1980 that are, or will be occupied by families; and

(4) Take effective interim measures to reduce and contain the risks of lead-based paint poisoning recommended in such professional risk assessments.

(b) *Applicability.* (1) The undesignated heading entitled, General Provisions, applies to all modernization under this subpart. The undesignated heading entitled, Comprehensive Improvement Assistance Program (CIAP), sets forth the requirements and procedures for the CIAP for IHAs that own or operate fewer than 250 Indian housing units. An IHA that qualifies for participation in the CGP is not eligible to participate in the CIAP. The undesignated heading entitled, Comprehensive Grant program (CGP), sets forth the requirements and procedures for the CGP for IHAs that own or operate 250 or more Indian housing units. For purposes of the 250 or more unit threshold for participation in the CGP, and for the formula allocation under § 950.601, an existing rental, Mutual Help or section 23 bond-financed unit under the ACC shall count as one unit; and a unit under the Turnkey III program shall count as one-fourth of a unit. An IHA that has already qualified to participate in the CGP because it owns or operates 250 or more units, may elect to continue to participate in the CGP so long as it owns or operates at least 200 units.

(2) This subpart applies to IHA-owned low-income Indian housing developments (including developments managed by a Resident Management Corporation pursuant to a contract with the IHA), and to section 23 Leased Housing Bond-Financed developments, for which IHAs request assistance under the CIAP or CGP. This subpart also applies to the implementation of modernization programs which were approved before FFY 1992. Rental developments that are planned for conversion to homeownership under sections 5(h), 21, or 301 of the Act, but which have not yet been sold by an IHA, continue to qualify for assistance under this part. This subpart does not apply to developments under the section 23 Leased Housing Non-Bond Financed

program, the section 10(c) Leased program, or the section 23 or section 8 Housing Assistance Payments programs.

(c) *Transition.* Any amount that HUD has obligated to an IHA under CIAP must be used for the purposes for which the funding was provided, or for purposes consistent with an approved action plan submitted by the IHA under the CGP, as the IHA determines to be appropriate.

(d) *Other.* See subpart A of this part for applicable requirements, other than the Act, that apply to modernization under this subpart.

§ 950.601 Allocation of funds under section 14.

(a) *General.* This section describes the process for allocating modernization funds to the aggregate of IHAs and PHAs participating in the CIAP (i.e., agencies that own or operate fewer than 250 units), and to individual IHAs and PHAs participating in the CGP (i.e., agencies that own or operate 250 or more units). The program requirements governing PHA participation in the CIAP and CGP are contained in 24 CFR part 968.

(b) *Set-aside for emergencies and disasters.* For each FFY, HUD shall reserve from amounts approved in the appropriation act for grants under this part and 24 CFR part 968, \$75 million (which shall include unused reserve amounts carried over from previous FFYs), which shall be made available to IHAs and PHAs for modernization needs resulting from natural and other disasters, and from emergencies. HUD shall replenish this reserve at the beginning of each FFY so that it always begins with a \$75 million balance. Any unused funds from previous years will remain in the reserve until allocated. The requirements governing the reserve for disasters and emergencies and the procedures by which an IHA may request such funds, are set forth in § 950.667.

(c) *Set-aside for credits for mod troubled PHAs under 24 CFR part 968, subpart C.* (1) *General.* After deducting amounts for the reserve for natural and other disasters and for emergencies under paragraph (b) of this section, HUD shall set aside no more than five percent of the remaining amount for the purpose of providing credits to PHAs under 24 CFR part 968 (subpart C) that were formerly designated as mod troubled agencies under the Public Housing Management Assessment program ("PHMAP") at 24 CFR part 901. The purpose of this set-aside is to compensate such PHAs for amounts previously withheld by HUD because of

their prior designation as a mod troubled agency.

(2) *Nonapplicability to IHAs.* Since the PHMAP performance indicators under 24 CFR part 901 do not apply to IHAs, these agencies cannot be deemed "mod troubled" for purposes of the CGP. Hence, IHAs are not subject to any reduction in funding under section 14(k)(5)(a) of the Act, nor do they participate in the set-aside of credits established under paragraph (c)(1) of this section.

(d) *Formula allocation based on relative needs.* After determining the amounts to be reserved under paragraphs (b) and (c) of this section, HUD shall allocate the amount remaining pursuant to the formula set forth in paragraphs (e) and (f) of this section, which is designed to measure the relative backlog and accrual needs of IHAs and PHAs.

(e) *Allocation for backlog needs.* HUD shall allocate half of the formula amount under paragraph (d) of this section based on the relative backlog needs of IHAs and PHAs, as follows:

(1) *Determination of backlog need.* (i) *Statistically reliable data.* Where HUD determines that the data concerning the categories of backlog need identified under paragraph (e)(4) of this section are statistically reliable for individual IHAs and PHAs with 250 or more units, or the aggregate of IHAs and PHAs with fewer than 250 units not participating in the formula funding portion of the modernization program, it will base its allocation on direct estimates of the statutory categories of backlog need, based on the most recently available, statistically reliable data.

(ii) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of backlog need identified under paragraph (e)(4) of this section are not available for individual IHAs and PHAs with 250 or more units, it will base its allocation of funds under this section on estimates of the categories of backlog need using:

(A) The most recently available data on the categories of backlog need under paragraph (e)(4) of this section;

(B) Objectively measurable data concerning the following IHA or PHA, community and development characteristics:

(1) The average number of bedrooms in the units in a development. (Weighted at 2858.7);

(2) The proportion of units in a development available for occupancy by very large families. (Weighted at 7295.7);

(3) The extent to which units for families are in high-rise elevator developments. (Weighted at 5555.8);

(4) The age of the developments, as determined by the DOFA date (date of full availability). In the case of acquired developments, HUD will use the DOFA date unless the IHA provides HUD with the actual date of construction, in which case HUD will use the age of the development (or, for scattered sites, the average age of all the buildings), subject to a 50 year cap. (Weighted at 206.5);

(5) In the case of a large agency, the number of units with 2 or more bedrooms. (Weighted at .433);

(6) The cost of rehabilitating property in the area. (Weighted at 27544.3);

(7) For family developments, the extent of population decline in the unit of general local government determined on the basis of the 1970 and 1980 censuses. (Weighted at 759.5); and

(C) An equation constant of 1412.9.

(2) *Calibration of backlog need for developments constructed prior to 1985.* The estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, shall be adjusted upward for developments constructed prior to 1985 by a constant ratio of 1.5 to more accurately reflect the costs of modernizing the categories of backlog need under paragraph (e)(4) of this section, for the Indian housing stock as of 1991.

(3) *Deduction for prior modernization.* HUD shall deduct from the estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, amounts previously provided to an IHA or PHA for modernization, using one of the following methods:

(i) *Standard deduction for prior CIAP and MROP.* HUD shall deduct 60 percent of the CIAP funds made available on an IHA-wide or PHA-wide basis from FFY 1984 to 1991, and 40 percent of the funds made available on a development-specific basis for the Major Reconstruction of Obsolete Projects (MROP) (not to exceed the estimated formula need for the development), subject to a maximum fifty percent deduction of an IHA's or PHA's total need for backlog funding;

(ii) *Newly constructed units.* Units with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog; or

(iii) *Acquired developments.* Developments acquired by an IHA with major rehabilitation, with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog.

(4) *Categories of backlog need.* The most recently available data to be used under either paragraphs (e)(1)(i) or

(e)(1)(ii) of this section must pertain to the following categories of backlog need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments;

(ii) Items that must be added to developments to meet HUD's modernization standards under § 950.603, and State, local and Tribal codes; and

(iii) Items that are necessary or highly desirable for the long-term viability of a development, in accordance with HUD's modernization standards.

(f) *Allocation for accrual needs.* HUD shall allocate the other half remaining under the formula allocation under paragraph (d) of this section based upon the relative accrual needs of IHAs and PHAs, determined as follows:

(1) *Statistically reliable data.* Where HUD determines that statistically reliable data are available concerning the categories of need identified under paragraph (f)(3) of this section for individual IHAs and PHAs with 250 or more units and for the aggregate of IHAs and PHAs with fewer than 250 units it shall base its allocation of assistance under this section on the needs that are estimated to have accrued since the date of the last objective measurement of backlog needs under paragraph (e)(1)(i) of this section; or

(2) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of need identified under paragraph (f)(3) of this section are not available for individual IHAs and PHAs with 250 or more units, it shall base its allocation of assistance under this section on estimates of accrued need using:

(i) The most recently available data on the categories of backlog need under paragraph (f)(3) of this section;

(ii) Objectively measurable data concerning the following IHA or PHA, community, and development characteristics:

(A) The average number of bedrooms in the units in a development.

(Weighted at 100.1);

(B) The proportion of units in a development available for occupancy by very large families. (Weighted at 356.7);

(C) The age of the developments. (Weighted at 10.4);

(D) The extent to which the buildings in developments of an agency average fewer than 5 units. (Weighted at 87.1.);

(E) The cost of rehabilitating property in the area. (Weighted at 679.1);

(F) The total number of units of each IHA or PHA that owns or operates 250 or more units. (Weighted at .0144); and

(iii) An equation constant of 602.1.

(3) *Categories of need.* The data to be provided under either paragraph (f)(1) or (f)(2) of this section must pertain to the following categories of need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments; and

(ii) Items that must be added to developments to meet HUD's modernization standards under § 950.603, and State, local and Tribal codes.

(g) *Allocation for CIAP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs and PHAs with fewer than 250 units shall be allocated to IHAs in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Improvement Assistance Program," (CIAP) and to PHAs in accordance with the requirements of 24 CFR part 968 (subpart B).

(h) *Allocation for CGP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs with 250 or more units shall be allocated in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Grant Program," and for PHAs in accordance with the requirements of 24 CFR part 968 (subpart C). An IHA that is eligible to receive a grant under the CGP may appeal the amount of its formula allocation under this section in accordance with the requirements set forth in § 950.669(b). An IHA which is eligible to receive modernization funds under the CGP because it owns or operates 250 or more units, is disqualified from receiving assistance under the CIAP under this part.

(i) *Use of formula allocation.* Any amounts allocated to an IHA under paragraphs (e) and (f) of this section may be used for any eligible activity under this subpart, notwithstanding that the allocation amount is determined by allocating half based on the relative backlog needs and half based on the relative accrual needs of IHAs and PHAs.

(j) *Calculation of number of units.* For purposes of determining under this section the number of units owned or operated by an IHA or PHA, and the relative modernization needs of IHAs and PHAs, HUD shall count as one unit each existing rental, Mutual Help and section 23 Bond-Financed unit under the ACC, except that it shall count as one-fourth of a unit each existing unit under the Turnkey III program. New development units that are added to an IHA's or PHA's inventory will be added to the overall unit count so long as they

are under ACC amendment and have reached DOFA by the first day in the FFY in which the formula is being run. Any increase in units (reaching DOFA and under ACC amendment) as of the beginning of the FFY shall result in an adjustment upwards in the number of units under the formula. New units reaching DOFA after this date will be counted for formula purposes as of the following FFY.

(k) *Demolition, disposition and conversion of units.* (1) *General.* Where an existing unit under an ACC is demolished, disposed of, or converted into a larger or smaller unit, HUD shall not adjust the amount the IHA or PHA receives under the formula, unless more than one percent of the units are affected on a cumulative basis. Where more than one percent of the existing units are demolished, disposed of, or converted, HUD shall reduce the formula amount for the IHA or PHA over a 3-year period to reflect removal of the units from the ACC.

(2) *Determination of one percent cap.* In determining whether more than one percent of the units are affected on a cumulative basis, HUD will compare the units eligible for funding in the initial year under formula funding with the number of units eligible for funding for formula funding purposes for the current year, and shall base its calculations on the following:

(i) Increases in the number of units resulting from the conversion of existing units will be added to the overall unit count so long as they are under ACC amendment by the first day of the FFY in which the formula is being run;

(ii) Units which are lost as a result of demolition, disposition or conversion shall not be offset against units subsequently added to an IHA's or PHA's inventory;

(iii) For purposes of calculating the number of converted units, HUD shall regard the converted size of the unit as the appropriate unit count (e.g., a unit that originally was counted as one unit under paragraph (j) of this section, but which later was converted into two units, shall be counted as two units under the ACC).

(3) *Phased-in reduction of units.* (i) *Reduction less than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is less than one percent, the IHA or PHA will be funded as though no change had occurred.

(ii) *Reduction greater than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is greater than one percent, the number of units on which formula funding is based will be the

number of units reported as eligible for funding for the current program, plus two thirds of the difference between the initial year and the current year in the first year, plus one third of the difference in the second year, and at the level of the current year in the third year.

(iii) *Exception.* A unit that is conveyed under the Mutual Help or Turnkey III programs will result in an automatic (rather than a phased-in) reduction in the unit count.

(4) *Subsequent reductions in unit count.* (i) Once an IHA's or PHA's unit count has been fully reduced under paragraph (k)(3)(ii) of this section to reflect the new number of units under the ACC, this new number of units will serve as the base for purposes of calculating whether there has been a one-percent reduction in units on a cumulative basis.

(ii) A reduction in formula funding, based upon additional reductions to the number of an IHA's or PHA's units, will also be phased in over a three-year period, as described in paragraph (k)(2) of this section.

§ 950.602 Special requirements for Turnkey III and Mutual Help developments.

(a) *Modernization costs.*

Modernization work on a Mutual Help or Turnkey III unit shall not increase the purchase price or amortization period of the home.

(b) *Paid off units.* (1) *Turnkey III units.* Modernization work on any Turnkey III units that have been paid off, even though not conveyed, by the time the CIAP application or CGP annual statement is submitted is ineligible. However, modernization work on any Turnkey III units that have not been paid off at the time the CIAP application or CGP annual statement is submitted and that is included in the CIAP application or annual statement is eligible even where the units are subsequently paid off before the work is completed. Notwithstanding this requirement, work which is necessary to meet statutory and regulatory requirements (e.g., handicapped accessibility, lead-based paint testing, interim containment, professional risk assessment, and abatement) may be performed on paid off Turnkey III units so long as the work is completed prior to conveyance.

(2) *Mutual Help units.* An IHA may use CIAP or CGP funds under this subpart for the purposes of modernizing a Mutual Help unit which is paid off though not conveyed, and may do so only with a unit which the IHA has identified in its CIAP application or Comprehensive Plan (including its

action plan and work statement). In accordance with the provisions of § 950.440(e)(8)(iii), an IHA may perform non-emergency work on a paid off Mutual Help unit only after all delinquencies are repaid.

(c) *Other.* The homebuyer family must be in compliance with its financial obligations under its homebuyer agreement in order to be eligible for non-emergency physical improvements, with the exception of work necessary to meet statutory and regulatory requirements, (e.g., handicapped accessibility, lead-based paint testing, interim containment, professional risk assessment, and abatement) and the correction of development deficiencies. Notwithstanding the above requirement, an IHA may, with prior HUD Field Office approval, complete non-emergency physical improvements on any homeownership unit where the IHA demonstrates that, due to economies of scale or geographic constraints, substantial cost savings may be realized by completing all necessary work in a development at one time.

§ 950.603 Modernization and energy conservation standards.

(a) All improvements funded under this subpart, which may include alterations, betterments, additions, replacements or non-routine maintenance, shall meet the HUD modernization standards, described in paragraph (b) of this section, comply with lead-based paint testing and abatement requirements in subpart H of this part, and provide decent, safe, and sanitary living conditions in IHA-owned and IHA-operated housing. All improvements funded under this part shall meet the HUD-energy conservation standards for cost-effective energy conservation measures in such developments, described in paragraphs (c) and (d) of this section.

(b) The modernization standards are comprised of both mandatory and development-specific standards. The mandatory standards are intended to provide decent, safe, and sanitary living conditions in Indian housing, including corrections of violations of basic health and safety codes, and to address all deficiencies, including those related to deferred maintenance. The development-specific standards permit an IHA to undertake improvements that are necessary or highly desirable for the long-term physical and social viability of a development, which includes site and building security. The modernization standards are contained in HUD Handbook 7485.2, as revised, Public and Indian Housing

Modernization Standards, and in other documents cited in the Handbook.

(c) The energy conservation standards are standards for the installation of cost-effective energy conserving improvements, including solar energy systems. The energy conservation standards provide for the conducting or updating of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measures will be cost effective in conserving energy. The energy conservation standards are contained in the HUD Workbook, Energy conservation for Housing, and in other documents cited in the Workbook.

(d) Life-cycle cost-effective energy performance standards established by HUD to reduce the operating costs of Indian housing developments over the estimated life of the buildings shall apply to developments modernized under this subpart. These standards are contained in HUD Handbook 7418.1, as revised, Life-Cycle Cost Analysis for Utility Combinations.

(Approved by the Office of Management and Budget under control number 2577-0024.)

Comprehensive Improvement Assistance Program (For IHAs that Own or Operate Fewer than 250 Indian Housing Units)

§ 950.609 Purpose.

The purpose of the undesignated heading entitled, Comprehensive Improvement Assistance Program (CIAP), is to set forth the policies and procedures for the CIAP under which IHAs that own or operate fewer than 250 units of Indian housing may receive financial assistance for the modernization of Indian housing developments, including Emergency and Other Modernization. Funding for this program is provided under section 5(c) of the Act (42 U.S.C. 1437c(c)), pursuant to section 14(k) of the Act (42 U.S.C. 1437l(k)) (see § 950.601 for the formula allocation process for the aggregate of CIAP agencies under this subpart).

§ 950.615 Eligible costs.

(a) *Demonstration of viability.* Except in the case of emergency work, an IHA shall only expend funds on a development for which the IHA has determined, and HUD agrees, that the completion of the improvements and replacements will reasonably ensure the long-term physical and social viability of the development at a reasonable cost, as defined in § 950.102.

(b) *Physical improvement costs for rental and Mutual Help developments.* Eligible costs include alterations,

betterments, non-dwelling additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 950.603. The modernization standards include mandatory and development specific work. The mandatory standards may be exceeded only when the IHA and HUD determine that it is necessary or highly desirable for the long-term physical and social viability of the individual development. If demolition or disposition is proposed, the IHA shall comply with subpart M of this part.

(c) *Turnkey III developments.* (1) *General.* Eligible physical improvement costs for existing Turnkey III developments are limited to work items under Emergency Modernization or Other Modernization which are not the responsibility of the homebuyer families, and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, or lead-based paint testing, interim containment, professional risk assessment and abatement. In addition, eligible costs include management improvements under the modernization type of Other Modernization.

(2) *Ineligible costs.* Nonroutine maintenance or replacements, dwelling additions, and items that are the responsibility of the homebuyer families are ineligible costs.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.*

(i) Notwithstanding the requirements of paragraph (c)(1) of this section, an IHA may carry out Other Modernization in a Turnkey III development, whenever a Turnkey III unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its CIAP application, the estimated number of units proposed for Other Modernization and subsequent sale. In addition, an IHA must certify that the IHA has homeownership, in accordance with the requirements of this part, and who have demonstrated their intent to be placed into each of the Turnkey III units proposed for Other Modernization.

(ii) Before an IHA may be approved for Other Modernization of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA), or Non-Routine Maintenance Reserve (NRMR) pertaining to the unit, and request the maximum operating subsidy. Any increase in the value of a unit caused by its Other Modernization under this paragraph shall be reflected solely by its subsequent appraised

value, and not by an automatic increase in its purchase price.

(d) *Demolition and conversion costs.* Eligible costs include:

(1) Demolition of dwelling units or non-dwelling facilities, where the demolition is approved by HUD under subpart M of this part, and related costs, such as clearing and grading the site after demolition and subsequent site improvement to benefit the remaining portion of the existing development; and

(2) Conversion of existing dwelling units to different bedroom sizes or to non-dwelling use.

(e) *Management improvement costs.*

(1) *General.* Management improvements that are development-specific or IHA-wide in nature are eligible costs where needed to upgrade the operation of the IHA's developments, sustain physical improvements at those developments or correct management deficiencies. Management improvements and planning costs may be funded as a single modernization project.

(2) *Ineligible costs.* An IHA's ongoing operating expenses, including direct provision of social services through either contract or force account labor, are ineligible management improvement costs. In addition, where an approved modernization program includes management improvements which involve ongoing costs, HUD is not obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. An IHA is responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(3) *Eligible costs.* Eligible costs include:

(i) *General management costs.* Eligible general management costs include, but are not limited to: Management, financial, and accounting control systems of the IHA, rent collection and maintenance.

(ii) *Economic development costs.* Economic development activities, such as job training and resident employment, for the purpose of carrying out activities related to the eligible management and physical improvements are eligible costs, as approved by HUD. HUD encourages IHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out the modernization program under this subpart.

(iii) *Resident management costs.* Technical assistance to a resident council or resident management corporation (RMC), as defined in

subpart O of this part, in order to determine the feasibility of the resident management entity or assist in its formation is an eligible cost.

(iv) *Resident homeownership costs.* The study of the feasibility of converting rental to homeownership units, as well as the preparation of an application for conversion to homeownership, is an eligible cost.

(f) *Drug elimination costs.* Drug elimination activities involving management or physical improvements are eligible costs, as specified by HUD.

(g) *Administrative costs.* Administrative costs necessary for the planning (planning costs can be funded as a single modernization project), design, implementation and monitoring of the physical and management improvements are eligible costs, and include the following:

(1) The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the work are beyond that which could reasonably be expected to be accomplished by such personnel in the performance of their non-modernization duties. An IHA shall properly apportion to the appropriate program budget any direct charges for the salaries of assigned full- or part-time staff (e.g., to the CIAP or operating budget);

(2) IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible costs in direct proportion to the amount of salary charged to the CIAP; and

(3) Other administrative costs, such as telephone and facsimile, as specified by HUD.

(h) *Architectural/engineering and consultant fees.* Fees for planning, preparation of needs assessments and other required documents, detailed design work, assistance in the preparation of construction and bid documents, lead-based paint professional risk assessments and testing are eligible costs.

(i) *Relocation and moving costs.* Relocation and other relocation assistance for permanent and temporary relocation are eligible costs, where this assistance is required by § 950.117.

(j) *Cost limitations.* (1) *Management improvements.* Management improvement costs shall not exceed 10 percent of the CIAP funds available to an Indian Field Office in a particular FFY.

(2) *Planning costs.* Planning costs are costs incurred before HUD approval of the CIAP application and which are related to developing the CIAP application or carrying out eligible

modernization planning, such as detailed design work, preparation of solicitations, and lead-based paint professional risk assessment and testing. Planning costs may be funded as a single modernization project. If an IHA incurs planning costs without prior HUD approval, an IHA does so with the full understanding that the costs may not be reimbursed upon approval of the CIAP application. Planning costs shall not exceed 5 percent of the CIAP funds available to an Indian Field Office in a particular FFY.

(3) *Program benefit.* Where the physical or management improvement will benefit programs other than Indian Housing, such as Section 8, local renewal, eligible costs are limited to the amount directly attributable to the Indian Housing Program.

(k) *Ineligible costs.* An IHA shall not make luxury improvements, or carry out any other ineligible activities, as specified by HUD.

§ 950.618 Procedures for obtaining approval of a modernization program.

(a) *HUD notification.* After modernization funds for a particular FFY become available, HUD shall publish in the *Federal Register* a notice of funding availability (NOFA) and the time frame for submission of applications.

(b) *IHA consultation with local officials and residents/homebuyers.* An IHA shall develop the application in consultation with local officials and resident and homebuyers, as set forth in § 950.624.

(c) *IHA application.* An IHA shall submit to HUD an application, in a form prescribed by HUD, which shall include:

(1) A general description of IHA development(s) (including the current physical condition, for each development for which the IHA is requesting funds, or for all the IHA's developments) and physical and management improvement needs (to meet the Secretary's standards in § 950.603), general description of major work categories (e.g., kitchens, bathrooms) required to correct identified deficiencies and estimated costs, including a statement concerning consultation with local officials and residents and viability of the development(s). The application will also identify a cost estimate for the equipment systems or structural elements which would normally be replaced over the remaining period of the annual contributions contract or during the 30-year period beginning on the date of submission of the application.

(2) For management improvements, the application must identify the management improvement need, including a general description of the work required for correction and an estimated cost. Management areas for which needs should be identified include, but are not limited to, the following:

(i) The management, financial, and accounting control systems of the IHA;

(ii) The adequacy and qualifications of personnel employed by such IHA (in the management and operation of such developments) for each category of employment; and

(iii) The adequacy and efficacy of resident programs and services in such developments, the security of each such development and its residents, policies and procedures of the IHA for the selection and eviction of residents in such developments, and other policies and procedures of such IHA relating to such developments, as specified by the Secretary; and

(3) Any other documents, as may be required by HUD.

(d) *Completeness review.* To be eligible for selection, an application must be received by the Field Office within the time period specified in the NOFA and must be complete. In order to determine whether an application is complete, responsive to the NOFA and acceptable for technical processing, the Field Office shall perform an initial completeness review upon receipt of the application. To make the above determination, the Field Office shall use the following criteria:

(1) The application was received by HUD at the appropriate address by the date and time specified in the NOFA and was complete and responsive (excluding exhibits which are certifications); or

(2) If an application is determined to be incomplete or to have missing certifications, the IHA shall be advised in writing of any deficiencies or any inconsistencies. The missing information is to be submitted within a specified period of time from the date of HUD's written notification. This is not additional time to substantially revise the application. Deficiencies which may be corrected at this time are inadvertently omitted documents or clarifications of previously submitted material and other changes which are not of such a nature as to improve the competitive position of the application. The IHA must acceptably correct deficiencies (including furnishing missing certifications) within the time specified in the NOFA.

(e) *Eligibility review.* (1) *Eligibility for processing.* To be eligible for processing,

based on the general description of its developments' condition and general statement of physical and management improvement needs, and the Field Office's knowledge of the development's conditions, the work items, particularly emergency work items, must appear to be eligible and needed.

(2) *Eligibility review on reduced scope.* When the following conditions exist, the IHA will be reviewed on a reduced scope:

(i) Where the IHA owes funds to HUD as a result of excess development, modernization or operating funds previously provided and the IHA has not repaid the funds, or has not entered into a repayment agreement, or is not meeting its obligations under a repayment agreement, the IHA is eligible for processing for Emergency Modernization only.

(ii) Where the IHA has not complied with Fair Housing and Equal Opportunity (FHEO) requirements as set forth in § 950.115, as evidenced by an action, finding or determination as described in paragraphs (e)(2)(ii)(A) through (E) of this section, unless the IHA is implementing a voluntary compliance agreement or settlement agreement designed to correct the area(s) of noncompliance, the IHA is eligible for processing only for Emergency Modernization or for work needed to remedy civil rights deficiencies.

(A) A pending proceeding against the IHA based upon a charge of discrimination issued under the Fair Housing Act. A charge of discrimination is a charge under section 810(g)(2) of the Fair Housing Act (42 U.S.C. 3610(g)(2)), issued by the HUD's General Counsel or legally authorized designee;

(B) A pending civil rights suit against the IHA, referred by the HUD's General Counsel and instituted by the Department of Justice;

(C) Outstanding HUD findings of IHA noncompliance with civil rights statutes and executive orders under § 950.115, or implementing regulations, as a result of formal administrative proceedings, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance;

(D) A deferral of the processing of applications from the IHA imposed by HUD under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and § 950.115, the Attorney General's Guidelines (28 CFR 50.3) and HUD's title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's

implementing regulations (24 CFR 8.57); or

(E) An adjudication of a violation under any of the authorities under § 950.115 in a civil action filed against the IHA by a private individual, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance.

(3) *FHEO Division review.* The processing office shall request the appropriate FHEO Division of the Field or Regional Office to identify any IHAs with equal opportunity-related problems. After consulting with Regional FHEO, as appropriate, and reviewing its own files, the FHEO Division shall identify each IHA by the following categories and provide any other relevant information within the requested time frame:

(i) There are no known equal opportunity-related problems;

(ii) There are known equal opportunity-related problems, as identified; or

(iii) There are circumstances as set forth in paragraph (e)(2) of this section.

(f) *Technical processing.* When an application is determined to be complete and responsive to the NOFA and eligible for processing, technical processing, consisting of the following, shall be accomplished:

(1) The Field Office shall categorize the eligible IHAs and their developments into two processing groups: Group 1 for Emergency Modernization; and Group 2 for Other Modernization. IHA developments may be included in both groups and the same development may be in each group. The IHA only needs to submit one application which includes needs which the Field Office will process under Group 1 or Group 2. However, the IHA can submit Emergency Modernization applications whenever needed. Group 2 developments are subject to the long-term viability and reasonable cost analysis. Preference will be given to IHAs which request assistance for developments having conditions which threaten the health or safety of the residents or having a significant number of vacant, substandard units; and which have demonstrated a capability of carrying out the activities proposed. Within Group 2, the Secretary may give priority to compliance with statutory, regulatory, and court-ordered deadlines.

(2) The Field Office will evaluate the Group 2 IHAs and developments to determine eligibility and acceptability based on the technical review factors in paragraph (g) of this section. Based on

these factors, the Field Office shall determine the applications which, in its judgment, are approvable. Selections then shall be made in accordance with paragraph (h) of this section.

(g) *Technical review factors.* The technical review factors for assistance include:

(1) Extent and urgency of need, including need to comply with statutory, regulatory, or court-ordered deadlines;

(2) Extent of vacancies;

(3) IHA's modernization capability;

(4) IHA's management capability;

(5) Degree of resident involvement in IHA operations;

(6) Degree of IHA activity in resident initiatives, including resident management, economic development, and drug elimination efforts;

(7) Degree of resident employment;

(8) Local government support for proposed modernization; and

(9) Such additional factors as the Secretary determines necessary and appropriate.

(h) *Rating and ranking.* The Field Office shall rate and rank each application in Group 2 on the basis of its assessment of the application using the technical review factors set forth in paragraph (g) of this section and in the NOFA. The Field Office shall identify for joint review selection the highest IHA ranking applications in Group 2 in descending order and other Group 2 IHAs with lower ranking applications but with high priority needs, which most reasonably approximate the amount of modernization which can be funded. High priority needs are non-emergency needs, but related to: health or safety; vacant, substandard units; structural or system integrity; or compliance with statutory, regulatory or court-ordered deadlines. All Group 1 applications would be automatically selected for joint review.

(i) *Joint review.* HUD shall notify each IHA whose application has been selected for further processing as to whether the joint review will be conducted on-site or off-site (e.g., by telephone or in-office meeting). The purpose of the joint review is to discuss the proposed modernization program, as set forth in the application, and determine the size of the grant, if any, to be awarded. Where the IHA has not included all its developments in the CIAP application, HUD may not, as a result of joint review consider funding any non-emergency work at excluded developments or subsequently approve use of leftover funds at excluded developments. An IHA shall prepare for the joint review by preparing a draft CIAP budget, and reviewing the other

items to be covered during the joint review, as prescribed by HUD. If conducted on-site, the joint review may include an inspection of the proposed physical work. IHAs not selected for joint review will be advised in writing of the reasons for nonselection.

(j) *HUD awards.* Upon completion of the joint review, HUD shall adjust the amounts to be awarded, as necessary, based on information obtained at Joint Review, including the information received as a result of the FHEO review and completion of the environmental review, and announce the IHAs selected for CIAP grants (subject to their submission of an approvable CIAP budget and any other required documents). HUD would request the funded IHA to submit a CIAP budget, including an implementation schedule, a resolution by the IHA Board of Commissioners (approving the CIAP budget and containing certifications required by HUD), and any other necessary documents.

(k) *ACC amendment.* After HUD approval of the CIAP budget, HUD and the IHA shall enter into an ACC amendment in order for the IHA to requisition modernization funds. The ACC amendment shall require low-income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC). HUD has the authority to condition an ACC amendment (e.g., to require an IHA to hire a modernization coordinator or contract administrator to administer its modernization program).

(l) *Declaration of trust.* An IHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20-year period during which the IHA is obligated to operate its developments in accordance with the ACC, the Act, and HUD regulations and requirements. A Declaration of Trust is not required for Mutual Help units.

§ 950.624 Resident and homebuyer participation.

(a) *Resident participation.* For a rental development only, the IHA shall establish a Partnership Process, as defined in § 950.102, to develop, implement and monitor the CIAP. Before submission of the application, an IHA shall consult with the residents, the resident organization or the RMC (see subpart O of this part) of the development being proposed for modernization regarding its intent to submit an application for CIAP funds. An IHA shall give residents a reasonable opportunity to present their views on

the proposed modernization program and alternatives to it, and give full and serious consideration to resident recommendations. An IHA shall respond in writing to the residents, the resident organization or the RMC, indicating its acceptance or rejection of resident recommendations, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, an IHA shall inform the residents, the resident organization or the RMC of the approved work items and its progress during implementation. Where HUD does not approve the modernization program, an IHA shall so inform the residents, the resident organization or the RMC.

(b) *Homebuyer participation: Turnkey III and Mutual Help.* For a homeownership development only, before submission of the application, an IHA shall consult with the homebuyer families of the development proposed for modernization regarding its intent to submit an application for CIAP funds. An IHA shall give the homebuyer families a reasonable opportunity to present their views on the proposed modernization program and alternatives to it, and give full and serious consideration to their recommendations. An IHA shall respond in writing to the homebuyer families, indicating its acceptance or rejection of their recommendations, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, an IHA shall inform the homebuyer families of the approved work items and its progress during implementation. Where HUD does not approve the modernization program, an IHA shall so inform the homebuyer families.

§ 950.635 Initiation of modernization activities.

After HUD has approved the modernization program and entered into an ACC amendment with the IHA, an IHA shall undertake the modernization activities and expenditures set forth in its approved CIAP budget in a timely, efficient and economical manner, subject to the following requirement. An IHA shall ensure that there is no duplication between the activities carried out with CIAP funds and the activities carried out with other funds.

§ 950.639 Fund requisitions.

An IHA shall requisition modernization funds against the approved CIAP budget in accordance with procedures prescribed by HUD.

§ 950.642 Contracting requirements.

An IHA shall comply with the prevailing wage rate requirements in §§ 950.120 and 950.172, as well as the Indian Preference requirements in § 950.175. In addition, an IHA shall comply with State, Tribal and local laws and Federal requirements, as set forth in 24 CFR part 85, except as follows:

(a) *Architect/engineer and other professional services contracts.* Notwithstanding 24 CFR 85.36(g), an IHA shall comply with HUD requirements to either:

(1) Where the proposed contract amount exceeds the HUD-established threshold, submit the contract for prior HUD approval before execution or issuance; or

(2) Where the proposed contract amount does not exceed the HUD-established threshold, certify that the scope of work is consistent with any agreements reached with HUD, and that the amount is appropriate and does not exceed the HUD-approved CIAP budget amount.

(b) *Assurance of completion.* For each construction contract over \$25,000, the contractor shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h), a twenty percent cash escrow, or a twenty-five percent letter of credit or, as may be required by law, separate performance and payment bonds, each for fifty percent or more of the contract price.

(c) *Construction solicitations.* Notwithstanding 24 CFR 85.36(g), an IHA shall comply with HUD requirements to either:

(1) Where the estimated contract amount exceeds the HUD-established threshold, submit a complete construction solicitation for prior HUD approval before issuance; or

(2) Where the estimated contract amount does not exceed the HUD-established threshold, certify receipt of the required architect's/engineer's certification that the construction documents accurately reflect HUD-approved work and meet the modernization and energy conservation standards and that the construction solicitation is complete and includes all mandatory items.

(d) *Contract awards.* An IHA shall obtain HUD approval of the proposed award of a contract if the award exceeds the HUD-approved CIAP budget amount or if the procurement meets the criteria set forth in 24 CFR 85.36(g)(2) (i) through (iv). In all other instances, an IHA shall make the award without HUD approval after the IHA has certified that:

(1) The solicitation and award procedures were conducted in

compliance with State, Tribal and local laws and Federal requirements;

(2) The award does not exceed the approved CIAP budget amount and does not meet the criteria in 24 CFR 85.36(g)(2) (i) through (iv) for prior HUD approval;

(3) The contractor is not on the Lists of Parties Excluded from the Federal Procurement or Nonprocurement Programs; and

(e) *Contract modifications.* Notwithstanding 24 CFR 85.36(g), except in an emergency endangering life or property, an IHA shall comply with HUD requirements to either:

(1) Where the proposed contract modification exceeds the HUD-established threshold, submit the proposed modification for prior HUD approval before issuance; or

(2) Where the proposed contract modification does not exceed the HUD-established threshold, certify that the proposed modification is within the scope of the contract and that any additional costs are within the latest HUD-approved CIAP budget or otherwise approved by HUD.

(f) *Construction requirements.* An IHA may be required to submit to HUD periodic progress reports and construction completion documents for prior HUD approval above a HUD-specified amount.

(g) *Previous participation.* An IHA shall ensure that the contractor is not on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

§ 950.645 On-site inspections.

It is the responsibility of the IHA, not HUD, to provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether work is performed by contract or force account labor and with or without the services of an architect/engineer, to assure work quality and progress.

§ 950.648 Budget revisions.

An IHA shall not incur any modernization cost in excess of the total HUD-approved CIAP budget. An IHA shall submit a budget revision, in a form prescribed by HUD, if the IHA plans (within the total approved CIAP budget) to incur modernization costs in excess of the approved CIAP budget amount for any development. An IHA also shall comply with HUD requirements to either:

(a) Submit the proposed CIAP budget revision for prior HUD approval if the IHA plans to delete or substantially revise approved work items, add new work items, or incur modernization

costs in excess of the HUD-established threshold; or

(b) Certify that the revisions are necessary to carry out the approved work and do not result in the approved CIAP budget amount for any development being exceeded.

§ 950.651 Progress reports.

For each six-month period, beginning October 1, until completion of the modernization program or expenditure of all funds, an IHA shall submit a report, in a form prescribed by HUD, to the HUD Field Office. Where HUD determines that an IHA is having implementation problems, HUD may require more frequent reporting. The report shall include:

(a) Modernization fund obligations and expenditures and progress against the approved implementation schedule(s); and

(b) Management improvement progress, where applicable.

§ 950.654 HUD review of IHA performance.

HUD shall periodically review IHA performance in carrying out its approved modernization program to determine compliance with HUD requirements, the quality of an IHA's inspections as evidenced by the quality of work, and the timeliness of the work. Where deficiencies are noted, an IHA shall take corrective action, as directed by HUD.

§ 950.657 Fiscal closeout.

Upon completion or termination of a modernization program, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. An IHA shall immediately remit any excess funds provided by HUD. The audit shall follow the guidelines prescribed in 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate indicates that there are still excess funds, an IHA shall immediately remit the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized or ineligible expenditures, an IHA shall take such corrective actions as HUD may direct.

Comprehensive Grant Program (For IHAs That Own or Operate 250 or More Indian Housing Units)

§ 950.660 Purpose.

(a) The purpose of the Comprehensive Grant Program (CGP) under this subpart is:

(1) To provide modernization assistance to IHAs that own or operate a total of 250 or more units of Indian

Housing on a reliable and more predictable basis, to enable them to operate, upgrade, modernize, and rehabilitate Indian housing developments, to ensure their continued availability for low income families as decent, safe, and sanitary housing;

(2) To provide considerable discretion to IHAs to decide the specific improvements, the manner of their execution, and the timing of the expenditure of funds;

(3) To simplify significantly the program of Federal assistance for capital improvements in Indian Housing developments;

(4) To provide increased opportunities and incentives for more efficient management of Indian housing developments; and

(5) To give IHAs greater control in planning and expending funds for modernization, rehabilitation, maintenance, and improvement of Indian housing developments to benefit low income families.

(b) The purpose of the sections under the undesignated heading entitled, Comprehensive Grant Program (CGP), is to set forth the policies and procedures for the CGP under which IHAs that own and operate a total of 250 or more units of Indian housing receive financial assistance on a formula grant basis in accordance with § 950.601(e) and (f) for the modernization of Indian housing developments.

§ 950.666 Eligible costs.

(a) *General.* An IHA may use financial assistance received under the CGP for the following eligible costs:

(1) Undertaking activities described in its approved action plan under § 950.672(d)(5);

(2) Carrying out emergency work, whether or not the need is indicated in the IHA's approved Comprehensive Plan (including Five-Year Action Plan) or Annual Submission;

(3) Funding a replacement reserve to carry out eligible activities in future years, subject to the restrictions set forth in paragraph (f) of this section;

(4) Preparing the Comprehensive Plan and action plan under § 950.672, including reasonable costs necessary to assist residents to participate in a meaningful way in the planning, implementation and monitoring process; and

(5) Carrying out an audit, in accordance with 24 CFR part 44 and § 950.120.

(b) *Demonstration of viability.* Except in the case of emergency work, an IHA shall only expend funds on a development for which the IHA has demonstrated that completion of the

improvements and replacements identified in the Comprehensive Plan will reasonably ensure the long-term physical and social viability of the development at a reasonable cost.

(c) *Physical improvement costs for rental and Mutual Help developments.* Eligible costs include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 950.603. These mandatory standards may be exceeded only when the IHA determines that it is necessary or highly desirable for the long-term physical and social viability of the individual development. Such development specific work may include property purchases. If demolition or disposition is proposed, the IHA shall comply with subpart M of this part.

(d) *Costs for Turnkey III developments.* (1) *Eligible costs.* Eligible physical improvement costs for existing Turnkey III developments are limited to work items which are not the responsibility of homebuyer families and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, and lead-based paint testing and abatement. In addition, management improvements are eligible modernization costs for existing homeownership developments.

(2) *Ineligible costs.* Nonroutine maintenance or replacements, additions, and items that are the responsibility of the homebuyer families are ineligible costs.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.*

(i) Notwithstanding the requirements of paragraph (d)(2) of this section, an IHA may substantially rehabilitate a Turnkey III development whenever a unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its needs assessment the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale. In addition, an IHA must demonstrate in its needs assessment that: the IHA has homebuyers who are both eligible for homeownership, in accordance with the requirements of subpart G of this part, and who have demonstrated their intent to be placed into each of the Turnkey III units proposed to be substantially rehabilitated.

(ii) Before an IHA may be approved for the substantial rehabilitation of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA) or Non-Routine

Maintenance Reserve (NRMR) pertaining to the unit, and request the maximum amount of operating subsidy. Any increase in the value caused by its substantial rehabilitation under this paragraph shall be reflected solely by its subsequent appraised value, and not by an automatic increase in its selling price.

(e) *Demolition and conversion costs.* Eligible costs include:

(1) Demolition of dwelling units or nondwelling facilities, where the demolition is approved by HUD under subpart M of this part, and related costs, such as clearing and grading the site after demolition and subsequent site improvement to benefit the remaining portion of the existing development; and

(2) Conversion of existing dwelling units to different bedroom sizes.

(f) *Replacement reserve costs.* (1) Funding a replacement reserve to carry out eligible activities in future years is an eligible cost, subject to the following restrictions:

(i) Annual CGP funds are not needed for existing needs, as identified by the IHA in its needs assessments; or

(ii) A physical improvement requires more funds than the IHA would receive under its annual formula allocation; or

(iii) A management improvement requires more funds than the IHA may use under its 20 percent limit for management improvements, and the IHA needs to save a portion of subsequent year(s) grants, to fund the work item;

(2) The IHA shall invest replacement reserve funds so as to generate a return equal to or greater than the average 91-day Treasury bill rate;

(3) Interest earned on funds in the replacement reserve will not be added to the IHA's income in the determination of an IHA's operating subsidy eligibility, but must be used for eligible modernization costs;

(4) To the extent that its annual formula allocation and any unobligated balances of modernization funds are not adequate to meet emergency needs, an IHA must first use its replacement reserve, where funded, to meet emergency needs, before requesting funds from the \$75 million reserve. An IHA is not required to use its replacement reserve for natural and other disasters.

(g) *Management improvement costs.* Management improvements that are needed to upgrade the operation of the IHA's developments, sustain physical improvements at those developments or correct management deficiencies identified by the IHA in its Comprehensive Plan are eligible costs.

An IHA's ongoing operating expenses, including direct provision of social services through either contract or force account labor, are ineligible management improvement costs.

(1) *Economic development activities costs.* Economic development activities such as job training, resident employment and resident businesses, for the purpose of carrying out activities related to the eligible management and physical improvements are eligible costs, as approved by HUD. HUD encourages IHAs, to the greatest extent feasible, to hire residents as trainees or employees to carry out the modernization program under this subpart, and to contract with resident-owned businesses for modernization work.

(2) *Resident management costs.* Technical assistance to a resident council or resident management corporation (RMC), as defined in § 950.455, in order to determine the feasibility of the resident management entity or assist in its formation is an eligible cost.

(3) *Resident homeownership costs.* The study of the feasibility of converting rental to homeownership units, as well as the preparation of an application for conversion to homeownership, is an eligible cost.

(h) *Drug elimination costs.* Drug elimination activities involving management or physical improvements are eligible costs, as specified by HUD.

(i) *Administrative costs.*

Administrative costs necessary for the planning, design, implementation and monitoring of the physical and management improvements are eligible costs and include the following:

(1) The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the work are beyond that which could be reasonably expected to be accomplished by such personnel in the performance of their nonmodernization duties. The IHA shall properly apportion to the appropriate program budget any direct charges for the salaries of assigned full- or part-time staff (e.g., to the CIAP, CGP or operating budgets);

(2) IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible costs in direct proportion to the amount of salary charged to the CGP; and

(3) Other administrative costs, such as telephone and facsimile, as specified by HUD.

(j) *Audit costs.*

(k) *Architectural/engineering and consultant fees.* Fees for planning,

preparation of needs assessments and required documents, detailed design work, preparation of construction and bid documents, lead-based paint testing, etc., are eligible costs.

(l) *Relocation costs.* Relocation costs as a direct result of rehabilitation, demolition or acquisition for a CGP-funded activity are eligible costs, as required by § 950.117.

(m) *Cost limitation.* (1) Notwithstanding the full fungibility of work items in § 950.675(c), an IHA shall not use more than a total of 20 percent of its annual grant for management improvement costs in account 1408, unless specifically approved by HUD, or unless the IHA is determined by the Field Office to be high performing and have administrative capacity under § 950.135.

(2) Notwithstanding the full fungibility of work items in § 950.675(c), an IHA shall not use more than a total of 7 percent of its annual grant on administrative costs in account 1410, excluding any costs related to in-house lead-based paint or asbestos testing, in-house architectural/engineering (A/E) work, or other special administrative costs required by state, tribal or local law, unless specifically approved by HUD. In the case of an IHA whose jurisdiction covers an unusually large geographic area, an additional two percent of the annual grant may be spent on costs related to travelling to the IHA's developments for CGP-related business, as specifically approved by HUD. (For purposes of this paragraph (m)(2), "an unusually large geographic area" means an area served by an IHA whose offices are physically separated from the majority of its developments by distances that require overnight travel and/or travel by air or other commercial carriers, e.g., a statewide IHA with developments in multiple localities; a regional IHA with developments in multiple counties or states; or an Alaska IHA with developments in multiple villages.);

(3) Where the physical or management improvement will benefit programs other than Indian Housing, such as Section 8, local renewal, etc., eligible costs are limited to the amount directly attributable to the Indian Housing Program.

(n) *Ineligible costs.* An IHA (or an RMC acting on behalf of an IHA) shall not make luxury improvements, or carry out any other ineligible activities, as specified by HUD.

§ 950.667 Reserve for emergencies and disasters.

(a) *Emergencies.* (1) *Eligibility for assistance.* An IHA (including an IHA

that is not considered to be administratively capable under § 950.135) may obtain funds at any time, for any eligible emergency work item as defined in § 950.102 (for IHAs participating in CGP) or for any eligible emergency work item (described as emergency modernization in § 950.102) (for IHAs participating in CIAP), from the reserve established under § 950.601(b). However, emergency reserve funds may not be provided to an IHA participating in CGP that has the necessary funds available from any other source, including its annual formula allocation under § 950.601(e) and (f), other unobligated modernization funds, and its replacement reserves under § 950.666. Emergency reserve funds may not be provided to an IHA participating in CIAP that has the necessary funds available from any other source, including unobligated CIAP (and no CIAP modernization is available for the remainder of the fiscal year) and residual receipts. IHAs participating in CIAP must also have the emergency modernization work under contract within 6 months after receiving HUD's approval of emergency reserve funds. An IHA is not required to have an approved Comprehensive Plan under § 950.672 before it can request emergency assistance from this reserve.

(2) *Procedure.* To obtain emergency funds, an IHA must submit a request, in a form to be prescribed by HUD, which demonstrates that without the requested funds from the set-aside under this section, the IHA does not have adequate funds available to correct the conditions which present an immediate threat to the health or safety of the residents. HUD will immediately process a request for such assistance and, if it determines that the IHA's request meets the requirements of paragraph (a)(1) of this section, it shall approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* An IHA that receives assistance for its emergency needs from the reserve under § 950.601(b) must repay such assistance from its future allocations of assistance, where available. For IHAs participating in the CGP, HUD shall deduct up to 50 percent of an IHA's succeeding year's formula allocation under § 950.601(e) and (f) to repay emergency funds previously provided by HUD to the IHA. The remaining balance, if any, shall be deducted from an IHA's succeeding years' formula allocations.

(b) *Natural and other disasters.* (1) *Eligibility for assistance.* An IHA (including an IHA which has been determined by HUD not to be administratively capable under

§ 950.135) may request assistance at any time from the reserve under § 950.601(b) for the purpose of permitting the IHA to respond to a natural or other disaster. To qualify for assistance, the disaster must pertain to an extraordinary event affecting only one or a few IHAs, such as an earthquake or hurricane. Any disaster declared by the President (or which HUD determines would qualify for a Presidential declaration if it were on a larger scale) qualifies for assistance under this paragraph. An IHA may receive funds from the reserve regardless of the availability of other modernization funds or reserves, but only to the extent its needs are in excess of its insurance coverage. An IHA is not required to have an approved Comprehensive Plan under § 950.672 before it can request assistance from the reserve under § 950.601(b).

(2) *Procedure.* To obtain funding for natural or other disasters under § 950.601(b), an IHA must submit a request, in a form prescribed by HUD, which demonstrates that it meets the requirements of paragraph (b)(1) of this section. HUD will immediately process a request for such assistance and, if it determines that the request meets the requirements under paragraph (b)(1) of this section, it will approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* Funds provided to an IHA under paragraph (b)(1) of this section for natural and other disasters shall be in the form of a grant, and are not required to be repaid.

§ 950.669 Allocation of assistance.

(a) *Submission of formula characteristics report.* (1) *Formula characteristics report.* In its first year of participation in the CGP, each IHA shall verify and provide data to HUD, in a form and at a time to be prescribed by HUD, concerning IHA and development characteristics, so that HUD can develop the IHA's annual funding allocation under the CGP in accordance with § 950.601(e) and (f). If an IHA fails to submit to HUD the formula characteristics report by the prescribed deadline, HUD will use the data which it has available concerning IHA and development characteristics for purposes of calculating the IHA's formula share. After its first year of participation in the CGP, an IHA is required to respond to data transmitted by HUD if there have been changes to its inventory from that previously reported, or where requested by HUD. On an annual basis, HUD will transmit to the IHA the formula characteristics report which reflects the data that will be used to determine the IHA's formula

share. The IHA will have 30 days to review and advise HUD of errors in this HUD report. Necessary adjustments will be made to the IHA's data before the formula is run for the current FFY.

(b) *HUD notification of formula amount; appeal rights.* (1) *Formula amounts notification.* After HUD determines an IHA's formula allocation under § 950.601 (e) and (f) based upon the IHA, development, and community characteristics, it shall notify the IHA of its formula amount and provide instruction on annual submission in accordance with §§ 950.672(a) and 950.678.

(2) *Appeal based upon unique circumstances.* An IHA may appeal in writing HUD's determination of its formula amount within 60 calendar days of the date of HUD's determination on the basis of "unique circumstances." The IHA must indicate what is unique, and specify the manner in which it is different from all other IHAs participating in the CGP, and provide any necessary supporting documentation. HUD shall render a written decision on an IHA's appeal under this paragraph within 60 calendar days of the date of its receipt of the IHA's request for an appeal. HUD shall publish in the *Federal Register* a description of the facts supporting any successful appeals based upon "unique circumstances." Any adjustments resulting from successful appeals in a particular FFY under this paragraph shall be made from the subsequent years' allocation of funds under this part.

(3) *Appeal based upon error.* An IHA may appeal in writing HUD's determination of its formula amount within 60 calendar days of the date of HUD's determination on the basis of an error. The IHA may appeal on the basis of error the correctness of data in the formula characteristics report. The IHA must describe the nature of the error, and provide any necessary supporting documentation. HUD shall respond to the IHA's request within 60 calendar days of the date of its receipt of the IHA's request for an appeal. Any adjustment resulting from successful appeals in a particular FFY under this paragraph shall be made from subsequent years' allocation of funds under this part.

(c) *IHAs determined to be high risk.* If an IHA is determined to have serious deficiencies in accordance with § 950.135, or if the IHA fails to meet, or to make reasonable progress toward meeting, the goals previously established in its management improvement plan under § 950.135, HUD may designate the IHA high risk.

If the IHA is designated high risk with respect to modernization, HUD may withhold some or all of the IHA's annual grant; HUD may declare a breach of the grant agreement with respect to all or some of the IHA's functions so that the IHA or a particular function of the IHA may be administered by another entity; or HUD may take other sanctions authorized by law or regulation.

(d) *Obligation of formula funding.* All formula funding should be obligated within two years of allocation or such longer period approved by HUD. If the IHA fails to obligate funds within this period, they may be subject to an alternative management strategy which may involve third-party oversight or administration of the modernization function. HUD would only require such action after a corrective action order had been issued under § 950.687 and the IHA failed to comply with the order. HUD could then issue an alternative management strategy in a correction action order. An IHA may appeal in writing the corrective action order imposing an alternative management strategy within 60 days of that order. HUD Headquarters shall render a written decision on an IHA's appeal within 60 calendar days of the date of its receipt of the IHA's appeal.

§ 950.672 Comprehensive Plan (including Five-Year Action Plan).

(a) *Submission.* HUD shall notify IHAs of the requested date for submitting or updating a Comprehensive Plan. For planning purposes, IHAs may use the amount they received under CGP in the prior year in developing their Comprehensive Plan or they may wait for the annual HUD notification of formula amount under § 950.669(b)(1).

(b)(1) *Resident participation.* An IHA is required to develop, implement, monitor and annually amend portions of its Comprehensive Plan in consultation with residents of the developments covered by the Comprehensive Plan, and with democratically elected resident groups. In addition, the IHA must also consult with resident management corporations (RMCs) to the extent that an RMC manages a development covered by the Comprehensive Plan. The IHA, in partnership with the residents, must develop and implement a process for resident participation which ensures that residents are involved in a meaningful way in all phases of the CGP. Such involvement shall involve implementing the Partnership Process as a critical element of the CGP.

(2) *Establishment of Partnership Process.* The IHA, in partnership with

the residents of the developments covered by the plan, and with democratically elected resident groups, must establish a Partnership Process to develop and implement the goals, needs, strategies and priorities identified in the Comprehensive Plan. After residents have organized to participate in the CGP, they may decide to establish a volunteer advisory group of experts in various professions to assist them in the CGP Partnership Process. The Partnership Process shall be designed to achieve the following:

(i) To assure that residents are fully briefed and involved in developing the content of, and monitoring the implementation of, the Comprehensive Plan including, but not limited to, the physical and management needs assessments, viability analysis, Five-Year Action Plan, and Work Statements for each year. If necessary, the IHA shall develop and implement capacity building strategies to ensure meaningful resident participation in CGP. Such technical assistance efforts for residents are eligible management improvement costs under CGP;

(ii) To enable residents to participate, on an IHA-wide or area-wide basis, in ongoing discussions of the Comprehensive Plan and strategies for its implementation, and in all meetings necessary to ensure meaningful participation.

(3) *Public notice.* Within a reasonable amount of time before the advance meeting for duly elected resident organizations under paragraph (b)(4) of this section, and the public hearing under paragraph (b)(5) of this section, the IHA shall provide public notice of the advance meeting and the public hearing in a manner determined by the IHA and which ensures notice to all duly elected resident organizations. The public notice shall also include a summary of activities of the previous year (uses of past funding) and progress update, estimated funding level (i.e., current year funding or formula amount, whichever the IHA elects); a summary of the CGP requirements; the estimated time frames for completion of the required CGP documents; and the requirement for resident participation in the planning, development and monitoring of modernization activities under the CGP;

(4) *Advance meeting for duly elected resident organizations.* The IHA shall hold, within a reasonable amount of time before the public hearing under paragraph (b)(5) of the section, a meeting for residents and duly elected resident organizations at which the IHA shall explain the components of the Comprehensive Plan. The meeting shall

be open to all residents and duly elected resident organizations;

(5) *Public hearing.* The IHA shall hold at least one public hearing, and any appropriate number of additional hearings, to ensure ample opportunity for residents, duly elected resident organizations, local government officials, and other interested parties, to express their priorities and concerns. The IHA shall give full consideration to the comments and concerns of residents, local government officials, and other interested parties.

(c) *Local government participation.* An IHA shall consult with appropriate local government officials with respect to the development of the Comprehensive Plan. In the case of an IHA with developments in multiple jurisdictions, the IHA may meet this requirement by consulting with an advisory group representative of all the jurisdictions. At a minimum, such consultation must include providing such officials with:

(1) Advance written notice of the public hearing required under paragraph (b)(5) of this section;

(2) A copy of the summary of total preliminary estimated costs to address physical needs by each development and management/operations needs IHA-wide and a specific description of the IHA's process for maximizing the level of participation by residents.

(d) *Contents of Comprehensive Plan.* The Comprehensive Plan shall identify all of the physical and management improvements needed for an IHA and all of its developments, and that represent needs eligible for funding under § 950.666. The plan shall also include preliminary estimates of the total cost of these improvements. The plan shall set forth general strategies for addressing the identified needs, and highlight any special strategies, such as major redesign or partial demolition of a development, that are necessary to ensure the long-term physical and social viability of the development. Each Comprehensive Plan shall contain the following elements:

(1) *Summaries.* An IHA shall include as part of its Comprehensive Plan the following summaries:

(i) A summary of total preliminary estimated costs to address physical needs by each development and management needs IHA-wide; and

(ii) A specific description of the IHA's process for maximizing the level of participation by residents during the development, implementation and monitoring of the Comprehensive Plan, a summary of the general issues raised on the plan by residents and others during the public comment process and

the IHA's response to the general issue. IHA records, such as minutes of planning meetings or resident surveys, shall be maintained in the IHA's files and made available to residents, duly elected resident organizations, and other interested parties, upon request.

(2) *Physical needs assessment.* (i) *Requirements.* The physical needs assessment identifies all of the work that an IHA would need to undertake to bring each of its developments up to the modernization and energy conservation standards, as required by section 14(e)(1)(A)(ii) of the Act, to comply with lead-based paint testing and abatement requirements under § 950.120(i), and to comply with other program requirements under § 950.120. The physical needs assessment is completed without regard to the availability of funds, and shall include the following information with respect to each of an IHA's developments:

(A) A brief summary of the physical improvements necessary to bring each development to a level at least equal to the modernization standards contained in HUD Handbook 7485.2 (Public and Indian Housing Modernization Standards), and to the energy conservation and life-cycle cost-effective performance standards, as required in § 950.603, and to comply with the Lead-Based Testing and Abatement requirements under § 950.120(i), and the relative urgency of need also must be indicated. If the IHA has no physical improvement needs at a particular development at the time it completes its Comprehensive Plan, it must so indicate. Similarly, if the IHA intends to demolish, partially demolish, convert, or dispose of a development (or units within a development) it must so indicate in the summary of physical improvements;

(B) The replacement needs of equipment systems and structural elements that will be required to be met (assuming routine and timely maintenance is performed) during the period covered by the action plan;

(C) A preliminary estimate of the cost to complete the physical work;

(D) The projected FFY in which the IHA anticipates that the development will meet the modernization and energy conservation standards;

(E) In addition, the IHA shall provide with respect to vacant or non-homebuyer-occupied Turnkey III units, the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale, in accordance with § 950.666(d)(3).

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to

develop the physical needs assessment under this paragraph, and shall retain such source documents in its files.

(3) *Management needs assessment.* (i) *Requirements.* The plan shall include a comprehensive assessment of the improvements needed to upgrade the management and operation of the IHA and of each viable development so decent, safe and sanitary living conditions will be provided. The management needs assessment shall include the following, with the relative urgency of need indicated:

(A) An identification of the most current needs related to the following areas (to the extent that any of these needs is addressed in a HUD-approved management improvement plan, the IHA may simply include a cross-reference to these documents);

(1) The management, financial, and accounting control systems of the IHA;

(2) The adequacy and qualifications of personnel employed by the IHA in the management and operation of its developments, for each significant category of employment;

(3) The adequacy and efficacy of:
(i) Resident programs and services;
(ii) Resident and development security;

(iii) Resident selection and eviction;

(iv) Occupancy;

(v) Maintenance;

(vi) Resident management and resident capacity building programs;

(vii) Resident opportunities for employment and business development and other self-sufficiency opportunities for residents; and

(viii) Homeownership opportunities for residents.

(B) Any additional deficiencies identified through audits and HUD monitoring reviews which are not addressed under paragraph (d)(3)(i)(A) of this section. To the extent that any of these is addressed in a HUD-approved management improvement plan, the IHA may include a cross-reference to these documents;

(C) Any other management and operations needs which the IHA wants to address at the IHA-wide or development level;

(D) An IHA-wide preliminary cost estimate for addressing all the needs identified in the management needs assessment, without regard to the availability of funds; and

(E) The projected FFY in which the IHA anticipates that all identified management deficiencies will be corrected.

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to develop the management needs

assessment under this paragraph, and shall retain such source documents in its files.

(4) *Demonstration of long-term physical and social viability.*

(i) *General.* The plan shall include, on a development-by-development basis, an analysis of whether completion of the improvements and replacements identified under paragraphs (d)(2) and (d)(3) of this section will reasonably ensure the long-term physical and social viability of the development at a reasonable cost. The IHA shall keep documentation in its files to support its reasonable cost determinations of each major work item (e.g., kitchen cabinets, exterior doors). HUD will review cost reasonableness as part of its review of the Annual Submission and the Performance and Evaluation Report. Where necessary, HUD will review the IHA's documentation in support of its cost reasonableness;

(ii) *Determination of non-viability.* Where an IHA's analysis of a development, under paragraph (d) of this section, establishes that completion of the identified improvements and replacements will not result in the long-term physical and social viability of the development at a reasonable cost, the IHA shall not expend CGP funds for the development, except for emergencies and essential non-routine maintenance necessary to maintain habitability until residents can be relocated. The IHA shall specify in its Comprehensive Plan the actions it proposes to take with respect to the non-viable development (e.g., demolition or disposition under subpart M of this part).

(5) *Five-Year Action Plan.* (i) *General.* The Comprehensive Plan shall include a rolling Five-Year Action Plan to carry out the improvements and replacements (or a portion thereof) identified under paragraphs (d)(2) and (d)(3) of this section. In developing its Five-Year Action Plan, the IHA shall assume that the current year funding or formula amount will be available for each year of its Five-Year Action Plan, whichever the IHA is using for planning purposes, plus the IHA's estimate of the funds that will be available from other sources, such as State, local and tribal governments. All activities specified in an IHA's Five Year Action Plan are contingent upon the availability of funds, and the work items are fungible, i.e., interchangeable;

(ii) *Requirements.* Under the action plan, an IHA must indicate how it intends to use the funds available to it under the CGP to address the deficiencies, or a portion of the deficiencies, identified under its

physical and management needs assessments, as follows:

(A) *Physical condition.* With respect to the physical condition of an IHA's developments, an IHA must indicate in its action plan how it intends to address, over a five-year period, the deficiencies (or a portion of the deficiencies) identified in its physical needs assessment so as to bring each of its developments up to a level at least equal to the modernization and energy conservation standards. This would include specifying the work to be undertaken by the IHA in major work categories (e.g., kitchens, electrical systems, etc.); establishing priorities among the major work categories by development and year based upon the relative urgency of need; and estimating the cost of each of the identified major work categories. In addition, an IHA must estimate the FFY in which it anticipates that the development will meet the modernization and energy conservation standards. In developing its action plan, an IHA shall give priority to the following:

- (1) Activities required to correct emergency conditions;
- (2) Activities required to meet statutory (or other legally mandated) requirements;
- (3) Activities required to meet the needs identified in the Section 504 needs assessment within the regulatory timeframes; and
- (4) Activities required to complete lead-based paint testing and abatement requirements by December 6, 1994.

(B) *Management and operations.* An IHA must address in its action plan the management and operations deficiencies (or a portion of the deficiencies) identified in its management needs assessment, as follows:

- (1) With respect to the management and operations needs of the IHA, the IHA must identify how it intends to address with CGP funds, if necessary, the deficiencies (or a portion thereof) identified in its management needs assessment, including work identified through audits, the ACA, HUD monitoring reviews, and self-assessments (this would include establishing priorities based upon the relative urgency of need);
 - (2) A preliminary IHA-wide cost estimate, by major work category.
- (iii) *Procedure for maintaining current Five-Year Action Plan.* The IHA shall maintain a current Five-Year Action Plan by annually amending its Five-Year Action Plan, in conjunction with the Annual Submission;
- (6) *Local government statement.* The Comprehensive Plan shall include a

statement signed by the chief executive officer of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, from the CEO of each such jurisdiction), certifying as to the following:

- (i) The IHA developed the Comprehensive Plan/Five-Year Action Plan or amendments thereto in consultation with officials of the appropriate governing body and with development residents covered by the Comprehensive Plan/Five-Year Action Plan, in accordance with the requirements of § 950.672(b) and (c);
 - (ii) The Comprehensive Plan/Five-Year Action Plan or amendments thereto are consistent with the appropriate governing body's assessment of its low-income housing needs and that the appropriate governing body will cooperate in providing resident programs and services; and
 - (iii) The IHA's proposed drug elimination activities are coordinated with, and supportive of, local drug elimination strategies and neighborhood improvement programs, if applicable.
- (7) *IHA resolution.* The plan shall include a resolution adopted by the IHA Board of Commissioners, and signed by the Board Chairman of the IHA, approving the Comprehensive Plan or any amendments thereto and certifying that:
- (i) The IHA will comply with all policies, procedures, and requirements prescribed by HUD for modernization, including implementation of the modernization in a timely, efficient, and economical manner;
 - (ii) IHA has established controls to assure that any activity funded by the CGP is not also funded by any other HUD program, thereby preventing duplicate funding of any activity;
 - (iii) The IHA will not provide to any development more assistance under the CGP than is necessary to provide affordable housing, after taking into account other government assistance provided;
 - (iv) The proposed physical work will meet the modernization and energy conservation standards under § 950.603;
 - (v) The proposed activities, obligations and expenditures in the Five-Year Action Plan/Annual Submission are consistent with the proposed or approved Comprehensive Plan of the IHA;
 - (vi) The IHA will comply with applicable civil rights requirements under § 950.115, and, where applicable, will carry out the Comprehensive Plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601--

3619), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794);

(vii) The IHA will, to the greatest extent feasible, give preference to the award of modernization contracts to Indian organizations and Indian-owned economic enterprises under § 950.165;

(viii) The IHA has provided to HUD any documentation that HUD has requested to carry out its review under the National Environmental Policy Act (NEPA) and other related authorities in accordance with § 950.120(a) and (b), and will not obligate, in any manner, the expenditure of CGP funds, or otherwise undertake the activities identified in its Comprehensive Plan/Annual Submission, until the IHA receives written notification from HUD indicating that HUD has complied with its responsibilities under NEPA and other related authorities;

(ix) The IHA will comply with the wage rate requirements under § 950.120(c) and (d);

(x) The IHA will comply with the relocation assistance and real property acquisition requirements under § 950.117;

(xi) The IHA will comply with the requirements for physical accessibility under § 950.120(f);

(xii) The IHA will comply with the requirements for access to records and audits under § 950.120(g);

(xiii) The IHA will comply with the uniform administrative requirements under § 950.120(h);

(xiv) The IHA will comply with lead-based paint testing and abatement requirements under § 950.120(i);

(xv) The IHA has complied with the requirements governing tribal government and resident participation in accordance with §§ 950.672(b), 950.678(d), and 950.684, and has given full consideration to the priorities and concerns of tribal government and residents, including comments which were ultimately not adopted, in preparing the Comprehensive Plan/Five-Year Action Plan and any amendments thereto;

(xvi) The IHA will comply with the special requirements of § 950.666(d) with respect to a homeownership development; and

(xvii) The IHA will comply with the special requirements of § 950.633 with respect to a Section 23 leased housing bond-financed development.

(xviii) The IHA will comply with section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u), and make best efforts, consistent with existing Federal, State, and local laws and regulations, to give low- and very low-income persons,

training and employment opportunities generated by CGP assistance, and to make best efforts, consistent with existing Federal, State, and local laws and regulations, to award contracts for work to be performed in connection with CGP assistance to business concerns that provide economic opportunities for low- and very low-income persons.

(e) *Amendments to the Comprehensive Plan.* (1) *Extension of time for performance.* An IHA shall have the right to amend its Comprehensive Plan (including the action plan) to extend the time for performance whenever HUD has not provided the amount of assistance set forth in the Comprehensive Plan or has not provided the assistance in a timely manner.

(2) *Amendments to needs assessments.* The IHA must amend its plan by revising its needs assessments whenever it proposes to carry out activities in its Five-Year Action Plan or Annual Submission, that are not reflected in its current needs assessments (except in the case of emergencies). If the bases for the needs assessment have changed substantially, an IHA may propose an amendment to its needs assessments, in connection with the submission of its Annual Submission (see § 950.678(b), or at any other time. These amendments shall be reviewed by HUD in accordance with § 950.675;

(3) *Six-year revision of Comprehensive Plan.* The physical and management needs assessments, and the summaries listed in § 950.672(d)(1) are required to be revised only every sixth year, although the IHA may elect to revise some or all of these more frequently. Every sixth year, an IHA must submit to HUD, as a part of its Annual Submission, a complete revision of its Comprehensive Plan.

(4) *Annual revision of Five-Year Action Plan.* Annually, the IHA shall submit to HUD, with its Annual Submission, an update of its Five-Year Action Plan. Notwithstanding the new fifth year, the IHA shall identify changes in work categories from the previous year Five-Year Action Plan when making this annual submission.

(5) *Required submissions.* Any amendments to the Comprehensive Plan under this section must be submitted with the IHA resolution under § 950.672(d)(7).

(f) *Prerequisite for receiving assistance.* (1) *Prohibition of assistance.* No financial assistance, except for emergency work to be funded under §§ 950.601(b) and 950.666(a)(2), and for modernization needs resulting from

disasters under § 950.601(b), may be made available under this subpart unless HUD has approved a Comprehensive Plan submitted by the IHA which meets the requirements of § 950.672. An IHA that has failed to obtain approval of its Comprehensive Plan by the end of the FFY shall have its formula allocation for that year (less any formula amounts provided to the IHA for emergencies) added to the subsequent year's appropriation of funds for grants under this part. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under § 950.601(e) and (f) in the subsequent FFY. An IHA which elects in any FFY not to participate in the CGP under this subpart may participate in the CGP in subsequent FFYs. (2) *Requests for emergency assistance.* An IHA may receive funds from its formula allocation to address emergency modernization needs where HUD has not approved an IHA's Comprehensive Plan. To request such assistance, an IHA shall submit to HUD a request for funds in such form as HUD may prescribe, including any documentation necessary to support its claim that an emergency exists. HUD shall review the request and supporting documentation to determine if it meets the definition of "emergency work," as set forth in § 950.102.

§ 950.675 HUD review and approval of Comprehensive Plan (including action plan).

(a) *Submission of Comprehensive Plan.* (1) Upon receipt of a Comprehensive Plan from an IHA, HUD shall determine whether:

(i) The plan contains each of the required components specified at § 950.672(d); and

(ii) Where applicable, the IHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate IHA performance, audit findings, or civil rights compliance findings.

(2) *Acceptance for review.* If the IHA has submitted a Comprehensive Plan (including the action plan) which meets the criteria specified in paragraph (a)(1) of this section, HUD shall accept the Comprehensive Plan for review, within 14 calendar days of its receipt in the Field Office. The IHA shall be notified in writing that the plan has been accepted by HUD, and that the 75-day review period is proceeding.

(3) *Time period for review.* A Comprehensive Plan that is accepted by HUD for review shall be considered to be approved unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date of HUD's

receipt of the Comprehensive Plan for review, that HUD has disapproved the plan. HUD shall not disapprove a Comprehensive Plan on the basis that it cannot complete its review within the 75-day deadline.

(4) *Rejection of Comprehensive Plan.* If an IHA has submitted a Comprehensive Plan (including the action plan), which does not meet the requirements of paragraph (a)(1) of this section, HUD shall notify the IHA within 14 calendar days of its receipt that HUD has rejected the plan for review. In such case, HUD shall indicate the reasons for rejection, the modifications required to qualify the Comprehensive Plan for HUD review, and the deadline date for receipt of any modifications.

(b) *HUD approval of Comprehensive Plan (including action plan).* (1) A Comprehensive Plan (including the action plan) that is accepted by HUD for review in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 days of the date of HUD's receipt of the Comprehensive Plan for review, that HUD has disapproved the plan, indicating the reasons for disapproval, and the modifications required to make the Comprehensive Plan approvable. The IHA must re-submit the Comprehensive Plan to HUD, in accordance with the deadline established by HUD, which may allow up to 75 calendar days before the end of the FFY for HUD review. If the revised plan is disapproved by HUD following its resubmission, or the IHA fails to resubmit the plan by the deadline established by HUD, any funds that would have been allocated to the IHA shall be added to the subsequent year's appropriation of funds for grants under this subpart. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under 24 CFR 968.103 and § 950.601. HUD shall not disapprove a Comprehensive Plan on the basis that HUD cannot complete its review under this section within the 75-day deadline.

(2) HUD shall approve the Comprehensive Plan except where it makes a determination in accordance with one or more of the following:

(i) The Comprehensive Plan is incomplete in significant matters. HUD determines that the IHA has failed to include all required information or documentation in its Comprehensive Plan, e.g., the physical needs assessment does not provide all of the information required by HUD concerning all of its developments; or the IHA has supplied

incomplete data on the current condition and other characteristics of its developments;

(ii) Identified needs are plainly inconsistent with facts and data. On the basis of available significant facts and data pertaining to the physical and operational condition of the IHA's developments or the management and operations of the IHA, HUD determines that the IHA's identification of modernization needs (see § 950.672(d) (2) and (3)) is plainly inconsistent with such facts and data. HUD will take into account facts and data such as those derived from recent HUD monitoring, audits, and resident comments and will disapprove a Comprehensive Plan based on such findings as:

(A) Identified physical improvements and replacement are inadequate. The completion of the identified physical improvements and replacements will not bring all of an IHA's developments to a level at least equal to the modernization and energy conservation and life-cycle cost-effective standards in § 950.603 (except that a development must meet the energy conservation standards under § 950.603 only when they are applicable to the work being performed);

(B) Identified management improvements are inadequate. The identified management and operations improvement needs do not address all of an IHA's areas of deficiency, or the completion of those improvements would not result in each area of deficiency under an IHA's management improvement plan under § 950.135 being brought up to an acceptable level of performance under the ACA and the Field Office Monitoring of IHAs Handbook 7440.3; and

(C) Proposed physical and management improvements fail to address identified needs. The proposed physical and management improvements in the action plan are not related to the identified needs in the needs assessments portion of the Comprehensive Plan, e.g., a heating plant renovation is in the action plan, but it was not included in the needs assessment for that development.

(iii) Action plan is plainly inappropriate to meeting identified needs. On the basis of the Comprehensive Plan, HUD determines that the action plan (see § 950.672(d)(5)) is plainly inappropriate to meet the needs identified in the Comprehensive Plan, e.g., the proposed work item will not correct the need identified in the needs assessment. HUD will take into account the availability of funds. In addition, HUD will take into account whether the action plan fails to address

work items that are needed to correct known emergency conditions or which are otherwise needed to meet statutory or other legally mandated requirements, as identified by the IHA in its Comprehensive Plan.

(iv) Inadequate demonstration of long-term viability at reasonable cost. HUD determines that the IHA has failed to demonstrate that completion of improvements and replacements identified in the Comprehensive Plan, as required by § 950.672(d) (2) and (3), will reasonably ensure long-term viability of one or more Indian housing developments to which they relate at a reasonable cost, as required by § 950.672(d)(4).

(v) Contradiction of local government statement or IHA resolution. HUD has evidence which tends to challenge, in a substantial manner, the appropriate governing body's statement or IHA resolution contained in the Comprehensive Plan, as required in § 950.672(d) (6) and (7). Such evidence may include, but is not necessarily limited to:

(A) Evidence that the IHA failed to implement the Partnership Process and to meet the requirements for resident participation, as set forth in § 950.672(b). In such cases, HUD shall review the IHA's resident participation process and any supporting documentation to determine whether the standards for participation under § 950.672(b) were met;

(B) With respect to an IHA established under State law and determined to be subject to the requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601-3619), HUD shall also consider as such evidence the following:

(1) A pending proceeding against the IHA based upon a charge of discrimination pursuant to the Fair Housing Act. (For purposes of this provision, "a charge of discrimination" means a charge, pursuant to section 810(g)(2) of the Fair Housing Act (42 U.S.C. 3610(g)(2)), issued by the HUD General Counsel, or his or her legally authorized designee;)

(2) A pending civil rights suit against the IHA instituted by the Department of Justice;

(3) Outstanding HUD findings, under § 950.120, of IHA noncompliance with civil rights statutes and executive orders or implementing regulations, as a result of formal administrative proceedings, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance;

(4) A deferral of the processing of applications from the IHA imposed by HUD under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Attorney General's Guidelines (28 CFR 50.3) and HUD's title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's section 504 regulations (24 CFR 8.57); or

(5) An adjudication of a violation under any of the authorities under § 950.120(a) in a civil action filed against the IHA by a private individual, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance.

(c) *Effect of HUD approval of Comprehensive Plan.* After HUD approves the Comprehensive Plan (including the Five-Year Action Plan), or any amendments to the plan, it shall be binding upon HUD and the IHA, until such time as the IHA submits, and HUD approves, an amendment to its plan. The IHA shall have full fungibility of work items (may undertake any of the work items) identified in any of the five years of the approved Five-Year Action Plan without further HUD approval. Actual uses of the funds are to be reflected in the IHA annual Performance and Evaluation Report for each grant. See § 950.684. Except for emergencies, the IHA shall consult, to the extent practicable, the residents on significant changes (such as changes in scope of work) whenever it moves work items within the approved Five-Year Action Plan. Documentation of that consultation is to be retained in IHA files. If HUD determines as a result of an audit or monitoring findings that an IHA has provided false or substantially inaccurate data in its Comprehensive Plan/Annual Submission or has circumvented the intent of the program, HUD may condition the receipt of assistance, in accordance with § 950.687. Moreover, in accordance with 18 U.S.C. 1001, any individual or entity who knowingly and willingly makes or uses a document or writing containing any false, fictitious or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

§ 950.678 Annual Submission of activities and expenditures.

(a) *General.* The Annual Submission consists of a Five-Year Action Plan with a Work Statement for each of the five

years and an implementation schedule for the current year, local government statement, materials demonstrating the partnership process, and other miscellaneous documents outlined in this section. For planning purposes, an IHA may use either the amount of funding received in the current year or the formula amount provided in HUD's notification under § 950.669(b)(1) in developing the Five-Year Action Plan for presentation at the resident meetings and public hearing. The Work Statement for the first year of the Five-Year Action Plan is intended to provide a statement of the activities and costs that the IHA plans to undertake, in whole or in part, with the assistance to be provided by HUD in that year. The Work Statements for all five years will be at the same level of detail so that the IHA may interchange work items as discussed in § 950.672(d)(5)(i).

(b) *Submission.* After considering the amount of HUD assistance under paragraph (a) of this section, and estimating how much funding will be available from other sources, such as State and tribal governments, and determining its activities and costs based on the current FFY formula amount, the IHA shall submit its Annual Submission in accordance with instructions provided by HUD.

(c) *Acceptance for review.* Upon receipt of an Annual Submission from an IHA, HUD shall determine whether:

- (1) It contains each of the required components; and
- (2) The IHA has submitted any additional information or assurances required as a result of HUD monitoring findings of inadequate IHA performance, audit findings, and civil rights compliance findings. If the IHA has submitted a complete Annual Submission and all required information and assurances, HUD will accept the submission for review, as of the date of receipt. If the IHA has not submitted all required material, HUD will promptly notify the IHA that it has disapproved the submission, indicating the reasons for disapproval, the modifications required to qualify the Annual Submission for HUD review, and the date by which such modifications must be received by HUD.

(d) *Resident and local government participation.* An IHA is required to develop its Annual Submission, including any proposed amendments to its Comprehensive Plan as provided in § 950.672(e), in consultation with officials of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, in consultation with the CEO of each such jurisdiction or with an advisory

group representative of all jurisdictions) and with residents and especially duly elected resident organizations of the developments covered by the Comprehensive Plan, as follows:

(1) *Public notice.* Within a reasonable amount of time before the advance meeting for residents under paragraph (d)(2) of this section, and the public hearing under paragraph (d)(3) of this section, the IHA shall provide public notice of the advance meeting and the public hearing in a manner determined by the IHA and which ensures notice to all duly elected resident organizations. The public notice shall also include a summary of activities of the previous year (uses of past funding) and progress update, estimated funding level (i.e., current year funding or formula amount, whichever the IHA elects); a summary of the CGP requirements; the estimated time frames for completion of the required CGP documents; and the requirement for resident participation in the planning, development and monitoring of modernization activities under the CGP;

(2) *Advance meeting with residents.* The IHA shall at least annually hold a meeting open to all residents and duly elected resident organizations. The advance meeting shall be held within a reasonable amount of time before the public hearing under paragraph (d)(3) of this section. The IHA will provide residents with information concerning the contents of the IHA's Five-Year Action Plan (and any proposed amendments to the IHA's Comprehensive Plan to be submitted with the Annual Submission) so that residents can comment adequately at the public hearing on the contents of the Five-Year Action Plan and any proposed amendments to the Comprehensive Plan.

(3) *Public hearing.* The IHA shall annually hold at least one public hearing, and any appropriate number of additional hearings, to ensure ample opportunity for residents of the developments covered by the Comprehensive Plan, officials of the appropriate governing body, and other interested parties, to express their priorities and concerns and discuss the current status of prior approved programs. The IHA shall give full consideration to the comments and concerns of residents, local government officials, and other interested parties in developing its Five-Year Action Plan, or any amendments to its Comprehensive Plan.

(4) *Expedited scheduling.* IHAs are encouraged to hold the meeting with residents and duly elected resident organizations under paragraph (d)(2) of

this section, and the public hearing under paragraph (d)(3) of this section between July 1 (i.e., after the end of the program year—June 30) and September 30, using the formula amount for the current FFY. If an IHA elects to use such expedited scheduling, it must explain at the meeting with residents and duly elected resident organizations and at the public hearing that the current FFY amount is not the actual grant amount for the subsequent year, but is rather the amount used for planning purposes and preparing the draft Performance and Evaluation Report. It must also explain that the Five-Year Action Plan will be adjusted when HUD provides notification of the actual formula amount, and explain which items may be added or deleted to adjust for the formula amount and that any added items will come from the Five-Year Action Plan.

(e) *Contents of Work Statement.* The Work Statement for each year must include, for each development or on an IHA-wide basis for management improvements for which work is to be funded out of that year's grant:

- (1) A list of development accounts with a general description of work items;
- (2) The cost for each work item, as well as a summary of cost by development account;
- (3) The IHA-wide or development-specific management improvements to be undertaken during the year;
- (4) For each development and for or any management improvements not covered by a HUD-approved management improvement plan, a schedule for the use of current year funds, including target dates for the obligation and expenditure of the funds. In general, HUD expects that an IHA will obligate its current year's allocation of CGP funds (except for its funded replacement reserves) within two years, and expend such funds within three years, of the date of HUD approval, unless longer time-frames are approved by HUD due to local differences;
- (5) A summary description of the actions to be taken with non-CGP funds to meet physical and management improvement needs which have been identified by the IHA in its needs assessments;

(6) Any documentation that HUD needs to assist it in carrying out its responsibilities under the National Environmental Policy Act (42 U.S.C. 4321) and other related authorities in accordance with § 950.120 (a) and (b);

(7) Other information, as specified by HUD; and

(8) An IHA resolution approving the Annual Submission or any amendments thereto, as set forth in § 950.672(d)(7).

(f) *Additional submissions with Annual Submission.* An IHA must submit with the Annual Submission:

- (1) Any amendments to the Comprehensive Plan, as set forth in § 950.672(e);
- (2) A summary of the IHA's resident consultation activities, including a summary of the general issues raised by residents and others during the public comment process and the IHA's response to the general issues; and
- (3) Such additional information as may be prescribed by HUD. HUD shall review any proposed amendments to the Comprehensive Plan in accordance with review standards under § 950.675(b).

(g) *HUD review and approval of Annual Submission.* (1) *General.* An Annual Submission accepted in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date that HUD receives the Annual Submission for review under paragraph (c) of this section, that HUD has disapproved the Annual Submission, indicating the reasons for disapproval, the modifications required to make the Annual Submission approvable, and the date by which such modifications must be received by HUD. HUD shall not disapprove an Annual Submission on the basis that HUD cannot complete its review under this section within the 75-day deadline;

(2) *Bases for disapproval for Annual Submission.* HUD shall approve the Annual Submission, except where:

(i) *Incomplete insignificant matters.* HUD determines that the IHA has failed to include all required information or documentation in its Annual Submission;

(ii) *Plainly inconsistent with Comprehensive Plan.* HUD determines that the activities and expenditures proposed in the Annual Submission are plainly inconsistent with the IHA's approved Comprehensive Plan;

(iii) *Contradiction of IHA resolution.* HUD has evidence which tends to challenge, in a substantial manner, the certifications contained in the board resolution, as required by § 950.672(d)(7).

(h) *Amendments to Annual Submission.* The IHA shall advise HUD of all changes to the IHA's approved Work Statement for year one in its Performance and Evaluation Report submitted under § 950.684. Any additional work items (changes which add work items), except for emergency

work, must be within the IHA's approved Five-Year Action Plan or receive prior HUD approval.

(i) *Extension of time for performance.* An IHA may revise the target dates for fund obligation and expenditure in the approved Annual Submission whenever any valid delay outside the IHA's control occurs, as specified by HUD. Such revision is subject to HUD review under § 950.687(a)(2) as to the IHA's continuing capacity. HUD shall not review as to an IHA's continuing capacity any revisions to an IHA's Comprehensive Plan and related statements where the basis for the revision is that HUD has not provided the amount of assistance set forth in the Annual Submission, or has not provided such assistance in a timely manner.

(j) *ACC Amendment.* After HUD approval of each year's Annual Submission, HUD and the IHA shall enter into an ACC amendment to obtain modernization funds. The ACC amendment shall require low-income use of housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

(k) *Declaration of Trust.* An IHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20-year period during which the IHA is obligated to operate its developments in accordance with the ACC, the Act, and HUD regulations and requirements. A Declaration of Trust is not required for Mutual Help units.

§ 950.681 Conduct of modernization activities.

(a) *Initiation of activities.* After HUD has approved a Five-Year Action Plan and entered into an ACC amendment or grant agreement with the IHA for year one of the Plan, the IHA shall undertake the modernization activities and expenditures set forth in its approved Work Statement for year one or substitute work items from within the approved Five-Year Action Plan, subject to the following requirements:

- (1) The IHA may undertake the activities using force account or contract labor, including contracting with an RMC. If the entirety of modernization activity (including the planning and architectural design of the rehabilitation) is administered by an RMC, the IHA shall not retain for any administrative or other reason, any portion of the CGP funds provided, unless the IHA and the RMC provide otherwise by contract; and

(2) All activities shall be monitored by resident groups within the framework and intent of the Partnership Process.

(b) *Fund requisitions.* To request modernization funds against the approved Work Statement for year one, the IHA shall comply with requirements prescribed by HUD.

(c) *Contracting requirements.* The IHA shall comply with the wage rate requirements in § 950.120. In addition, the IHA shall comply with the requirements set forth in subpart B of this part, except as follows:

(1) *Assurance of completion.* For each construction or equipment contract over \$25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h) and § 950.170, a 20 percent cash escrow, or a 25 percent letter of credit or, as may be required by law, separate performance and payments bonds, each for 50 percent or more of the contract price.

(2) *Previous participation.* An IHA shall ensure that the contractor is not on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(d) *Assurance of non-duplication.* The IHA shall ensure that there is no duplication between the activities carried out pursuant to the CGP, and activities carried out with other funds.

(e) *Fiscal closeout of a comprehensive grant.* Upon expenditure by an IHA of all funds, or termination by HUD of the activities funded by each annual grant, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The audit shall follow the guidelines prescribed by 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD may direct.

§ 950.664 IHA Performance and Evaluation Report.

(a) *Submission.* For any FFY in which an IHA has received assistance under this subpart, the IHA shall submit a Performance and Evaluation Report, in a form and at a time to be prescribed by HUD, describing its use of assistance in accordance with the approved Five-Year Action Plan. The IHA must make reasonable efforts to notify residents and officials of the appropriate governing body of the availability of the draft report, make copies available to residents in the development office, and provide residents with at least 30

calendar days in which to comment on the report.

(b) *Content.* The report shall include the following:

(1) An explanation of how the IHA has used other funds, such as Community Development Block Grant program assistance, State or Tribal assistance, and private funding, for the needs identified in the IHA's Comprehensive Plan and for the purposes of this subpart;

(2) An explanation of how the IHA has used the CGP funds to address the needs identified in its Comprehensive Plan and to carry out the activities identified in its approved Five-Year Action Plan, and shall specifically address:

(i) Any funds used for emergency needs not set forth in its Five-Year Action Plan, and

(ii) Any changes to the Annual Submission under § 950.678(h);

(3) The results of the IHA's process for consulting with residents on the implementation of the plan;

(4) The current status of the IHA's obligations and expenditures and specifying how the IHA is performing with respect to its implementation schedules, and an explanation of any necessary revision to the planned target dates;

(5) A summary of resident, Tribal or local government comments received on the report; and

(6) A resolution by the IHA Board of Commissioners approving the Performance and Evaluation Report and containing a certification the IHA has made reasonable efforts to notify residents in the development(s) and local government officials of the opportunity to review the draft and comment on it before its submission to HUD, and that copies of the report were provided to residents in the development office, to local government officials, or furnished upon their request.

§ 950.687 HUD review of IHA performance.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA as may be necessary or appropriate to make the determinations required by this paragraph, taking into consideration all available evidence.

(1) *Conformity with Comprehensive Plan.* HUD will determine whether the IHA has carried out its activities under this subpart in a timely manner and in accordance with its Comprehensive Plan.

(i) In making this determination, HUD will review the IHA's performance to determine whether the modernization

activities undertaken during the period under review conform substantially to the activities specified in the approved Five-Year Action Plan. HUD will also review an IHA's schedules which are provided with its Annual Submission for purposes of determining whether the IHA has carried out its modernization activities in a timely manner;

(ii) HUD will review an IHA's performance to determine whether the activities carried out comply with the requirements of the Act, including the requirement that the work carried out meets the modernization and energy conservation standards in § 950.603, this part, and other applicable laws and regulations.

(2) *Continuing capacity.* HUD will determine whether the IHA has a continuing capacity to carry out its Comprehensive Plan in a timely manner. After the first full operational year of CGP, CIAP experience will not be taken into consideration except where the IHA has not yet had comparable experience under the CGP.

(i) The primary factors to be considered in arriving at a determination that a recipient has a continuing capacity are those described in paragraphs (a)(1) and (a)(3) of this section as they relate to carrying out the Comprehensive Plan. HUD generally will consider an IHA to have a continuing capacity if it determines that the IHA has:

(A) Carried out its activities under the CGP program, as well as the CIAP, in a timely manner, taking into account the level of funding available and whether the IHA obligates its modernization funds within two years from the execution of the ACC amendment and expends such modernization funds within three years of ACC amendment execution, or such longer period if agreed to by HUD in an implementation schedule, except in circumstances beyond the IHA's reasonable control.

(B) Adequately inspected the funded modernization to assure that the physical work is being carried out in accordance with the plans and specifications and the modernization and energy conservation standards (or, in the case of an IHA's performance under CIAP, whether the IHA has carried out the physical work in accordance with the HUD-approved budget and in conformance with the modernization and energy conservation standards) and that any HUD monitoring findings relating to the quality of the physical work have been, or are being, resolved;

(C) Established and maintained internal controls for its modernization program in accordance with HUD

requirements for financial management and accounting, as determined by the fiscal audit;

(D) Administered its modernization contracts in accordance with a HUD-approved procurement policy, which meets the requirements of 24 CFR 85.36(a) and § 950.160;

(E) Carried out its activities in accordance with its Comprehensive Plan and HUD requirements; and

(F) Has satisfied, or made reasonable progress toward satisfying, the performance standards prescribed in paragraph (a)(3) of this section as they relate to activities under the CGP program;

(ii) HUD will give particular attention to IHA efforts to accelerate the progress of the program and to prevent the recurrence of past deficiencies or noncompliance with applicable laws and regulations.

(3) *Reasonable progress.* HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the following performance standards:

(i) With respect to the physical condition of each development, whether the work items being carried out by the IHA are in conformity with the modernization and energy conservation standards in § 950.603, and whether the IHA has brought, or is making reasonable progress toward bringing, all of its developments to these standards, in accordance with its physical needs assessment; and

(ii) With respect to the management condition of the IHA, whether the IHA is making reasonable progress in implementing, the work items (specified in its annual submission and Five-Year Action Plan), necessary to eliminate the deficiencies identified in its management needs assessment; and

(iii) In determining whether the IHA has made reasonable progress, HUD will take into account the level of funding available and whether the IHA obligates its modernization funds within two years from the execution of the ACC amendment and expends such modernization funds within three years of ACC amendment execution, or such longer period if agreed to by HUD in an implementation schedule. The IHA must demonstrate to HUD's satisfaction that any lack of timeliness (beyond the time periods specified in this paragraph or date specified in a HUD approved implementation schedule) has resulted from factors beyond the IHA's reasonable control.

(b) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in paragraph (d) of this section, HUD may

issue to the IHA a notice of deficiency stating the specific program requirements which the IHA has violated and requesting the IHA to take any of the actions in paragraph (e) of this section.

(c) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies paragraph (d) of this section, HUD may issue to the IHA a corrective action order, whether or not a notice of deficiency has previously been issued in regard to the specific deficiency on which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements which the IHA has violated, and specifying that any of the corrective actions listed in paragraph (e) of this section must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, or prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the grant agreement.

(4) If HUD orders corrective action by an IHA in accordance with this section, the IHA's Board of Commissioners must notify affected residents of HUD's determination, the bases for the determination, the conditioning requirements imposed under this paragraph, and the consequences to the IHA if it fails to comply with HUD's requirements.

(d) *Basis for corrective action.* HUD may order an IHA to take corrective action only if HUD determines:

(1) The IHA has not submitted a performance and evaluation report, in accordance with § 950.684;

(2) The IHA has not carried out its activities under the CGP program in a timely manner and in accordance with its Comprehensive Plan or HUD requirements, as described in paragraph (a)(1) of this section;

(3) The IHA does not have a continuing capacity to carry out its Comprehensive Plan in a timely manner or in accordance with its Comprehensive Plan or HUD requirements, as described in paragraph (a)(2) of this section;

(4) The IHA has not satisfied, or has not made reasonable progress towards satisfying, the performance standards specified in paragraph (a)(3) of this section;

(5) An audit conducted in accordance with 24 CFR part 44 and § 950.120, or pursuant to other HUD reviews (including monitoring findings) reveals deficiencies that HUD reasonably believes require corrective action;

(6) The IHA has failed to repay HUD for amounts awarded under the CGP program that were improperly expended; or

(7) The IHA has been determined to be high risk, in accordance with § 950.135.

(e) *Types of corrective action.* HUD may direct an IHA to take one or more of the following corrective actions:

(1) Submit additional information:

(i) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for a IHA not meeting the standards in paragraph (a) (1), (2), or (3) of this section;

(ii) Explaining any steps the IHA is taking to correct the deficiencies;

(iii) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable laws, regulations, or program requirements; and

(iv) Demonstrating that the IHA has a continuing capacity to carry out the Comprehensive Plan in a timely manner;

(2) Submit schedules for completing the work identified in its Work Statements and report periodically on its progress on meeting the schedules;

(3) Notwithstanding 24 CFR 85.36(g), submit to HUD the following documents for prior approval, which may include, but are not limited to:

(i) Proposed agreement with the architect/engineer (prior to execution);

(ii) Complete construction and bid documents (prior to soliciting bids);

(iii) Proposed award of contracts, including construction and equipment contracts and management contracts; or

(iv) Proposed contract modifications prior to issuance, including modifications to construction and equipment contracts, and management contracts.

(4) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's Comprehensive Plan, annual statement, or performance and evaluation report;

(5) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's Comprehensive Plan, Five-Year Action Plan, or Performance and Evaluation Report;

(6) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended;

(7) Take such other corrective actions HUD determines appropriate to correct IHA deficiencies.

(8) Submit to an alternative management strategy which may involve third-party oversight or administration of the modernization function (see § 950.669(d)); and

(9) Take such other corrective actions HUD determines appropriate to correct IHA deficiencies.

(f) *Failure to take corrective action.* In cases where HUD has ordered corrective action and the IHA has failed to take the required actions within a reasonable time, as specified by HUD, HUD may take one or more of the following steps:

(1) Withhold some or all of the IHA's grant;

(2) Declare a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(3) Any other sanction authorized by law or regulation.

(g) *Reallocation of funds that have been withheld.* Where HUD has withheld for a prescribed period of time some or all of an IHA's annual grant, HUD may reallocate such amounts to other IHAs/PHAs under the CGP program, subject to approval in appropriations acts. The reallocation shall be made to IHAs which HUD has determined to be administratively capable under § 950.135, and to PHAs under the CGP program which are not designated as either troubled or mod troubled under the PHMAP at 24 CFR part 901, based upon the relative needs of these IHAs and PHAs, as determined under the formula at § 950.601.

(h) *Right to appeal.* Before withholding some or all of the IHA's annual grant, declaring a breach of the ACC grant amendment, or reallocating funds that have been withheld, HUD will notify the IHA and give it an opportunity, within a prescribed period of time, to present to the Assistant Secretary for Public and Indian Housing any arguments or additional facts and data concerning the proposed action.

(i) *Notification of residents.* The IHA's Board of Commissioners must notify affected residents of HUD's final determination to withhold funds, declare a breach of the ACC grant amendment, or reallocate funds, as well as the basis for, and the consequences resulting from, such a determination.

(j) *Recapture.* In addition, HUD may recapture for good cause any grant amounts previously provided to an IHA, based upon a determination that the IHA has failed to comply with the requirements of the CGP program.

Before recapturing any grant amounts, HUD will notify the IHA and give it an opportunity to appeal in accordance with § 950.687(h). Any reallocation of recaptured amounts will be in accordance with § 950.687(g). The IHA's board of Commissioners must notify affected residents of HUD's final determination to recapture any funds.

Subpart J—Operating Subsidy

§ 950.701 Purpose and applicability.

(a) *Implementation of section 9(a).* (1) The purpose of this subpart is to establish standards and policies for the distribution of operating subsidy in accordance with section 9(a) of the United States Housing Act of 1937 (42 U.S.C. 1437g(a)). Section 9(a) authorizes the Secretary of Housing and Urban Development (HUD) to make annual contributions for the operation of IHA-owned rental housing (operating subsidy).

(2) This subpart establishes standards for the cost of providing comparable services as determined in accordance with a formula representing the operations of a prototype well-managed project, taking into account the character and location of the project and the characteristics of the families served. These standards, policies and procedures are called the Performance Funding System (PFS), as described in this subpart. The provisions of PFS are intended to recognize and give an incentive for efficient and economical management and to avoid the expenditure of Federal funds to compensate for excessive costs attributable to poor or inefficient management. PFS is intended to provide the incentive and financial discipline for excessively high-cost IHAs to improve their management efficiency.

(b) *Applicability.* This subpart is applicable to all IHA-owned rental units under Annual Contributions Contracts. This subpart is not applicable to the Section 23 Leased Housing Program, the Section 23 Housing Assistance Payments Program, the Section 8 Housing Assistance Payments Program, the Mutual-Help Program, or the Turnkey III Homeownership Opportunity Program. Provisions regarding operating subsidy for the homeownership programs are found in the applicable subpart of this rule (subpart E for Mutual Help of this part, and subpart G for Turnkey III of this part).

§ 950.705 Determination of amount of operating subsidy under PFS.

The amount of operating subsidy for which each IHA is eligible shall be

determined as follows: The projected operating income level is subtracted from the total expense level (Allowable Expense Level plus Utilities Expense Level). These amounts are per-unit per-month dollar amounts, and must be multiplied by the Unit Months Available. Transition funding, if applicable, and other costs as specified in paragraphs (b) through (e) of § 950.720 are then added to this total in order to determine the total amount of operating subsidy for the requested budget year, exclusive of consideration of the cost of an independent audit. As an independent operating subsidy eligibility factor, an IHA may receive operating subsidy in an amount, approved by HUD, equal to the actual or estimated cost of the independent audit to be prorated to operations of the IHA-owned rental housing (under § 950.720(a)). (See § 950.730 regarding adjustments.)

§ 950.710 Computation of allowable expense level.

The IHA shall compute its Allowable Expense Level (AEL) using forms prescribed by HUD, as follows:

(a) *Computation of Base Year Expense Level.* The Base Year Expense Level includes payments in lieu of taxes (PILOT) required by a Cooperation Agreement even if PILOT is not included in the approved operating budget for the base year because of a waiver of the requirements by the local taxing jurisdiction(s). The Base Year Expense Level includes all other operating expenditures as reflected in the IHA's operating budget for the base year approved by HUD except the following:

- (1) Utilities expense;
- (2) Cost of an independent audit;
- (3) Adjustments applicable to budget years before the base year;
- (4) Expenditures supported by supplemental subsidy payments applicable to budget years before the base year;

(5) All other expenditures that are not normal fiscal year expenditures as to amount or as to the purpose for which expended; and

(6) Expenditures that were funded from a nonrecurring source of income.

(b) *Adjustment.* In compliance with the six exclusions set forth in paragraph (a) of this section, the IHA shall adjust the AEL by excluding any of these items from the Base Year Expense Level if this has not already been accomplished. If such adjustment is made in the second or some later fiscal year of the PFS, the AEL shall be adjusted in the year in which the adjustment is made, but the adjustment shall not be applied

retroactively. If the IHA does not make these adjustments, the HUD Field Office shall compute the adjustments.

(c) *Computation of "Formula Expense Level".* The IHA shall compute its Formula Expense Level in accordance with a HUD-prescribed formula that estimates the cost of operating an average unit in a particular IHA's inventory. The formula takes into account such data as the number of two or more bedroom units, ratio of two or more bedroom units in high-rise family projects, ratio of units with three or more bedrooms, local government wage rates, and number of pre-1940 rental units occupied by poor households. It uses weights, and a local inflation factor assigned each year, to derive a Formula Expense Level for the current year and the requested budget year. The weights of the formula and the formula are subject to updating by HUD.

(d) *Computation of Allowable Expense Level.* The IHA shall compute its Allowable Expense Level as follows:

(1) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level does not exceed the top of the range.* The top of the range is defined as: FEL plus \$10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level is less than the top limit of the range shall compute its AEL for the first budget year under PFS by adding the following to its Base Year Expense Level (before adjustment under § 950.730):

(i) Any increase approved by HUD in accordance with § 950.730(a);

(ii) The increase (decrease) between the Formula Expense Level for the base year and the Formula Expense Level for the first budget year under PFS; and

(iii) The sum of the Base Year Expense Level, and any amounts described in paragraphs (d)(1)(i) and (ii) of this section multiplied by the local inflation factor.

(2) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level exceeds the top of the range.* The top of the range is defined as: FEL plus \$10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level exceeds the top of the range shall compute its AEL for the first budget year under PFS by adding the following to the top of the range (not to its Base Year Expense Level, as in paragraph (d)(1) of this section):

(i) The increase (decrease) between the Formula Expense Level for the base

year and the Formula Expense Level or the first budget year under PFS;

(ii) The sum of the figure equal to the top of the range and the increase (decrease) described in paragraph (d)(2)(i) of this section, multiplied by the local inflation factor. (If the Base Year Expense Level is above the allowable expense level, computed as provided in paragraph (d) of this section, the IHA may be eligible for transition funding under § 950.735.)

(3) *Allowable Expense Level for first budget year under PFS for a new project.* A new project of a new IHA or a new project of an existing IHA that the IHA decides to place under a separate ACC, which did not have a sufficient number of units available for occupancy in the base year to have a level of operations representative of a full fiscal year of operation is considered to be a "new project". The AEL for the first budget year under PFS for a "new project" will be based on the AEL for a comparable project, as determined by the HUD Field Office. The IHA may suggest a project or projects it believes to be comparable.

(4) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1986.* For each budget year after the first budget year under PFS that begin on or after April 1, 1986, the AEL shall be computed as follows:

(i) The allowable expense level shall be increased by any increase to the AEL approved by HUD under § 950.720(c);

(ii) The AEL for the current budget year also shall be increased (or decreased) by either:

(A) If the IHA has not experienced a change in the number of its units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on paragraph (d)(4)(ii)(B) of this section, the AEL shall be increased by one-half of one percent (.5 percent); or

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph (d)(4)(ii)(B) of this section, it shall use the increase (decrease) between the Formula Expense Level for the current budget year and the Formula Expense Level for the requested budget year. The IHA characteristics that shall be used to compute the Formula Expense Level for the current budget year shall be the same as those that were used for the requested budget year when the last adjustment to the AEL was made based on this paragraph (d)(4)(ii)(B) of this section, except that the number of interim years in which the .5 percent adjustment was made under paragraph

(d)(4)(ii)(A) of this section shall be added to the average age that was used for the last adjustment; and

(iii) The amount computed in accordance with paragraphs (d)(4)(i) and (ii) of this section shall be multiplied by the local inflation factor.

Example:

FY 1987. Assume that: (1) The IHA has experienced no change in the number of its units, (2) the AEL for the IHA's FY 1986 is \$64.00, and (3) the applicable local inflation factor is 6 percent (expressed as 1.06). The AEL for FY 1987 is \$68.18, computed as follows:

1. Allowable Expense Level for FY 1986	\$64.00
2. Delta: Increase (or Decrease) in Formula Expense Level (\$64.00 x .5 percent)	.32
3. Sum (line 1 plus line 2)	64.32
4. Local Inflation Factor	1.06
5. Allowable Expense Level for FY 1987 (line 3 multiplied by line 4)	\$68.18

FY 1988. Assume that the IHA has deprogrammed (e.g., demolished or sold) a project that represents seven percent of its units, and that the last time an adjustment to the AEL was made based on paragraph (d)(4)(ii)(B) of this section was in its FY 1985, at which time the IHA had the following characteristics for its requested budget year: average age of 10 years, average project height of 5 stories, and average unit size of 4 bedrooms. The Formula Expense Level for the current budget year is calculated using 12 years (10 years plus two years in which the standard .5 percent adjustment was used), 5 stories and 4 bedrooms.

Also assume that Formula Expense Level calculated based on these characteristics is \$70.00 and that the IHA average characteristics for the requested budget year are now an average age of 8 years, average project height of 4 stories and average unit size of 2 bedrooms, resulting in a Formula Expense Level for the requested budget year of \$68.00. The Formula Expense Level for the requested budget year, therefore, decreases by \$2.00. Assuming that the local inflation factor is 4.5 percent (expressed as 1.045), the AEL for FY 1988 is \$69.16, computed as follows:

1. Allowable Expense Level for FY 1987	\$68.18
2. Delta (or Decrease) in Formula Expense Level	(2.00)
3. Sum (line 1 plus line 2)	66.18
4. Local Inflation Factor	1.045
5. Allowable Expense Level for FY 1988 (line 3 multiplied by line 4)	\$69.16

It should be noted that the Delta in line 2 of the example reflects the application of the formula weights, constant and local inflation factor for the requested budget year applied first to the IHA characteristics for the current

budget year and then to the IHA characteristics for the requested budget year, to determine the respective Formula Expense Levels. The local inflation factor shown on line 4 of the example is the same one used in determining the Formula Expense Levels.

(5) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1992.* For each budget year after the first budget year under PFS that begins on or after April 1, 1992, the AEL shall be computed as follows:

(i) The Allowable Expense Level shall be increased by any increase to the AEL approved by HUD under § 950.720(c);

(ii) The AEL for the Current Budget Year also shall be adjusted as follows:

(A) Increased by one-half of one percent (.5 percent); and

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph (d)(5)(ii)(B) of this section, it shall use the increase (decrease) between the Formula Expense Level for the Current Budget Year and the Formula Expense Level for the Requested Budget Year. The IHA's characteristics that shall be used to compute the Formula Expense Level for the Current Budget Year shall be the same as those that applied to the Requested Budget Year when the last adjustment to the AEL was made based on this paragraph (d)(5)(ii)(B) of this section, except that the number of interim years in which the .5 percent adjustment was made under paragraph (d)(5)(ii)(A) of this section shall be added to the average age that was used for the last adjustment.

(iii) The amount computed in accordance with paragraphs (d)(5) (i) and (ii) of this section shall be multiplied by the Local Inflation Factor.

(6) *Adjustment of Allowable Expense Level for budget years after the first budget year under PFS.* HUD may adjust the AEL of budget years after the first year under PFS under the provisions of §§ 950.710(b) or 950.720(c).

§ 950.715 Computation of utilities expense level.

(a) *General.* In recognition of the rapid rises which occur in utilities costs, the wide diversity among IHAs as to types of utilities services used and the manner in which utilities payments are allocated between IHAs and tenants, and the fact that utilities rates charged by suppliers are beyond the control of the IHA, the PFS treats utilities expenses separately from other IHA expenses. Utilities expenses are, therefore, excluded from the IHA's allowable expense level and the PFS provides for computation of the amount of operating subsidy for utilities costs based upon a calculated utilities expense of each IHA. Accordingly, the IHA's utilities expense level for the requested budget year shall be computed by multiplying the allowable utilities consumption level (AUL) per unit per month for each utility, determined as provided in paragraph (c) of this section, by the projected utility rate determined as provided in paragraph (b) of this section. The AUL for space heating utilities will be adjusted after the end of the affected fiscal year pursuant to the instructions of paragraph (d) of this section.

(b) *Utilities rates.* (1) The currently applicable rates, with consideration of adjustments and pass-throughs, in effect at the time the operating budget is submitted to HUD will be used as the utilities rates for the requested budget year, except that, when the appropriate utility commission has, before the date of submission of the operating budget to HUD, approved and published rate changes to be applicable during the requested budget year, the future approved rates may be used as the utilities rates for the entire requested budget year.

(2) If an IHA takes action, such as a well-head purchase of natural gas or administrative appeals or legal action beyond normal public participation in rate-making proceedings to reduce the rate it pays for utilities (including water, fuel oil, electricity, and gas), then the IHA will be permitted to retain one-half of the cost savings during the first 12 months attributable to its actions. Upon

determination that the action was cost-effective in the first year, the IHA may be permitted to retain one-half the annual cost savings for an additional period not to exceed six years, if the actions continue to be cost-effective. See also paragraph (f) of this section and § 950.730(c).

(c) *Computation of "Allowable Utilities Consumption Level".* The Allowable Utilities Consumption Level (AUL) used to compute the utilities expense level of an IHA for the requested budget year generally will be based upon the availability of consumption data. For project utilities where consumption data are available for the entire rolling base period, the computation will be in accordance with paragraph (c)(1) of this section. Where data are not available for the entire period, the computation will be in accordance with paragraph (c)(2) of this section, unless the project is a new project, in which case the computation will be in accordance with paragraph (c)(3) of this section. For a project where the IHA has taken special energy conservation measures that qualify for special treatment in accordance with paragraph (g)(1) of this section, the computation of the AUL may be made in accordance with paragraph (c)(4) of this section. The AUL for all of an IHA's projects is the sum of the amounts determined using all of the paragraphs in this paragraph (c), as appropriate.

(1) *Rolling Base Period System.* For project utilities with consumption data for the entire rolling base period, the AUL is the average amount consumed per unit per month during the rolling base period, adjusted in accordance with paragraph (d) of this section. The IHA shall determine the average amount of each of the utilities consumed during the rolling base period (i.e., the 36-month period ending 12 months prior to the first day of the requested budget year).

(i) *IHA fiscal years affected.* The rolling base period shall be used to compute the AUL submitted with the operating budgets.

(ii) An example of a rolling base is as follows:

IHA fiscal year (affected fiscal year)		Rolling base period	
Beginning	Ending	Begins	Ends
1-1-92	12-31-92 (1st year)	1-1-88	12-31-90
1-1-93	12-31-93 (2nd year)	1-1-89	12-31-91

(2) Alternative method where data is not available for the entire rolling base period:

(i) If the IHA has not maintained or cannot recapture consumption data regarding a particular utility from its

records for the whole rolling base period mentioned in paragraph (c)(1) of this section, it shall submit consumption

data for that utility for the last 24 months of its rolling base period to the HUD Field Office for approval. If this is not possible, it shall submit consumption data for the last 12 months of its rolling base period. The IHA also shall submit a written explanation of the reasons that data for the whole rolling base period is unavailable.

(ii) In those cases where an IHA has not maintained or cannot recapture consumption data for a utility for the entire rolling base period, comparable consumption for the greatest of either 36, 24, or 12 months, as needed, shall be used for the utility for which the data is lacking. The comparable consumption shall be estimated based upon the consumption experienced during the rolling base period of comparable project(s) with comparable utility delivery systems and occupancy. The use of actual and comparable consumption by each IHA, other than those IHAs defined as new projects in paragraph (c)(3) of this section, will be determined by the availability of complete data for the entire 36-month rolling base period. Appropriate utility consumption records, satisfactory to HUD, shall be developed and maintained by all IHAs so that a 36-month rolling average utility consumption per unit per month under paragraph (c)(1) of this section can be determined.

(iii) If an IHA cannot develop the consumption data for the rolling base period or for 12 or 24 months of the rolling base period, either from its own project(s) data, or by using comparable consumption data the actual per-unit per-month utility expenses stated in paragraph (e) of this section shall be used as the utilities expense level and no change factor shall be applied.

(3) *Computation of Allowable Utilities Consumption Levels for New Projects.* (i) A new project, for the purpose of establishing the rolling base period and the utilities expense level, is defined as either:

(A) A project that had not been in operation during at least 12 months of the rolling base period, or a project that enters management after the rolling base period and before the end of the requested budget year, or

(B) A project that during or after the rolling base period, has experienced conversion from one energy source to another; interruptible service; deprogrammed units, a switch from tenant-purchased to IHA-supplied utilities; or a switch from IHA-supplied to tenant-purchased utilities.

(ii) The actual consumption for new projects shall be determined so as not to distort the rolling base period in accordance with a method prescribed by HUD.

(4) *Freezing the Allowable Utilities Consumption Level (AUCL).*

(i) Notwithstanding the provisions of paragraphs (c)(1) and (c)(2) of this section, if an IHA undertakes energy conservation measures that are approved by HUD under paragraph (g) of this section, the AUCL for the project and the utilities involved may be frozen during the contract period. Before the AUCL is frozen, it shall be adjusted to reflect any energy savings resulting from the use of any HUD funding. The AUCL is then frozen at the level calculated for the year during which the conservation measures initially will be implemented, as determined in accordance with paragraph (g) of this section.

(ii) See § 950.730(c)(2)(ii) for the method of adjusting the AUCL for heating degree days.

(iii) If the AUCL is frozen during the contract period, the annual three-year rolling base procedures for computing the AUCL shall be reactivated after the IHA satisfies the conditions of the contract. The three years of consumption data to be used in calculating the AUCL after the end of the contract period will be as follows:

(A) *First year:* The energy consumption during the year before the year in which the contract ended and the energy consumption for each of the two years before installation of the energy conservation improvements;

(B) *Second year:* The energy consumption during the year the contract ended, energy consumption during the year before the contract ended, and energy consumption during the year before installation of the energy conservation improvements;

(C) *Third year:* The energy consumption during the year after the contract ended, energy consumption during the year the contract ended, and energy consumption during the year before the contract ended.

(d) *Adjustment to utilities used for space heating.* For project utilities with consumption data for the entire rolling base period, and for new projects, consumption of utilities used for space heating shall be adjusted, after the end of the affected year, using a change factor as follows:

(1) *Adjustment of the rolling base period data.* (i) *Use of Change Factors.* A change factor will be developed each year by HUD that indicates the

relationship of the affected IHA fiscal year Heating Degree Days (HDD) to the average HDD of the rolling base period. This change factor is to be used to establish an AUCL for utilities used for space heating which reflects the severity of the winter weather of the affected IHA fiscal year. The change factors are developed by the National Climatic Center of the Department of Commerce for each established standard weather division of the country, by IHA fiscal year. Change factors will be supplied by HUD to the IHAs. When a change factor is greater than 1.000, it means that the HDD of the affected fiscal year were greater than the average annual HDD of the rolling base period. An example of the effect of the change factor on the rolling base period consumption is:

Assume:

Affected fiscal year HDD—5,250
Rolling Base Period average HDD—5,000
Rolling Base Period average annual consumption for heating purposes—1,000 gallons

Results:

Change Factor is (5,250 divided by 5,000) = 1.050

Adjusted Rolling Base Period average consumption for heating purposes (1,000 × 1.050) = 1,050 gallons

(ii) *Application of change factor to consumption of the Rolling Base Period.*

The change factor is to be applied only to the consumption readings of meters of utilities, or gallons of oil, or tons of coal used for the purpose of generating heat for dwelling units and other IHA associated buildings. The change factor shall not be applied to the consumption readings of meters of utilities not used for the purpose of generating heat; e.g., water and sewer or electricity used solely for non-heating purposes. The change factor shall be applied to the total consumption reading of meters of utilities, or gallons of oil, or tons of coal used for heating even though the same meter or same energy source is used for other purposes; e.g., heating and cooking gas usage metered on the same meter or oil used for space heating and also heating of water. Such consumption for each fiscal year of the rolling base period shall be adjusted by the change factor. The adjusted consumption for each year shall be totalled. These totals then will be averaged. The consumption readings of meters of utilities not used for heating (not adjusted by the change factor) shall be included in the total consumption.

EXAMPLE SHOWING APPLICATION OF CHANGE FACTOR

	Base years		
	1st year	2nd year	3rd year
Gas meters used for heating:			
No. 1234 (In therms)	15,000	18,000	17,000
No. 2345	10,000	12,000	11,000
Subtotal	25,000	30,000	28,000
Change Factor (from HUD)	x1.050	x1.050	x1.050
Subtotal	26,250	31,500	29,400
Gas meters not used for heating:			
No. 3456	2,500	2,600	2,650
Total adjusted allowable gas consumption level	28,750	34,100	32,050

(iii) IHAs will be required to use change factors of less than 1.000. Change factors are listed by county. If an IHA manages units in more than one county and those counties have different change factors, the above calculation shall be done considering the units in each county and each county's assigned change factor. If an IHA manages units in an independent city not within the jurisdiction of a county, it shall:

(A) If within one county, use that county's change factor; or

(B) If the city abuts more than one county, use the average of the change factors of the contiguous counties.

(2) *Adjusted consumption for new projects.* (i) *Use of change factor.* For new projects, the IHA shall apply the change factor to the HUD approved consumption level of utilities used for heating.

(ii) *Application of change factor to consumption of new projects.* The annual AUCL for new projects shall be adjusted by applying the change factor to the estimated consumption where the utility is used for heating in part or in total. This consumption shall be from a comparable project during the permissible rolling base period. Any other consumption of this utility which is not used for heating shall not be adjusted by the change factor, but the estimated annual consumption based upon data from a comparable project during the permissible rolling base period shall be added to the adjusted consumption.

(e) *Utilities expense level where consumption data for the full rolling base period is unavailable.* If an IHA does not obtain the consumption data for the entire rolling base period, or for 12 or 24 months of the rolling base period, either for its own project(s) or by using comparable consumption data as required in paragraph (c)(2) of this section, it shall request HUD Field Office approval to use actual per-unit per-month utility expenses. These expenses shall exclude utilities labor

and other utilities expenses. The actual per-unit per-month utility expenses shall be taken from the year-end statement of operating receipts and expenditures Form HUD-52599 (Office of Management and Budget approval number 2577-0067), prepared for the IHA fiscal year which ended 12 months before the beginning of the IHA requested budget year (e.g., for an IHA fiscal year beginning January 1, 1983, the IHA would use data from the fiscal year ended December 31, 1981). No change factor shall be applied to actual per-unit per-month utility expenses, and subsequent adjustments will not be approved for a budget year for which the utility expense level is established based upon actual per-unit per-month utility expenses.

(f) *Adjustments.* IHAs shall request adjustments of utilities expense levels in accordance with § 950.730(c), which requires an adjustment based upon a comparison of actual experience and estimates of consumption (after adjustment for heating degree days in accordance with paragraph (d) of this section) and of utility rates.

(g) *Incentives for energy conservation improvements.* If an IHA undertakes energy conservation measures (including measures to save water, fuel oil, electricity, and gas) that are financed by an entity other than the Secretary, such as physical improvements financed by a loan from a utility or governmental entity, management of costs under a performance contract, or a shared savings agreement with a private energy service company, the IHA may qualify for one of two possible incentives under this part. For an IHA to qualify for these incentives, HUD approval shall be obtained. Approval will be based upon a determination that payments under the contract can be funded from the reasonably anticipated energy cost savings, and the contract period does not exceed 12 years.

(1) If the contract allows the IHA's payments to be dependent on the cost

savings it realizes, the IHA shall use at least 50 percent of the cost savings to pay the contractor. With this type of contract, the IHA may take advantage of a frozen AUCL under paragraph (c)(4) of this section, and it may use the full amount of the cost savings, as described in § 950.730(c)(2)(ii).

(2) If the contract does not allow the IHA's payments to be dependent on the cost savings it realizes, then the AUCL will continue to be calculated in accordance with paragraphs (c)(1) through (c)(3) of this section, as appropriate; the IHA will be able to retain part of the cost savings, in accordance with § 950.730(c)(2)(i); and the IHA will qualify for additional operating subsidy eligibility (above the amount based on the allowable expense level) to cover the cost of amortizing the improvement loan during the term of the contract, in accordance with § 950.730(f).

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§ 950.720 Other costs.

(a) *Costs of independent audits.* (1) Eligibility to receive operating subsidy for independent audits is considered separately from the PFS. However, the IHA shall not request, nor will HUD approve, an operating subsidy for the cost of an independent audit if the audit has been funded by subsidy in a prior year. The IHA's estimate of cost of the independent audit is subject to adjustment by HUD. If the IHA requires assistance in determining the amount of cost to be estimated, the HUD Field Office should be contacted.

(2) An IHA that is required by the Single Audit Act (31 U.S.C. 7501-7507) (see 24 CFR part 44) to conduct a regular independent audit may receive operating subsidy to cover the cost of the audit. The amount shall be prorated between the IHA's development cost budget and one or all of its operating budgets, as appropriate. The estimated cost of an independent audit, applicable

to the operations of IHA-owned rental housing, is not included in the allowable expense level, but it is allowed in full in computing the amount of operating subsidy under § 950.705.

(3) An IHA that is exempt from the audit requirements of the Single Audit Act (31 U.S.C. 7501-7507; see 24 CFR part 44) may receive operating subsidy to offset the cost of an independent audit chargeable to operations (after the end of the initial operating period) if the IHA chooses to have an audit.

(b) *Costs attributable to units approved for deprogramming and vacant.*

(1) Units approved for deprogramming are those for which the IHA's formal request has been approved by HUD but for which deprogramming has not been completed. Costs for these units may be eligible for inclusion, but shall be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because they are utilized for IHA related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of unit months available. Units approved for deprogramming shall be listed by the IHA and supporting documentation regarding direct costs attributable to such units shall be included as part of the operating budget in which the IHA requests operating subsidy for these units. If the IHA requires assistance in this matter, the HUD Field Office should be contacted.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to them are to be included in the operating budget. If a unit satisfies the conditions stated in paragraphs (b)(2) (i) through (v) of this section, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than three years. Renewal of the approval to allow payments after that period may be made only if the IHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available:

(i) The unit must be used for either economic self-sufficiency activities directly related to maximizing the number of employed residents or for anti-drug programs directly related to

reducing the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The IHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that resources are committed to make the space safe and suitable.

(iii) The IHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per Indian housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The IHA must submit a certification with its Performance Funding System calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The IHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units and project/management control numbers.

(c) *Costs attributable to changes in Federal law or regulation.* In the event that HUD determines that enactment of a Federal law or revision in HUD or other Federal regulation has caused or will cause a significant increase in expenditures of a continuing nature above the allowable expense level and utilities expense level, and upon a determination that sufficient other funds are not available to cover the required expenditures, HUD may in HUD's sole discretion decide to prescribe a procedure under which the IHA may apply for or may receive an increase in operating subsidy.

(d) *Costs beyond the control of the IHA.* Costs attributable to unique circumstances that are beyond the control of the IHA and were not reflected in the IHA's Base Year Expense Level may be considered for supplemental operating subsidy funding. Where costs were reflected in the IHA's Base Year Expense Level, but the rate of increase for such costs is greater than the prescribed PFS inflation

rate(s), then the increase in excess of that provided by the inflation rate may be considered for supplemental operating subsidy funding. The IHA shall submit to the HUD Field Office complete documentation relating to those cost items which it claims to be beyond its control. Such documentation shall not be submitted as part of the requested operating budget, but shall be submitted separately as an addendum to the budget. The IHA also shall show that these additional costs cannot be funded from its own resources. In the event that excess funds are available after making all payments approvable under §§ 950.705 and 950.720 of these regulations, HUD may, in HUD's sole discretion, solicit, evaluate and approve or disapprove, in full or in part, these requests for additional operating subsidy for costs beyond the control of the IHA.

(e) *Costs resulting from combination of two or more units.* When an IHA redesigns or rehabilitates a project and combines two or more units into one larger unit and the combination of units results in a unit that houses at least the same number of people as were previously served, the AEL for the requested year shall be multiplied by the number of unit months not included in the requested year's unit months available as a result of these combinations that have occurred since the Base Year. The number of people served in a unit will be based on the formula $[(2 \times \text{No. of bedrooms}) \text{ minus } 1]$, which yields the average number of people that would be served. An efficiency unit will be counted as a one bedroom unit for purposes of this calculation.

(f) *User fee.* Additional operating subsidy will be provided to IHAs for payment of an annual User Fee separate from the PFS. An IHA operating a rental program shall pay an annual User Fee to municipalities, which may include Tribal, city, county government, or other political subdivision that provides any roads, water supply, sewage facilities, electrical systems or fuel distribution systems. The annual User Fee will be paid in an amount equal to 10 percent of the applicable shelter rent, minus the utility allowance; or \$150, whichever is greater, for each rental housing unit covered by this section.

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§ 950.725 Projected operating income level.

(a) *Policy.* PFS determines the amount of operating subsidy for a particular IHA based in part upon a projection of the actual dwelling rental income and other

income for the particular IHA. The projection of dwelling rental income is obtained by computing the average monthly dwelling rental charge per unit for the IHA, and projecting this amount for the requested budget year by applying an upward trend factor (subject to updating) of 3 percent, and multiplying this amount by the projected occupancy percentage for the requested budget year. Nondwelling income is projected by the IHA subject to adjustment by HUD. There are special provisions for projection of dwelling rental income for new projects.

(b) *Computation of projected average monthly dwelling rental income.* The projected average monthly dwelling rental income per unit for the IHA is computed as follows:

(1) *Average monthly dwelling rental charge per unit.* The dollar amount of the average monthly dwelling rental charge per unit shall be computed on the basis of the total dwelling rental charges (total of the adjusted rent roll amounts) for all project units, as shown on the rent roll control and analysis of dwelling rent charges, which the IHA is required to maintain, for the first day of the month which is six months before the first day of the requested budget year, except that if a change in the total of the rent rolls has occurred in a subsequent month which is before the beginning of the requested budget year and before the submission of the requested budget year operating budget, the IHA shall use the latest changed rent roll for the purpose of the computation. This aggregate dollar amount shall be divided by the number of occupied dwelling units as of the same date.

(2) *Three percent increase.* The average monthly dwelling rental charge per unit, computed under paragraph (b)(1) of this section, is increased by 3 percent to obtain the projected average monthly dwelling rental charge per unit of the IHA for the requested budget year.

(3) *Projected occupancy percentage.* The IHA shall determine its projected percentage of occupancy for all project units (projected occupancy percentage) as follows:

(i) *High occupancy IHAs.* If the IHA's actual occupancy percentage (see § 950.760) is equal to or greater than 97 percent, the IHA's projected occupancy percentage is 97 percent.

(ii) *High occupancy IHAs exclusive of scheduled modernization.* If the IHA's actual occupancy percentage (see § 950.760) is less than 97 percent solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section, the IHA's projected occupancy percentage is its actual occupancy percentage. An

IHA may also use its actual occupancy percentage as its projected occupancy percentage if the IHA has five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section.

(iii) *Low occupancy IHAs with an approved Comprehensive Occupancy Plan (COP).* If the IHA has an actual occupancy percentage (see § 950.760) less than 97 percent and more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section and if the IHA has a HUD-approved COP, the IHA's projected occupancy percentage is determined under § 950.770(h).

(iv) *Low Occupancy IHAs without an approved COP.* (A) The IHA shall use 97 percent as its projected occupancy percentage, if the IHA:

(1) Has an actual occupancy percentage (see § 950.760) less than 97 percent and has more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section; and the IHA:

(2)(i) Has completed the term of its approved COP but has not achieved a 97 percent actual occupancy percentage or has not had five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section; or

(ii) Is authorized to submit a COP but elects not to submit one; or

(iii) Submits a COP that is disapproved by HUD.

(B) Notwithstanding the requirement in paragraph (b)(3)(iv)(A) of this section that 97 percent be the projected occupancy percentage, a low occupancy IHA which satisfies all the conditions described in paragraph (b)(3)(iv)(A)(2)(i) of this section, may adjust the 97 percent projected occupancy percentage to discount units that are vacant for reasons beyond its control, as provided in § 950.770(i).

(v) *Vacant, on-schedule modernization units.* Vacant, on-schedule modernization units are vacant units in an otherwise occupiable project that has received funding for modernization through the comprehensive improvement assistance program (subpart I of this part) or other sources; and for which:

(A) It is expected that the vacant units will be occupied on completion of modernization work;

(B) The IHA has a schedule for carrying out the modernization which is acceptable to HUD; and

(C) The modernization work is on schedule.

(4) *Projected average monthly dwelling rental income.* The projected occupancy percentage under paragraph (b)(3) of this section shall be multiplied by the projected average monthly dwelling rental charge under paragraph (b)(2) of this section to obtain the projected monthly dwelling rental income per unit.

(c) *Projected average monthly dwelling rental charge per unit for new projects.* The projected average monthly dwelling rental charge for new projects that were not available for occupancy during the budget year before the requested budget year and which will reach the end of the initial operating period (EIOP) within the first nine months of the requested budget year, shall be calculated as follows:

(1) If the IHA has another project or projects under management which are comparable in terms of elderly and nonelderly tenant composition, the IHA shall use the projected average monthly dwelling rental charge for such project or projects.

(2) If the IHA has no other projects which are comparable in terms of elderly and nonelderly tenant composition, the HUD Field Office will provide the projected average monthly dwelling rental charge for such project or projects, based on comparable projects located in the area.

(d) *Estimate of additional dwelling rental income.* After implementation of the provisions of any legislation enacted or any HUD administrative action taken after [THE EFFECTIVE DATE OF THE FINAL RULE], which affects rent paid by tenants of projects, each IHA shall submit a revision of its annual operating budget showing an estimate of any change in rental income which it anticipates as the result of the implementation of said provisions. HUD shall have complete discretion to adjust the projected average monthly dwelling rental charge per unit to reflect the IHA's estimate of change or, in the absence of this submission, to reflect HUD's estimate of such change. HUD also shall have complete discretion to reduce or increase the operating subsidy approved for the IHA current fiscal year in an amount equivalent to the change in the rental income.

(e) *IHA's estimate of income other than dwelling rental income.*

(1) *Investment income.* IHAs with an estimated average cash balance of less than \$20,000, excluding investment income earned from a funded replacement reserve under § 950.666(f), shall make a reasonable estimate of investment income for the Requested Budget Year. IHAs with an estimated average cash balance of \$20,000 or

more, excluding investment income earned from a funded replacement reserve under § 950.666(f), shall estimate interest on general fund investments based on the estimated average yield for 91-day Treasury bills for the IHA's Requested Budget Year (yield information will be provided by HUD). The determination of average cash balance will allow a deduction of \$10,000, plus \$10 per unit for each unit over 1,000, subject to a total maximum deduction of \$250,000. In all cases, the estimated investment income amount shall be subject to HUD approval. (See § 950.730(b).)

(2) *Other income.* All IHAs shall estimate other income based on past experience and a reasonable projection for the requested budget year, which estimate shall be subject to HUD approval.

(3) *Total.* The estimated total amount of income from investments and other income, as approved, shall be divided by the number of unit months available to obtain a per-unit per-month amount. Such amount shall be added to the projected average dwelling rental income per unit to obtain the projected operating income level. This amount shall not be subject to the provisions regarding program income in 24 CFR 85.25.

(f) *Required adjustments to estimates.* The IHA shall submit year-end adjustments of projected operating income levels in accordance with § 950.730(b), which covers investment income.

(Approved by the Office of Management and Budget under control number 2577-0029.)

§ 950.730 Adjustments.

Adjustment information submitted to HUD under this section shall be accompanied by an original or revised operating budget.

(a) *Adjustment of Base Year Expense Level.* (1) *Eligibility.* An IHA with projects that have been in management for at least one full fiscal year, for which operating subsidy is being requested under the formula for the first time, may, during its first budget year under PFS, request HUD to increase its Base Year Expense Level. Included in this category are existing IHAs requesting subsidy for a project or projects in operation at least one full fiscal year under separate ACC for which operating subsidy has never been paid, except for IPA audit costs. This request may be granted by HUD, in its discretion, only where the IHA establishes to HUD's satisfaction that the Base Year Expense Level computed under § 950.710(a) will result in operating subsidy at a level insufficient to support a reasonable

level of essential services. The approved increase cannot exceed the per-unit per-month amount by which the top of the range exceeds the Base Year Expense Level or \$10.31.

(2) *Procedure.* An IHA that is eligible for an adjustment under paragraph (a)(1) of this section may only make a request for such adjustment once for projects under a particular ACC, at the time it submits the operating budget for the first budget year under PFS. Such request shall be submitted to the HUD Field Office, which will review, modify as necessary, and approve or disapprove the request. A request under this paragraph shall include a calculation of the amount per-unit per-month of requested increase in the Base Year Expense Level, and shall show the requested increase as a percentage of the Base Year Expense Level.

(b) *Adjustments to estimated investment income.* An IHA that has an estimated average cash balance of at least \$20,000 shall submit a year-end adjustment to the estimated amount of investment income that was used to determine subsidy eligibility at the beginning of the IHA's fiscal year. The amount of the adjustment will be the difference between the estimate and a target investment income amount based on the actual average yield on 91-day Treasury bills for the IHA's fiscal year being adjusted and the actual average cash balance available for investment during the IHA's fiscal year, computed in accordance with HUD requirements. HUD will provide the IHA with the actual average yield on 91-day Treasury bills for the IHA's fiscal year. Failure of an IHA to submit the required adjustment of investment income by the date due may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until the adjustment is received.

(c) *Adjustments to Utilities Expense Level.* An IHA receiving operating subsidy under § 950.705, excluding those IHAs that receive operating subsidy solely for IPA audit (§ 950.720(a)), shall submit a year-end adjustment regarding the utility expense level approved for operating subsidy eligibility purposes. This adjustment, which will compare the actual utility expense and consumption for the IHA fiscal year to the estimates used for subsidy eligibility purposes, shall be submitted on forms prescribed by HUD. This request shall be submitted to the HUD Field Office by a deadline established by HUD, which will be during the IHA fiscal year following the IHA fiscal year for which an operating subsidy was received by the IHA, exclusive of a subsidy solely for IPA

audit costs. Failure to submit the required adjustment of the utilities expense level by the due date may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until it is received. Adjustments under this subsection normally will be made in the IHA fiscal year following the year for which the adjustment is applicable, except as provided in paragraph (c)(5) of this section or unless a repayment plan is necessary as noted in paragraph (d) of this section.

(1) *Rates.* (i) A decrease in the utilities expense level because of decreased utility rates—to the extent funded by operating subsidy—will be deducted by HUD from future operating subsidy payments. However, where the rate reduction covering utilities, such as water, fuel oil, electricity, and gas, is directly attributable to action by the IHA, such as well-head purchase of natural gas, or administrative appeals or legal action beyond normal public participation in ratemaking proceedings, then the IHA will be permitted to retain one-half of the cost savings attributable to its actions for the first year and, upon determination that the action was cost-effective in the first year, for up to an additional six years, as long as the actions continue to be cost-effective, and the other one-half of the cost savings will be deducted from operating subsidy otherwise payable.

(ii) An increase in the utilities expense level because of increased utility rates—to the extent funded by operating subsidy—will be fully funded by increased operating subsidy, subject to availability of funds.

(2) *Consumption.* (i) Generally, 50 percent of any decrease in the utilities expense level attributable to decreased consumption (adjusted for heating degree days in accordance with § 950.715(d)), after adjustment for any utility rate change, will be retained by the IHA; 50 percent will be offset by HUD against subsequent payment of operating subsidy.

(ii) However, in the case of an IHA whose energy conservation measures have been approved by HUD as satisfying the requirements of § 950.715(g)(1), the IHA may retain 100 percent of the savings from decreased consumption after payment of the amount due the contractor until the term of the financing agreement is completed. The decreased consumption is to be determined using a heating degree day adjustment for space heating utilities and by adjusting for any utility rate changes. The heating degree day experience during the frozen rolling base period will be used instead of the

degree days in the year being adjusted. The documentation on the degree days shall be supplied by the IHA and is subject to HUD approval. The savings realized shall be applied in the following order:

(A) Retention of up to 50 percent of the total savings from decreased consumption to cover training of IHA employees, counseling of tenants, IHA management of the cost reduction program and any other eligible costs; and

(B) Prepayment of the amount due the contractor under the contract.

(iii) Fifty percent of the increase in the Utilities Expense Level attributable to increased consumption will be funded by increased operating subsidy payments, subject to the availability of funds.

(3) *Emergency adjustments.* In emergency cases, where an IHA establishes to HUD's satisfaction that a severe financial crisis would result from a utility rate increase, an adjustment covering only the rate increase may be submitted to HUD at any time during the IHA's Current Budget Year. Unlike the adjustments mentioned in paragraphs (c)(1) and (c)(2) of this section, this adjustment shall be submitted to the HUD Field Office by revision of the original submission of the estimated Utility Expense Level for the fiscal year to be adjusted.

(4) *Documentation.* Supporting documentation substantiating the requested adjustments shall be retained by the IHA pending HUD audit.

(d) *Requests for adjustments to projected average monthly dwelling rental income.* Requests for adjustments to projected average monthly dwelling rental income may be made as follows:

(1) *Criteria for granting request.* An IHA may request an adjustment to projected average monthly dwelling rental income under PFS if the IHA can establish to HUD's satisfaction that the projected amount computed under § 950.725 was not attained because of circumstances beyond the control of the IHA, such as a substantial increase in general unemployment in the locality, or because of a revision of the IHA's rent schedule which has been approved by HUD. The IHA shall also demonstrate to HUD's satisfaction that it has established and is effectively implementing tenant selection criteria in compliance with HUD requirements. HUD shall have complete discretion to approve completely, approve in part or deny any requested adjustments to projected average monthly dwelling rental income.

(2) *Procedure.* A request for an adjustment under this subsection shall

be submitted to the HUD Field Office by a deadline established by HUD, which will be within twelve months following the IHA's fiscal year being adjusted. In emergency cases, however, where an IHA establishes to HUD's satisfaction that decreased rental income would result in a severe financial crisis, a request for adjustments may be submitted to HUD at an earlier time.

(e) *Energy conservation financing.* If HUD has approved an energy conservation contract under § 950.715(g)(2), then the IHA is eligible for additional operating subsidy each year of the contract to amortize the cost of the energy conservation measures under the contract, subject to a maximum annual limit equal to the cost savings for that year (and a maximum contract period of 12 years).

(1) Each year, the energy cost savings would be determined as follows:

(i) The consumption level that would have been expected if the energy conservation measure had not been undertaken would be adjusted for the Heating Degree Days experience for the year, and for any change in utility rate.

(ii) The actual cost of energy (of the type affected by the energy conservation measure) after implementation of the energy conservation measure would be subtracted from the expected energy cost, to produce the energy cost savings for the year. (See also paragraph (c)(2)(ii) of this section for retention of consumption savings.)

(2) If the cost savings for any year during the contract period is less than the amount of operating subsidy to be made available under this paragraph (e) to pay for the energy conservation measure in that year, the deficiency will be offset against the IHA's operating subsidy eligibility for the IHA's next fiscal year.

(3) If energy cost savings are less than the amount necessary to meet amortization payments specified in a contract, the contract term may be extended (up to the 12-year limit) if HUD determines that the shortfall is the result of changed circumstances rather than a miscalculation or misrepresentation of projected energy savings by the contractor or IHA. The contract term may only be extended to accommodate payment to the contractor and associated direct costs.

(f) *Formal review process (1992).* (1) *Eligibility for consideration.* Any IHA with an established Allowable Expense Level may request to use a revised Allowable Expense Level for its requested budget year that starts on or after April 1, 1992 (and ends during calendar year 1993).

(2) *Eligibility for adjustment.* (i) If an IHA's AEL for the budget year that ends during calendar year 1992 is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level, as calculated using the revised formula and the characteristics for the IHA and its community, then the IHA's AEL for the budget year that ends during calendar year 1993 is subject to adjustment at the IHA's request. The revised formula expense level for the fiscal year ending during calendar year 1992 is the IHA's value of the following formula, after updating by the local inflation factors from FY 1989 to the requested budget year.

(ii) The revised formula is the sum of the following six numbers:

(A) *The number of pre-1940 rental units occupied by poor households in 1980 as a percentage of the 1980 population of the community multiplied by a weight of 7.954.* This Census-based statistic applies to the county of the IHA, except that, if the IHA has 80 percent or more of its units in an incorporated city of more than 10,000 persons, it uses city-specific data. County data will exclude data for any incorporated cities of more than 10,000 persons within its boundaries.

(B) *The Local Government Wage Rate multiplied by a weight of 116.496.* The wage rate used is a figure determined by the Bureau of Labor Statistics. It is a county-based statistic, calibrated to a unit-weighted IHA standard of 1.0. For multi-county IHAs, the local government wage is unit-weighted. For this formula, the local government wage index for a specific county cannot be less than 85 percent or more than 115 percent of the average local government wage for counties of comparable population and metro/non-metro status, on a state-by-state basis. In addition, for counties of more than 150,000 population in 1980, the local government wage cannot be less than 85 percent or more than 115 percent of the wage index of private employment determined by the Bureau of Labor Statistics and the rehabilitation cost index of labor and materials determined by the R.S. Means Company.

(C) *The lesser of the current number of the IHA's two or more bedroom units available for occupancy, or 15,000 units, multiplied by a weight of .002896.*

(D) *The current ratio of the number of the IHA's two or more bedroom units available for occupancy in high-rise family projects to the number of all the IHA's units available for occupancy multiplied by a weight of 37.294.* For this indicator, a high-rise family project is defined as averaging 1.5 or more

bedrooms per unit available for occupancy and averaging 35 or more units available for occupancy per building and containing at least one building with units available for occupancy that is 5 or more stories high.

(E) *The current ratio of the number of the IHA's three or more bedroom units available for occupancy to the number of all the IHA's units available for occupancy multiplied by a weight of 22.303.*

(F) *An equation calibration constant of -.2344.*

(3) *Procedure.* If an IHA wants to request a revision to its AEL, it should determine whether its AEL for the fiscal year ending in calendar year 1992 (for purposes of this section, the "unrevised AEL") is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level. Then, in lieu of using the unrevised AEL as the basis for developing the IHA's AEL and operating budget for the fiscal year ending in calendar year 1993, the IHA will use 85 percent of the FEL (if this is higher than the unrevised AEL) or 115 percent of the FEL (if this is lower than the unrevised AEL). If an IHA has submitted its original operating budget before the publication of a change to the PFS handbook containing forms and instructions necessary to implementation of this regulatory change, the IHA shall submit a revision to its operating budget with calculations based on the new AEL. If an IHA requests such revision of its AEL in connection with submission of an operating budget and its current AEL is within 85 to 115 percent of the FEL, HUD will not adjust the AEL. If an IHA requests revision and its AEL is not within 85 to 115 percent of the FEL, HUD will increase it to 85 percent or decrease it to 115 percent. The revised Allowable Expense Levels approved by HUD will be put into effect for the IHA's budget year that begins on or after April 1, 1992 (and thus ends in calendar year 1993).

(g) *Additional HUD-initiated adjustments.* Notwithstanding any other provisions of this subpart, HUD may at any time make an upward or downward adjustment in the amount of the IHA's operating subsidy as result of data subsequently available to HUD which alters projections upon which the approved operating subsidy was based. Normally adjustments shall be made in total in the IHA fiscal year in which the needed adjustment is determined; however, if a downward adjustment would cause a severe financial hardship on the IHA, the HUD Field Office may establish a recovery schedule which

represents the minimum number of years needed for repayment.

(Approved by the Office of Management and Budget under control number 2577-0029)

§ 950.735 Transition funding for excessive high-cost IHAs.

If an IHA's Base Year Expense Level exceeds its allowable expense level, computed as provided in § 950.710, for any budget year under PFS, the IHA may be eligible for transition funding. Transition funding shall be an amount not to exceed the difference between the Base Year Expense Level and the allowable expense level for the requested budget year, multiplied by the number of units months available. HUD shall have the right to discontinue payment of all or part of the transition funding in the event HUD at any time determines that the IHA has not achieved a satisfactory level of management efficiency, or is not making efforts satisfactory to HUD to improve its management performance.

§ 950.740 Operating reserves.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities, common property and dwelling units, for the payment of advanced insurance premiums and unanticipated project requirements. If an IHA fails to maintain an adequate operating reserve level, HUD may declare the IHA to be "high risk" and require that the IHA develop a plan for improving its financial condition.

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating expenses of the project for the budget period, or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period.

§ 950.745 Operating budget submission and approval.

(a) *Required board resolution.* In addition to other budget documentation required by HUD, each operating budget or operating budget revision shall include a certified copy of a resolution of the board of commissioners stating that the board has reviewed and approved the operating budget or operating budget revision and has found:

(1) That the proposed expenditures are necessary in the efficient and

economical operation of the housing for the purpose of serving low income families.

(2) That the financial plan is reasonable in that:

(i) It indicates a source of funding adequate to cover all proposed expenditures.

(ii) It does not provide for use of Federal funding in excess of that payable under the provisions of these regulations.

(3) That all proposed rental charges and expenditures will be consistent with provisions of law and the annual contributions contract.

(b) *HUD limited operating budget review.* Detailed HUD review of the operating budgets or operating budget revisions normally will be limited to the prescribed PFS forms. Under this procedure, although the operating budget normally will not be reviewed in depth, the operating reserve calculation in all cases will be examined and budget modifications will be made where the operating reserve provisions are not in accordance with HUD requirements. In addition, if the HUD Field Office finds that an operating budget is incomplete, includes illegal or ineligible expenditures, mathematical errors or errors in the application of accounting procedures, or is otherwise unacceptable, the HUD Field Office may at any time require the submission by the IHA of further information regarding an operating budget or operating budget revision.

(c) *Withdrawal by HUD of limited operating budget review.* HUD reserves the right at any time to deviate from the limited operating budget review provided in paragraph (b) of this section if HUD finds that the IHA is operating its program in a manner which threatens the future serviceability, efficiency, economy, or stability of the housing that it operates. If such action is deemed necessary, the HUD Field Office will normally notify the IHA before its submission of the operating budget that HUD will subject the operating budget to a detailed review. When the IHA's operating no longer threaten the future serviceability, efficiency, economy or stability of the housing, HUD will notify the IHA that the limited review as provided in paragraph (b) of this section is being reinstated.

(Approved by the Office of Management and Budget under control number 2577-00267.)

§ 950.750 Payment procedure for operating subsidy under PFS.

(a) *General.* Subject to the availability of funds, payments of operating subsidy under PFS shall be made generally by electronic funds transfers, based on a

schedule submitted by the IHA and approved by HUD, reflecting the IHA's projected cash needs. The schedule may provide for several payments per month. If an IHA has an unanticipated, immediate need for disbursement of approved operating subsidy, it may make an informal request to HUD to revise the approved schedule. (Requests by telephone are acceptable.)

(b) *Payments procedure.* In the event that the amount of operating subsidy has not been determined by HUD as of the beginning of an IHA's budget year under the PFS regulations in this subpart, annual or monthly or quarterly payments of operating subsidy shall be made, as provided in paragraph (a) of this section, based upon the amount of the IHA's operating subsidy for the previous budget year or such other amount as HUD may determine to be appropriate.

(c) *Availability of funds.* In the event that insufficient funds are available to make payments approvable under PFS for operating subsidy payable by HUD, HUD shall have complete discretion to revise, on a pro rata basis or other basis established by HUD, the amounts of operating subsidy to be paid to IHAs.

§ 950.755 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.

(a) *Policy.* The income and composition of each family shall be reexamined at least annually (see § 950.315). IHAs must be in compliance with this reexamination requirement to be eligible to receive full operating subsidy payments.

(b) *IHAs in compliance with requirements.* Each submission of the original operating budget for a fiscal year shall be accompanied by a certification by the IHA that it is in compliance with the annual income reexamination requirements and that rents have been or will be adjusted in accordance with subpart D of this part.

(c) *IHAs not in compliance with requirements.* Any IHA not in compliance with the annual income reexamination requirement at the time of operating budget submission shall furnish to the HUD Field Office a copy of the procedure it is using to attain compliance and a statement of the number of families that have undergone reexamination during the twelve months preceding the date of the operating budget submission, or the revision thereof. If, on the basis of such submission, or any other information, the Field Office Director determines that the IHA is not substantially in compliance with the annual income reexamination requirement, HUD shall

withhold payments to which the IHA might otherwise be entitled under this part, equal to his or her estimate of the loss of rental income to the IHA resulting from its failure to comply with those requirements.

(Approved by the Office of Management and Budget under control number 2577-0026.)

§ 950.760 Determining actual occupancy percentage.

(a) For each requested budget year beginning on or after July 1, 1986, the IHA shall determine the percentage of occupancy for all project units included in the unit months available (actual occupancy percentage), at its option, either:

(1) For the last day of the month that ends six months before the beginning of the requested budget year; or

(2) Based on the average occupancy during the month ending six months before the beginning of the requested budget year.

(b) If the IHA elects to use an average, it shall maintain a record of its computation of its actual occupancy percentage. The actual occupancy percentage shall be adjusted to reflect expected changes in occupancy because of modernization, new development, demolition or disposition in order to reflect the expected average occupancy rate throughout the year. If, after that date, there are changes, up or down, in occupancy because of modernization, new development, demolition, or disposition not reflected in the adjustment, the IHA shall submit a budget revision to reflect the actual change in occupancy due to these actions.

§ 950.770 Comprehensive Occupancy Plan requirements.

(a) *IHAs that may submit a Comprehensive Occupancy Plan.* An IHA may prepare and submit a COP to HUD in accordance with the provisions of this section:

(1) For its first requested budget year beginning on or after July 1, 1986, if the IHA has an actual occupancy percentage (§ 950.760) less than 97 percent, and has more than five vacant units, not solely because of vacant, on-schedule modernization units (as defined in § 950.725(b)(3)(v)); or

(2) For a requested budget year beginning on or after July 1, 1987, if:

(i) The IHA projects an actual occupancy percentage (§ 950.760) for the requested budget year of less than 97 percent and has more than five vacant units, other than vacant, on-schedule modernization units;

(ii) The IHA is not currently a low occupancy IHA, that is, the IHA had an

actual occupancy percentage determined under § 950.760 for the current requested budget year that equalled or exceeded 97 percent or had five or fewer vacant units other than vacant, on-schedule modernization units; and

(iii) The IHA is not currently under a COP.

(b) *Comprehensive Occupancy Plan content.* A COP shall provide a general IHA-wide strategy for returning to occupancy or deprogramming all vacant units and a specific strategy for returning to occupancy or deprogramming units for each project that has an occupancy percentage of less than 97 percent.

(1) The general IHA-wide strategy for returning to occupancy or deprogramming all vacant units shall specify management actions the IHA is taking or intends to take to eliminate vacancies, such as revised occupancy policies, actions to reduce time to return vacated units to occupancy, and identification of the need to use the exception for nonelderly tenants in elderly projects, and shall include a schedule for completing these actions.

(2) The project-specific strategy shall:

(i) Identify each project that has a percentage of occupancy less than 97 percent.

(ii) State the project-specific actions the IHA is taking or intends to take to eliminate vacancies, such as:

- (A) Modernization;
- (B) Demolition;
- (C) Disposition;
- (D) Change in occupancy policy; or
- (E) Physical or management improvements; and

(iii) For each project identified, include a schedule for completing these actions and returning the units to occupancy.

(3) The COP shall also include yearly IHA-wide occupancy goals and yearly occupancy goals for each project with an occupancy rate below 97 percent stated for each year until there is a projected IHA-wide occupancy rate of at least 97 percent or an estimate that the IHA will have five or fewer vacant units, excluding units that are vacant, on-schedule modernization units. These goals should reflect the average occupancy percentage for each year. The yearly occupancy goals (both IHA-wide and project specific) for the first year of a COP that is submitted with an IHA's budget for its first requested budget year beginning on or after July 1, 1986, shall take into account actions taken by the IHA from August 2, 1985, to reduce vacancies.

(c) *Time for submitting a Comprehensive Occupancy Plan.* An

IHA that submits a COP to HUD for approval in accordance with paragraph (a) of this section shall submit the COP with its budget.

(d) *Maximum term of a Comprehensive Occupancy Plan.* (1) Except as provided in paragraph (d)(2) of this section, a COP:

(i) Submitted for an IHA's first requested budget year beginning on or after July 1, 1986, shall be for a period approved by HUD as reasonable, which shall not exceed five years; or

(ii) Submitted for a requested budget year beginning on or after July 1, 1987, shall be for a period of one or two years, as approved by HUD.

(2) A COP that exceeds the maximum period provided in paragraphs (d)(1) (i) or (ii) of this section may be approved only if the Assistant Secretary for Public and Indian Housing has given written authorization for such longer period before the approval of the COP.

(e) *Local governing body review.* The IHA shall have the COP reviewed by the local governing body for comment and shall submit any comments from the local governing body to HUD with the COP.

(f) *HUD review of Comprehensive Occupancy Plan.* If HUD fails to approve, disapprove or otherwise substantively comment on a COP within 45 days of receipt of the plan, the IHA-wide yearly occupancy goal for the first year of the COP shall be considered approved for the purpose of determining the IHA's projected occupancy percentage under paragraph (h) of this section.

(g) *Projected Occupancy Percentage (Comprehensive Occupancy Plan).* An IHA that has a HUD-approved COP shall use as its projected occupancy percentage for computing its projected operating income level under § 950.725 the greater of its actual occupancy percentage, as determined under § 950.760 or its approved, yearly IHA-wide occupancy goal, adjusted, as necessary, to discount units that are vacant for reasons beyond the IHA's control, as provided in paragraph (i) of this section.

(h) *Units vacant for reasons beyond an IHA's control.* A vacant unit is considered vacant for reasons beyond an IHA's control only if the unit is located in a project that meets one of the following conditions:

(1) The IHA has applied for modernization, HUD cannot fund the project because of lack of sufficient funding, and it is expected that the units will be occupied when the units are modernized.

(2) The vacant units are vacant, on-schedule modernization units.

(3) The units are vacant because of natural disasters, or as a result of court-ordered, or HUD-approved, constraints relating to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d).

§ 905.772 Financial management systems, monitoring and reporting.

The financial management systems, reporting and monitoring on program performance and financial reporting will be in compliance with the requirements of 24 CFR 85.20, 85.40, and 85.41, except to the extent that HUD requirements provide for additional specialized procedures necessary to permit the Secretary to make the determinations regarding the payment of operating subsidy specified in section 9(a)(1) of the United States Housing Act of 1937 (42 U.S.C. 1437g(a)(1)).

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§ 950.774 Operating subsidy eligibility for projects owned by IHAs in Alaska.

The provisions of this subpart are applicable to the development, modernization, and operation of the rental housing owned by the IHAs in the State of Alaska, excluding the formula calculation for the PFS.

Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances

§ 950.801 Purpose and applicability.

(a) *Purpose.* The purpose of this subpart is to implement HUD policies in support of national energy conservation goals by reducing energy consumption, with consequent reduction of operating costs of IHA-owned housing projects, by requiring that IHAs conduct energy audits and undertake certain cost-effective, energy conservation measures. This subpart also provides for the establishment of utility allowances for tenants based on reasonable consumption of utilities by an energy-conscious household.

(b) *Applicability.* The provisions of this subpart apply to all IHAs with IHA-owned housing including Mutual Help and Turnkey III.

Energy Audits and Energy Conservation Measures

§ 950.805 Requirements for energy audits.

All IHAs shall complete an appropriate energy audit for each IHA-owned project under management in accordance with the schedule specified in § 950.822. Energy audits shall be conducted by IHA personnel or consultants as appropriate. Standards for energy audits shall be equivalent to

State or Tribal standards for energy audits or as approved by HUD. Energy audits shall analyze all of the energy conservation measures, and the payback period for these measures, that are pertinent to the type of buildings and equipment operated by the IHA.

§ 950.810 Order of funding.

Within the funds available to an IHA, energy conservation measures should be accomplished with the shortest pay-back periods funded first. However, HUD Field Offices should permit IHAs to make adjustments to this funding order because of insufficient funds to accomplish high-cost energy conservation measures (ECM) or a situation in which an ECM with a longer pay-back period can be more efficiently installed in conjunction with other planned modernization. Field Offices may not authorize installation of individual utility meters that measure the energy or fuel used for space heating in dwelling units that need substantial weatherization, when installation of meters would result in economic hardship for tenants. In these cases, the ECMs related to weatherization must be accomplished before the installation of individual utility meters.

§ 950.812 Funding.

(a) The cost of accomplishing cost-effective energy conservation measures, including the cost of performing energy audits, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization program, for funding from any available development funds in the case of projects still in development or for other available funds that HUD may designate to be used for energy conservation.

(b) If an IHA finances energy conservation measures from sources other than CIAP or operating reserves, such as on the basis of a promise to repay, HUD may agree to provide adjustments in its calculation of the IHA's operating subsidy eligibility under the PFS for the project and utility involved if the financing arrangement is cost-beneficial to HUD. (See § 950.730(e).)

§ 950.815 Energy conservation equipment and practices.

In purchasing original or, when needed, replacement equipment, IHAs shall acquire only equipment that meets or exceeds the minimum efficiency requirements established by the U.S. Department of Energy. In the operation of their facilities, IHAs shall follow

operating practices directed to maximum energy conservation.

§ 950.822 Compliance schedule.

All energy conservation measures determined by energy audits to be cost effective shall be accomplished as funds are available.

§ 950.825 Energy performance contracts.

(a) *Method of procurement.* Energy performance contracting shall be conducted using one of the following methods of procurement:

(1) Competitive proposals (see § 950.175(d)). In identifying the evaluation factors and their relative importance, as required by § 950.175(d)(1), the solicitation shall state that technical factors are significantly more important than price (of the energy audit); or

(2) If the services are available only from a single source, noncompetitive proposals (see § 950.175(e)(2)).

(b) *HUD review.* Solicitations for energy performance contracts shall be submitted to the HUD Field Office for review and approval before issuance. Energy performance contracts shall be submitted to the Office of Native American Programs for review and approval before award.

Individual Metering of Utilities

§ 950.840 Individually metered utilities.

(a) All utility service shall be individually metered to tenants, either through provision of retail service to the tenants by the utility supplier or through the use of checkmeters unless:

(1) Individual metering is impractical, such as in the case of a central heating system in an apartment building;

(2) Change from a mastermetering system to individual meters would not be financially justified based upon a benefit/cost analysis; or

(3) Checkmetering is not permissible under state or local law, or under the policies of the particular utility supplier or public service commission.

(b) If checkmetering is not permissible, retail service must be considered. Where checkmetering is permissible, the type of individual metering offering the most savings to the IHA shall be selected.

§ 950.842 Benefit/cost analysis.

(a) A benefit/cost analysis shall be made to determine whether a change from a mastermetering system to individual meters will be cost effective, except as otherwise provided in § 950.846.

(b) Proposed installation of checkmeters must be justified on the basis that the cost of debt service

(interest and amortization) of the estimated installation costs plus the operating costs of the checkmeters will be more than offset by reduction in future utilities expenditures to the IHA under the mastermeter system.

(c) Proposed conversion to retail service must be justified on the basis of net savings to the IHA. This determination involves making a comparison between the reduction in utility expense obtained through eliminating the expense to the IHA for IHA-supplied utilities compared to the resultant allowance for tenant-supplied utilities, based on the cost of utility service to the tenants after conversion.

§ 950.844 Funding.

The cost to change mastermeter systems to individual metering of tenant consumption, including the costs of benefit/cost analysis and complete installation of checkmeters, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization project or for funding from any available development funds.

§ 950.845 Order of conversion.

Conversions to individually metered utility service shall be accomplished in the following order where an IHA has projects of two or more of the designated categories, unless otherwise approved by the HUD Field Office:

(a) In projects where retail service is provided by the utility supplier and the IHA is paying all the individual utility bills, no benefit/cost analysis is necessary and tenants shall be billed directly after the IHA adopts revised payment schedules providing appropriate allowances for tenant-supplied utilities.

(b) In projects where checkmeters have been installed but are not being utilized as the basis for determining utility charges to the tenants, no benefit/cost analysis is necessary and the checkmeters shall be used as the basis for utility charges, and tenants shall be surcharged for excess utility use.

(c) Projects where meter loops have been installed for utilization of checkmeters shall be analyzed both for the installation of checkmeters and for conversion to retail service.

(d) Low or medium rise family units with a mastermeter system should be analyzed for both checkmetering and conversion to retail service, because of their large potential for energy savings.

(e) Low or medium rise housing for elderly should next be analyzed for both checkmetering and conversion to retail

service, since the potential for energy saving is less than for family units.

(f) Electric service under mastermeters for high rise buildings, including projects for the elderly, should be analyzed for both use of retail service and of checkmeters.

§ 950.846 Actions affecting residents.

(a) Before making any conversion to retail service, the IHA shall adopt revised payment schedules, providing appropriate allowances for the tenant-supplied utilities resulting from the conversion.

(b) Before implementing any modifications to utility services arrangements with the tenants or charges with respect thereto, the requisite changes shall be made in tenant dwelling leases in accordance with subpart D of this part.

(c) To the extent practicable, IHAs should work closely with resident organizations in making plans for conversion of utility service to individual metering, explaining the national policy objectives of energy conservation, the changes in charges and rent structure that will result, and the goals of achieving an equitable structure that will be advantageous to tenants who conserve energy.

(d) A transition period of at least six months shall be provided in the case of initiation of checkmeters during which tenants will be advised of the charges but during which no surcharge will be made, based on the readings. This trial period will afford tenants ample notice of the effects the checkmetering system will have on their individual utility charges and also afford a test period for the adequacy of the utility allowances established.

(e) During and after the transition period, IHAs shall advise and assist tenants with high utility consumption on methods for reducing their usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances, and corrective maintenance.

§ 950.849 Waivers for similar projects.

IHAs with more than one project of similar design and utilities service may prepare a benefit/cost analysis for a representative project. A finding that a change in metering is not cost effective for the representative project is sufficient reason for the HUD Field Office to waive the requirements of this subpart for benefit/cost analysis on the remaining similar projects.

§ 950.850 Reevaluations of mastermeter systems.

Because of changes in the cost of utility services and the periodic changes

in utility regulations, IHAs with mastermeter systems are required to reevaluate mastermeter systems without checkmeters by making benefit/cost analyses at least every 36 months. HUD Field Offices may grant waivers of this requirement upon making a finding as provided in § 950.849.

Resident Utility Allowances

§ 950.860 Applicability.

(a) Sections 950.860 through 950.876 apply to all Indian housing dwelling units, including those operated under the Mutual Help Homeownership Opportunity Program.

(b) In rental units where utilities are furnished by the IHA but there are no checkmeters to measure the actual utilities consumption of the individual units, tenants shall be subject to charges for consumption of tenant-owned major appliances, or for optional functions of IHA-furnished equipment, in accordance with § 950.865(e), but no utility allowance will be established.

§ 950.865 Establishment of utility allowances by IHAs.

(a) IHAs shall establish allowances for IHA-furnished utilities for all checkmetered utilities and allowances for tenant-purchased utilities for all utilities purchased directly by tenants from the utilities suppliers.

(b) The IHA shall maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. Such record shall be available for inspection by tenants.

(c) The IHA shall give notice to all tenants of proposed allowances and scheduled surcharges and revisions thereof. Such notice shall be given, in the manner provided in the lease or homebuyer agreement, not less than 60 days before the proposed effective date of the allowances or scheduled surcharges or revisions; shall describe with reasonable particularity the basis for determination of the allowances, scheduled surcharges or revisions, including a statement of the specific items of equipment and function whose utility consumption requirements were included in determining the amounts of the allowances or scheduled surcharges; shall notify tenants of the place where the IHA's record maintained in accordance with paragraph (b) of this section is available for inspection; and shall provide all tenants an opportunity to submit written comments during a period expiring not less than 30 days before the proposed effective date of the allowances or scheduled surcharges or revisions. Such written comments shall be retained by the IHA and shall be

available for inspection by tenants and, upon request, by HUD.

(d) The IHA shall furnish to HUD, as instructed, a copy of its schedule of allowances and scheduled surcharges, and each revision thereof, promptly upon such schedule becoming effective. Schedules of allowances and scheduled surcharges shall not ordinarily be subject to approval by HUD before becoming effective but will be reviewed in the course of audits or reviews of IHA operations. Following such audits or reviews, HUD may require additional data concerning the IHA's basis for determination of allowances or scheduled surcharges, may require additional or different relevant data to be considered by the IHA in its next annual review on an exception basis, and may require that an IHA submit its proposed revision of allowances or scheduled surcharges to HUD for review and approval before the revision is adopted.

(e) The IHA's determinations of allowances, scheduled surcharges and revisions thereof shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(Approved by the Office of Management and Budget under control number 2577-0062)

§ 950.867 Categories for establishment of allowances.

Separate allowances shall be established for each utility and for each category of dwelling units determined by the IHA to be reasonably comparable as to factors affecting utility usage. The IHA will establish allowances for different size units, in terms of numbers of bedrooms. Other categories may be established at the discretion of the IHA.

§ 950.869 Period for which allowances are established.

(a) IHA-furnished utilities.

Allowances will normally be established on a quarterly basis; however, tenants may be surcharged on a monthly basis. The allowances established may provide for seasonal variations.

(b) Tenant-purchased utilities.

Monthly allowances shall be established at a uniform monthly amount based on an average monthly utility requirement for a year; however, if the utility supplier does not offer tenants a uniform payment plan, the allowances established may provide for seasonal variations.

§ 950.870 Standards for allowances for utilities.

(a) The objective of an IHA in designing methods of establishing

utility allowances for each dwelling unit category and unit size shall be to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.

(b) Allowances for both IHA-furnished and tenant-purchased utilities shall be designed to include such reasonable consumption for major equipment or for utility functions furnished by the IHA for all tenants (e.g., heating furnace, hot water heater), for essential equipment whether or not furnished by the IHA (e.g., range and refrigerator), and for minor items of equipment (such as toasters and radios) furnished by tenants.

(c) The complexity and elaborateness of the methods chosen by the IHA, in its discretion, to achieve the foregoing objective will be dependent upon the data available to the IHA and the extent of the administrative resources reasonably available to the IHA to be devoted to the collection of such data, the formulation of methods of calculation, and actual calculation and monitoring of the allowances.

(d) In establishing allowances, the IHA shall take into account relevant factors affecting consumption requirements, including:

(1) The equipment and functions intended to be covered by the allowance for which the utility will be used. For instance, natural gas may be used for cooking or heating domestic water or space heating or any combination of the three.

(2) The climatic location of the housing projects.

(3) The size of the dwelling units and the number of occupants per dwelling unit.

(4) Type of construction and design of the housing project.

(5) The energy efficiency of IHA-supplied appliances and equipment.

(6) The utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total tenant payment.

(7) The physical condition, including insulation and weatherization, of the housing project.

(8) Temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather.

(9) Temperature of domestic hot water.

§ 950.872 Surcharges for excess consumption of IHA-furnished utilities.

(a) For dwelling units subject to allowances for IHA-furnished utilities

where checkmeters have been installed, the IHA shall establish surcharges for utility consumption in excess of the allowances. Surcharges may be computed on a straight per unit of purchase basis (e.g., cents per kilowatt hour of electricity) or for stated blocks of excess consumption, and shall be based on the IHA's average utility rate. The basis for calculating such surcharges shall be described in the IHA's schedule of allowances. Changes in the dollar amounts of surcharges based directly on changes in the IHA's average utility rate shall not be subject to the advance notice requirements of this section.

(b) For dwelling units served by IHA-furnished utilities where checkmeters have not been installed, the IHA shall establish schedules of surcharges indicating additional dollar amounts tenants will be required to pay by reason of estimated utility consumption attributable to tenant-owned major appliances or to optional functions of IHA-furnished equipment. Such surcharge schedules shall state the tenant-owned equipment (or functions of IHA-furnished equipment) for which surcharges shall be made and the amounts of such charges, which shall be based on the cost to the IHA of the utility consumption estimated to be attributable to reasonable usage of such equipment.

§ 950.874 Review and revision of allowances.

(a) *Annual review.* The IHA shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 950.870, shall establish revised allowances. The review shall include all changes in circumstances (including completion of comprehensive or special purpose modernization under the Comprehensive Improvement Assistance Program and/or other energy conservation measures implemented by the IHA) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.

(b) *Revision as a result of rate changes.* The IHA may revise its allowances for tenant-purchased utilities between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which such allowances were based. Adjustments to tenant payments as a result of such

changes shall be retroactive to the first day of the month following the month in which the last rate change taken into account in such revision became effective.

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§ 950.876 Individual relief.

Requests for relief from surcharges for excess consumption of IHA-purchased utilities, or from payment of utility supplier billings in excess of the allowances for tenant-purchased utilities, may be granted by the IHA on reasonable grounds, such as special needs of elderly, ill or handicapped tenants, or special factors affecting utility usage not within the control of the tenant, as the IHA shall deem appropriate. The IHA's criteria for granting such relief, and procedures for requesting such relief, shall be adopted at the time the IHA adopts the methods and procedures for determining utility allowances. Notice of the availability of such procedures (including identification of the IHA representative with whom initial contact may be made by tenants), and the IHA's criteria for granting such relief, shall be included in each notice to tenants given in accordance with § 950.865(c) and in the information given to new tenants upon admission.

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Subpart M—Disposition or Demolition of Projects

§ 950.921 Purpose and applicability.

(a) *Purpose.* This subpart sets forth requirements for HUD approval of an IHA's application to dispose of or demolish (in whole or in part) IHA-owned projects assisted under the Act. The rules and procedures contained in 24 CFR part 85 are inapplicable.

(b) *Applicability.*—(1) *Type of projects.* This subpart applies to any Indian housing project which is owned by an IHA and is subject to an ACC under section 5 of the United States Housing Act of 1937 (42 U.S.C. 1437c), including rental, Turnkey III, or Mutual Help housing. This subpart does not apply to:

(i) IHA-owned Section 8 housing or housing leased under section 10(c) or section 23 of the Act (42 U.S.C. 1437h(c) or 1437u);

(ii) Demolition or disposition before the end of the initial operating period (EIOP), as determined under the ACC, of property acquired incident to the development of an Indian housing project (however, this exception does not apply to units occupied or available

for occupancy by Indian housing tenants before EIOP);

(iii) Conveyance of Indian housing for the purpose of providing homeownership opportunities for low-income families under section 21 of the Act, the Turnkey III or Mutual Help Homeownership Opportunity programs, or any other homeownership programs established under sections 5(h) and 6(c)(4)(D) of the Act (42 U.S.C. 1437c(h), 1437d(c)(4)(3)) or titles II and III of the Act (42 U.S.C. 1437aa, 1437aaa).

(iv) Leasing of dwelling or nondwelling space incident to the normal operation of the project for Indian housing purposes, as permitted by the ACC;

(v) Easements, rights-of-way and transfers of utility systems incident to the normal operation of the project for Indian housing purposes, as permitted by the ACC;

(vi) Reconfiguration of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes or number of units) without demolition; and

(vii) A whole or partial taking by a public or quasi-public entity through the exercise of its power of eminent domain.

(2) [Reserved]

(c) *Type of actions.* Any action by an IHA to dispose of or demolish an Indian housing project or a portion of an Indian housing project is subject to the requirements of this subpart. Until such time as HUD approval may be obtained, the IHA may not take any action to dispose of or demolish an Indian housing project or portion of an Indian housing project, and the IHA shall continue to meet its ACC obligations to maintain and operate the property as housing for low-income families. This does not mean that HUD approval under this subpart is required for planning activities, analysis, or consultations, such as project viability studies, comprehensive modernization planning or comprehensive occupancy planning.

§ 950.923 General requirements for HUD approval of disposition or demolition.

(a) For purposes of this subpart, the term "tenant" will also include "homebuyer" where the development involved is a homeownership project, and the term "unit of general government" will include the tribal government, where applicable.

(b) HUD will not approve an application for disposition or demolition unless:

(1) The application has been developed in consultation with tenants of the project involved, any tenant organizations for the project, and any

IHA-wide tenant organizations that will be affected by the disposition or demolition;

(2) The IHA has complied with the requirement to offer the project or portion of the project proposed for demolition or disposition to the resident organizations as required under § 950.925 of this subpart;

(3) The application contains a certification by the chief executive officer, or designee, that the unit of general government will comply with displacement, relocation, and real property acquisition policies described in § 950.117;

(4) Demolition or disposition (including any related replacement housing plan) will meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321), the National Historic Preservation Act of 1966 (16 U.S.C. 469), and related laws, as stated in the HUD's regulations at 24 CFR part 50. Where the site of the replacement housing is unknown at the time of submission of the application for demolition or disposition, the application shall contain a certification that the applicant agrees to assist HUD to comply with 24 CFR part 50 and that the applicant shall:

(i) Supply HUD with all available, relevant information necessary for HUD to perform for each property any environmental review required by 24 CFR part 50;

(ii) Carry out mitigating measures required by HUD or select alternate eligible property; and

(iii) Not acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD funds or other funds to such program activities with respect to any eligible property, until HUD approval is received.

(5) The IHA has developed a replacement housing plan, in accordance with § 950.935, and has obtained a commitment for the funds necessary to carry out the plan over the approved schedule of the plan. To the extent such funding is not provided from other sources (e.g., State, tribal or local programs or proceeds of disposition), HUD approval of the application for demolition or disposition is conditioned on HUD's agreement to commit the necessary funds (subject to availability of future appropriations).

§ 950.925 Resident organization opportunity to purchase.

(a) *Applicability.* (1) This section applies to applications for demolition or disposition of a development which involve dwelling units, nondwelling

spaces (e.g., administration and community buildings, maintenance facilities), and excess land.

(2) The requirements of this section do not apply to the following cases which it has been determined do not present appropriate opportunities for resident purchase:

(i) The IHA has determined that the property proposed for demolition is an imminent threat to the health and safety of residents;

(ii) The tribal or local government has condemned the property proposed for demolition;

(iii) A tribal or local government agency has determined and notified the IHA that units must be demolished to allow access to fire and emergency equipment;

(iv) The IHA has determined that the demolition of selected portions of the development in order to reduce density is essential to ensure the long term viability of the development or the IHA (but in no case should this be used cumulatively to avoid Section 412 requirements); or

(v) A public body has requested to acquire vacant land that is less than two acres in order to build or expand its services (e.g., a tribal or local government wishes to use the land to build or establish a police substation).

(3) In the situations listed in paragraph (a)(2) of this section, the IHA may proceed to submit its request to demolish or dispose of the property, or the portion of the property, to HUD, in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart without affording an opportunity for purchase by a resident organization. However, resident consultation would be required in accordance with § 950.923(b)(1). The IHA must submit written documentation, on official stationery, with date and signatures to justify paragraphs (a)(2)(i) through (v) of this section. Examples of such documentation include:

(i) A certification from a tribal or local agency, such as the fire or health department, that a condition exists in the development that is an imminent threat to residents; or

(ii) A copy of the condemnation order from the local health department. If, however, at some future date, the IHA proposes to sell the remaining property described in paragraphs (a)(2)(i) through (iii) of this section, the IHA will be required to comply with this section.

(b) *Opportunity for residents to organize.* Where the affected development does not have an existing resident organization, resident management corporation or resident

cooperative at the time of the IHA proposal to demolish or dispose of the development or a portion of the development, the IHA shall make a reasonable effort to inform residents of the development of the opportunity to organize and purchase the property proposed for demolition or disposition. Examples of "reasonable effort" at a minimum include at least one of the following activities: convening a meeting, sending letters to all residents, publishing an announcement in the resident newsletter, where available, or hiring a consultant to provide technical assistance to the residents. HUD will not approve any application that cannot demonstrate that the IHA has allowed at least 45 days for the residents of the affected development to organize a resident organization. The IHA should initiate its efforts to inform the residents of their right to organize as an integral part of the resident consultation requirement under § 950.923(b)(1).

(c) *Established organizations.* Where there are duly formed resident management corporations, resident organizations or resident cooperatives at the affected development, the IHA should follow the procedures beginning in paragraph (d) of this section. Where the affected development is fully or partially occupied, the residents must be given the opportunity to form under the procedures in paragraph (b) of this section.

(d) *Offer of sale to resident organizations.* (1) The IHA shall make the formal offer for sale which must include the information listed in this section. All contacted organizations shall have 30 days to express an interest in the offer. The IHA must offer to sell the property proposed for demolition or disposition to the resident management corporation, the resident organization or resident cooperative of the affected development under at least as favorable terms and conditions as the IHA would offer it for sale to another purchaser. The offer shall include:

(i) An identification of the development, or portion of the development, in the proposed demolition or disposition, including the development number and location, the number of units and bedroom configuration, the amount of space and use for non-dwelling space, the current physical condition (e.g., fire damaged, friable asbestos, lead based paint test results), and occupancy status (e.g., percent occupancy);

(ii) In the case of disposition, a copy of the appraisal of the property and any terms of sale;

(iii) An IHA disclosure and description of plans proposed for reuse

of land, if any, after the proposed demolition or disposition;

(iv) An identification of available resources (including its own and HUD's) to provide technical assistance to the resident management corporation, resident organization or resident cooperative of the affected development to enable the organization to better understand its opportunity to purchase the development, the development's value and potential use;

(v) Any and all terms of sale that the IHA requires for the Section 18 action; [If the resident management corporation, resident organization or resident cooperative of the affected development submits a proposal that is other than the terms of sale (e.g., purchase at less than fair market value with demonstrated commensurate public benefit or for the purposes of homeownership), the IHA may consider accepting the offer.]

(vi) A date by which the resident management corporation, resident organization or resident cooperative of the affected development must respond to the IHA's offer to sell the property proposed for demolition or disposition, which shall be no less than 30 days from the date of the official offering of the IHA which will be made sometime after the meeting. The response from the resident management corporation, resident organization or resident cooperative of the affected development shall be in the form of a letter expressing its interest in accepting the IHA's written offer.

(vii) A statement that the resident management corporation, resident organization and resident cooperative of the affected development will be given up to 60 days to develop and submit a proposal to the IHA to purchase the property and to obtain a firm financial commitment. It shall explain that the IHA shall approve the proposal from the resident management corporation, resident organization or resident cooperative of the affected development, if it meets the terms of sale. However, the statement shall indicate that the IHA can consider accepting an offer from the resident management corporation, resident organization or resident cooperative of the affected development that is other than the terms of sale; e.g., purchase at less than fair market value with demonstrated commensurate public benefit or for the purposes of homeownership. The statement shall explain that if the IHA receives more than one proposal from a resident management corporation, resident organization or resident cooperative at the affected development, the IHA shall select the proposal that meets the terms

of sale. In the event that two proposals from the affected development meet the terms of sale, the IHA shall choose the best proposal.

(2) After the 30 day time frame for the resident management corporation, resident organization or resident cooperative of the affected development to respond to the notification letter has expired, the IHA is to prepare letters to those organizations that responded affirmatively inviting them to submit a formal proposal to purchase the property. The organization has up to 60 days from the date of its affirmative response to prepare and submit a proposal to the IHA that provides all the information requested in paragraph (d)(1) of this section and meets the terms of sale.

(e) *IHA review of proposals.* The IHA has up to 60 days from the date of receipt of the proposals to review them and determine whether they meet the terms of sale set forth in its offer. If the resident management corporation, resident organization or resident cooperative of the affected development submits a proposal that is other than the terms of sale (e.g., purchase at less than the fair market value with demonstrated commensurate public benefit or for the purposes of homeownership), the IHA may consider accepting the offer. If the terms of sale are met, within 14 days of the IHA's final decision, the IHA shall notify the resident management corporation, resident organization or resident cooperative of the affected development of that fact and that the proposal has been accepted or rejected.

(f) *Appeals.* The resident management corporation, resident organization or resident cooperative of the affected development has the right to appeal the IHA's decision to the HUD Field Office. A written appeal must be made within 30 days of the decision by the IHA. The appeal should include copies of the proposal and any related correspondence. The HUD Field Office will render a final decision within 30 days. A letter communicating the decision is to be prepared and sent to the IHA and the resident management corporation, resident organization or resident cooperative of the affected development.

(g) *Contents of proposal.* (1) The proposal from the resident management corporation, resident organization or resident cooperative of the affected development shall at a minimum include the following:

(i) The length of time the organization has been in existence;

(ii) A description of current or past activities which demonstrate the organization's organizational and

management capability or the planned acquisition of such capability through a partner or other outside entities;

(iii) A statement of financial capability;

(iv) A description of involvement of any non-resident organization (non-profit, for-profit, governmental or other entities), if any, the proposed division of responsibilities between the two, and the non-resident organization's financial capabilities;

(v) A plan for financing the purchase of the property and a firm commitment for funding resources necessary to purchase the property and pay for any necessary repairs;

(vi) A plan for the use of the property;

(vii) The proposed purchase price in relation to the appraised value;

(viii) Justification for purchase at less than the fair market value in accordance with § 950.931(h), if appropriate;

(ix) Estimated time schedule for completing the transaction;

(x) The response to the IHA's terms of sale;

(xi) A resolution from the resident organization approving the proposal; and

(xii) A proposed date of settlement, generally not to exceed six months from the date of IHA approval of the proposal, or such period as the IHA may determine to be reasonable.

(2) If the proposal is to purchase the property for homeownership under section 5(h) or HOPE 1, then the requirements of section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart do not apply, and the applicable requirements shall be those under the HOPE 1 guidelines, as set forth at 24 CFR Subtitle A, App. A, or the section 5(h) regulation, as set forth in subpart P of this part. In order for the IHA to consider a proposal to purchase under section 412, using homeownership opportunities under section 5(h) or HOPE 1, the resident management corporation, organization or resident cooperative of the affected development shall meet the provisions of this paragraph (g), including items in paragraph (g)(1) of this section.

(3) If the proposal is to purchase the property for other than the aforementioned homeownership programs or for uses other than homeownership, then the proposal must meet all the disposition requirements of section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart.

(h) *IHA Obligations.* (1) Prepare and disperse the formal offer of sale to the resident management corporation, resident organization and resident cooperative of the affected development.

(2) Evaluate proposals received and make the selection based on the considerations set forth in paragraph (b) of this section. Issue letters of acceptance and rejection.

(3) Prepare certifications, where appropriate, as discussed in paragraph (j)(3) of this section. The IHA shall comply with its obligations under § 950.923(b)(1) regarding tenant consultation and provide evidence to HUD that it has met those obligations. The IHA shall not act in an arbitrary manner and shall give full and fair consideration to any qualified resident management corporation, resident organization or resident cooperative of the affected development and accept the proposal if it meets the terms of sale.

(i) *IHA application submission requirements for proposed demolition or disposition.* (1) If the proposal from the resident organization is rejected by the IHA, and either there is no appeal by the organization or the appeal has been denied, the IHA shall submit its demolition or disposition application to HUD in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart. The demolition or disposition application must include complete documentation that the requirements of this section have been met. IHAs must submit written documentation that the resident management corporation, resident organization and resident cooperative of the affected development have been apprised of their opportunity to purchase under this section. This documentation shall include a copy of the signed and dated IHA notification letter(s) to each organization informing them of the IHA's intention to submit an application for demolition or disposition and the responses from each organization.

(2) If the IHA accepts the proposal of the resident organization, the IHA shall submit a disposition application in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart, with appropriate justification for a negotiated sale and for sale at less than fair market value, if applicable.

(3) HUD will not process an application for demolition or disposition unless the IHA provides HUD with one of the following:

(i) Where no resident management corporation, resident organization or resident cooperative exists in the affected development and the residents of the affected development have not formed a new organization, a certification from either the executive director or the board of commissioners stating that no such organization(s)

exists and documentation that a reasonable effort to inform residents of their opportunity to organize has been made; or

(ii) Where a resident management corporation, resident organization or resident cooperative exists in the affected development one of the following, either paragraph (i)(3), (ii) (A) or (B) of this section:

(A) A board resolution or its equivalent from each resident management corporation, resident organization or resident cooperative stating that such organization has received the IHA letter, and that it understands the offer and waives its opportunity to purchase the project, or portion of the project, covered by the demolition or disposition application. The response should clearly state that the resolution was adopted by the entire organization at a formal meeting; or

(B) A certification from the executive director or board of commissioners of the IHA that the thirty (30) day timeframe has expired and no response was received to its offer.

§ 950.927 Specific criteria for HUD approval of disposition requests.

In addition to other applicable requirements of this subpart, HUD will not approve a request for disposition unless HUD determines that retention is not in the best interests of the tenants and the IHA, because at least one of the following criteria is met:

(a) Developmental changes in the area surrounding the project adversely affect the health or safety of the tenants or the feasible operation of the project by the IHA.

(b) Disposition will allow the acquisition, development, or rehabilitation of other properties that will be more efficiently or effectively operated as low-income housing projects, and that will preserve the total amount of low-income housing stock available to the community.

(c) There are other factors justifying disposition that HUD determines are consistent with the best interests of the tenants and the IHA that are not inconsistent with other provisions of the Act.

(d) In the case of disposition of property other than dwelling units:

(1) The property is determined by HUD to be excess to the needs of the project (after the end of the initial operating period); or

(2) The disposition of the property is incidental to, or does not interfere with, continued operation of the remaining portion of the project.

§ 950.928 Specific criteria for HUD approval of demolition requests.

In addition to other applicable requirements of this subpart, HUD will not approve an application for demolition unless HUD determines that at least one of the following criteria is met:

(a) In the case of demolition of all or a portion of a project, the project, or a portion of the project, is obsolete as to physical condition, location, or other factors, making it unusable for housing purposes; and

(b) No reasonable program of modifications, in keeping with the provisions of subpart I of this part, is feasible to return the project or portion of the project to useful life.

§ 950.931 IHA application for HUD approval.

Written approval by HUD shall be required before the IHA may undertake any transaction involving demolition or disposition. To request approval, the IHA shall submit an application to the HUD Field Office that includes the following:

(a) A description of the property involved;

(b) A description of, as well as a timetable for, the specific action proposed (including, in the case of disposition, the specific method proposed);

(c) A statement justifying the proposed disposition or demolition under one or more of the applicable criteria of §§ 950.927 or 950.928;

(d) If applicable, a plan that meets the requirements of § 950.117 for the relocation of tenants who would be displaced by the proposed demolition or disposition;

(e) A description of the IHA's consultations with tenants and any tenant organizations (as required under § 950.923(b)(1)), with copies of any written comments which may have been submitted to the IHA and the IHA's evaluation of the comments;

(f) A replacement housing plan, as required under § 950.935, and a resolution by the governing body of the unit of tribal or general local government in which the project is located, indicating approval of the replacement plan;

(g) Evidence that the IHA has complied with the requirement to offer the project or portion of the project proposed for demolition or disposition to the resident organizations as required under § 950.925;

(h) The estimated balance of project debt, if any, under the ACC, for development and modernization;

(i) In the case of disposition, an estimate of the fair market value of the

property, established on the basis of one independent appraisal unless, as determined by HUD:

(1) More than one appraisal is warranted; or

(2) Another method of valuation is clearly sufficient and the expense of an independent appraisal is unjustified because of the limited nature of the property interest involved or other available data;

(j) In the case of disposition, estimates of the gross and net proceeds to be realized, with an itemization of estimated costs to be paid out of gross proceeds and the proposed use of any net proceeds in accordance with § 950.933;

(k) A copy of a resolution by the IHA's Board of Commissioners approving the application;

(l) If determined to be necessary by HUD, an opinion by the IHA's legal counsel that the proposed action is consistent with applicable requirements of Federal, State, Tribal and local laws; and

(m) Any additional information necessary to support the application and assist HUD in making determinations under this subpart.

§ 950.933 Use of proceeds.

(a) *Disposition.* (1) Where HUD approves the disposition of real property of a project, in whole or in part, the IHA shall dispose of it promptly by public solicitation of bids for not less than fair market value, unless HUD authorizes negotiated sale for reasons found to be in the best interests of the IHA or the Federal government, or for sale for less than fair market value (where permitted by State, Tribal or local law), based on commensurate public benefits to the community, the IHA or the Federal government justifying such an exception.

(2) Net proceeds (after payment of HUD-approved costs of disposition and relocation under paragraph (a) of this section) shall be used, subject to HUD approval, as follows: first for the retirement of outstanding obligations, if any, issued to finance development or modernization of the project, which in the case of scattered site housing of an IHA, shall be in an amount that bears the same ratio to the total of such costs and obligations as the number of units disposed of bears to the total number of units of the project at the time of disposition, and thereafter for the provision of housing assistance for low-income families, through such measures as modernization of low-income housing or the acquisition, development

or rehabilitation of other properties to operate as low-income housing.

(b) *Demolition.* Where HUD has approved demolition of a project, or a portion of a project, and the proposed action is part of a modernization program under subpart I of this part, the costs of demolition and of relocation of displaced tenants may be included in the modernization budget.

§ 950.935 Replacement housing plan.

(a) HUD may not approve an application or furnish assistance under this subpart unless the IHA submitting the application for disposition or demolition also submits a plan for the provision of an additional decent, safe, sanitary, and affordable dwelling unit (at rents no higher than permitted under the Act) for each dwelling unit to be disposed of or demolished under the application. The plan must include any one or a combination of the following:

(1) The acquisition or development of additional low-income housing dwelling units;

(2) The use of 15-year project-based assistance under section 8 (as provided for in 24 CFR part 882, subpart G);

(3) The use of not less than 15-year project-based assistance under other Federal programs;

(4) The acquisition or development of dwelling units assisted under a State or local Tribal government program that provides for project-based assistance comparable in terms of eligibility, contribution to rent, and length of assistance contract (not less than 15 years) to assistance under section 8(b)(1) of the Act; or

(5) The use of 15-year tenant-based assistance under section 8 of the Act (excluding vouchers under section 8(a) of the Act (42 U.S.C. 1437f(o)), under the conditions described in paragraph (b) of this section.

(b) Fifteen-year tenant-based assistance under section 8 may be approved under the replacement plan only if:

(1) There is a finding by HUD that replacement with project-based assistance is not feasible; that the supply of private rental housing actually available to those who would receive project-based assistance under the plan is sufficient for the total number of certificates and vouchers available in the community after implementation of the plan; and that this available housing supply is likely to remain available for the full 15-year term of the assistance; and

(2) HUD's findings under paragraph (b)(1) of this section are based on objective information, which must include rates of participation by

landlords in the Section 8 program; size, condition, and rent levels of available rental housing as compared to Section 8 standards; the supply of vacant existing housing meeting the Section 8 housing quality standards with rents at or below the fair market rent or the likelihood of adjusting the fair market rent; the number of eligible families waiting for housing assistance under the Act; the extent of discrimination practiced against the types of individuals or families to be served by the assistance; and such additional data as HUD may determine to be relevant in particular circumstances.

(c) The plan must be approved by the unit of general local government (including tribal government) in which the project is located.

(d) The plan must include a schedule for carrying out all its terms within a period consistent with the size of the proposed disposition or demolition, except that the schedule for completing the plan shall in no event exceed 6 years from the date specified to begin plan implementation.

(e) The plan must include a method that ensures that at least the same total number of individuals and families will be provided housing, allowing for replacement with units of different sizes to accommodate changes in local priority needs.

(f) The plan must include an assessment of the suitability of the location of proposed replacement housing based upon application of the site selection criteria established in § 950.230.

(g) The plan must contain assurances that any replacement units acquired, newly constructed or rehabilitated will meet the applicable accessibility requirements set forth in 24 CFR 8.25.

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Subpart Q—[Reserved]

Subpart R—Family Self-Sufficiency

§ 950.3001 Purpose, scope, and applicability.

(a) *Purpose.* The purpose of the Family Self-Sufficiency (FSS) program is to develop local strategies to coordinate the use of public and Indian housing assistance and housing assistance under the section 8 rental certificate and rental voucher programs with public and private resources, to enable families eligible to receive assistance under these programs to achieve economic independence and self-sufficiency.

(b) *Applicability.* This subpart applies to Indian housing authorities that elect to operate a local FSS program, and

where such an election is made, to Indian housing assisted under the U.S. Housing Act of 1937, and developed or operated by an IHA in an Indian area, as defined in § 950.102. This subpart does not apply to the Mutual Help Homeownership Program or the Turnkey III Program. Indian housing authorities that elect to participate in the FSS program are not subject to minimum program size requirements. Additionally, Indian housing authorities that received Indian housing units under the FSS incentive award competitions are not subject to the minimum program size requirements.

§ 950.3002 Program objectives.

The objective of the FSS program is to reduce the dependency of low-income families on welfare assistance and on section 8, public or Indian housing assistance or any Federal, State, or local rent or homeownership subsidies. The FSS program provides, low-income families opportunities for education, job training, counseling, and other forms of social service assistance, while living in assisted housing, so that they may obtain the education, employment, and business and social skills necessary to achieve self-sufficiency, as this term is defined in § 950.3003 of this subpart. HUD will measure the success of a local FSS program not only by the number of families who achieve self-sufficiency, but also by the number of FSS families who, as a result of participation in the program, have family members who obtain their first job, or who obtain higher paying jobs; no longer need benefits received under one or more welfare programs; obtain a high school diploma or higher education degree; or accomplish similar goals that will assist the family in obtaining economic independence.

§ 950.3003 Definitions.

As used in this subpart:

Act means the United States Housing Act of 1937 (42 U.S.C. 1437-1440).

Action Plan. See § 950.3011 of this subpart.

Certification means a written assertion based on supporting evidence, provided by the FSS family or the IHA, as may be required under this subpart, and which:

(1) Shall be maintained by the IHA in the case of the family's certification, or by HUD in the case of the IHA's certification;

(2) Shall be made available for inspection by HUD, the IHA, and the public, as appropriate; and

(3) Shall be deemed to be accurate for purposes of this subpart, unless the Secretary or the IHA, as applicable,

determines otherwise after inspecting the evidence and providing due notice and opportunity for comment.

Chief executive officer (CEO). (1) The CEO of a unit of general local government means the elected official or the legally designated official who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the CEO of a unit of general local government are:

(i) The elected mayor of a municipality; the elected county executive of a county;

(ii) The chairperson of a county commission or board in a county that has no elected county executive; or

(iii) The official designated pursuant to law by the governing body of a unit of general local government (e.g., city manager).

(2) The CEO for an Indian tribe is the tribal governing official.

Contract of participation means a contract in a form approved by HUD, entered into between a participating family and an IHA operating an FSS program that sets forth the terms and conditions governing participation in the FSS program. The contract of participation includes all individual training and services plans entered into between the IHA and all members of the family who will participate in the FSS program, and which plans are attached to the contract as exhibits. For additional detail, see § 950.3022 of this subpart.

Earned income means income or earnings included in annual income from wages, tips, salaries, other employee compensation, and self-employment. (See § 950.102.) Earned income does not include any pension or annuity, transfer payments, any cash or in-kind benefits, or funds deposited in or accrued interest on the FSS escrow account established by an IHA on behalf of a participating family.

Effective date of contract of participation means the first day of the month following the month in which the FSS family and the IHA entered into the contract of participation.

Eligible families mean current residents of Indian housing.

Enrollment means the date that the FSS family entered into the contract of participation with the IHA.

Family Self-Sufficiency program or FSS program means the program established by an IHA within its jurisdiction to promote self-sufficiency among participating families, including the provision of supportive services to these families, as authorized by section 23 of the U.S. Housing Act of 1937 (42 U.S.C. 1437u).

FSS account means the FSS escrow account authorized by section 23 of the Act, and as provided by § 950.3025 of this subpart.

FSS credit means the amount credited by the IHA to the participating family's FSS account.

FSS family or participating family means a family that resides in Indian housing, and that elects to participate in the FSS program, and whose designated head of the family has signed the contract of participation.

FSS related service program means any program, publicly or privately sponsored, that offers the kinds of supportive services described in the definition of "supportive services" set forth in this § 950.3003.

FSS slots refer to the total number of Indian housing units that comprise the minimum size of an IHA's Indian housing FSS program.

FY means Federal Fiscal Year (starting with October 1, and ending September 30, and designated by the calendar year in which it ends).

Head of FSS family means the adult member of the FSS family who is the head of the household for purposes of determining income eligibility and rent.

Housing subsidies means assistance to meet the costs and expenses of temporary shelter, rental housing or homeownership, including rent, mortgage or utility payments.

HUD or Department means the Department of Housing and Urban Development Field Offices, unless HUD Headquarters is specified.

Indian housing authority or IHA. See definition in § 950.102.

Individual training and services plan means:

(1) A written plan that is prepared for the head of the FSS family, and each adult member of the FSS family who elects to participate in the FSS program, by the IHA in consultation with the family member, and which sets forth:

(i) The supportive services to be provided to the family member;

(ii) The activities to be completed by that family member; and

(iii) The agreed upon completion dates for the services and activities.

(2) Each individual training and services plan must be signed by the IHA and the participating family member, and is attached to, and incorporated as part of the contract of participation. An individual training and services plan must be prepared for the head of the FSS family.

JOBS Program means the Job Opportunities and Basic Skills Training Program authorized under part F of title IV of the Social Security Act (42 U.S.C. 402(a)(19)).

JTPA means the Job Training Partnership Act (29 U.S.C. 1579(a)).

Low-income family. See definition in 24 CFR 950.102.

Participating family. See definition for "FSS family" in this section.

Program Coordinating Committee or PCC is the committee described in § 950.3012 of this subpart.

Secretary means the Secretary of Housing and Urban Development.

Self-sufficiency means that an FSS family is no longer receiving section 8, public or Indian housing assistance, or any Federal, State, or local rent or homeownership subsidies or welfare assistance. Achievement of self-sufficiency, although an FSS program objective, is not a condition for receipt of the FSS account funds. (See § 950.3025.)

Supportive services means those appropriate services that an IHA will make available, or cause to be made available to an FSS family under a contract of participation, and may include:

(1) *Child care*—child care of a type that provides sufficient hours of operation and serves an appropriate range of ages;

(2) *Transportation*—transportation necessary to enable participating family members to receive available services, or to commute to their places of employment;

(3) *Education*—remedial education; education for completion of secondary or post secondary schooling;

(4) *Employment*—job training, preparation, and counseling; job development and placement; and follow-up assistance after job placement and completion of the contract of participation;

(5) *Personal welfare*—substance/alcohol abuse treatment and counseling;

(6) *Household skills and management*—training in homemaking and parenting skills; household management; and money management;

(7) *Counseling*—counseling in the areas of:

(i) The responsibilities of homeownership;

(ii) Opportunities available for affordable rental and homeownership in the private housing market; and

(iii) Money management; and

(8) *Other services*—any other services and resources, including case management, reasonable accommodations for individuals with disabilities, that the IHA may determine to be appropriate in assisting FSS families to achieve economic independence and self-sufficiency.

Unit size or size of unit refers to the number of bedrooms in a dwelling unit.

Very low-income family. See definition in § 950.102.

Welfare assistance means income assistance from Federal or State welfare programs, and includes assistance provided under the Aid to Families with Dependent Children (AFDC) Program, Supplemental Security Income (SSI) that is subject to an income eligibility test; Medicaid, food stamps, general assistance, or other assistance provided under a Federal or State program directed to meeting general living expenses, such as food, health care, child care, but does not include assistance solely directed to meeting housing expenses (e.g., rent, mortgage or utilities payments), and does not include transitional welfare assistance (e.g. medicaid) provided to JOBS participants.

§ 950.3004 Basic requirements of the FSS program.

(a) *Compliance with program regulations.* An FSS program established under this subpart shall be operated in conformity with the regulations of this part.

(b) *Compliance with Action Plan.* An FSS program established under this subpart shall be operated in compliance with an Action Plan, as described in § 950.3011, and provide comprehensive supportive services as defined in § 950.3003.

(c) *Compliance with equal opportunity requirements.* An FSS program established under this subpart shall be operated in compliance with all applicable Indian housing regulations and all applicable civil rights authorities including: the Indian Civil Rights Act of 1968 (25 U.S.C. 1301-1303); title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601-3619); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107); Executive Order 11063 on Equal Opportunity in Housing, 27 FR 11527 (1962), as amended, 46 FR 1253 (1980); section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(e)(b)); section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u); and the regulations implementing these authorities. (The Indian Civil Rights Act applies to IHAs organized pursuant to tribal laws; and Title VI of the Civil Rights Act of 1964 and the Fair Housing Act applies to state authorized IHAs.)

§ 950.3011 Action Plan.

(a) *General.* To participate in the FSS program, an IHA must have a HUD-

approved Action Plan that complies with the requirements of this section.

(b) *Development of Action Plan.* The Action Plan shall be developed by the IHA in consultation with the chief executive officer of the applicable unit of general local government, and the Program Coordinating Committee.

(c) *Initial submission and revisions.*

(1) *Initial submission.* Unless the dates set forth in this paragraph are extended by HUD for good cause, an IHA that is establishing its first FSS program must submit an Action Plan to HUD for approval within:

(i) 90 days of notification by HUD of approval of the IHA's application for FY 1991 or FY 1992 incentive award units; or

(ii) If the IHA did not apply for FSS incentive award units, within 90 days of notification by HUD of approval of the IHA's first application, commencing in FY 1993, for new Indian housing units.

(2) *Revision.* Following initial approval of the Action Plan by HUD, no further approval of the Action Plan is required unless the IHA proposes to make policy changes to the Action Plan, or changes are required by HUD. Any changes to the Action Plan must be submitted to, and approved by HUD.

(d) *Contents of Plan.* The Action Plan shall describe the policies and procedures of the IHA for operation of a local FSS program, and shall contain, at a minimum, the following information:

(1) *Family demographics*—a description of the number, size, characteristics, and other demographics (including racial and ethnic data), and the supportive service needs of the families expected to participate in the FSS program;

(2) *Estimate of participating families*—an estimate of the number of eligible FSS families who can reasonably be expected to receive supportive services under the FSS program, based on available and anticipated Federal, tribal, State, local, and private resources;

(3) *Eligible families from other self-sufficiency program*—if applicable, the number of eligible families, by program type, who are participating in Operation Bootstrap, Project Self-Sufficiency, or any other local self-sufficiency program who are expected to agree to execute an FSS contract of participation.

(4) *FSS family selection procedures*—a statement indicating the procedures to be utilized to select families for participation in the FSS program, subject to the requirements governing the selection of FSS families, set forth in § 950.3013.

(5) *Incentives to encourage participation*—a description of the incentives that the IHA intends to offer eligible families to encourage their participation in the FSS program (incentives plan). The incentives plan shall provide for the establishment of the FSS account in accordance with the requirements set forth in § 950.3025, and other incentives, if any, designed by the IHA. The incentives plan shall be part of the Action Plan.

(6) *Outreach efforts*—a description of:

- (i) The IHA's efforts, including notification and outreach efforts, to recruit FSS participants from among eligible families; and
- (ii) The IHA's actions to be taken to assure that both minority and non-minority groups are informed about the FSS program, and how the IHA will make this information known (e.g., through door-to-door flyers, posters in any common rooms, advertisements in newspapers of general circulation, as well as any media targeted to minority groups).

(7) *FSS activities and supportive services*—a description of the activities and supportive services to be provided by both public and private resources to FSS families, and identification of the public and private resources, which are expected to provide the supportive services.

(8) *Method for identification of family support needs*—a description of how the FSS program will identify the needs and deliver the services and activities according to the needs of the FSS families;

(9) *Program termination; withholding of services; and grievance procedures*—a description of the IHA's policies concerning: termination of participation in the FSS program, or withholding of supportive services on the basis of a family's failure to comply with the requirements of the contract of participation; and the grievance and hearing procedures available to FSS families.

(10) *Assurances of non-interference with rights of non-participating families*—an assurance that a family's election to not participate in the FSS program will not affect the family's admission to Indian housing or the family's right to occupancy in accordance with its lease.

(11) *Timetable for program implementation*—a timetable for implementation of the FSS program, as provided in § 950.3020(a)(1), including the schedule for filling FSS slots with eligible FSS families, as provided in § 950.3013;

(12) *Certification of coordination*—a certification that development of the

services and activities under the FSS program has been coordinated with the JOBS Program; the programs provided under the JTPA; and any other relevant employment, child care, transportation, training, and education programs (e.g., Job Training for the Homeless Demonstration program) in the applicable area, and that implementation will continue to be coordinated, in order to avoid duplication of services and activities; and

(13) *Optional additional information*—such other information that would help HUD determine the soundness of the IHA's proposed FSS program.

(e) *Eligibility of a combined program.* An IHA that wishes to operate a joint FSS program with other IHAs may combine its resources with one or more IHAs to deliver supportive services under a joint Action Plan that will provide for the establishment and operation of a combined FSS program that meets the requirements of this subpart.

(f) *Single action plan.* IHAs implementing both a section 8 FSS program and an Indian housing FSS program may submit one Action Plan.

§ 950.3012 Program Coordinating Committee (PCC).

(a) *General.* Each participating IHA must establish a PCC whose functions will be to assist the IHA in securing commitments of public and private resources for the operation of the FSS program within the IHA's jurisdiction, including assistance in developing the Action Plan and in implementing the program.

(b) *Membership.* (1) The PCC may consist of representatives of the IHA and of residents of Indian housing.

(2) *Recommended membership.* Membership on the PCC also may include representatives of the unit of general local government served by the IHA, local agencies (if any) responsible for carrying out JOBS training programs, or programs under the JTPA, and other organizations, such as other State, local or tribal welfare and employment agencies, public and private education or training institutions, child care providers, nonprofit service providers, private business, and any other public and private service providers with resources to assist the FSS program.

(c) *Alternative committee.* The IHA may, in consultation with the chief executive officer of the unit of general local government served by the IHA, utilize an existing entity as the PCC if the membership of the existing entity consists or will consist of the

individuals identified in paragraph (b)(1) of this section, and also includes individuals from the same or similar organizations identified in paragraph (b)(2) of this section.

§ 950.3013 FSS family selection procedures.

(a) *Preference in the FSS selection process.* An IHA has the option of giving a selection preference for up to 50 percent of its FSS slots to eligible families, as defined in § 950.3003, who have one or more family members currently enrolled in an FSS related service program or on the waiting list for such a program. The IHA may limit the selection preference given to participants in and applicants for FSS related service programs to one or more eligible FSS related service programs. An IHA that chooses to exercise the selection preference option must include the following information in its Action Plan:

(1) The percentage of FSS slots, not to exceed 50 percent of the total number of FSS slots, for which it will give a selection preference;

(2) The FSS related service programs to which it will give a selection preference to the programs' participants and applicants; and

(3) The method of outreach to, and selection of, families with one or more members participating in the identified programs.

(b) *FSS selection without preference.* For those FSS slots for which the IHA chooses not to exercise the selection preference provided in paragraph (a) of this section, the FSS slots must be filled with eligible families in accordance with an objective selection system, such as a lottery, the length of time living in subsidized housing, or the date the family expressed an interest in participating in the FSS program. The objective system to be used by the IHA must be described in the IHA's Action Plan.

(c) *Motivation as a selection factor.* (1) *General.* An IHA may screen families for interest, and motivation to participate in the FSS program, provided that the factors utilized by the IHA are those which solely measure the family's interest, and motivation to participate in the FSS program.

(2) *Permissible motivational screening factors.* Permitted motivational factors include requiring attendance at FSS orientation sessions or preselection interviews, and assigning certain tasks which indicate the family's willingness to undertake the obligations which may be imposed by the FSS contract of participation (e.g., contacting job training or educational program

referrals). However, any tasks assigned shall be those which may be readily accomplishable by the family, based on the family members' educational level, and disabilities, if any. Reasonable accommodations must be made for individuals with mobility, manual, sensory, speech impairments, mental or developmental disabilities.

(3) *Prohibited motivational screening factors.* Prohibited motivational screening factors include the family's educational level, educational or standardized motivational test results, previous job history or job performance, credit rating, marital status, number of children, or other factors, such as sensory or manual skills, and any factors which may result in discriminatory practices or treatment toward individuals with disabilities or minority or non-minority groups.

§ 950.3014 On-site facilities.

Each IHA may, subject to the approval of HUD, make available and utilize common areas or unoccupied units in Indian housing projects to provide supportive services under an FSS program.

§ 950.3020 Program implementation.

(a) *Program implementation deadline.* (1) *Program start-up.* Full delivery of the supportive services to be provided to the total number of families required to be served under the program need not occur within 12 months, but must occur by the deadline set forth in paragraph (a)(2) of this section.

(2) *Full enrollment and delivery of services.* Except as provided in paragraph (a)(3) of this section, the IHA must have completed enrollment of the total number of families to be served under the FSS program and must have begun delivery of the supportive services within two years from the date of notification of approval of the application for new Indian housing units.

(3) *Extension of program deadlines for good cause.* HUD may extend the deadline set forth in either paragraph (a)(1) or paragraph (a)(2) of this section if the IHA requests an extension, and the HUD Field Office determines that, despite best efforts on the part of the IHA, the development of new Indian housing units will not occur within the deadlines set forth in this paragraph (a), the commitment by public or private resources to deliver supportive services has been withdrawn, the delivery of such services has been delayed, or other local circumstances which the HUD Field Office determines warrants an extension of the deadlines set forth in paragraph (a) of this section.

(b) *Program administration.* An IHA may employ appropriate staff, including a service coordinator or program coordinator to administer its FSS program, and may contract with an appropriate organization to establish and administer the FSS program, including the FSS account, as provided by § 950.3025.

§ 950.3021 Administrative fees.

The performance funding system (PFS), provided under section 9(a) of the Act, shall provide for the inclusion of reasonable and administrative costs incurred by IHAs in carrying out the local FSS programs. These costs are subject to appropriations by the Congress.

§ 950.3022 Contract of participation.

(a) *General.* Each family that is selected to participate in an FSS program must enter into a contract of participation with the IHA that operates the FSS program in which the family will participate. The contract of participation shall be signed by the head of the FSS family.

(b) *Form and content of contract.* (1) *General.* The contract of participation, which incorporates the individual training and services plan, shall be in the form prescribed by HUD, and shall set forth the principal terms and conditions governing participation in the FSS program, including the rights and responsibilities of the FSS family and of the IHA, the services to be provided to, and the activities to be completed by, the head of the FSS family, and each adult member of the family who elects to participate in the program.

(2) *Interim goals.* The individual training and services plan, incorporated in the contract of participation, shall establish specific interim and final goals by which the IHA, and the family, may measure the family's progress toward fulfilling its obligations under the contract of participation, and becoming self-sufficient. For each participating FSS family that is a recipient of welfare assistance, the IHA must establish as an interim goal that the family become independent from welfare assistance and remain independent from welfare assistance for at least one year before expiration of the term of the contract of participation, including any extension thereof.

(3) *Compliance with lease terms.* The contract of participation shall provide that one of the obligations of the FSS family is to comply with the terms and conditions of the Indian housing lease.

(4) *Employment obligation.* (i) *Head of family's obligation.* The head of the FSS

family shall be required under the contract of participation to seek and maintain suitable employment during the term of the contract and any extension thereof. Although other members of the FSS family may seek and maintain employment during the term of the contract, only the head of the FSS family is required to seek and maintain suitable employment.

(ii) *Seek employment.* The obligation to seek employment means that the head of the FSS family has applied for employment, attended job interviews, and has otherwise followed through on employment opportunities.

(iii) *Determination of suitable employment.* A determination of suitable employment shall be made by the IHA based on the skills, education, and job training of the individual that has been designated the head of the FSS family, and based on the available job opportunities within the jurisdiction served by the IHA.

(5) *Consequences of noncompliance with contract.* The contract of participation shall specify that if the FSS family fails to comply with the terms and conditions of the contract of participation, the IHA may:

(i) Withhold the supportive services; or

(ii) Terminate the family's participation in the FSS program.

(c) *Contract term.* The contract of participation shall provide that each FSS family will be required to fulfill those obligations to which the participating family has committed itself under the contract of participation no later than 5 years after the effective date of the contract.

(d) *Contract extension.* The IHA shall, in writing, extend the term of the contract of participation for a period not to exceed two years for any FSS family that requests, in writing, an extension of the contract, provided that the IHA finds that good cause exists for granting the extension. The family's written request for an extension must include a description of the need for the extension. As used in this paragraph (d) of this section, "good cause" means circumstances beyond the control of the FSS family, as determined by the IHA, such as a serious illness or involuntary loss of employment. Extension of the contract of participation will entitle the FSS family to continue to have amounts credited to the family's FSS account in accordance with § 950.3025.

(e) *Unavailability of supportive services.* (1) *Good faith effort to replace unavailable services.* If a social service agency fails to deliver the supportive services pledged under an FSS family member's individual training and

services plan, the IHA shall make a good faith effort to obtain these services from another agency.

(2) *Assessment of necessity of services.* If the IHA is unable to obtain the services from another agency, the IHA shall reassess the family member's needs, and determine whether other available services would achieve the same purpose. If other available services would not achieve the same purpose, the IHA shall determine whether the unavailable services are integral to the FSS family's advancement or progress toward self-sufficiency. If the unavailable services are:

(i) Determined not to be integral to the FSS family's advancement toward self-sufficiency, the IHA shall revise the individual training and services plan to delete these services, and modify the contract of participation to remove any obligation on the part of the FSS family to accept the unavailable services, in accordance with paragraph (f) of this section; or

(ii) Determined to be integral to the FSS family's advancement toward self-sufficiency (which may be the case if the affected family member is the head of the FSS family), the IHA shall declare the contract of participation null and void.

(f) *Modification.* The IHA and the FSS family may mutually agree to modify the contract of participation. The contract of participation may be modified in writing with respect to the individual training and services plan, the contract term in accordance with paragraph (d) of this section, and designation of the head of the family.

(g) *Completion of the contract.* The contract of participation is considered to be completed, and a family's participation in the FSS program is considered to be concluded when one of the following occurs:

(1) The FSS family has fulfilled all of its obligations under the contract of participation on or before the expiration of the contract term, including any extension thereof; or

(2) Thirty (30) percent of the monthly adjusted income of the FSS family equals or exceeds the published existing housing fair market rent for the size of the unit for which the FSS family qualifies based on the IHA's occupancy standards. The contract of participation will be considered completed and the family's participation in the FSS program concluded on this basis even though the contract term, including any extension thereof, has not expired, and the family members who have individual training and services plans, have not completed all the activities set forth in their plans.

(h) *Termination of the contract.* The contract of participation may be terminated before the expiration of the contract term, and any extension thereof, by:

- (1) Mutual consent of the parties;
- (2) The failure of the FSS family to meet its obligations under the contract of participation without good cause;
- (3) The family's withdrawal from the FSS program;
- (4) Such other act as is deemed inconsistent with the purpose of the FSS program; or
- (5) By operation of law.

(i) *Transitional supportive service assistance.* An IHA may continue to offer to a former FSS family who has completed its contract of participation and whose head of the family is employed, appropriate FSS supportive services in becoming self-sufficient (if the family still resides in Indian housing), or in remaining self-sufficient (if the family no longer resides in Indian or other assisted housing).

§ 950.3024 Total tenant payment and increases in family income.

(a) *Calculation of total tenant payment.* Total tenant payment for a family participating in the FSS program is determined in accordance with the regulations set forth in §§ 950.315 through 950.325.

(b) *Increases in FSS family income.* Any increase in the earned income of an FSS family during its participation in an FSS program may not be considered as income or a resource for purposes of eligibility of the FSS family for other benefits, or amount of benefits payable to the FSS family, under any other program administered by HUD, unless the income of the FSS family equals or exceeds 80 percent of the median income of the area (as determined by HUD, with adjustments for smaller and larger families).

§ 950.3025 FSS account.

(a) *Establishment of FSS account.* (1) *General.* The IHA shall deposit the FSS account funds of all families participating in the IHA's FSS program into a single depository account. The IHA must deposit the FSS account funds in one or more of the HUD-approved investments.

(2) *Accounting for FSS account funds.* (i) *Accounting records.* The total of the FSS account funds will be supported in the IHA accounting records by a subsidiary ledger showing the balance applicable to each FSS family. During the term of the contract of participation, the IHA shall credit monthly, to each family's FSS account, the amount of the FSS credit determined in accordance with paragraph (b) of this section.

(ii) *Proration of investment income.* The investment income for funds in the FSS account will be prorated and credited to each family's FSS account based on the balance in each family's FSS account at the end of the period for which the investment income is credited.

(iii) *Reduction of amounts due by FSS family.* If the FSS family has not paid the family contribution towards rent, or other amounts, if any, due under the Indian housing lease, the balance in the family's FSS account shall be reduced by that amount before prorating the interest income. If the FSS family has fraudulently under-reported income, the amount credited to the FSS account will be based on the income amounts originally reported by the FSS family.

(3) *Reporting on FSS account.* Each IHA will be required to make a report, at least once annually, to each FSS family on the status of the family's FSS account. At a minimum, the report will include:

(i) The balance at the beginning of the reporting period;

(ii) The amount of the family's rent payment that was credited to the FSS account, during the reporting period;

(iii) Any deductions made from the account for amounts due the IHA before interest is distributed;

(iv) The amount of interest earned on the account during the year; and

(v) The total in the account at the end of the reporting period.

(b) *FSS credit.* (1) *Computation of amount.* For purposes of determining the FSS credit, "family rent" is the total tenant payment as defined in this part 950. The FSS credit shall be computed as follows:

(i) For FSS families who are very low-income families, the FSS credit shall be the amount which is the lesser of:

(A) Thirty (30) percent of the family's current monthly adjusted income less the family rent, which is obtained by disregarding any increase in earned income (as defined in § 950.3003) from the effective date of the contract of participation; or

(B) The current family rent less the family rent at the time of the effective date of the contract of participation.

(ii) For FSS families who are low-income families but not very low-income families, the FSS credit shall be the amount determined according to paragraph (b)(1)(i) of this section, but which shall not exceed the amount computed for 50 percent of median income.

(2) *Ineligibility for FSS credit.* FSS families who are not low-income families shall not be entitled to any FSS credit.

(3) *Cessation of FSS credit.* The IHA shall not make any additional credits to the FSS family's FSS account when the FSS family has completed the contract of participation, as defined in § 950.3022(g), or when the contract of participation is terminated or otherwise nullified.

(c) *Disbursement of FSS account funds.* (1) *General.* The amount in an FSS account, in excess of any amount owed to the IHA by the FSS family, as provided in paragraph (a)(3)(iii) of this section, shall be paid to the head of the FSS family when the contract of participation has been completed as provided in § 950.3022(g), and if, at the time of contract completion, the head of FSS family submits to the IHA a certification, as defined in § 950.3003, that, to the best of his or her knowledge and belief, no member of the FSS family is a recipient of welfare assistance.

(2) *Disbursement before expiration of contract term.* (i) If the IHA determines that the FSS family has fulfilled its obligations under the contract of participation before the expiration of the contract term, and the head of the FSS family submits a certification that, to the best of his or her knowledge, no member of the FSS family is a recipient of welfare assistance, the amount in the family's FSS account, in excess of any amount owed to the IHA by the FSS family as provided in paragraph (a)(3)(iii) of this section, shall be paid to the head of the FSS family.

(ii) If the IHA determines that the FSS family has fulfilled certain interim goals established in the contract of participation and needs a portion of the FSS account funds for purposes consistent with the contract of

participation, such as completion of higher education (i.e., college, graduate school), or job training, or to meet start-up expenses involved in creation of a small business, the IHA may, at the IHA's sole option, disburse a portion of the funds from the family's FSS account to assist the family meet those expenses.

(3) *Verification of family certification.* Before disbursement of the FSS account funds to the family, the IHA may verify that the FSS family is no longer a recipient of welfare assistance by requesting copies of any documents which may indicate whether the family is receiving any welfare assistance, and contacting welfare agencies.

(d) *Succession to FSS account.* If the head of the FSS family ceases to reside with other family members in the Indian housing unit, the remaining members of the FSS family, after consultation with the IHA, shall have the right to designate another family member to receive the funds in accordance with paragraph (d) (1) or (2) of this section.

(e) *Use of FSS account funds for homeownership.* An FSS family may use its FSS account funds for the purchase of a home, including the purchase of a home under one of HUD's homeownership programs, or other Federal, State, or local homeownership programs, unless such use is prohibited by the statute or regulations governing the particular homeownership program.

(f) *Forfeiture of FSS account funds.* (1) *Conditions for forfeiture.* Amounts in the FSS account shall be forfeited upon the occurrence of the following:

- (i) The contract of participation is terminated, as provided in §§ 950.3022(e) or 950.3022(h); or
- (ii) The contract of participation is completed by the family, as provided in

§ 950.3022(g), but the FSS family is receiving welfare assistance at the time of expiration of the term of the contract of participation, including any extension thereof.

(2) *Treatment of forfeited FSS account funds.* FSS account funds forfeited by the FSS family will be credited to the IHA's operating reserves and counted as other income in the calculation of the PFS operating subsidy eligibility for the next budget year.

§ 950.3030 Reporting.

Each IHA that carries out an FSS program under this subpart shall submit to HUD, in the form prescribed by HUD, a report regarding its FSS program. The report shall include the following information:

- (a) A description of the activities carried out under the program;
- (b) A description of the effectiveness of the program in assisting families to achieve economic independence and self-sufficiency;
- (c) A description of the effectiveness of the program in coordinating resources of communities to assist families to achieve economic independence and self-sufficiency; and
- (d) Any recommendations by the IHA or the appropriate local program coordinating committee for legislative or administrative action that would improve the FSS program and ensure the effectiveness of the program.

Dated: July 18, 1994

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94-17838 Filed 7-29-94; 8:45 am]

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Registered Federal Trade

Monday
August 1, 1994

Part IV

Department of Education

Demonstration Projects for the Integration
of Vocational and Academic Learning
Program; Notice Inviting Applications for
New Awards for FY 1994

DEPARTMENT OF EDUCATION

[CFDA No.: 84.248]

Demonstration Projects for the Integration of Vocational and Academic Learning Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1995

Note to Applicants: This notice is a complete application package. Together with the statute authorizing the program and applicable regulations governing the program, including the Education Department General Administrative Regulations (EDGAR), the notice contains all of the information, application forms, and instructions needed to apply for a grant under this competition.

Purpose of Program: The Demonstration Projects for the Integration of Vocational and Academic Learning Program provides financial assistance to projects that develop, implement, and operate programs using different models of curricula that integrate vocational and academic learning. The Secretary wishes to highlight for potential applicants that this program can help to further the National Education Goals. Specifically, the integration of vocational and academic learning directly supports the National Education Goal that, by the year 2000, every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Eligible Applicants: Institutions of higher education, area vocational educational schools, secondary schools funded by the Bureau of Indian Affairs, State boards of vocational education, public or private nonprofit organizations, local educational agencies, and consortia composed of these entities.

Deadline for Transmittal of Applications: September 16, 1994.

Deadline for Intergovernmental Review: November 15, 1994.

Available Funds: \$6,000,000 to \$7,000,000 for the first 12 months. Funding for the second, third, and fourth years is subject to the availability of funds and to a grantee meeting the requirements in 34 CFR 75.253.

Estimated Range of Awards: \$300,000–\$500,000 (funding for the first 12 months).

Estimated Average Size of Awards: \$365,000 (funding for the first 12 months).

Estimated Number of Awards: 15–19.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months (four 12-month grant cycles).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR 74 (Administration of Grants to Institutions of Higher Education, Hospitals and Nonprofit Organizations).

(2) 34 CFR Part 75 (Direct Grant Programs).

(3) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR Part 82 (New Restrictions on Lobbying).

(8) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(b) The regulations for this program in 34 CFR Parts 400 and 425.

Invitational Priorities

Under 34 CFR 75.105(c)(1), the Secretary is particularly interested in applications that focus primarily on one or more of the following areas. However, an application that meets these invitational priorities does not receive competitive or absolute preference over the applications.

(a) Demonstrating strong ties with the State's school-to-work activities through the integration of academic and vocational skills at work-based learning sites.

(b) Demonstrating strong ties with the business and industry skill standards projects funded by the Departments of Education and Labor through the identification and use of concrete world-of-work examples to teach abstract concepts and principles.

(c) Including both vocational and academic faculty and employers in the design of integrated curricula and courses that are targeted at the secondary and postsecondary levels of instruction.

(d) Involving the education community and employers in providing inservice training for teachers of vocational education students and administrators in the planning, implementation, and operation of integrated curricula or programs.

(e) Disseminating information and materials regarding effective strategies for integrating vocational and academic learning to national audiences.

(f) Evaluating programs that integrate vocational and academic learning through the use of experimental and control group samples.

Selection Criteria

The Secretary uses the following selection criteria to evaluate applications for new grants under this competition. The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parentheses. For this competition, the Secretary assigns the fifteen points, reserved in 34 CFR 425.20(b), as follows:

Program factors (34 CFR 425.21(a)). Five points are added to this criterion for a possible total of 15 points.

Educational significance (34 CFR 425.21(b)). Ten points are added to this criterion for a possible total of 20 points.

(a) **Program factors** (15 points) The Secretary reviews each application to assess the quality of the proposed project, including—

(1) The extent to which the project involves creative or innovative methods for integrating vocational and academic learning; and

(2) The quality of the services that the project will provide to—

(i) Individuals who are members of special populations;

(ii) Vocational students in secondary schools and at postsecondary institutions;

(iii) Individuals enrolled in adult programs; or

(iv) Single parents, displaced homemakers, and single pregnant women.

(b) **Educational significance** (20 points) The Secretary reviews each application to determine the extent to which the applicant—

(1) Bases the proposed project on successful model vocational education programs that include components similar to the components required by this program, as evidenced by empirical data from those programs in such factors as—

(i) Student performance and achievement;

(ii) High school graduation;

(iii) Placement of students in jobs, including military service; and

(iv) Successful transfer of students to a variety of postsecondary education programs;

(2) Proposes project objectives that contribute to the improvement of education; and

(3) Proposes to use unique and innovative techniques that address the

need to integrate vocational and academic learning, and produce benefits that are of national significance.

(c) *Plan of operation* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the project design, especially the establishment of measureable objectives for the project that are based on the project's overall goals;

(2) The extent to which the plan of management is effective and ensures proper and efficient administration of the project over the award period;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The quality of the applicant's plan to use its resources and personnel to achieve each objective; and

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability.

(d) *Evaluation plan* (15 points) The Secretary reviews each application to determine the quality of the project's evaluation plan, including the extent to which the plan—

(1) Carries out the requirements in 34 CFR 425.30;

(2) Is clearly explained and is appropriate to the project;

(3) To the extent possible, is objective and will produce data that are quantifiable;

(4) Includes quality measures to assess the effectiveness of the curricular developed by the project;

(5) Identifies expected outcomes of the participants and how those outcomes will be measured;

(6) Includes activities during the formative stages of the project to help guide and improve the project, as well as a summative evaluation that includes recommendations for replicating project activities and results;

(7) Will provide a comparison between intended and observed results, and lead to the demonstration of a clear link between the observed results and the specific treatment of project participants; and

(8) Will yield results that can be summarized and submitted to the Secretary for review by the

Department's Program Effectiveness Panel, as defined in 34 CFR 400.4(b).

NOTE: The Program Effectiveness Panel (PEP) is a mechanism the Department has developed for validating the effectiveness of educational programs developed by schools, universities, and other agencies. The PEP is composed of experts in the evaluation of educational

programs and in other areas of education, at least two-thirds of whom are non-Federal employees who are appointed by the Secretary. Regulations governing the PEP are codified in 34 CFR Parts 785-789. Specific criteria for PEP review are found in 34 CFR 786.12 or 787.121.

(e) *Demonstration and dissemination*. (10 points) The Secretary reviews each application for information to determine the effectiveness and efficiency of the plan for demonstrating and disseminating information about project activities and results throughout the project period, including—

(1) High quality in the design of the dissemination plan and procedures for evaluating the effectiveness of the dissemination plan;

(2) Identification of the audience to which the project activities will be disseminated and provisions for publicizing the project at the local, State, and national levels by conducting, or delivering presentations at, conferences, workshops, and other professional meetings and by preparing materials for journal articles, newsletters, and brochures;

(3) Provisions for demonstrating the methods and techniques used by the project to others interested in replicating these methods and techniques, such as by inviting them to observe project activities;

(4) A description of the types of materials the applicant plans to make available to help others replicate project activities and the methods for making the materials available; and

(5) Provisions for assisting others to adopt and successfully implement the methods, approaches, and techniques developed by the project.

(f) *Key personnel*. (10 points)

(1) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(i) The qualifications, in relation to project requirements, of the project director;

(ii) The qualifications, in relation to project requirements, of each of the other key personnel to be used in the project;

(iii) The appropriateness of the time that each person referred to in paragraphs (f)(1) (i) and (ii) will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability.

(2) To determine personnel qualifications under paragraphs (f)(1) (i) and (ii), the Secretary considers—

(i) The experience and training of key personnel in project management and in fields related to the objectives of the project; and

(ii) Any other qualifications of key personnel that pertain to the quality of the project.

(g) *Budget and cost effectiveness*. (10 points) The Secretary reviews each application to determine the extent to which the budget—

(1) Is cost effective and adequate to support the project activities;

(2) Contains costs that are reasonable and necessary in relation to the objectives of the project; and

(3) Proposes using non-Federal resources available from appropriate employment, training, and education agencies in the State to provide services and activities and to acquire project equipment and facilities, to ensure that funds awarded under this part are used to provide instructional services.

(h) *Adequacy of resources and commitment*. (5 points)

(1) The Secretary reviews each application to determine the extent to which the applicant plans to devote adequate resources to the project. The Secretary considers the extent to which—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(2) The Secretary reviews each application to determine the commitment to the project, including whether the—

(i) Uses of non-Federal resources are adequate to provide project services and activities, especially resources of community organizations and State and local educational agencies; and

(ii) Applicant has the capacity to continue, expand, and build upon the project when Federal assistance under 34 CFR part 425 ends.

Additional Factors

(a) After evaluating the applications according to the selection criteria, the Secretary determines whether the most highly rated applications—

(1) Are equitably distributed throughout the Nation;

(2) Offer significantly different approaches to integrating vocational and academic curricula; and

(3) Serve—

(i) Individuals who are members of special populations;

(ii) Vocational students in secondary schools;

(iii) Vocational students at postsecondary institutions;

(iv) Individuals enrolled in adult programs; or

(v) Single parents, displaced homemakers, and single pregnant women.

(b) The Secretary may select other applications for funding if doing so would improve the geographical distribution of, diversity of approaches in, or the diversity of populations to be served by projects funded under this program.

Intergovernmental Review of Federal Programs

This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR Part 79.

The objective of the Executive order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. Applicants proposing to perform activities in more than one State should immediately contact the Single Point of Contact for each of those States and follow the procedure established in each State under the Executive order. If you want to know the name and address of any State Single Point of Contact, see the list published in the **Federal Register** on May 3, 1994 (59 FR 22904-22905). In States that have not established a process or chosen a program for review, State, areawide, regional, and local entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, areawide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, E.O. 12372—CFDA# 84.248, U.S. Department of Education, Room 4181, 400 Maryland Avenue SW., Washington, DC 20202-0125.

Proof of mailing will be determined on the same basis as applications (see 34

CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, DC time) on the date indicated in this notice.

PLEASE NOTE THAT THE ABOVE ADDRESS IS NOT THE SAME ADDRESS AS THE ONE TO WHICH THE APPLICANT SUBMITS ITS COMPLETED APPLICATION. *DO NOT SEND APPLICATIONS TO THE ABOVE ADDRESS.*

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and six copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA# 84.248), Washington, DC 20202-4725, or

(2) Hand deliver the original and six copies of the application by 4:30 p.m. (Washington, DC time) on the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA# 84.248), Room #3633, Regional Office Building #3, 7th and D Streets SW., Washington, DC.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes: (1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) The Application Control Center will mail a Grant Application Receipt Acknowledgement to each applicant. If an applicant fails to receive the notification of application receipt within 15 days from the date of mailing the application, the applicant should call the U.S. Department of Education Application Control Center at (202) 708-9494.

(3) The applicant *must* indicate on the envelope and—if not provided by the

Department—in Item 10 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and suffix letter, if any—of the competition under which the application is being submitted.

Application Instructions and Forms

To apply for an award under this program competition, your application must be organized in the following order and include the following five parts:

Application for Federal Assistance (Standard Form 424 (Rev. 4-88)).

Budget Information (ED Form No. 524).

Budget Narrative.

Program Narrative.

Additional Assurances and Certifications:

a. Assurances—Non-Construction Programs (Standard Form 424B).

b. Certification regarding Lobbying; Debarment, Suspension, and Other Responsibility Matters; and Drug-Free Workplace Requirements (ED 80-0013) and Instructions.

c. Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED 80-0014, 9/90) and Instructions.

(Note: ED 80-0014 is intended for the use of grantees and should not be transmitted to the Department.)

d. Disclosure of Lobbying Activities (Standard Form LLL) (if applicable) and Instructions, and Disclosure of Lobbying Activities Continuation Sheet (Standard Form LLL-A).

All forms and instructions are included as Appendix A of this notice. Questions and answers pertaining to this program are included, as Appendix B, to assist potential applicants.

An applicant may submit information on a photostatic copy of the forms in Appendix A. However, each of the pertinent documents must include an original ink signature. All applicants must submit *ONE original signed application*, including ink signatures on all forms and assurances and *SIX copies of the application*. Please mark each application as original or copy. Local or State agencies may choose to submit two copies with the original. No grant may be awarded unless a *complete* application form has been received.

FOR FURTHER INFORMATION CONTACT:

Pariece M. Wilkins, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 4512—MES), Washington, D.C. 20202-7242. Telephone (202) 205-9673. Individuals who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED Board), telephone (202) 260-9950; or on the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins, and Press Releases). **However**, the official application notice for a discretionary

grant competition is the notice published in the **Federal Register**.

Program authority: 20 U.S.C. 2420.

Dated: May 18, 1994.

Augusta S. Kappner,

Assistant Secretary, Office of Vocational and Adult Education.

Appendix A

BILLING CODE 4000-01-M

OMB Approval No. 0348-0043

**APPLICATION FOR
FEDERAL ASSISTANCE**

1. TYPE OF SUBMISSION: Application Preapplication ☐ Construction ☐ Construction ☒ Non-Construction ☐ Non-Construction		2. DATE SUBMITTED	Applicant Identifier																					
3. DATE RECEIVED BY STATE		State Application Identifier																						
4. DATE RECEIVED BY FEDERAL AGENCY		Federal Identifier																						
5. APPLICANT INFORMATION																								
Legal Name:		Organizational Unit:																						
Address (give city, county, state, and zip code):		Name and telephone number of the person to be contacted on matters involving this application (give area code):																						
6. EMPLOYER IDENTIFICATION NUMBER (EIN): 		7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐ A. State H. Independent School Dist. B. County I. State Controlled Institution of Higher Learning C. Municipal J. Private University D. Township K. Indian Tribe E. Interstate L. Individual F. Intermunicipal M. Profit Organization G. Special District N. Other (Specify) _____																						
8. TYPE OF APPLICATION: ☒ New ☐ Continuation ☐ Revision If Revision, enter appropriate letter(s) in box(es): ☐ ☐ A. Increase Award B. Decrease Award C. Increase Duration D. Decrease Duration Other (specify): _____		9. NAME OF FEDERAL AGENCY: U.S. Department of Education																						
10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 8 4 2 4 8 Demonstration Projects for the Integration of Vocational and Academic Learning		11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:																						
12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):																								
13. PROPOSED PROJECT: Start Date Ending Date		14. CONGRESSIONAL DISTRICTS OF: a. Applicant b. Project																						
15. ESTIMATED FUNDING: <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%;">a. Federal</td> <td style="width: 10%;">\$</td> <td style="width: 10%; text-align: right;">.00</td> </tr> <tr> <td>b. Applicant</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> <tr> <td>c. State</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> <tr> <td>d. Local</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> <tr> <td>e. Other</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> <tr> <td>f. Program Income</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> <tr> <td>g. TOTAL</td> <td>\$</td> <td style="text-align: right;">.00</td> </tr> </table>		a. Federal	\$	.00	b. Applicant	\$	.00	c. State	\$	.00	d. Local	\$	.00	e. Other	\$	.00	f. Program Income	\$	.00	g. TOTAL	\$	.00	16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS? a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON _____ DATE _____ b. NO ☐ PROGRAM IS NOT COVERED BY E.O. 12372 ☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW	
a. Federal	\$	.00																						
b. Applicant	\$	.00																						
c. State	\$	.00																						
d. Local	\$	.00																						
e. Other	\$	.00																						
f. Program Income	\$	.00																						
g. TOTAL	\$	.00																						
17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT? ☐ Yes If "Yes," attach an explanation. ☐ No																								
18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION PREAPPLICATION ARE TRUE AND CORRECT. THE DOCUMENT HAS BEEN ONLY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED																								
a. Typed Name of Authorized Representative		b. Title	c. Telephone number																					
d. Signature of Authorized Representative		e. Date Signed																						

Previous Editions Not Usable

Standard Form 424 - REV. 3-881
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

- | Item: | Entry: | Item: | Entry: |
|-------|--|-------|--|
| 1. | Self-explanatory. | 12. | List only the largest political entities affected (e.g., State, counties, cities). |
| 2. | Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable). | 13. | Self-explanatory. |
| 3. | State use only (if applicable). | 14. | List the applicant's Congressional District and any District(s) affected by the program or project. |
| 4. | If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank. | 15. | Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate <u>only</u> the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15. |
| 5. | Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application. | 16. | Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process. |
| 6. | Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service. | 17. | This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes. |
| 7. | Enter the appropriate letter in the space provided. | 18. | To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.) |
| 8. | Check appropriate box and enter appropriate letter(s) in the space(s) provided:
— "New" means a new assistance award.
— "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
— "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation. | | |
| 9. | Name of Federal agency from which assistance is being requested with this application. | | |
| 10. | Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested. | | |
| 11. | Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project. | | |

 U.S. DEPARTMENT OF EDUCATION BUDGET INFORMATION NON-CONSTRUCTION PROGRAMS		OMB Control No. 1875-0102				
		Expiration Date: 9/30/95				
Name of Institution/Organization		Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.				
SECTION A - BUDGET SUMMARY U.S. DEPARTMENT OF EDUCATION FUNDS						
Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	Total (f)
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						

Name of Institution/Organization		SECTION B - BUDGET SUMMARY NON-FEDERAL FUNDS					
Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.		Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	Total (f)
Budget Categories							
1. Personnel							
2. Fringe Benefits							
3. Travel							
4. Equipment							
5. Supplies							
6. Contractual							
7. Construction							
8. Other							
9. Total Direct Costs (lines 1-8)							
10. Indirect Costs							
11. Training Stipends							
12. Total Costs (lines 9-11)							
		SECTION C - OTHER BUDGET INFORMATION (see instructions)					

ED FORM NO. 524

Public reporting burden for this collection of information is estimated to vary from 13 to 22 hours per response, with an average of 17.5 hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202-4651; and the Office of Management and Budget, Paperwork Reduction Project 1875-0102, Washington, D.C. 20503

Instructions for ED Form No. 524

General Instructions

This form is used to apply to individual U.S. Department of Education discretionary grants programs. Unless directed otherwise, provide the same budget information for each year of the multi-year funding request. Pay attention to applicable program specific instructions, if attached.

Section A—Budget Summary U.S. Department of Education Funds

All applicants must complete Section A and provide a breakdown by the applicable budget categories shown in lines 1-11.

Lines 1-11, columns (a)-(e):

For each project year for which funding is requested, show the total amount requested for each applicable budget category.

Lines 1-11, column (f):

Show the multi-year total for each budget category. If funding is requested for only one project year, leave this column blank.

Lines 12, columns (a)-(e):

Show the total budget request for each project year for which funding is requested.

Lines 12, column (f):

Show the total amount requested for all project years. If funding is requested for only one year, leave this space blank.

Section B—Budget Summary, Non-Federal Funds

If you are required to provide or volunteer to provide matching funds or other non-Federal resources to the project, these should be shown for each applicable budget category on lines 1-11 of Section B.

Lines 1-11, columns (a)-(e):

For each project year for which matching funds or other contributions are provided, show the total contribution for each applicable budget category.

Lines 1-11, column (f):

Show the multi-year total for each budget category. If non-Federal contributions are provided for only one year, leave this column blank.

Lines 12, columns (a)-(e):

Show that total matching or other contribution for each project year.

Lines 12, column (f):

Show the total amount to be contributed for all years of the multi-year project. If

non-Federal contributions are provided for only one year, leave this space blank.

Section C—Other Budget Information

Pay attention to applicable program specific instructions, if attached.

1. Provide an itemized budget breakdown, by project year, for each budget category listed in Sections A and B.

2. If applicable to this program, enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period. In addition, enter the estimated amount of the base to which the rate is applied, and the total indirect expense.

3. If applicable to this program, provide the rate and base on which fringe benefits are calculated.

4. Provide other explanations or comments you deem necessary

Instructions for Budget Categories

1. **Personnel:** Show salaries to be paid to project personnel.

2. **Fringe Benefits:** Indicate the rate and amount of fringe benefits.

3. **Travel:** Indicate the amount requested for both inter- and intra-State travel of project staff. Include funds for at least one trip for two people to attend a project director's meeting in Washington, D.C.

4. **Equipment:** Indicate the cost of non-expendable personnel property that has a useful life of more than one year and a cost of \$300 or more per unit (\$5,000 or more if State, Local, or Tribal Government).

5. **Supplies:** Include the cost of consumable supplies and materials to be used during the project.

6. **Contractual:** Show the amount to be used for (1) procurement contracts (except those which belong on other lines such as supplies and equipment); and (2) subcontracts.

7. **Construction:** Not allowable.

8. **Other:** Indicate all direct costs not clearly covered by lines 1 through 6 above, including consultants.

9. **Total, Direct Cost:** Show the total for lines 1 through 7.

10. **Indirect Costs:** Indicate the rate and amount of indirect costs. NOTE: For training grants, the indirect cost rate cannot exceed 8%.

11. **Training/Stipend Cost:** (if allowable)

Instructions for Budget Narrative

Prepare a detailed Budget Narrative for all four years of the project that justifies, and/or clarifies the budget figures shown in the budget summary. The Budget Narrative should explain, justify, and, if needed, clarify your budget summary. For each line item (personnel, fringe benefits, travel, etc.) in your budget explain:

1. How personnel costs are calculated—provide yearly and/or hourly rates; for other than full-time staff, provide hours per day, week, month, and year.

2. The basis used to estimate certain costs (professional personnel, consultants, travel, indirect costs) and any other cost that may appear usual;

3. How the major cost items relate to the proposed project activities (refer to application page);

4. The costs of the project's evaluation component;

5. What matching occurs in each budget category.

Please limit this section to no more than five pages. Be sure that each page of your application is numbered consecutively.

Instructions for Program Narrative

The program narrative will comprise the largest portion of your application. This part is where you spell out the who, what, when, where, why, and how of your proposed project.

Although you will not have a form to fill out for your narrative, there is a format. This format is the *selection criteria*. Because your application will be reviewed and rated by a review panel on the basis of the selection criteria, your narrative should follow the order and format of the criteria.

Before preparing your application, you should carefully read the legislation and regulations of the program, eligibility requirements, information on any priority set by the Secretary, and the selection criteria for this competition.

Your program narrative should be clear, concise, and to the point. Begin the narrative with a one page abstract or summary of your proposed project. Then describe the project in detail, addressing each selection criterion in order.

The Secretary strongly requests you limit the program narrative to no more than 30 double-spaced, typed pages (on one side only), although the Secretary will consider your application if it is longer. Be sure to number consecutively ALL pages in your application.

You may include supporting documentation as appendices. Be sure that this material is concise and pertinent to this program competition.

You are advised that:

(a) The Department considers only information contained in the application in ranking applications for funding consideration. Letters of support sent separately from the formal application package are not considered in the review by the technical review panels. (EGAR Sec. 75.217)

(b) The technical review panel evaluates each application solely on the basis of the established technical review criteria. Letters of support contained in the application will strengthen the application only insofar as they contain commitments which pertain to the established technical review criteria, such as commitment and resources.

Estimated Public Reporting Burden

Under terms of the Paperwork Reduction Act of 1980, as amended, and the regulations implementing that Act, the Department of Education invites comment on the public reporting burden in this collection of information. Public reporting burden for this collection of information is estimated to average 90 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. You may send comments regarding this

burden to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202-4651; and to the Office of Management and Budget,

Paperwork Reduction Project, OMB 1830-0013, Washington, D.C. 20503. (Information collection approved under OMB control

number 1830-0013. Expiration date: 2/28/95.)

BILLING CODE 4000-01-M

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).
12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).
14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.
16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.
17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.
18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE	
APPLICANT ORGANIZATION		DATE SUBMITTED

CERTIFICATIONS REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

Applicants should refer to the regulations cited below to determine the certification to which they are required to attest. Applicants should also review the instructions for certification included in the regulations before completing this form. Signature of this form provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." The certifications shall be treated as a material representation of fact upon which reliance will be placed when the Department of Education determines to award the covered transaction, grant, or cooperative agreement.

1. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over \$100,000, as defined at 34 CFR Part 82, Sections 82.105 and 82.110, the applicant certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;

(c) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110 -

A. The applicant certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default; and

B. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

3. DRUG-FREE WORKPLACE (GRANTEES OTHER THAN INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 -

A. The applicant certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about-

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will-

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, CSA Regional Office Building No. 3),

Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

Check ☐ if there are workplaces on file that are not identified here.

DRUG-FREE WORKPLACE (GRANTEES WHO ARE INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610—

A. As a condition of the grant, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

B. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, I will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant.

As the duly authorized representative of the applicant, I hereby certify that the applicant will comply with the above certifications.

NAME OF APPLICANT

PR/AWARD NUMBER AND/OR PROJECT NAME

PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE

SIGNATURE

DATE

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transactions

This certification is required by the Department of Education regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, for all lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.
2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.
3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.
5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.
6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.
8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification

- (1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- (2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

DISCLOSURE OF LOBBYING ACTIVITIESApproved by OMB
0346-0046Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action: ☐ a. contract ☐ b. grant ☐ c. cooperative agreement ☐ d. loan ☐ e. loan guarantee ☐ f. loan insurance	2. Status of Federal Action: ☐ a. bid/offer/application ☐ b. initial award ☐ c. post-award	3. Report Type: ☐ a. initial filing ☐ b. material change For Material Change Only: year _____ quarter _____ date of last report _____
4. Name and Address of Reporting Entity: ☐ Prime ☐ Subawardee Tier _____, if known: Congressional District, if known: _____	5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime: Congressional District, if known: _____	
6. Federal Department/Agency:	7. Federal Program Name/Description: CFDA Number, if applicable: _____	
8. Federal Action Number, if known:	9. Award Amount, if known: \$ _____	
10. a. Name and Address of Lobbying Entity (if individual, last name, first name, MI): b. Individuals Performing Services (including address if different from No. 10a) (last name, first name, MI): (attach Continuation Sheet(s) SF-LLL-A, if necessary)		
11. Amount of Payment (check all that apply): \$ _____ ☐ actual ☐ planned	13. Type of Payment (check all that apply): ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____	
12. Form of Payment (check all that apply): ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____		
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: (attach Continuation Sheet(s) SF-LLL-A, if necessary)		
15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No		
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be provided to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.	Signature: _____ Print Name: _____ Title: _____ Telephone No.: _____ Date: _____	
Federal Use Only:		Authorized for Local Reproduction Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.
(b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

**DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET**

Approved by OMB
0348-0046

Reporting Entity: _____ Page _____ of _____

Appendix B

Potential applicants frequently direct questions to officials of the Department regarding application notices and programmatic and administrative regulations governing various direct grant programs. To assist potential applicants the Department has assembled the following most commonly asked questions.

Q. Can we get an extension of the deadline?

A. No. A closing date may be changed only under extraordinary circumstances. Any change must be announced in the **Federal Register** and apply to all applications. Waivers for individual applications cannot be granted regardless of the circumstances.

Q. How many copies of the application should I submit and must they be bound?

A. Our new policy calls for an original and six copies to be submitted. The binding of applications is optional.

Q. We just missed the deadline for the XXX competition. May we submit under another competition?

A. Yes, however, the likelihood of success is not good. A properly prepared application must meet the requirements of the competition to which it is submitted.

Q. I'm not sure which competition is most appropriate for my project. What should I do?

A. We are happy to discuss any questions with you and provide clarification on the unique elements of the various competitions.

Q. Will you help us prepare our application?

A. We are happy to provide general program information. Clearly, it would not be appropriate for staff to participate in the actual writing of an application, but we can respond to specific questions about application requirements, evaluation criteria, and the priorities. Applicants should understand that this previous preapplication consultation is not required, nor will it in any way influence the success of an application.

Q. When will I find out if I'm going to be funded?

A. You can expect to receive notification within 3 to 4 months of the application closing date, depending on the number of applications received and

the number of competitions with closing dates at about the same time.

Q. Once my application has been reviewed by the review panel, can you tell me the outcome?

A. No. Every year we are called by a number of applicants who have legitimate reasons for needing to know the outcome of the review prior to official notification. Some applicants need to make job decisions, some need to notify a local school district, etc. Regardless of the reason, because final funding decisions have not been made at that point, we cannot share information about the review with anyone.

Q. Will my application be returned if I am not funded?

A. We no longer return unsuccessful applications. Thus, applicants should retain at least one copy of the application.

Q. Can I obtain copies of reviewers' comments?

A. Upon written request, reviewers' comments will be mailed to unsuccessful applicants.

Q. Is travel allowed under these projects?

A. Travel associated with carrying out the project is allowed. Because we will request the project directors and evaluators of funded projects to attend an annual project directors meeting, you should include annual trips for each to Washington, D.C., in the travel budget. Travel to conferences is sometimes allowed when it is for purposes of dissemination.

Q. If my application receives high scores from the reviewers, does that mean that I will receive funding?

A. Not necessarily. It is often the case that the number of applications scored highly by the reviewers exceeds the dollars available for funding projects under a particular competition. The order of selection, which is based on the scores of all the applications and other relevant factors, determines the applications that can be funded.

Q. What happens during negotiations?

A. During negotiations technical and budget issues may be raised. These are issues that have been identified during the panel and staff reviews that require clarification. Sometimes issues are stated as "conditions." These are issues

that have been identified as so critical that the award cannot be made unless those conditions are met. Questions may also be raised about the proposed budget. Generally, these issues are raised because there is inadequate justification or explanation of a particular budget item, or because the budget item seems unimportant to the successful completion of the project. If you are asked to make changes that you feel could seriously affect the project's success, you may provide reasons for not making the changes or provide alternative suggestions. Similarly, if proposed budget reductions will, in your opinion, seriously affect the project activities, you may explain why and provide additional justification for the proposed expenses. An award cannot be made until all negotiation issues have been resolved.

Q. How do I provide an assurance?

A. Except for SF-424B, "Assurances—Non-Construction Programs," simply state in writing that you are meeting a proscribed requirement.

Q. Where can copies of the **Federal Register**, program regulations, and Federal statutes be obtained?

A. Copies of these materials can usually be found at your local library. If not, they can be obtained from the Government Printing Office by writing to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Telephone: (202) 783-3238. When requesting copies of regulations or statutes, it is helpful to use the specific name, public law number, or part number. The material referenced in this notice should be referred to as follows:

(1) Carl D. Perkins Vocational and Applied Technology Education Act (Perkins Act) (Public Law 101-392, 104 Stat. 753 (1990)).

(2) State Vocational and Applied Technology Education Programs and National Discretionary Programs of Vocational Education Final Regulations, 34 CFR Parts 400 and 425.

(3) Education Department General Administrative Regulations, 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 85, and 86.

Q. What are the Department of Education's Program Effectiveness Panel and National Diffusion Network?

A. The Program Effectiveness Panel (PEP) is the Department of Education's primary mechanism for validating the effectiveness of educational programs developed by schools, universities, and other agencies. The National Diffusion Network (NDN) is a Federally funded dissemination system that helps public and private schools, colleges, and other

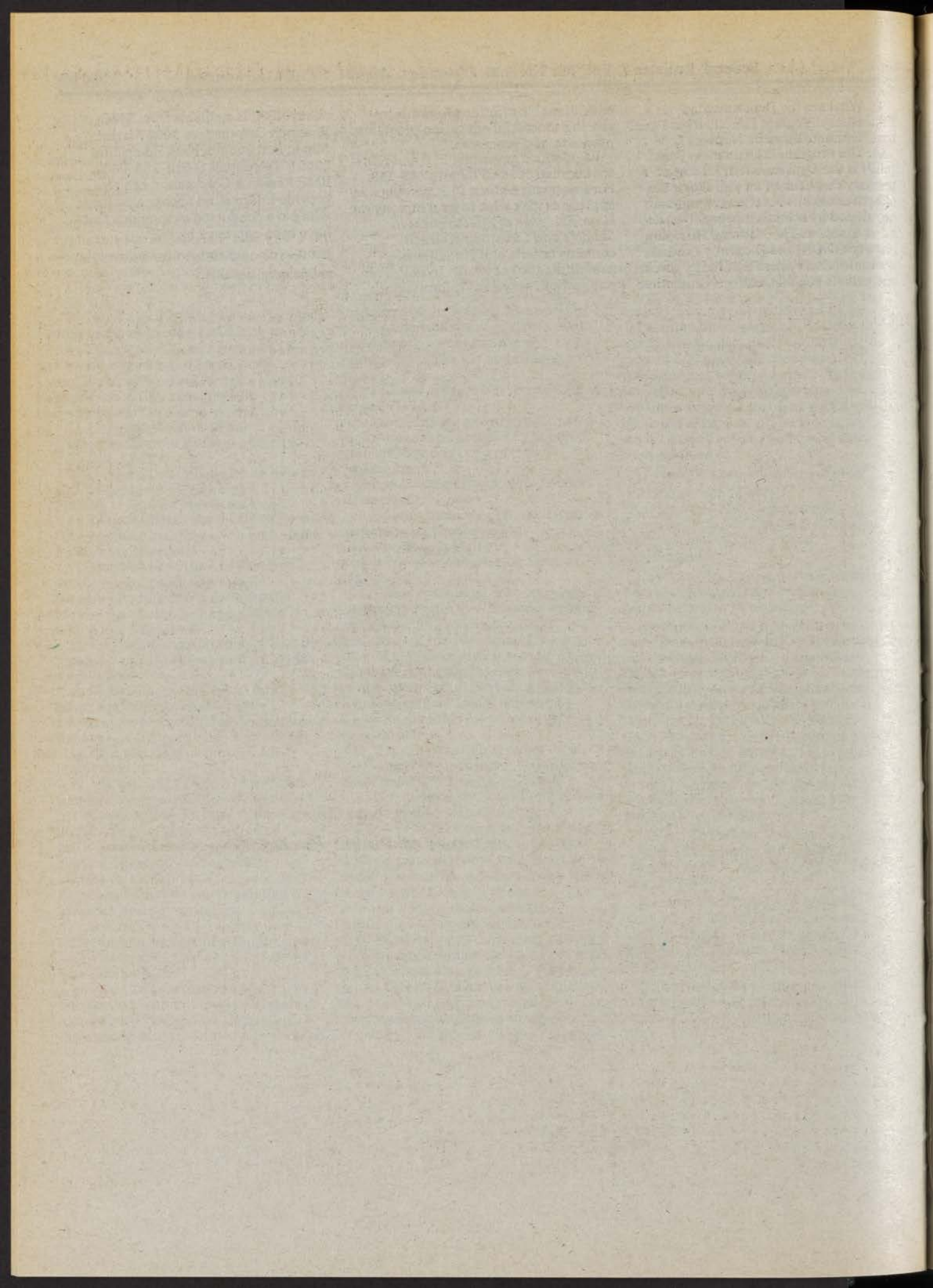
educational institutions improve by sharing successful education programs, products, and processes.

Regulations governing PEP and NDN are codified at 34 CFR Parts 785-789. For information about PEP, prospective applicants may wish to read *Making the Case: Evidence of Effectiveness in Schools and Classrooms*, which contains criteria and guidelines for submitting project results to PEP. This publication, as well as information

about NDN, is available from RMC Research Corporation, 1000 Market Street, Portsmouth, New Hampshire 03801. Telephone 1-800-258-0802. RMC Research Corporation can also provide information about consultants who have conducted evaluations that have been approved by PEP.

[FR Doc. 94-18474 Filed 7-29-94; 8:45 am]

BILLING CODE 4000-01-M



Registered Federal Register

Monday
August 1, 1994

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 1

Use of Public Aircraft; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 1

[Docket No. 27836]

Use of Public Aircraft

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of reconsideration of legal interpretation and invitation for comments.

SUMMARY: The Federal Aviation Administration (FAA) is reconsidering a previously issued legal interpretation of the term "commercial purposes" used in the definition of "public aircraft" that appears in the Federal Aviation Act of 1958, as amended. The reason for this action is to assess whether the interpretation is appropriate, and if it is not, to issue an appropriate interpretation.

DATES: Comments must be received on or before August 31, 1994.

ADDRESSES: Send comments in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, ATTN: Rules Docket (AGC-200), Docket No. 27836, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: John Walsh (AGC-100), (202) 376-6406, 701 Pennsylvania Avenue NW., Suite 925, Washington, DC 20004.

SUPPLEMENTARY INFORMATION: Under the Federal Aviation Act of 1958 (Act), as amended, aircraft fall into one of two major categories, "civil" or "public". Civil aircraft are regulated in every aspect of their construction, maintenance, and operation by the Federal Aviation Administration (FAA). Public aircraft are free from such regulation except with regard to air traffic rules.

The two classes of aircraft are defined in the Act as follows:

"Civil aircraft" means any aircraft other than a public aircraft.

"Public aircraft" means any aircraft used exclusively in the service of any government or of any political subdivision thereof including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. For purposes of this paragraph, "used exclusively in the service of" means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.

Act, Section 101 (17), (36); 49 U.S.C. App. 1301 (17), (36).

In April, 1993, in response to an inquiry from a private sector operator, I issued an interpretation of the term "used for commercial purposes" as that term appears in the definition of "public aircraft" in the Act. Under the interpretation, a government-owned aircraft must be operated under the Federal Aviation Regulations (FAR) applicable to civil aircraft when compensation is received for operating the aircraft on behalf of another state or local government. The interpretation was not new in its analytical approach. It only restated, in the context of a novel question, the FAA's previous interpretations that receipt of any compensation for the operation of one's aircraft constitutes operating the aircraft for "commercial purposes" within the meaning of the statutory definition. When a county sheriff whose operation was the subject of the interpretation became aware of the interpretation, he asked for the opportunity to submit information and argument on the subject. I agreed to reconsider the interpretation, and the sheriff submitted information. In the meantime, others who became aware of the reconsideration process submitted information, also. After consideration of all the submitted information found relevant to the legal question, I confirmed the interpretation in a letter to the sheriff's county attorney, dated December 1993.

That letter has apparently been widely disseminated among private and public sector operators that have an interest in the issue. Since its issuance, the FAA has been advised by local government agencies, by Federal government agencies, and by Congressional sources, that the interpretation is having an unintended effect that they view as detrimental to public safety. These sources advise that certain public agencies' wildfire suppression capabilities are reduced by the unavailability of aircraft that do not comply with the FAR, but which previously had been considered by those public agencies to be available for those uses. The FAA has been advised that this shortage creates an imminent danger to life and property from wildfires.

Some of those same sources have also urged that the FAA reconsider whether reimbursement by one government entity to another for the use of the latter's aircraft to carry out a governmental duty of the reimbursing agency constitutes "commercial purposes" within the Act. In support of their request, they have provided a legal

analysis of the Act that is different from the FAA analysis and that warrants consideration.

In further support of reconsideration, the sources point to what they consider an anomalous result when the law is applied as interpreted. That is, a government entity can use its aircraft in fire suppression activities on its own land without complying with the FAR, but must comply with the FAR when operating on behalf of another jurisdiction, only because the economics of government require reimbursement in the latter case. This circumstance, they urge, indicates that the FAA is making decisions based on economic factors rather than on safety considerations. Finally, the same sources urge expedited treatment of the request for reconsideration in view of the emergency circumstances they perceive to be extant in regard to wildfires in the western forests.

At the same time, other interested parties have urged that there are sufficient private sector resources available to support wildfire suppression activities. Those parties claim to be disadvantaged in their efforts to obtain contracts to perform that work by the fact that public sector aircraft do not have to bear the cost of compliance with the FAR. These parties also urge that their operations are, by virtue of their compliance with the FAR, inherently safer than public aircraft operations.

In view of the public safety situation that has been reported to the FAA; the apparently anomalous situations permitted by the Act as currently interpreted, and the possible merits of a different legal interpretation of the Act that has been provided to the FAA, it is appropriate to reconsider whether reimbursement by one government for the use of another government's aircraft to carry out a governmental duty means the resulting operation is for a commercial purpose. The arguments advanced in support of such review suggest some uncertainty in the statutory definition, as applied to intergovernmental reimbursement, and it is possible that, upon reconsideration, a different interpretation might be reached. The parties to whom the previous interpretation was issued, as well as other parties who have recently written the agency expressing concern, are being advised by mailed copies of this notice that the matter is again under review.

This reconsideration should be completed within 90 days. Interested persons are invited to submit any arguments, views, or information they consider relevant. All material received

30 days after publication date will be considered in coming to a final interpretation. Later received material may be considered as time allows. All material submitted will be available for review and copying by interested

persons in the FAA Rules Docket No. 27836 at the address given above. All material relied upon in the interpretative process to date is available in the docket as of the date of this announcement.

Issued in Washington, DC on July 26, 1994.
John H. Cassady,
Deputy Chief Counsel.
[FR Doc. 94-18546 Filed 7-29-94; 8:45 am]
BILLING CODE 4910-13-M