Dated: September 8, 1993.

Chris Sale,

Acting Commissioner, Immigration and Naturalization Service.

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RESOLUTION TRUST CORPORATION

12 CFR Part 1625

RIN 3205–AA11

Procedures Applicable to RTC Investigations

AGENCY: Resolution Trust Corporation.

ACTION: Final rule.

SUMMARY: The Resolution Trust Corporation (RTC) hereby issues this final rule setting forth procedures applicable to the conduct of RTC investigations which involve the exercise of powers established in section 8(n) of the Federal Deposit Insurance Act, as amended. The RTC is authorized to exercise such investigatory powers in carrying out its statutory obligations to resolve failed savings associations.

In the absence of its own investigative regulations, the RTC has been relying, with some exceptions, on the investigative regulations of the Federal Deposit Insurance Corporation. This final rule provides the RTC with its own set of investigative regulations and will thus provide the public with specific guidance regarding procedures applicable to the RTC's conduct of investigations in which it exercises the investigative powers, including subpoena powers, contained in section 8(n). Promulgation of the RTC's own investigative regulations will eliminate possible confusion or ambiguity regarding procedures applicable to the RTC and will eliminate the need for the RTC to specify exceptions to the FDIC procedures on which the RTC has been partially relying. The RTC regulations will thereby provide the public with greater guidance and certainty regarding applicable RTC investigative procedures and will reduce the possibility of needless litigation over questions involving procedures applicable specifically to the RTC.

EFFECTIVE DATE: This final rule is effective November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Suzanne Rigby, Professional Liability Section, telephone 202/736–0314; Gregg H.S. Golden, Litigation Section, telephone 202/736–3042.

SUPPLEMENTARY INFORMATION:

I. Background

Section 501 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) added a new section 21A to the Federal Home Loan Bank Act (FHLBA) (12 U.S.C. 1441a), establishing powers, authority, and duties for the RTC with respect to failed savings associations. Among other things FIRREA establishes the RTC's duties to minimize the losses resulting from the resolution of failed savings associations, to maximize the recoveries realized from the disposition of such associations or their assets, and to make efficient use of funds obtained by the RTC. In carrying out these duties, the RTC must determine whether there are valid claims against former directors, officers, or others who rendered services to or otherwise dealt with such associations, whether the RTC should seek to avoid transfers of assets or the incurrence of obligations or seek an attachment of assets, whether there are assets that would justify the RTC's pursuing such claims, and whether the pursuit of such claims would otherwise be consistent with the RTC's statutory obligations and sound public policy.

In section 21A(b)(4) of the FHLBA (12 U.S.C. 1441a(b)(4)), Congress granted certain powers to the RTC by reference to the powers of the Federal Deposit Insurance Corporation (FDIC) under sections 11, 12, and 13 of the Federal Deposit Insurance Act, as amended (FDIA) (12 U.S.C. 1821, 1822, and 1823). Section 11(d)(2)(I) of the FDIA provides that the FDIC may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority or duty with respect to an insured depository institution, exercise any power established under section 8(n) of the FDIA (12 U.S.C. 1818(n)). Section 8(n), in turn, enumerates various investigatory powers, including the power to issue subpoenas and subpoenas duces tecum. Section 13(d)(3)(A) of the FDIA (12 U.S.C. 1823(d)(3)(A)) gives the FDIC (and, by virtue of 12 U.S.C. 1441a(b)(4), the RTC) the same powers in its corporate capacity as it has as receiver under section 11, which includes the exercise of the investigatory powers of section 8(n).

On July 27, 1992 (57 FR 33133), the RTC issued a Proposed Rule and Request for Comments regarding procedures applicable to RTC investigations. This proposed rule set forth certain procedures by which the RTC will conduct investigations in which the section 8(n) powers are used. Although the RTC begins its inquiries into the affairs of a failed savings association as soon as the institution is closed and the RTC is appointed receiver or conservator, the use of the section 8(n) investigatory powers commences with the issuance of the Order of Investigation.

The RTC has received comment on its proposed rule and is now issuing a final rule. To date, in the absence of its own regulations governing investigations in which the section 8(n) powers are used, the RTC, as authorized by section 21A(a)(7) of the FHLBA (12 U.S.C. 1441a(a)(7)), has been following the FDIC's investigative rules in 12 CFR part 308, subpart K, as amended, except where such procedures differ from the provisions of section 8(n). This final rule terminates the RTC's reliance on the FDIC's investigative rules.

II. Comment and Discussion

A. Comment Summary

In response to the July 27, 1992, notice of proposed rule, the RTC received one comment. The comment raised issues falling into two broad categories: (1) The scope of the RTC's authority to conduct investigations and issue regulations pertaining thereto; and (2) the adequacy of the regulations with respect to disclosures by the RTC to persons outside the agency. These issues are discussed below, along with various changes the RTC is making to the proposed rule in response to the comment and for clarification.

B. Discussion of Comment and Agency Responses

The commenter asserted that the RTC's statutory powers are limited to "collecting money due the institution" and do not include the power to conduct investigations into potential professional liability claims. The RTC does not construe its powers so narrowly. Section 11(d)(2)(I) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1821(d)(2)(I)), reads as follows:

> The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title, and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

The RTC construes the parenthetical language relied on by the commenter as examples of the RTC's power, not intended to narrow the breadth of authority granted by the other language of the section. The position advocated by the commenter would effectively read out of the provision the language preceding the parenthetical, thus violating the fundamental principle that a statute must be read to give effect to all its terms. Accepting the commenter's interpretation of the statute would also severely inhibit the RTC's ability to perform its statutory duties.

One of the specific responsibilities of the RTC is to investigate potential claims against various persons or entities, including former officers or directors and others who rendered services to or otherwise dealt with a failed savings association (12 U.S.C. 1821(k), (l)). Thus, investigation of such potential claims is clearly within the RTC's statutory authority. The courts have rejected arguments similar to the commenter's and affirmed the RTC's interpretation of its subpoena power. See *RTC* v. *Feffer*, 793 F. Supp. 11, 15 (D.D.C. 1992) (order on reconsideration); *RTC* v. *McCamish, Ingram, Martin & Brown*, Misc. No. 92–152 (D.D.C. May 26, 1992); *RTC* v. *American Casualty Co.*, 787 F. Supp. 5 (D.D.C. 1992); *RTC* v. *Ernst & Young*, 1992 WL 77255, Misc. No. 91–398 (D.D.C. Jan 29, 1992). The courts have recognized that the RTC's interpretation of its statutory subpoena authority is entitled to deference. *American Casualty*, 787 F. Supp. at 7.

The commenter also asserted that the RTC has no power to conduct investigations but merely to engage in limited types of pre-complaint discovery, similar to discovery undertaken by civil litigants. The RTC disagrees. By virtue of 12 U.S.C. 1821(d)(2)(I) and 1818(n), the RTC has the power to conduct administrative investigations using the subpoena power for the purposes specified in section 1821(d)(2)(I). In conducting these investigations, the RTC is not acting as a civil litigant, and the scope of its subpoena power is not limited by civil discovery rules. See, e.g., *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642–43 (1950).

In this same category of objections, the commenter objected to various provisions in the proposed regulations (16 CFR 1625.7(b)(2) and 1625.8) dealing with the conduct of attorneys representing witnesses in RTC investigations. The commenter claimed that these provisions deny the witness assistance of counsel of his choice and are intended solely to give the RTC an illegitimate strategic advantage in obtaining witness testimony. The commenter also asserted that these sections fail to provide objective standards to justify exclusion of counsel.

Section 1625.7(b)(2) specifies actions the RTC may take to address situations in which there is a conflict of interest arising from an attorney's representation of witnesses in an RTC investigation. Section 1625.8 specifies the procedures that the RTC must follow to exclude an attorney from an RTC investigation where the attorney has engaged in obstructionist or similar conduct.

Nothing in the proposed regulations deprives a witness of counsel or is otherwise intended to provide the RTC with any unfair advantage in obtaining witness testimony. The RTC also recognizes that in handling conflicts of interest, the agency must comply with applicable prevailing law. See, e.g., *Professional Reactor Operator Soc'y* v. *NRC*, 939 F.2d 1047 (D.C. Cir. 1991).

The second category of objections raised by the commenter involves RTC disclosures of confidential subpoenaed documents to persons outside the agency, including its outside counsel and consultants. The commenter stated that the procedures in place regarding such disclosures are inadequate because they do not provide sufficient protections against disclosures to persons potentially adverse to, or persons affiliated with commercial competitors of, the document submitter and do not provide for advance notice to the submitter of such disclosure.

RTC regulations provide explicit limitations on an outside contractor's use of confidential information obtained in the course of its work for the RTC. These regulations incorporate Congress's specific directives regarding the RTC's adoption of regulations pertaining to outside contractor's access to and use of confidential information. See 12 U.S.C. 1441a(p)(3); H.R. Conf. Rep. No. 101–272, 101st Cong., 1st Sess. 455 (1989), reprinted in 1989 U.S.C.C.A.N. 432, 455. RTC consultants are prohibited from disclosing nonpublic information (12 CFR 1606.11(b)(1)) and from "[u]sing or allowing the use of any nonpublic information to further any private interest other than as contemplated by the contract." 12 CFR 1606.11(b)(2). Outside consultants are required to take appropriate measures to ensure the confidentiality of nonpublic information and to prevent its inappropriate use. 12 CFR 1606.11(c). Unauthorized use or disclosure of nonpublic information is grounds for rescission of a contract or a permanent bar from contracting with the RTC, as well as constituting a basis for damages. 12 CFR 1606.15. Unauthorized use of confidential government information is also punishable by criminal penalties. See 18 U.S.C. 641, 1905.

The adequacy of the protections afforded confidential documents submitted pursuant to RTC subpoenas has been raised in various RTC subpoena enforcement proceedings. The RTC concludes that the various statutory, regulatory, and procedural confidentiality safeguards constitute adequate protection for subpoena recipients' confidential documents. The courts have upheld the RTC's position. See *RTC* v. *Ernst & Young*, 1992 WL 77255, Misc. No. 91–398 (D.D.C. Jan. 29, 1992); see also *RTC* v. *Feffer*, 798 F. Supp. 11, 18 (D.D.C. 1992) (order on reconsideration). In addition, the RTC concludes that the additional requirements proposed by the commenter here are unnecessary and would unduly burden the RTC's investigations. The courts have consistently refused to impose upon the RTC the very same types of requirements advocated by the commenter. See *RTC* v. *KPMG Peat Marwick*, 779 F. Supp. 2 (D.D.C. 1991); *Ernst & Young*; *RTC* v. *Grant Thornton*, 798 F. Supp. 1 (D.D.C. 1992) (order on reconsideration).

Also with respect to confidentiality, the commenter indicated that the proposed regulation dealing with use of confidential documents in litigation was ambiguous and should be clarified to incorporate internal procedures established in an RTC internal practice guideline. In response to the comment and consistent with its present practice, the RTC has revised its final regulation (now 12 CFR 1625.6(e)) to provide that if the RTC intends to disclose the submitter's confidential information in the course of any judicial or administrative proceeding, the RTC will provide the submitter such notice as is reasonable under the circumstances, including notice of any protective measures to be sought. The RTC has determined not to incorporate the terms of its internal practice guideline in the regulation because its experience with use of confidential materials in litigation has been limited to date and it is therefore unwise at this time to establish legally binding detailed procedures in this area.

The commenter also objected to the inclusion of the provision which states that the RTC may, for "good cause," deny a witness a copy of the transcript of the witness's testimony. The commenter argued that this requirement is unnecessary, unjustifiable, and inconsistent with FDIC investigate rules.

The RTC has decided not to change this provision, 12 CFR 1625.10(c). The provision is based on the RTC's need to maintain the confidentially of its investigations and accordingly allows the RTC to deny the availability of a transcript in those situations in which the RTC is concerned that release of the transcript may impair the RTC's continuing investigative functions. The provision is substantively identical to that used by various other agencies (see, e.g., 12 CFR 512.4 (OTS), 17 CFR 203.6 (SEC), 12 CFR 19.183(d) (OCC), 12 CFR 747.806 (NCUA)), and is consistent with the Administrative Procedure Act (5 U.S.C. 555(c)). Contrary to the commenter's contention, the pertinent FDIC investigative rule, 12 CFR 308.150(a), does not allow a witness an "absolute right" to obtain a copy of the transcript of his or her testimony. That regulation provides that a transcript will be available at the conclusion of the investigation, or at an earlier time in the discretion of the person conducting the investigation. During the pendency of the investigation, therefore, the FDIC's regulation allows the agency greater discretion than does the "good cause" requirement of the RTC's regulation. The RTC notes, in addition, that the RTC's final rule provides that a witness is entitled to inspect any transcript of such person's own testimony. 12 CFR 1625.10(b).

With respect to this same proposed regulation, the commenter urged modification of the regulation to make clear that exhibits to the transcript 'of a witness's testimony would be included as part of the transcript. The RTC has made this change, subject, however, to the qualification that an exhibit that consists of a document designated as confidential may be withheld.

Finally, the commenter objected to the provisions in sections 1625.7(b)(1)(ii) and (iii) of the proposed rule regarding the types of objections a witness's counsel may make during the taking of oral testimony pursuant to an administrative subpoena. The commenter stated that these provisions are unnecessary, inappropriately restrict the witness's right to counsel, and are not used by other agencies. The RTC has decided not to alter the proposed regulations. These regulations are intended to facilitate the prompt and efficient taking of testimony and to avoid delay. Contrary to the commenter's characterization, the taking of oral testimony pursuant to an RTC subpoena is not a "deposition," nor is it governed by the rules of civil discovery or evidence. In addition, the regulations are virtually identical to those used in similar contexts in investigations conducted by other agencies. See, e.g., 16 CFR 2.9(b) (FTC); *Hannah* v. *Larche*, 363 U.S. 420, 445–48 (1960).

In addition to the changes discussed above in response to the comment, the RTC also is making various changes to the regulations to improve their clarity and consistency. These changes are discussed in the section-by-section summary and discussion. Included among these changes is language clarifying that the RTC, when conducting investigations pursuant to its receivership, conservatorship, or liquidation powers, is exempt from the requirements of the Right to Financial Privacy Act (12 U.S.C. 3401–3422).

III. Applicability of Rule to Investigations

This rule shall apply to the conduct of all pending and future RTC investigations (as defined in § 1625.2(c)) and terminates the RTC's reliance on the investigative rules of the FDIC in 12 CFR part 308, subpart K.

IV. Section-by-Section Summary and Discussion

Section 1625.1 ("Purpose and Scope") specifies the RTC's investigative authority pursuant to sections 8(n), 11(d)(2)(I), and 13(d)(3)(A) of the FDIA (12 U.S.C. 1818(n), 1821(d)(2)(I), and 1823(d)(3)(A)), as made applicable to the RTC pursuant to section 21A(b)(4) of the FHLBA (12 U.S.C. 1441a(b)(4)). These provisions govern the RTC's investigative authority in its capacity as conservator or receiver for failed savings associations, as well as in its corporate capacity as acquirer of the assets of such associations.

Section 1625.2 ("Definitions") makes clear that the term "Chief Executive Officer," as used in the regulations, includes the Chief Executive Officer's delegates. The section also makes clear that the designated representative shall be an attorney within the RTC.

Section 1625.3 ("Orders of Investigation") indicates that the Order of Investigation shall indicate generally the principal purposes of the investigation. The words "orders or judgments" were added to this section because an Order of Investigation may authorize use of the RTC's investigative powers to collect information relevant to enforcing an order of restitution issued pursuant to 18 U.S.C. 3663 in favor of the RTC or the savings association which is the subject of the RTC's investigation.

Section 1625.4 ("Powers of Chief Executive Officer") specifies that the Chief Executive Officer may exercise any authority or fulfill any duty of the RTC under these regulations.

Section 1625.5 ("Powers of designated representative") spells out the various powers of the designated representative, including the power to issue subpoenas and subpoenas duces tecum and to apply, upon approval by the RTC, to an appropriate Court for the enforcement of any such subpoena. Section 8(n) of the FDIA (12 U.S.C. 1818(n)) specifies the various courts, including the United States District Court for the District of Columbia, in which an enforcement proceeding may be brought. Section 8(n) does not authorize pre-enforcement review, but is expressly limited to proceedings to enforce subpoenas. There is no subject matter jurisdiction for pre-enforcement review of RTC administrative subpoenas. See, e.g., *Ramirez* v. *RTC*, 798 F. Supp. 415 (S.D. Tex. 1992); *In re Valley Federal Savings Bank*, Misc. No. 92–186 (D.D.C. Apr. 20, 1992); see also *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

This subsection also indicates that the designated representative may rely on persons outside the RTC to assist in the conduct of any investigation, but that such persons shall not have the power to issue subpoenas. Language has been added to paragraph (b) of this section to make clear that RTC outside counsel may receive production of subpoenaed documents or take testimony of subpoenaed witnesses. This clarification reflects existing RTC practice.

Section 1625.6 ("Investigations nonpublic") provides that investigations shall be nonpublic and that the disclosure of documents or other information obtained in an investigation shall be governed by the confidentiality provisions specified therein. The confidentiality provisions generally accord with RTC practice to date in instances in which subpoena recipients have requested confidential treatment for documents produced pursuant to a subpoena.

As discussed in Section II.B herein, paragraph (e) of this section has been revised to provide that in the event the RTC intends to disclose a confidential document in a judicial or administrative proceeding, the RTC will provide the submitter with such notice as is reasonable under the circumstances, including notice of what protective measures, if any, will be sought.

Paragraph (h) of this section of the proposed regulations has been deleted. This paragraph provided that nothing in this section should be read as making the provisions of the Right To Financial Privacy Act applicable to the RTC. This paragraph has been clarified in a new § 1625.9(f).

Section 1625.7 ("Rights of witnesses") provides that any person compelled to appear and testify in an investigation may be represented by counsel and further specifies the requirements and role of counsel in any such investigation. A new paragraph (b)(2)(ii) has been added for clarification and paragraph (b)(2)(ii) of the proposed rule has been redesignated (b)(2)(iii). The new paragraph (b)(2)(ii) specifically addresses the situation where a witness' attorney or law firm previously represented the savings association which is the subject of the RTC's investigation, and where the RTC declines to waive any conflict arising from such representation. The paragraph specifies the steps the designated representative may take in such situations to ensure that the witness is fully apprised of the conflict and possible RTC actions to cure the conflict.

Section 1625.8 ("Obstruction of proceedings") discusses the RTC's authority to exclude an attorney or other person from any investigation where the RTC finds that such person has engaged in contemptuous, contumacious or similarly objectionable conduct.

Section 1625.9 ("Subpoenas") specifies the manner of service of an investigative subpoena and the procedures applicable to motions to quash or limit such subpoenas. The procedures essentially codify existing RTC practice. Section 1625.9(c) has been clarified to indicate that where documents are withheld on grounds of privilege, the documents so withheld must be identified along with the grounds for asserting the privilege. This clarification reflects existing RTC subpoena practice and is consistent with well-settled law and agency practice generally. See, e.g., 16 CFR 2.8A (FTC). Also, as indicated above, a new paragraph (f) has been added to this section clarifying that the RTC construes 12 U.S.C. 3413(n) as expressly exempting the RTC from the Right To Financial Privacy Act (RFPA) (12 U.S.C. 3401–3422) when the RTC issues subpoenas in any of the capacities specified in section 3413(n). Two federal district court decisions have upheld the RTC's construction of 12 U.S.C. 3413(n) as exempting the RTC from the provisions of the RFPA. See *RTC* v. *Banco Santander Puerto Rico*, Misc. No. 92–367 (D.D.C. Sept. 29, 1992); *Ferguson* v. *RTC*, Civ. Action 7–92–0020–K (N.D. Tex. Mar. 20, 1992).

Section 1625.10 ("Transcripts") provides that a person may inspect a transcript, if any, of his or her testimony and may obtain a copy thereof, on written request, subject to the RTC's denying such request for good cause. As discussed in Section II.B above, this paragraph has been modified to include exhibits to the transcript in certain circumstances.

V. Regulatory Flexibility Act Statement

Pursuant to section 605(b) of the Regulatory Flexibility Act, the RTC hereby certifies that this rule is not expected to have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

List of Subjects in 12 CFR Part 1625

Administrative practice and procedure, Investigations, Savings associations.

Authority and Issuance

For the reasons set forth in the preamble, part 1625 of Title 12, chapter XVI, of the Code of Federal Regulations, is added to read as follows:

PART 1625—PROCEDURES APPLICABLE TO RTC INVESTIGATIONS

Sec.

Authority: 12 U.S.C. 1441a(b)(3), (b)(4), (b)(11), 1818(n), 1821(d)(1), 1821(d)(2)(I), 1823(d)(3)(A).

§ 1625.1 Purpose and scope.

This part prescribes procedures applicable to the conduct of investigations by the Resolution Trust Corporation (RTC) under section 21A(b)(4) of the Federal Home Loan Bank Act, as amended (FHLBA) (12 U.S.C. 1441a(b)(4)), and sections 8(n), 11(d)(2)(I), and 13(d)(3)(A) of the Federal Deposit Insurance Act, as amended (FDIA) (12 U.S.C. 1818(n), 1821(d)(2)(I), and 1823(d)(3)(A)).

§ 1625.2 Definitions.

As used in this part:

(a) *Chief Executive Officer* means the Chief Executive Officer of the RTC or delegates.

(b) *Designated representative* means the attorney or attorneys within the RTC Division of Legal Services named in an Order of Investigation to exercise the powers granted by section 8(n) of the FDIA.

(c) *Investigation* means, for purposes of this part only, the exercise of the powers granted by section 8(n) of the FDIA to the RTC, through sections 11(d)(2)(I) and 13(d)(3)(A) of the FDIA and section 21A(b)(4) of the FHLBA, including among other things administering oaths and affirmations, taking and preserving testimony, requiring the production of books, papers, correspondence, memoranda, financial records, and all other records and documents in whatever form, the issuance of subpoenas and subpoenas duces tecum, and all other activities related to the exercise of such powers.

(d) *Order of Investigation* means the document issued by the RTC, authorizing an investigation as defined herein.

(e) *Person* means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, or other entity or organization.

§ 1625.3 Orders of Investigation.

An Order of Investigation shall indicate generally the principal purpose or purposes of the investigation and shall identify the designated representatives, as defined in § 1625.2. Such purposes may include, but are not limited to, determining whether the RTC has valid claims against former directors, officers, or others who rendered services to or otherwise dealt with the institution, whether there are assets that would justify the RTC's pursuit of such claims, orders, or judgments consistent with its statutory obligation to minimize losses, whether the RTC should seek to avoid transfers of assets or the incurrence of obligations or seek an attachment of assets, and whether the pursuit of such claims, orders, or judgments would otherwise be consistent with the RTC's statutory obligations and sound public policy.

§ 1625.4 Powers of Chief Executive Officer.

The Chief Executive Officer may exercise any authority or fulfill any duty of the RTC under this part.

§ 1625.5 Powers of designated representative.

(a) The designated representative shall have all of the powers granted to a designated representative under section 8(n) of the FDIA or any successor provision, including among other things the powers to administer oaths and affirmations, to take and preserve testimony under oath, to issue subpoenas and subpoenas duces tecum, and to apply, upon approval by the RTC, for their enforcement to any of the courts specified in that section for such purposes.

(b) The designated representative may, in his or her discretion, appoint or

revoke the appointment of counsel or other persons from within or without the RTC to assist in the conduct of the investigation, provided, however, that such appointee shall not have the power to issue subpoenas or subpoenas duces tecum. Such assistance from counsel from without the RTC may include receiving production of subpoenaed documents, taking the testimony of subpoenaed witnesses, and utilizing a notary public from outside the RTC to administer oaths and affirmations and preserve the witness's testimony.

§ 1625.6 Investigation nonpublic.

(a) Unless otherwise ordered by the RTC, investigations shall be nonpublic. Information and documents obtained by the RTC in the course of such investigations and for which a claim of confidentiality has been asserted shall be treated in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), where applicable, and paragraphs (b) through (e) of this section.

(b) The submitter may designate as confidential any document provided in response to an RTC subpoena that discloses trade secrets or other confidential commercial or financial information. The submitter shall plainly stamp each page of any such document "CONFIDENTIAL" in a manner that does not interfere with the document's legibility. On each page stamped in accordance with this paragraph, the submitter shall mark with brackets information designated as confidential, unless the entire page is designated as confidential.

(c) Except as provided in paragraph (d) of this section, documents or portions thereof designated as confidential by the submitter shall not be disclosed outside the RTC without ten days' advance notice to the submitter.

(d) Paragraph (c) of this section shall not apply to:

(1) Disclosure to any outside counsel or other contractor of the RTC solely for purposes of performing RTC assignments, and subject to the recipient's obligation pursuant to 12 CFR 1606.11 (b) and (c), or any successor provision, and as otherwise required by law, to maintain information received from the RTC in confidence;

(2) Disclosure in response to any request from the chairman or ranking minority member of a committee or subcommittee of Congress acting pursuant to committee business, or from any agency of the United States, but the submitter will be given ten days' advance notice of such disclosure or such other prior notice as can reasonably be given under the circumstances;

(3) Disclosure of any document, or any portion thereof, marked "CONFIDENTIAL" if, at any time, the RTC determines such document or portion thereof does not contain trade secrets or other confidential commercial or financial information. The RTC shall provide the submitter ten days' notice of such determination and may thereafter disclose such document or portion thereof;

(4) Disclosure of information which:

(i) Is in the public domain;

(ii) Was in the possession of the RTC prior to having been provided by the submitter or which is also given to the RTC by another person lawfully in possession of the information; or

(iii) Is information over which the RTC may exercise proprietary rights under applicable law;

(5) Disclosure in the course of interviewing or examining any witness in an RTC investigation, but the witness will be advised that the document has been designated confidential and will not be allowed to retain any copy of the document;

(6) Disclosure in response to a judicial or administrative subpoena. If documents designated confidential are subpoenaed, the submitter will be given ten days' notice, or as much notice as can reasonably be given under the circumstances, before the documents are provided, except that no notice will be given in the case of grand jury subpoenas; and

(7)(i) Disclosure to:

(A) The Office of Thrift Supervision (OTS) pursuant to the Agreement Regarding Confidential Information dated April 29, 1991, among the FDIC, RTC, and OTS; or

(B) The FDIC pursuant to the Statement Of Policy And Procedures Concerning The Sharing Of Confidential Information Between The FDIC And The RTC, dated January 1, 1992; or

(C) Any other federal or state agency pursuant to a written confidentiality agreement between the RTC and such agency.

(ii) Copies of interagency agreements and policy statements referred to in § 1625.6(d)(7)(i) (A) and (B) are available at the RTC Reading Room, 801 17th Street NW., Washington, DC 20434–0001.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, disclosure by the RTC in the course of any judicial or administrative proceeding shall be governed by the rules and procedures of the court or administrative body conducting the proceeding and the RTC shall give the submitter such notice as is reasonable under the circumstances of its intent to disclose such information in the proceeding and what protective measures are to be sought, if any.

(f) Nothing contained in this section shall be construed to limit the RTC's internal use of information or documents obtained in the course of an investigation, such use to be determined solely by the RTC.

(g) Nothing contained in this section shall be construed as authority to withhold information or documents if disclosure by the RTC is otherwise required by law, or to permit disclosure if disclosure is otherwise prohibited by law.

§ 1625.7 Rights of witnesses.

(a) Any person compelled or requested to furnish testimony, documents, or other information in the course of an investigation shall, on request, by shown the Order of Investigation. Copies of such Order may be furnished to such persons for their retention in the discretion of the RTC.

(b) Any person compelled or requested to appear and testify in the course of an investigation may be represented by an attorney.

(1) Such attorney shall be a member in good standing of the bar of the highest court of any state, Commonwealth, possession, territory, or the District of Columbia, who has not been suspended or disbarred from practice by the bar of any such political entity or before the RTC or any other federal agency or instrumentality, and has not been excluded from the same investigation as provided in this part. The attorney may be required to state on the record that he or she is qualified to represent the witness in accordance with this paragraph.

(i) Such attorney may be present and may advise the witness before, during, and after such testimony, may briefly question the witness on the record at the conclusion of such testimony solely for the purpose of clarifying the witness's testimony, and may make summary notes during such testimony solely for the use and benefit of the witness.

(ii) If the witness refuses to answer a question, then counsel may briefly state on the record whether counsel has advised the witness not to answer the question and the legal grounds for such refusal. Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, the witness or counsel for the witness may

object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(iii) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) (i) and (ii) of this section, interrupt the examination of the witness by making any objections or statements on the record.

(2) (i) In any case where an attorney or law firm represents more than one witness in an investigation, and in any case where there is a perceived or actual conflict of interest arising out of an attorney's or law firm's representation of a witness and another person (including prior representation of the savings association which is the subject of the RTC's investigation), counsel may be required to state, in writing under penalty of perjury or on the record of the witness's testimony, that:

(A) Counsel has personally and fully discussed the possibility of conflicts of interest with each such witness or other person;

(B) Each such witness or other person has advised the counsel that there is no existing or anticipated material conflict between its interests and those of others represented by the same attorney or law firm; and

(C) Each such witness or other person waives any right to assert any known conflicts of interest or to assert any nonmaterial conflicts during the course of the proceeding.

(c) All witnesses shall be sequestered. Unless otherwise permitted in the discretion of the designated representative, all persons shall be excluded from the room in which a witness's testimony is given, except for the witness, the witness's counsel, the persons by whom the testimony is to be taken, and the stenographer recording such testimony.

§ 1625.8 Obstruction of proceedings.

(a) The RTC may exclude an attorney from any investigation in which the RTC finds that the attorney has engaged in dilatory, obstructionist, egregious, contemptuous, or contumacious conduct, or has otherwise violated any provision of this part. After due notice to the attorney, the RTC may take such action as the circumstances warrant based upon a written record evidencing the conduct of the attorney in that investigation or such other or additional written or oral presentation as the RTC may permit or require.

(b) The designated representative shall report to the RTC any instances where any person other than an attorney has engaged in dilatory, obstructionist, egregious, contemptuous, or contumacious conduct, or has otherwise violated any provision of this part, and the RTC may take such action as the circumstances warrant.

§ 1625.9 Subpoenas.

(a) *Service.* Service of a subpoena in connection with an investigation shall be made in the following manner:

(1) *Service upon a natural person.* Service of a subpoena upon a natural person may be made by handing it to such person, by leaving it at such person's office with the person in charge thereof, by leaving it at such person's residence with some person of suitable age and discretion, by sending it by registered or certified mail or by delivery service to the person's last known address, or by any other method reasonably calculated to give actual notice.

(2) *Service upon other persons.* When the person to be served is not a natural person, service of the subpoena may be made by handing the subpoena to a registered agent for service, or to any director, officer, partner or to any agent in charge of any office of such person, by sending it to any such representative by registered or certified mail or by a delivery service to the person's last known address, or by any other method reasonably calculated to give actual notice.

(b) *Testimony of entity.* When the witness is not a natural person, the subpoena may describe with reasonable particularity the matters on which the witness is to testify. In that event, the entity so named shall designate one or more directors, officers, managing agents, or other persons with knowledge of such matters, and may for each such person designate the matters on which the person will testify. The subpoena shall advise the entity of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the entity. This paragraph does not preclude the issuance of subpoenas for individuals by any other procedure authorized in this part.

(c) *Motions to quash.* (1) Any application to limit or quash a subpoena shall be filed within ten days after service of the subpoena or, if the return date is less than ten days after service, prior to the return date. Such application shall be filed with the designated representative, who shall refer the application to the RTC for decision. The application shall be filed only by the person to whom the subpoena is directed or such person's counsel and shall set forth all factual and legal objections to the subpoena, including all assertions of privilege. The RTC may deny the application, quash or limit the subpoena, or condition the granting of the application on such terms as the RTC determines to be just, reasonable, and proper. Where material is withheld on the basis of an assertion of privilege, the subpoena recipient or such person's counsel shall submit a schedule of the documents withheld which states as to each such item the subject matter of the document, the name of each author, writer, sender or initiator of such document, the recipient, addressee, or party for whom such document was intended, the date of the document, and the specific grounds on which the assertion of privilege is based.

(2) Each application shall be accompanied by a signed statement representing that counsel for the applicant has conferred with counsel for the RTC in a good faith effort to resolve by agreement the issues raised by the application and has been unable to reach such agreement. If some of the issues in controversy have been resolved by agreement, the statement shall specify the issues resolved and those remaining unresolved.

(3) The timely filing of an application to quash or limit a subpoena shall stay the time permitted for compliance with the portion challenged. If the application is denied in whole or in part, the ruling will specify a new return date.

(d) *Attendance of witnesses.* Subpoenas issued in connection with an investigation may require the attendance and/or testimony of witnesses from any state, territory, or other place subject to the jurisdiction of the United States, and the production of documentary or other tangible evidence at any designated place where the investigation is being or is to be conducted. Foreign nationals are subject to such subpoenas if service is made upon them within the United States or on an agent located within a place subject to the jurisdiction of the United States.

(e) *Witness fees and mileage.* Witnesses shall be paid the same fees for attendance and mileage that are paid to witnesses in the United States district court. Failure to tender such fees shall not render any subpoena invalid or constitute any grounds for refusal to comply with any such subpoena. Fees need not be tendered at the time a subpoena is served.

(f) *Inapplicability of RFPA.* In issuing subpoenas pursuant to any of the capacities listed in 12 U.S.C. 3413(n), the RTC is exempt from the provisions of 12 U.S.C. 3401 through 3422.

§ 1625.10 Transcripts.

(a) Transcripts of testimony, if any, or other records in an investigation shall be prepared solely by an official reporter or by any other person or means authorized by the designated representatives.

(b) A person who has given testimony in an investigation is entitled to inspect the transcript, if any (including nonconfidential exhibits), of such person's own testimony, upon request.

(c) A person who has submitted documents or given testimony in an investigation may procure a copy of his or her own documents or the transcript, if any (including exhibits), of his or her own testimony upon payment of the cost thereof; provided, that a person seeking a transcript of his or her own testimony must file a written request with the RTC stating the reason for such request, and the RTC may for good cause deny such request; provided further that if any exhibit to such transcript consists of a document that has been designated confidential by the submitter of the document, a copy of the exhibit may be withheld, unless the submitter of the document is the person having given the testimony.

By Order of the Chief Executive Officer of the Resolution Trust Corporation.

Dated at Washington, DC, this 2nd day of November 1993.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Secretary.

[FR Doc. 93-27296 Filed 11-4-83; 8:45 am]

BILLING CODE 6714-01-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1221

NASA Seal and Other Devices, and Congressional Space Medal of Honor

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This rule establishes NASA policy, responsibilities, and procedures for the use of the NASA Seal, NASA Insignia, NASA Logotype, NASA Program Identifiers, and NASA Flags. It also establishes and sets forth the concept and scope of the NASA Unified Visual Communications System.

EFFECTIVE DATE: November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Robert Schulman, NASA Graphics Coordinator, (202) 358-1750.

SUPPLEMENTARY INFORMATION: This revision updates the official(s) authorized to develop and implement the NASA Unified Visual Communications System; updates the officials authorized to designate Graphics Coordinators; updates the official authorized to approve the manufacture and use of the NASA Insignia, NASA Logotype, and the NASA Program Identifiers; changes Program Badges to Program Identifiers; and removes all reference to Astronaut Badges and the Space Shuttle Program Badge and Add-on Bar transferring responsibility to the Associate Administrator for Space Flight. Since this involves administrative and editorial management decisions and procedures, no public comment period is required.

The National Aeronautics and Space Administration has determined that:

1. This rule is not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, since it will not exert a significant economic impact on a substantial number of small entities.

2. This rule is not a major rule as defined in Executive Order 12291.

List of Subjects in 14 CFR Part 1221

Decorations, Medals, Awards, Flags, Seals, Insignia, Unified Visual Communications System.

PART 1221—THE NASA SEAL AND OTHER DEVICES, AND THE CONGRESSIONAL SPACE MEDAL OF HONOR

For reasons set forth in the Preamble, 14 CFR part 1221, subpart 1221.1 is revised to read as follows:

Subpart 1221.1—NASA Seal, NASA Insignia, NASA Logotype, NASA Program Identifiers, NASA Flags, and the Agency's Unified Visual Communications System

Sec.

Authority: 42 U.S.C. 2472(a) and 2473(c)(1).

§ 1221.100 Scope.

This subpart sets forth the policy governing the use of the NASA Seal, the NASA Insignia, NASA Logotype, NASA Program Identifiers, and the NASA Flags. This subpart also establishes and sets forth the concept and scope of the NASA Unified Visual Communications System and prescribes the policy and guidelines for implementation of the system.

§ 1221.101 Policy.

(a) The NASA Seal, the NASA Insignia, NASA Logotype, NASA Program Identifiers, the NASA Flags, and the Agency's Unified Visual Communications System, as prescribed in § 1221.102 through § 1221.108 of this subpart, shall be used exclusively to represent NASA, its programs, projects, functions, activities, or elements. The use of any devices other than those provided by or subsequently approved in accordance with the provisions of this subpart is prohibited.

(b) The use of the devices prescribed in this section shall be governed by the provisions of this subpart. The use of the devices prescribed in this section for any purpose other than as authorized by this subpart is prohibited. Their misuse shall be subject to the penalties authorized by statute, as set forth in § 1221.115 and shall be reported as provided in § 1221.116.

(c) Any proposal for a new NASA Insignia, NASA Logotype, NASA Program Identifier, or for modification to those prescribed in this section shall be processed in accordance with § 1221.114.

§ 1221.102 Establishment of the NASA Seal.

The NASA Seal was established by Executive Order 10849 (24 FR 9559), November 27, 1959, as amended by Executive Order 10942 (24 FR 4419), May 22, 1961. The NASA Seal, established by the President, is the Seal of the Agency and symbolizes the achievements and goals of NASA and the United States in aeronautical and space activities. The NASA Seal shall be used as set forth in § 1221.109.

BILLING CODE 7510-01-M

FIGURE A

The NASA Seal

TECHNICAL DESCRIPTION:

The official seal of the National Aeronautics and Space Administration is a disc of blue sky strewn with white stars. To the left, there is a large yellow sphere bearing a red flight vector symbol. The wings of the vector symbol envelope and cast a brown shadow upon it. A white horizontal orbit also encircles the sphere. To the right, there is a small light blue sphere. A white band which circumscribes the disc is edged in gold and is inscribed with "National Aeronautics and Space Administration U.S.A." in red letters.

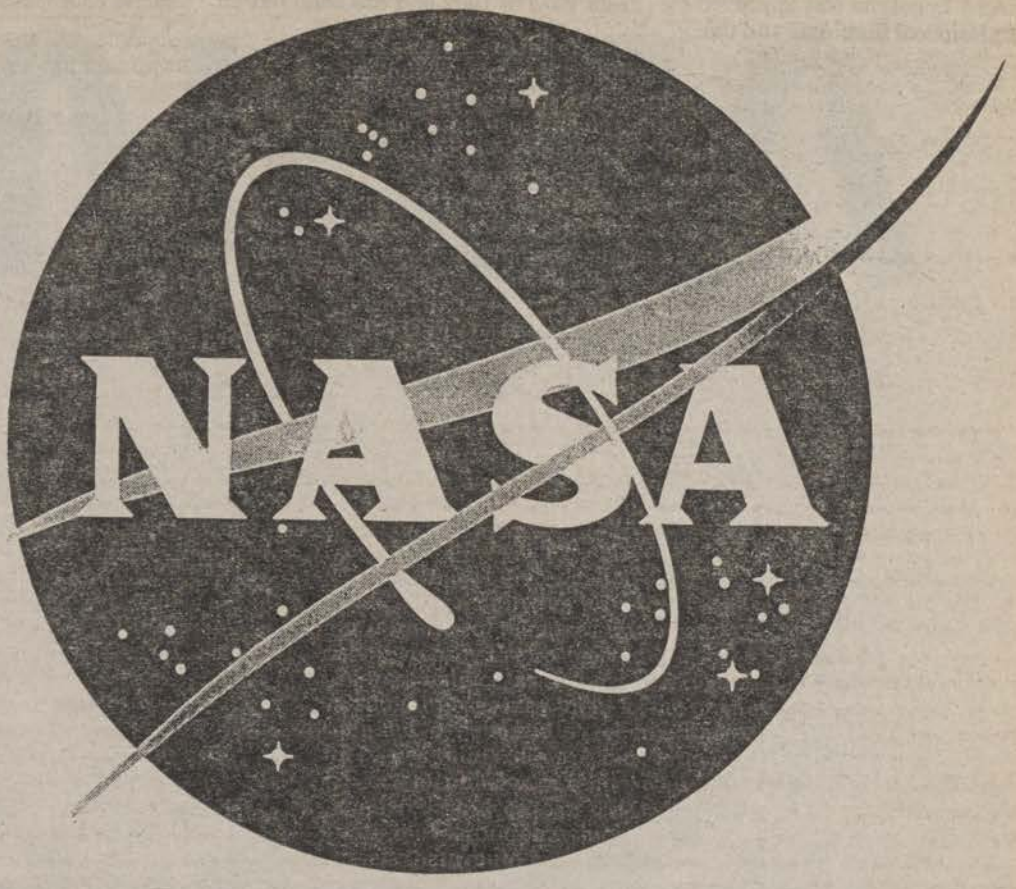
BILLING CODE 7510-01-C

§ 1221.103 Establishment of the NASA insignia.

The NASA Insignia was designed by the Army Institute of Heraldry and approved by the Commission of Fine Arts and the NASA Administrator. It symbolizes NASA's role in aeronautics and space and is established by the NASA Administrator as the signature an design element for visual communications formerly reserved for the NASA Logotype. The NASA Insignia shall be used as set forth in § 1221.110, the NASA Graphics Standards Manual, NASA Insignia Standards Supplement, and any related NASA directive or specification approved by the NASA Administrator and published subsequent hereto.

BILLING CODE 7510-01-M

FIGURE B



The NASA Insignia

TECHNICAL DESCRIPTION:

The official insignia of the National Aeronautics and Space Administration is a dark blue disc with white stars. The white hand-cut letters "NASA" are in the center of the disc and are encircled by a white diagonal orbit. A solid red vector symbol also appears behind and in front of the letters.

REPRODUCTION:

The NASA Insignia may be reproduced black-on-white (single color) as shown above or two-color (blue and red on white). The colors are PMS 286 blue and PMS 185 red.

The Insignia may be reproduced in various sizes but not less than five-eighths (5/8) of an inch. The sizes are determined on the basis of (a) desired effect for visual identification or publicity purposes, (b) relative size of the object on which the Insignia is to appear, and (c) consideration of any design, layout, reproduction, or other problems involved. For more information, refer to the NASA Insignia Standards Supplement.

BILLING CODE 7510-01-C

§ 1221.104 Establishment of the NASA Logotype.

The NASA Logotype was approved by the Commission of Fine Arts and the NASA Administrator. It symbolizes NASA's role in aeronautics and space from 1975 to 1992 and has been retired. The NASA Logotype shall be used as set forth in § 1221.111.

BILLING CODE 7510-01-M

FIGURE C

The NASA Logotype

REPRODUCTION:

Black-on- white or single color: As shown.

One color: The preferred color of the NASA Logotype is NASA red (PMS 179), used only when a second color is available and appropriate. Against a white background, the NASA Logotype may be shown in NASA red, black, or NASA warm gray (PMS 416). For background of other values, the Graphics Standards Manual is to be consulted and followed.

SIZE:

The NASA Logotype may be reproduced or used in various sizes. Size to be determined on the basis of (a) desired effect for visual identification or publicity purposes, (b) relative size of the object on which the NASA Logotype is to appear, and (c) consideration of any design, layout, reproduction or other problems involved. Refer to the Graphics Standards Manual for details.

RESTRICTION:

The NASA Logotype will not be used for any purpose without the written approval of the Administrator.

BILLING CODE 7510-01-C

§ 1221.105 Establishment of NASA Program Identifiers.

A separate and unique identifier may be designed and approved in connection with or in commemoration of a major NASA program. Each approved identifier shall be officially identified by its title such as "Apollo," "Skylab," "Viking," "Space Shuttle," "Space Station," or a major NASA anniversary. NASA Program Identifiers shall be used as set forth in § 1221.112 pursuant to approval as set forth in § 1221.114.

§ 1221.106 Establishment of the NASA Flag.

The NASA Flags for interior and exterior use were created by the NASA Administrator in January 1960. Complete design, size, and color of the NASA interior and exterior flags for manufacturing purposes are detailed in U.S. Army QMG Drawing 5–1–269, revision September 14, 1960. The NASA Flags shall be used as set forth in § 1221.113.

BILLING CODE 7510-01-M

FIGURE D

The NASA Flag

REFERENCE:

U.S. Army QMG Drawing 5-1-269; Revision 14 September 1960, Note: Recommend use of Military Specification (MIL F-2692D dated 14 March 1969, as amended) in conjunction with referenced drawing as a guide-line for procurement purposes.

Technical Description of Interior Flag:

The color of the National Aeronautics and Space Administration flag will be of blue Bemberg taffeta-weave rayon, three (3) feet, four (4) inches on the hoist by five (5) feet, six (6) inches fly. In the center of the color will be the Official Seal of the National Aeronautics and Space Administration thirty inches in diameter. The devices and stars of the Seal will be embroidered by the Bonnaz Process. The color will be trimmed on three edges with a knotted fringe of rayon two and one half (2½) inches wide. Cord and tassels will be yellow rayon strands. See drawing referenced above for complete details..

Technical Description of Exterior Flag:

NASA flags for external use may be procured in two sizes: 5' x 9'-6" (without fringe) or 10' x 19' (without fringe). Detailed design, colors and size specifications are as set forth in the drawing referenced above.

BILLING CODE 7510-01-C

§ 1221.107 Establishment of the NASA Administrator's, Deputy Administrator's, and Associate Deputy Administrator's Flags.

(a) Concurrently with the establishment of the NASA Flag in January 1960, the NASA Administrator also established NASA Flags to represent the NASA Administrator, Deputy Administrator, and Associate Deputy Administrator. Each of these flags conforms to the basic design of the NASA Flag except for the following:

(1) The size of the flag is 3 feet x 4 feet;

(2) The Administrator's Flag has four stars;

(3) The Deputy Administrator's Flag has three stars; and

(4) The Associate Deputy Administrator's Flag has two stars.

(b) Flags representing these senior officials shall be used as set forth in § 1221.113.

§ 1221.108 Establishment of the NASA Unified Visual Communications System.

(a) The NASA Administrator directed the establishment of a NASA Unified Visual Communications System. The system was developed under the Federal Design Improvement Program initiated by the President in May 1972. This system is the Agencywide program by which NASA projects a contemporary, business-like, progressive, and forward-looking image through the use of effective design for improved communications. The system provides a professional and cohesive NASA identity by imparting continuity of graphics design in all layout, reproduction art, stationery, forms, publications, signs, films, video productions, vehicles, aircraft, and spacecraft markings and other items. It creates a unified image which is representative and symbolic of NASA's progressive attitudes and programs.

(b) The Associate Administrator for Public Affairs is responsible for the development and implementation of the NASA Unified Visual Communications System. With the development of the NASA Unified Visual Communications System, the Office of Public Affairs at NASA Headquarters created the NASA Graphics Standards Manual and the NASA Insignia Standards Supplement which are the official guides for the use and application of the NASA Insignia and the NASA Unified Visual Communications System.

(c) The Associate Administrator for Public Affairs, NASA Headquarters, has designated a NASA Graphics Coordinator to implement and monitor Agencywide design improvements in consonance with the NASA Graphics Standards Manual, the NASA Insignia Standards Supplement, and the NASA Unified Visual Communications System. The NASA Graphics Coordinator will develop and issue changes and additions to the manual as required and as new design standards and specifications are developed and approved. Copies of the NASA Graphics Standards Manual and the NASA Insignia Standards Supplement may be obtained directly from the NASA Graphics Coordinator, Office of Public Affairs, NASA Headquarters.

(d) The Director of each Field Installation has designated an official to serve as Graphics Coordinator for his/her Installation. The Director, HQ Operations Division, has designated an official to serve as the Headquarters Graphics Coordinator. Any changes in these assignments shall be reported to the NASA Graphics Coordinator, NASA Headquarters, Code POS.

(e) Graphics Coordinators are responsible for ensuring compliance with the NASA Graphics Standards Manual, the NASA Insignia Standards Supplement, and the NASA Unified Visual Communications System for their respective Installations.

§ 1221.109 Use of the NASA Seal.

(a) The Associate Deputy Administrator shall be responsible for custody of the NASA Impression Seal and custody of NASA replica (plaques) seals. The NASA Seal is restricted to the following:

(1) NASA award certificates and medals.

(2) NASA awards for career service.

(3) Security credentials and employee identification cards.

(4) NASA Administrator's documents; the Seal may be used on documents such as interagency or intergovernmental agreements and special reports to the President and Congress, and on other documents, at the discretion of the NASA Administrator.

(5) Plaques; the design of the NASA Seal may be incorporated in plaques for display in Agency auditoriums, presentation rooms, lobbies, offices of senior officials, and on the fronts of buildings occupied by NASA. A separate NASA seal in the form of a 15-inch, round, bronze-colored plaque on a walnut-colored wood base is also available, but prohibited for use in the above representational manner. It is restricted to use only as a presentation item by the Administrator and the Deputy Administrator.

(6) The NASA Flag and the NASA Administrator's, Deputy Administrator's, and Associate Deputy Administrator's Flags, which incorporate the design of the Seal.

(7) NASA prestige publications which represent the achievements or missions of NASA as a whole.

(8) Publications (or documents) involving participation by another Government agency for which the other Government agency has authorized the use of its seal.

(b) Use of the NASA Seal for any purpose other than as prescribed in this section is prohibited, except that the Associate Deputy Administrator may authorize, on a case-by-case basis, the use of the NASA Seal for purposes other than those prescribed when the Associate Deputy Administrator deems such use to be appropriate.

§ 1221.110 Use of the NASA Insignia.

The NASA Insignia is authorized for use on the following:

(a) *NASA articles.*

(1) NASA letterhead stationary.

(2) Films, videotapes, and sound recordings produced by or for NASA.

(3) Wearing apparel and personal property items used by NASA employees in the performance of their duties.

(4) Required uniforms of contractor employees when performing public affairs, guard or fire protection duties, and similar duties within NASA Installations or at other assigned NASA duty stations, and on any required contractor-owned vehicles used exclusively in the performance of these duties, when authorized by NASA contracting officers.

(5) Spacecraft, aircraft, automobiles, trucks and similar vehicles owned by, leased to, or contractor-furnished to NASA, or produced for NASA by contractors, but excluding NASA-owned vehicles used and operated by contractors for the conduct of contractor business.

(6) Equipment and facilities owned by, leased to, or contractor-furnished to NASA, such as machinery, major tools, ground handling equipment, office and shop furnishings (if appropriate), and similar items of a permanent nature, including those produced for NASA by contractors.

(7) NASA publications, including pamphlets, brochures, manuals, handbooks, house organs, bulletins, general reports, posters, signs, charts, exhibits, and items of similar nature for general use, as specified in the NASA Graphics Standards Manual and the NASA Insignia Standards Supplement.

(8) Briefcases or dispatch cases issued by NASA.

(9) Certificates covering authority to NASA and contractor security personnel to carry firearms.

(10) NASA occupied buildings when the use of the NASA Insignia is more appropriate than use of the NASA Seal.

(b) *Personal articles—NASA employees.*

(1) Business calling cards of NASA employees may carry the imprint of the NASA Insignia.

(2) Limited usage on automobiles. If determined appropriate by the cognizant Installation official, it is acceptable to place a NASA Insignia sticker on personal automobiles where such identification will facilitate entry or control of such vehicles at NASA Installations or parking areas.

(3) Personal items used in connection with NASA employees' recreation association activities.

(4) Items for sale through NASA employees' nonappropriated fund activities subject to paragraph (c) of this section.

(5) NASA employees shall not use the NASA Insignia in any manner that would imply that NASA endorses a commercial product, service, or activity or that material of a nonofficial nature represents NASA's official position.

(c) *Miscellaneous articles.* (1) The manufacture and commercial sale of the NASA Insignia as a separate and distinct device in the form of an emblem, patch, insignia, badge, decal, vinylcal, cloth, metal, or other material which would preclude NASA's control over its use or application is prohibited.

(2) Use of the NASA Uniform Patches, which incorporate the NASA Insignia, is authorized only as prescribed in the NASA Graphics Standards Manual and the NASA Insignia Standards Supplement, for NASA personnel and NASA contractor personnel identification.

(3) No approval for use of the NASA Insignia will be authorized when its use can be construed as an endorsement by NASA of a product or service.

(4) Items bearing the NASA Insignia such as souvenirs, novelties, toys, models, clothing, and similar items (including items for sale through the NASA employees' nonappropriated fund activities) may be manufactured and sold only after the NASA Insignia application has been submitted to, and approved by, the Associate Administrator for Public Affairs, or designee, NASA Headquarters, Washington, DC 20546.

(d) Use of the NASA Insignia for any other purpose than as prescribed in this section is prohibited, except that the Associate Administrator for Public Affairs may authorize on a case-by-case basis the use of the NASA Insignia for other purposes when the Associate Administrator for the Public Affairs deems such use to be appropriate.

§ 1221.111 Use of the NASA Logotype.

The NASA Logotype has been retired and is used only in an authentic historical context, and only with prior written approval of the NASA Administrator.

§ 1221.112 Use of the NASA Program Identifiers.

(a) Official NASA Program Identifiers will be restricted to the uses set forth in this section and to such other uses as the Associate Administrator for Public Affairs may specifically approve.

(b) Specific approval is given for the following uses:

(1) Use of exact reproductions of a badge in the form of a patch made of cloth or other material, or a decal, or a gummed sticker on articles of wearing apparel and personal property items; and

(2) Use of exact renderings of a badge on a coin, medal, plaque, or other commemorative souvenirs.

(c) The manufacture and sale or free distribution of identifiers for the uses approved or that may be approved under paragraphs (a) and (b) of this section are authorized.

(d) Portrayal of an exact reproduction of a badge in conjunction with the advertising of any product or service will be approved on a case-by-case basis by the Associate Administrator for Public Affairs.

(e) The manufacture, sale, or use of any colorable imitation of the design of an official NASA Program Identifier will not be approved.

§ 1221.113 Use of the NASA Flags.

(a) The NASA Flag is authorized for use only as follows:

(1) On or in front of NASA buildings.

(2) At NASA ceremonies.

(3) At conferences (including display in NASA conference rooms).

(4) At governmental or public appearances of NASA executives.

(5) In private offices of senior officials.

(6) As otherwise authorized by the NASA Administrator or designee.

(7) The NASA Flag must be displayed with the United States Flag. When the United States Flag and the NASA Flag are displayed on a speaker's platform in an auditorium, the United States Flag must occupy the position of honor and be placed at the speaker's right as the speaker faces the audience, with the NASA Flag at the speaker's left.

(b) The NASA Administrator's, Deputy Administrator's and Associate Deputy Administrator's Flags shall be displayed with the United States Flag in the respective offices of these officials but may be temporarily removed for use at the discretion of the officials concerned.

§ 1221.114 Approval of new or change proposals.

(a) Except for NASA Astronaut Mission Crew Badges/Patches, any proposal to change or modify the emblematic devices set forth in this subpart or to introduce a new emblematic device other than as prescribed in this subpart requires the written approval of the NASA Administrator with prior approval and recommendation of the Director, Public Services Division.

(b) In addition to the written approval of the NASA Administrator, any proposal for a new or for a modification to the design of the NASA Insignia may also be submitted to the Commission of Fine Arts for its advice as to the merit of the design. If approved in writing by the NASA Administrator and advice received from the Commission of Fine Arts, the NASA Insignia and the use of such NASA Insignia must be prescribed in this subpart and published in the **Federal Register.**

(c) Proposals to establish, change, or modify NASA Astronaut Crew Mission Badges/Patches requires the written approval of the Director, Flight Crew Operations, Johnson Space Center; Center Director, Johnson Space Center; and the Associate Administrator for Space Flight. Decals/patches/badges may be produced as soon as the approval cycle is completed.

§ 1221.115 Violations.

(a) *NASA Seal.* Any person who uses the NASA Seal in a manner other than as authorized in this subpart shall be subject to the provisions of Title 18 U.S.C. 1017.

(b) *NASA Insignia, NASA Logotype, and NASA Program Identifiers.* Any person who uses the NASA Insignia, NASA Logotype, or NASA Program Identifier in a manner other than as authorized in this subpart shall be subject to the provisions of title 18 U.S.C. 701.

§ 1221.116 Compliance and enforcement.

In order to ensure adherence to the authorized uses of the NASA Seal, the NASA Insignia, the NASA Logotype, NASA Program Identifiers, and the NASA Flags as provided, in this subpart, a report of each suspected violation of this subpart (including the use of unauthorized NASA Insignias) or of questionable usages of the NASA Seal, the NASA Insignia, the NASA

Logotype, NASA Program Identifiers, or the NASA Flags, shall be submitted to the Inspector General, NASA Headquarters, in accordance with NASA Management Instruction 9810.1, "The NASA Investigations Program."

Daniel S. Goldin,

Administrator.

[FR Doc. 93-27242 Filed 11-4-93; 8:45 am]

BILLING CODE 7510-01-M

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of suspension of regulations and reinstatement of former regulation.

SUMMARY: Congress has enacted legislation that prohibits the Department of Labor from implementing or administering, during fiscal year 1994, the Davis-Bacon "helper" regulations. President Clinton signed this legislation on October 21, 1993. Accordingly, the Department of Labor is suspending these regulations with respect to all contracts entered into on or after October 21, 1993.

EFFECTIVE DATE: October 21, 1993. This action is applicable only to contracts awarded on or after October 21, 1993.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Acting Assistant Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S-3028, 200 Constitution Avenue NW., Washington, DC 20210. Telephone (202) 219-8353. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On January 27, 1989, the Department of Labor published a final rule governing the use of semi-skilled helpers on federal and federally-assisted construction contracts subject to the Davis-Bacon and Related Acts (54 FR 4234). On December 4, 1990, the Department published a **Federal Register** notice implementing the helper regulations effective February 4, 1991 (55 FR 50148). In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102-27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102-27 (105 Stat. 151) prohibited the Department of Labor from spending any funds to implement or administer the helper regulations as published, or implement or administer any other regulation that would have the same or similar effect. In compliance with this directive from the Congress, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed which did not include a ban restricting the implementation of the helper regulations. The Department issued All Agency Memorandum No. 161 on January 29, 1992, instructing the contracting agencies to include the helper contract clauses in contracts for which bids were solicited or negotiations were concluded after that date. On April 21, 1992, the United States Court of Appeals for the District of Columbia Circuit invalidated one of the provisions of these regulations that prescribed a maximum ratio governing the use of helpers, at 29 CFR 5.5(a)(4)(iv), and upheld the remaining helper provisions as valid (*Building and Construction Trades Department, AFL-CIO* v. *Martin*, 961 F.2d 269 (DC Cir. 1992)). On June 26, 1992, the Department issued a **Federal Register** notice removing 29 CFR 5.5(a)(4)(iv) from the Code of Federal Regulations to comply with the ruling of the court. Further advice regarding implementation of the helper regulations in light of the lifting of the appropriations ban and the court action was given in All Agency Memorandum No. 163, dated June 22, 1992, and All Agency Memorandum No. 165, dated July 24, 1992.

Section 104 of the Department of Labor Appropriations Act, 1994, Public Law 103-112, prohibits the Department of Labor from expending funds to implement or administer the helper regulations at 29 CFR 1.7(d), 5.2(n)(4), and 5.5(l)(ii)(A), published in the **Federal Register** at 54 FR 4234 (January 27, 1989). The conference report accompanying the appropriations measure states that the conferees are taking this action on a one-time basis and that it prohibits the Department from implementing, during fiscal year 1994 only, the Davis-Bacon helper regulations.

Accordingly, the regulations presently codified at 29 CFR 1.7(d), 5.2(n)(4), and 5.5(a)(1)(ii) are suspended until the Department of Labor publishes notice in the **Federal Register** that the prohibition on implementation of the regulations has been lifted. With respect to any contracts awarded on or after October 21, 1993, contracting agencies should advise contractors, except as set forth below, that helpers may not be used on such contracts. Additionally, contracting agencies should ensure that no other action is taken that would give force or effect to the helper regulations.

Prior to promulgation of the helper regulations which are being suspended by this notice, it was the policy of the Department that a helper classification would be approved only if it was a separate and distinct class of worker, that prevailed in the area, to perform duties that could be differentiated from the duties of journeylevel workers in the classification, as well as other classifications on the wage determination. Helpers could not ordinarily use "tools of the trade," nor could they be used as informal apprentices or trainees.

The suspension of these helper regulations reinstates this prior practice of the Department. Therefore the Department will issue helper classifications on wage determinations and approve additional helper classifications only if they meet the requirements set forth above. It has been the Department's practice, where helpers meet these requirements, to set forth a specific definition applicable to the particular classification in the wage determination. Therefore, a helper classification included in a wage determination may be utilized under contracts awarded on or after October 21, 1993, only if the wage determination includes a specific definition applicable to the particular helper classification. That definition shall apply in lieu of the definition in 29 CFR 5.2(n)(4), which is suspended by this notice.

Contracting agencies should also ensure that instead of the contract clause set forth at 29 CFR 5.5(a)(1)(ii), all contracts awarded on or after October 21, 1993, contain the contract clause which was in effect prior to implementing the revised helper regulations, and which is incorporated in the regulations at section 5.5(a)(1)(v) by this notice. This clause will be withdrawn when the appropriations bar is lifted and the suspended clause at 5.5(a)(1)(ii) is reinstated.

In the near future the Department will issue additional guidance regarding the effect of the prohibition in Public Law 103-112, on contracts entered into prior to and after October 21, 1993, by All-Agency Memorandum, to be published in the **Federal Register.**

Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act, the Department finds that there is good cause for dispensing with notice and public comment concerning this suspension of a fiscal rule. Congress has directed that the Department not expend funds to implement or administer this rule for the duration of the fiscal year.

The Department also finds that there is good cause for waiving the 30-day delay in effectiveness under section 553(d)(3) of the Administrative Procedures Act, for the reason set forth above regarding waiver of prior notice and opportunity for public comment. Therefore this rule shall become effective upon October 21, 1993, the date of enactment of Public Law 103–112.

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects

29 CFR Part 1

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Wages.

29 CFR Part 5

Administrative practice and procedures, Government contracts, Labor, Minimum wages, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, the following action is taken:

PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

1. The authority citation for part 1 reads as follows:

Authority: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 29 U.S.C. 259; 40 U.S.C. 276a—276a–7; 40 U.S.C. 276c; and the laws listed in appendix A of this part.

2. Section 1.7(d) is suspended.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

1. The authority citation for part 5 continues to read as follows:

Authority: 40 U.S.C. 276a–276a–7; 40 U.S.C. 276c; 40 U.S.C. 327–332; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

2. Section 5.2 (n)(4) is suspended.

3. Section 5.5(a)(1) is amended by suspending paragraph (a)(1)(ii) and by adding a new paragraph (a)(1)(v) to read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) * * *

(v)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(*1*) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(*2*) The classification is utilized in the area by the construction industry; and

(*3*) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

Signed at Washington, DC, on this 29th day of October 1993.

Maria Echaveste,

Administrator, Wage and Hour Division.

[FR Doc. 93–27371 Filed 11–3–93; 11:03 am]

BILLING CODE 4510–27–M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

RIN–0720–AA16

[DoD 6010.8–R]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Specialized Treatment Services; Nonavailability Statements; Peer Review Organization Program; Supplemental Care

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This final rule: establishes a Specialized Treatment Services Program, under which CHAMPUS beneficiaries in need of certain highly specialized medical care will be referred to specially designated national or regional, military or civilian treatment facilities; revises a number of procedures applicable to the CHAMPUS Peer Review Organization program; and expands reliance on CHAMPUS payment rules and procedures for purposes of the supplemental care program, which applies to services provided by civilian providers to active duty members and certain other patients referred by military providers.

EFFECTIVE DATE: This final rule is effective December 6, 1993.

ADDRESSES: Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045–6900. For copies of the **Federal Register** containing this final rule, contact the Superintendent of

Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783–3238.

FOR FURTHER INFORMATION CONTACT: Steve Lillie, Office of the Assistant Secretary of Defense for Health Affairs, telephone (703) 695–3350.

Questions regarding payment of specific claims should be addressed to the appropriate CHAMPUS contractor.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

A. Specialized Treatment Services Program

Under this rule, a new Specialized Treatment Services (STS) Program will be established, under an authority provided in the National Defense Authorization Act for Fiscal Year 1992. The STS Program will establish new requirements for CHAMPUS beneficiaries to obtain some highly specialized health care services from selected sources, either military or civilian. The specific types of care to be covered and the sites at which particular types of care must be obtained will be announced annually by the Assistant Secretary of Defense for Health Affairs. The program will operate through the designation and management of care within catchment areas, larger than the traditional catchment areas of about 40 miles around military hospitals. Two broad categories of specialized treatment services are established: first, for extraordinarily specialized care, such as some organ transplants, a nationwide catchment area could be established; second, for less extraordinary, but still highly specialized services, a catchment area of up to 200 miles could be established. Beneficiaries who live within the specified catchment area for a particular service will have to obtain the needed service from the designated source, unless they obtain a Nonavailability Statement (NAS). Existing NAS requirements also continue to apply.

B. Additional Nonavailability Statement Requirements

The proposed rule added a number of health care services to the list of those for which CHAMPUS beneficiaries must obtain a Nonavailability Statement (NAS) from their local military hospital before obtaining the service in the private sector. In part, these services were proposed to be added in response to a new statutory authority added by the National Defense Authorization Act for Fiscal Year 1992, which permits a hospital commander to consider the availability of services in a civilian provider network in determining whether to issue an NAS.

The additional NAS requirements in the proposed rule have not been included in this final rule, because of pending Congressional action on the 1994 Defense Authorization Act which may affect authority for additional NAS requirements. We anticipate issuance of a final rule amendment soon after enactment of the 1994 Defense Authorization Act.

C. Quality and Utilization Review Peer Review Organization Program

The rule establishes a set of common rules and procedures for the operation of all quality and utilization review activities under CHAMPUS. Such functions are conducted under contract by Regional Review Centers (formerly called Peer Review Organizations) and by other contractors with broad health care management responsibilities. The recently awarded CHAMPUS National Quality Management contract will incorporate oversight of quality and utilization review activities conducted for CHAMPUS.

D. Supplemental Care Program

The rule increases the reliance on CHAMPUS payment policies and practices for the operation of the Supplemental Care Program, which reimburses civilian providers for care rendered to active duty service members.

E. Miscellaneous Provisions

The rule contains additional provisions related to preauthorization of care, the impermissibility of waiving beneficiary cost sharing requirements, and other matters.

F. Public Comments

The proposed rule was published in the **Federal Register** on May 11, 1993. We received 16 comment letters; 15 were from providers and provider organizations, and one was from a beneficiary organization. Many of the letters were quite similar in comment and wording. Some were very detailed and provided helpful input. We thank those who provided comments. Specific matters raised by commenters and our analysis of the comments are summarized below.

II. Specialized Treatment Services Program

A. Provisions of Proposed Rule (Revisions to § 199.4(a) (10) and (11))

The proposed rule introduced a new program called the Specialized Treatment Services (STS) Program. This program would utilize two new statutory authorities included in the National Defense Authorization Act for Fiscal Year 1992. These are the authority to expand the normal 40-mile catchment area for purposes of NAS requirements (applicable during fiscal years 1992 and 1993) and the authority to consider also the availability of care in a designated civilian provider network when determining whether to issue an NAS. These authorities are provided in 10 U.S.C. 1079(a)(7) and 1105.

Under the STS Program, as proposed, certain military treatment facilities, based on demonstrated capability, would be designated as Specialized Treatment Services Facilities for certain highly specialized types of medical care. For example, for extremely specialized procedures such as specific organ transplants, one or more military STS Facilities may be designated for the United States. If so, beneficiaries requiring an organ transplant would, if medically appropriate, be referred to that facility.

Other types of procedures, less extraordinary than transplants, but still highly specialized, could be referred to a military STS Facility, if the beneficiary lives within a designated, regional catchment area of about 200 miles from the military STS Facility. An example of this type of care could be open heart surgery. The mechanism for requiring CHAMPUS beneficiaries to use the STS Facilities would be similar to the familiar NAS, with the difference being that for designated highly specialized care, the catchment area would not be the normal 40-mile radius area around a military hospital, but a nationwide or 200-mile catchment area.

In cases in which the needed care could not be provided by a designated military STS Provider, but could be provided in a similarly designated civilian STS Facility, the referral would be made to that facility.

As with the routine type of NAS within a 40-mile catchment area, if the needed care could not be provided by either a military or civilian STS Facility, an NAS would be issued, allowing the beneficiary to receive the care from any civilian facility that is an authorized CHAMPUS provider for that service. Similarly, if the care could be provided by a designated military or civilian STS Facility, an NAS would be denied and the beneficiary would not be authorized to use CHAMPUS benefits if the care were obtained elsewhere.

Recognizing that, even in cases in which care would be available from a designated STS Facility, there may be good reasons to waive the requirement because of medical factors or personal

or family hardship, the proposed rule included specific procedures for waivers to be requested and granted.

B. Analysis of Major Public Comments

1. Standards for Designation of STS Facilities

Several commenters expressed concern about standards for Specialized Treatment Service Facilities (STSFs), focusing on several related issues. First, commenters were concerned that military STSFs be required to meet the same standards for designation as civilian STSFs. Second, commenters were concerned that quality standards for STSFs be developed in consultation with civilian authorities, and that they be published for review and comment prior to implementation. Lastly, an organization representing providers of care to children suggested that separate standards be used for pediatric care, that military STSFs not be designated for pediatric care unless they meet those special standards, and that pediatric care be exempted from the explicit preference of military STSFs over civilian STSFs.

Response. The proposed rule specified in § 199.4(a)(10)(x) that military or civilian STSFs would be required to meet quality standards established by the Assistant Secretary of Defense for Health Affairs, to be based on nationally recognized standards to the extent feasible. Also, § 199.4(a)(11)(iv)(B) specified that civilian STSFs would be designated on the basis of standards similar to those applicable to designation of military STSFs. Another relevant provision is § 199.4(a)(11)(v), which specified that military STSFs be given preference over civilian STSFs if both are available.

Our assessment is that the proposed § 199.4(a)(10)(x) provisions are adequate to assure that military and civilian STSFs must meet the same standards. On the issue of consultation with civilian authorities in development of standards, we agree, and have modified this provision to provide for such consultation in the development of standards.

We disagree that publication of proposed standards for comment is necessary or appropriate. The development and refinement of standards will call for an effective dialogue among DoD health professionals, officials of other Federal agencies, representatives of medical specialty societies, and other interested parties, rather than something akin to the rulemaking process.

Regarding special treatment of pediatric care under the STS program, we agree that the special needs of sick children demand careful consideration. The development of separate standards for pediatric care, where clinically appropriate, will be an important component of the STS program, and the rule makes clear that any facility, military or civilian, must meet the standards established in order to qualify for designation as an STSF. Given this, we do not believe that a blanket exemption of pediatric care from military hospital preference is warranted. A military hospital which is designated as an STSF for a particular service will meet quality standards comparable to those applicable to civilian facilities similarly designated.

2. Reimbursement of Travel Costs for the Patient and an Accompanying Family Member

One commenter raised concerns about the financial burden of potential high travel costs associated with the requirement to use regional or national STSFs for health care services, and suggested that travel costs for the patient and at least one accompanying family member be reimbursed by the Government.

Response. We agree. We have added a new paragraph to § 199.4(a)(10) regarding the potential availability of reimbursement of transportation and lodging costs for the patient and one accompanying family member in STSF cases. Authority for such reimbursement is included in the FY 1994 Defense Authorization Act.

3. Exception Criteria for Children

Several commenters suggested that the special needs of children demand (1) development of specific exception criteria which would favor use of pediatric facilities close to home rather than making children travel long distances for specialized care, and (2) development of explicit pediatric emergency care exemption criteria for children for STSFs as well as for standard NAS requirements.

Response. We acknowledge that children may have differing needs from adults and that special consideration is warranted in some circumstances. However, on the issue of separate criteria to favor pediatric facilities closer to a patient's home, it seems more appropriate to rely on the development of appropriate standards for STSF designation, as well as on the exception and waiver processes built into the rule at § 199.4(a)(10) (vi) and (vii). It should be noted that the exception criteria in the rule allow consideration of exceptions on grounds of medical inappropriateness and, in addition, because of family hardship. These provisions are intended to assure that maximum consideration is given to accommodating the needs of patients and their families in the administration of the program.

Involvement of civilian medical specialty societies and other appropriate parties in the standards development process will assure that full consideration of the special needs of children, as well as other patient groups, is incorporated. An essential component of the standards for STSFs, as well as of the administration of the exception and waiver processes, will be assuring that beneficiaries' health is not put at risk because of travel burdens.

In a similar vein, it does not seem appropriate to embrace, as a universal constant, separate pediatric emergency care exemption criteria for STSFs and for standard NAS requirements. Rather, responsible administration of the requirements demand careful, well-informed consideration of the health needs of the individual patient on a case-by-case basis. The blanket exemptions for emergencies provided in § 199.4(a)(10)(vi)(A) of the proposed rule for STSF cases, and in § 199.4(a)(9)(i) of the existing regulation for non-STSF cases would appear to provide adequate regulatory protections. Assuring appropriate recognition of emergency cases is an administrative issue, not requiring special regulatory provisions.

4. Application for Designation as a Civilian STSF

Several commenters, representing providers of highly specialized diagnostic or therapeutic services, expressed interest in being designated as the civilian STSF for a particular type of service, and desired information on the process which DoD would undertake to identify civilian STSFs.

Response. Designation of civilian STSFs will be carried out in accordance with applicable acquisition law. For example, DoD has some ongoing procurements for regional, at-risk contracts for CHAMPUS services, and anticipates additional procurements in the future. Requirements for regional STSFs might be incorporated into such procurements. Another possibility would be separate procurements for STSF activities. When acquisitions are undertaken, notice will be given in accordance with applicable procedures, including publication in the Commerce Business Daily.

5. Waiver Criteria

One commenter raised concerns regarding the criteria for medical

appropriateness waivers of the requirement to use an STSF. The commenter suggested that special consideration be given to the need for follow-up treatment, such as radiation or chemotherapy in cancer cases, which might weigh in favor of local provision of some services. On the issue of hardship waivers, the commenter suggested that obtaining such waivers could be made more difficult by the explicit preference for military STSFs stated in § 199.4(a)(11)(v), and by the fact that waivers are based on the medical judgment of the military hospital commander, who may have a conflict of interest.

Response. On the issue of criteria for issuing waivers, we agree that considerations such as those suggested by the commenter should be among those weighed in the decision whether to grant a waiver. Both the medical waiver and the hardship waiver process are intended to give sufficient latitude for consideration of all significant factors; provisions for written determinations and appeals of determinations are intended to maximize beneficiary protections.

Regarding the preference for military facilities in § 199.4(a)(11)(v), this provision is not intended to influence the decision making process regarding medical appropriateness or hardship waivers; rather, in accordance with long-standing Congressional and DoD policies, it is intended only to maximize use of military facilities, where the Government has a substantial investment, in cases where the appropriateness of a case for STS referral is not in question.

The appropriateness of the military STSF commander being empowered as the decision maker on waivers is not, in our view, problematic. The predominant interests of this senior military officer will be first, assuring that the individual patient has a successful outcome; and second, that the STS program operates successfully on the whole at the facility. That will hinge on the quality of care rendered, the successful outcomes of treatment, and beneficiary satisfaction with the program. Also, as noted above, the waiver process requires that a written decision on the waiver request be provided, and that an additional level of appeal be made available to the beneficiary.

6. Classification of Procedures as "Highly Specialized"

One commenter questioned the inclusion of inpatient diagnoses with a DRG weight of 2.0 or greater as "highly specialized," suggesting that many items in that category would not warrant designation as STS procedures.

Response. We agree that many diagnoses with a DRG weight of 2.0 or more will not warrant inclusion in the STS Program because of their wide availability and other characteristics. It is our intention to designate annually the specific types of cases to which STS provisions will apply. The limitation to diagnoses with a DRG weight of 2.0 or more is only intended to limit consideration to those cases which, by definition, are at least twice as complex as the average case.

C. Provisions of the Final Rule

The final rule is consistent with the proposed rule except that § 199.4(a)(11)(iv)(B) has been modified to provide for consultation with medical specialty groups and other appropriate parties in the development of standards for STSFs.

III. Additional Nonavailability Statement Requirements

A. Provisions of Proposed Rule (Revisions to § 199.4(a)(9) and 199.4(a)(11))

The proposed rule expanded the requirements for NASs for outpatient care to include most outpatient surgery, major diagnostic procedures (endoscopic procedures and invasive radiologic procedures), certain courses of therapy, and routine prenatal care. CHAMPUS beneficiaries would be required to obtain such services in the military treatment facility unless they had other primary insurance coverage.

B. Provisions of the Final Rule

The final rule does not include the provisions of the proposed rule associated with the expanded NAS requirements, because of pending action on the FY 1994 National Defense Authorization Act. The final rule restricts consideration of availability of services from civilian providers to specialized treatment services only. We expect to issue a final rule on the subject of expanded NAS requirements soon after enactment of the FY 1994 National Defense Authorization Act.

IV. Quality and Utilization Review Peer Review Organization Program

A. Provisions of Proposed Rule (Revisions to § 199.15)

The CHAMPUS Quality and Utilization Review Peer Review Organization Program has been in operation for several years, several times expanded to cover additional activities. In connection with ongoing program improvements, quality and utilization review activities under CHAMPUS will again expand. For this reason, the proposed rule included revisions to § 199.15 of the CHAMPUS regulation to address a number of rules and procedures concerning this program.

The principal thrust of these proposals is to establish a common set of rules and procedures for all of the utilization and quality review activities under CHAMPUS. This includes functions conducted by regional contractors whose sole responsibilities are under this program (previously referred to as Peer Review Organizations; now called Regional Review Centers) and similar activities conducted by contractors with broad health care management responsibilities.

Included in the proposed rule was a provision that would apply current procedures for limitations on beneficiary liability in connection with health care services determined to have been not medically necessary to all utilization review activities under CHAMPUS. Similarly, broad authority for requiring preauthorization approvals was proposed. Services actually subject to preauthorization requirements could, subject to the approval of the Assistant Secretary of Defense for Health Affairs, vary in different localities, but medical standards and basic rules and procedures would be the same.

The proposed rule also included a number of detailed provisions concerning payment reductions when providers fail to comply with required utilization review procedures, special procedures in cases in which peer review activities are carried out by contractors with broad responsibilities for the delivery and financing of services, and other matters.

B. Analysis of Major Public Comments

1. Reductions in Payments for Noncompliance With Utilization Review Requirements

One commenter suggested that provisions be included for exceptions to the rule barring provider payments in cases where preauthorization of an admission is not obtained timely, if compelling circumstances explain the delay and necessity for the services can be retroactively determined. Other commenters suggested that reducing DRG-based payments for noncompliance with preauthorization requirements is unfair because the prospective payment approach already provides incentives for efficiency. In addition, some commenters suggested that the calculation of the penalty for noncompliance DRG cases was punitive,

because it is based on the average length of stay for the diagnosis, so that cases with exceptionally long stays could see a dramatic payment reduction for a minor violation.

Response. Proposed § 199.15(b)(4)(iii) would reduce allowable payments by 10 percent for failure to comply with preauthorization requirements. This seems to us a reasonable reduction for noncompliance with well-publicized, easily-met administrative requirements, even under the DRG-based payment system, where other incentives to encourage appropriate care are at play. Many health care programs impose even more onerous utilization review requirements, and may bar payment completely in cases of noncompliance. Finally, § 199.15(b)(4)(iii)(C) provides for a waiver of the payment reduction when the provider could not reasonably have been expected to know of the preauthorization requirement or some other special circumstance justifies the waiver.

Regarding the assertion that the calculation method for DRG cases is potentially excessive because long-stay cases may be unfairly affected, we agree, and will revise the calculation methodology to use the proportion of the number of days which violated preauthorization procedures to the actual length of stay for the case.

C. Provisions of the Final Rule

The final rule is consistent with the proposed rule except that § 199.15(b)(4)(iii)(B) has been revised to incorporate the actual length of stay for DRG case rather than the average length of stay in the calculation of payment reductions.

V. Application of Additional CHAMPUS Payment and Related Rules to Supplemental Care Program

A. Provisions of the Proposed Rule (Revisions to § 199.16)

As part of the Department of Defense's ongoing efforts to improve coordination between military treatment facilities and CHAMPUS, the proposed rule expanded on the current practice of using CHAMPUS payment rules to reimburse providers for care provided to active duty members under the Supplemental Care Program. This is currently the practice with respect to all inpatient hospital care covered by the CHAMPUS DRG-based payment system.

The proposed rule, under the authority of 10 U.S.C. section 1074(c), included a provision to extend this practice to all services provided by CHAMPUS-authorized providers to active duty members (and in other special cases involving military treatment facility patients referred for civilian health care services but not disengaged from the MTF). Waiver authority exists to exceed CHAMPUS allowable payment amounts if necessary to assure availability of services. Because CHAMPUS allowable payment amounts are quite reasonable, we believe that the vast majority of providers will accept these payment amounts for care provided to active duty members of the uniformed services, and waivers will be needed very rarely.

B. Analysis of Major Public Comments

No public comments were received on this portion of the proposed rule.

C. Provisions of the Final Rule

The final rule is consistent with the proposed rule.

VI. Miscellaneous Provisions

A. Provisions of the Proposed Rule

The proposed rule contained a number of other provisions, including some proposed technical and conforming amendments. These include the following:

- Certain preadmission authorization requirements for mental health services would conform with similar requirements for other services. See section 199.4(a)(12)(ii)(B).
- Provisions generally making preauthorization approvals valid for 90 days would be replaced by a general 30 day standard, which may be varied based on the circumstances presented in any given case. See sections 199.4(b)(4)(viii)(D), 199.7(f)(1)(ii), and 199.15(b)(4)(ii).
- A long-standing CHAMPUS interpretation of applicable legal requirements would be expressly stated in the rule concerning the general impermissibility of waiving beneficiary cost sharing requirements. See section 199.4(f)(9).
- A 60-day deadline, similar to a Medicare requirement, would be established for hospitals to request reclassification of a claim into a higher weighted DRG.

B. Analysis of Major Public Comments

No public comments were received on this portion of the proposed rule.

C. Provisions of the Final Rule

The final rule is consistent with the proposed rule.

VII. Regulatory Procedures

Executive Order 12866 requires certain regulatory assessments for any "significant regulatory action," defined as one which would result in an annual effect on the economy of $100 million or more, or have other substantial impacts.

The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities.

This is not a significant regulatory action under the provisions of Executive Order 12866, and it would not have a significant impact on a substantial number of small entities.

This rule imposes no additional information collection requirements on the public under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3511).

Accodingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. 1079, 1086.

2. Section 199.2(b) is amended by adding the definition "Specialized Treatment Service Facility" and placing it in alphabetical order to read as follows:

§ 199.2 Definitions.

* * * * *

(b) * * *

Specialized Treatment Service Facility. A military or civilian medical treatment facility specifically designated pursuant to § 199.4(a)(10) to be a referral facility for certain highly specialized care. For this purpose, a civilian medical treatment facility may be another federal facility (such as a Department of Veterans Affairs hospital).

* * * * *

3. Section 199.4 is amended by revising the heading for paragraph (a)(9), paragraph (a)(10), paragraph (a)(11), paragraph (a)(12)(ii)(B), paragraph (a)(13), and paragraph (b)(4)(viii)(D); by removing the NOTE at the end of paragraph (a)(9)(i)(C) and removing and reserving paragraph (f)(6); and by adding paragraph (a)(9)(i)(D) and paragraph (f)(9) to read as follows:

§ 199.4 Basic program benefits.

(a) *General.* * * *

* * * * *

(9) *Nonavailability Statements within a 40-mile catchment area.* * * *

(i) * * *

(D) In addition to NAS requirements set forth in paragraph (a)(9) of this

section, additional NAS requirements are established pursuant to paragraph (a)(10) of this section in connection with highly specialized care in national or 200-mile catchment areas of military or civilian STS facilities.

(10) *Nonavailability Statements in national or 200-mile catchment areas for highly specialized care available in selected military or civilian Specialized Treatment Service Facilities*—(i) *Specialized Treatment Service Facilities.* STS Facilities may be designated for certain high cost, high technology procedures. The purpose of such designations is to concentrate patient referrals for certain highly specialized procedures which are of relatively low incidence and/or relatively high per-case cost and which require patient concentration to permit resource investment and enhance the effectiveness of quality assurance efforts.

(ii) *Designation.* Selected military treatment facilities and civilian facilities will be designated by the Assistant Secretary of Defense for Health Affairs as STS Facilities for certain procedures. These designations will be based on the highly specialized capabilities of those selected facilities. For each STS designation for which NASs in national or 200-mile catchment areas will be required, there shall be a determination that total government costs associated with providing the service under the Specialized Treatment Services program will in the aggregate be less than the total government cost of that service under the normal operation of CHAMPUS. There shall also be a determination that the Specialized Treatment Services Facility meets a standard of excellence in quality comparable to that prevailing in other highly specialized medical centers in the nation or region that provide the services involved.

(iii) *Organ transplants and similar procedures.* For organ transplants and procedures of similar extraordinary specialization, military or civilian STS Facilities may be designated for a nationwide catchment area, covering all 50 states, the District of Columbia and Puerto Rico (or, alternatively, for any portion of such a nationwide area).

(iv) *Other highly specialized procedures.* For other highly specialized procedures, military or civilian STS Facilities will be designated for catchment areas of up to approximately 200 miles radius. The exact geographical area covered for each STS Facility will be identified by reference to State and local governmental jurisdictions, zip code groups or other method to describe an area within an approximate radius of 200 miles from the facility. In paragraph (a)(10) of this section, this catchment area is referred to as a "200-mile catchment area".

(v) *NAS requirement.* For procedures subject to a nationwide catchment area NAS requirement under paragraph (a)(10)(iii) of this section or a 200-mile catchment area NAS requirement under paragraph (a)(10)(iv) of this section, CHAMPUS cost sharing is not allowed unless the services are obtained from a designated civilian Specialized Treatment Services program (as authorized) or an NAS has been issued. This rule is subject to the exceptions set forth in paragraph (a)(10)(vi) of this section. This NAS requirement is a general requirement of the CHAMPUS program.

(vi) *Exceptions.* Nationwide catchment areas NASs and 200-mile catchment area NASs are not required in any of the following circumstances:

(A) An emergency.

(B) When another insurance plan or program provides the beneficiary primary coverage for the services.

(C) A case-by-case waiver is granted based on a medical judgment made by the commander of the STS Facility (or other person designated for this purpose) that, although the care is available at the facility, it would be medically inappropriate because of a delay in the treatment or other special reason to require that the STS Facility be used; or

(D) A case-by-case waiver is granted by the commander of the STS Facility (or other person designated for this purpose) that, although the care is available at the facility, use of the facility would impose exceptional hardship on the beneficiary or the beneficiary's family.

(vii) *Waiver process.* A process shall be established for beneficiaries to request a case-by-case waiver under paragraphs (a)(10)(vi) (C) and (D) of this section. This process shall include:

(A) An opportunity for the beneficiary (and/or the beneficiary's physician) to submit information the beneficiary believes justifies a waiver.

(B) A written decision from a person designated for the purpose on the request for a waiver, including a statement of the reasons for the decision.

(C) An opportunity for the beneficiary to appeal an unfavorable decision to a designated appeal authority not involved in the initial decision; and

(D) A written decision on the appeal, including a statement of the reasons for the decision.

(viii) *Notice.* The Assistant Secretary of Defense for Health Affairs will annually publish in the **Federal Register** a notice of all military and civilian STS Facilities, including a listing of the several procedures subject to nationwide catchment area NASs and the highly specialized procedures subject to 200-mile catchment area NASs.

(ix) *Specialized procedures.* Highly specialized procedures that may be established as subject to 200-mile catchment area NASs are limited to:

(A) Medical and surgical diagnoses requiring inpatient hospital treatment of an unusually intensive nature, documented by a DRG-based payment system weight (pursuant to § 199.14(a)(1)) for a single DRG or an aggregated DRG weight for a category of DRGs of at least 2.0 (i.e., treatment is at least two times as intensive as the average CHAMPUS inpatient case).

(B) Diagnostic or therapeutic services, including outpatient services, related to such inpatient categories of treatment.

(C) Other procedures which require highly specialized equipment the cost of which exceeds $1,000,000 (e.g., lithotriptor, positron emission tomography equipment) and such equipment is underutilized in the area; and

(D) Other comparable highly specialized procedures as determined by the Assistant Secretary of Defense for Health Affairs.

(x) *Quality standards.* Any facility designated as a military or civilian STS Facility under paragraph (a)(10) of this section shall be required to meet quality standards established by the Assistant Secretary of Defense for Health Affairs. In the development of such standards, the Assistant Secretary shall consult with relevant medical specialty societies and other appropriate parties. To the extent feasible, quality standards shall be based on nationally recognized standards.

(xi) *NAS procedures.* The provisions of paragraphs (a)(9)(ii) through (a)(9)(v) of this section regarding procedures applicable to NASs shall apply to expanded catchment area NASs required by paragraph (a)(10) of this section.

(xii) *Travel and lodging expenses.* In accordance with guidelines issued by the Assistant Secretary of Defense for Health Affairs, certain travel and lodging expenses associated with services under the Specialized Treatment Services program may be fully or partially reimbursed.

(xiii) *Preference for military facility use.* In any case in which services subject to an NAS requirement under paragraph (a)(10) of this section are available in both a military STS Facility

and from a civilian STS Facility, the military Facility must be used unless use of the civilian Facility is specifically authorized.

(11) *Quality and Utilization Review Peer Review Organization program.* All benefits under the CHAMPUS program are subject to review under the CHAMPUS Quality and Utilization Review Peer Review Organization program pursuant to § 199.15. (Utilization and quality review of mental health services are also part of the Peer Review Organization program, and are addressed in paragraph (a)(12) of this section.)

(12) * * *

(ii) *Preadmission authorization.*

* * *

(B) In cases of noncompliance with preauthorization requirements, a payment reduction shall be made in accordance with § 199.15(b)(4)(iii).

* * * * *

(13) *Implementing instructions.* The Director, OCHAMPUS shall issue policies, procedures, instructions, guidelines, standards and/or criteria to implement this section.

(b) *Institutional benefits.* * * *

(4) *Services and supplies provided by RTCs—* * *

(viii) *Preauthorization requirement.*

* * *

(D) Preauthorization requests should be made not fewer than two business days prior to the planned admission. In general, the decision regarding preauthorization shall be made within one business day of receipt of a request for preauthorization, and shall be followed with written confirmation. Preauthorizations are valid for the period of time, appropriate to the type of care involved, stated when the preauthorization is issued. In general, preauthorizations are valid for 30 days.

* * * * *

(f) * * *

(9) *Waiver of deductible amounts or cost-sharing not allowed—*(i) *General rule.* Because deductible amounts and cost sharing are statutorily mandated, except when specifically authorized by law (as determined by the Director, OCHAMPUS), a provider may not waive or forgive beneficiary liability for annual deductible amounts or inpatient or outpatient cost sharing, as set forth in this section.

(ii) *Exception for bad debts.* This general rule is not violated in cases in which a provider has made all reasonable attempts to effect collection, without success, and determines in accordance with generally accepted fiscal management standards that the beneficiary liability in a particular case is an uncollectible bad debt.

(iii) *Remedies for noncompliance.* Potential remedies for noncompliance with this requirement include:

(A) A claim for services regarding which the provider has waived the beneficiary's liability may be disallowed in full, or, alternatively, the amount payable for such a claim may be reduced by the amount of the beneficiary liability waived.

(B) Repeated noncompliance with this requirement is a basis for exclusion of a provider.

* * * * *

4. Section 199.6 is amended by revising paragraph (b)(1)(i) to read as follows:

§ 199.6 Authorized providers.

* * * * *

(b) *Institutional providers*

(1) *General.* * * *

(i) *Preauthorization.* Preauthorization may be required by the Director, OCHAMPUS for any health care service for which payment is sought under CHAMPUS. (See §§ 199.4 and 199.15 for further information on preauthorization requirements.)

* * * * *

5. Section 199.7 is amended by revising paragraph (f)(1)(ii) to read as follows:

§ 199.7 Claims submission, review, and payment.

* * * * *

(f) *Preauthorization.* * * *

(1) *Preauthorization must be granted before benefits can be extended.* * * *

(ii) *Time limit on preauthorization.* Approved preauthorizations are valid for specific periods of time, appropriate for the circumstances presented and specified at the time of the preauthorization is approved. In general, preauthorization are valid for 30 days. If the preauthorized service or supplies are not obtained or commenced within the specified time limit, a new preauthorization is required before benefits may be extended.

* * * * *

6. Section 199.14 is amended by revising paragraph (a)(1)(i)(C)(*1*) to read as follows:

§ 199.14 Provider reimbursement methods.

(a) Hospitals. * * *

(1) *CHAMPUS Diagnosis Related Group (DRG)-based payment system.*

* * *

(i) *General.* * * *

(C) *Basis of payment.*

(*1*) *Hospital billing.* Under the CHAMPUS DRG-based payment system, hospitals are required to submit claims (including itemized charges) in accordance with § 199.7(b). The CHAMPUS fiscal intermediary will assign the appropriate DRG to the claim based on the information contained in the claim. Any request from a hospital for reclassification of a claim to a higher weighted DRG must be submitted, within 60 days from the date of the initial payment, in a manner prescribed by the Director, OCHAMPUS.

* * * * *

7. Section 199.15 is amended by revising the section heading, paragraphs (a), (b), (f) and (i)(4) and by removing paragraph (c)(5) to read as follows:

§ 199.15 Quality and utilization review peer review organization program.

(a) *General.*

(1) *Purpose.* The purpose of this section is to establish rules and procedures for the CHAMPUS Quality and Utilization Review Peer Review Organization program.

(2) *Applicability of program.* All claims submitted for health services under CHAMPUS are subject to review for quality of care and appropriate utilization. The Director, OCHAMPUS shall establish generally accepted standards, norms and criteria as are necessary for this program of utilization and quality review. These standards, norms and criteria shall include, but not be limited to, need for inpatient admission or inpatient or outpatient service, length of inpatient stay, intensity of care, appropriateness of treatment, and level of institutional care required. The Director, OCHAMPUS may issue implementing instructions, procedures and guidelines for retrospective, concurrent and prospective review.

(3) *Contractor implementation.* The CHAMPUS Quality and Utilization Review Peer Review Organization program may be implemented through contracts administered by the Director, OCHAMPUS. These contractors may include contractors that have exclusive functions in the area of utilization and quality review, fiscal intermediary contractors (which perform these functions along with a broad range of administrative services), and managed care contractors (which perform a range of functions concerning management of the delivery and financing of health care services under CHAMPUS). Regardless of the contractors involved, utilization and quality review activities follow the same standards, rules and procedures set forth in this section, unless otherwise specifically provided in this section or elsewhere in this part.

(4) *Medical issues affected.* The CHAMPUS Quality and Utilization Review Peer Review Organization

program is distinguishable in purpose and impact from other activities relating to the administration and management of CHAMPUS in that the Peer Review Organization program is concerned primarily with medical judgments regarding the quality and appropriateness of health care services. Issues regarding such matters as benefit limitations are similar, but, if not determined on the basis of medical judgments, are governed by CHAMPUS rules and procedures other than those provided in this section. (See, for example, § 199.7 regarding claims submission, review and payment.) Based on this purpose, a major attribute of the Peer Review Organization program is that medical judgments are made by (directly or pursuant to guidelines and subject to direct review) reviewers who are peers of the health care providers providing the services under review.

(5) *Provider responsibilities.* Because of the dominance of medical judgments in the quality and utilization review program, principal responsibility for complying with program rules and procedures rests with health care providers. For this reason, there are limitations, set forth in this section and in § 199.4(h), on the extent to which beneficiaries may be held financially liable for health care services not provided in conformity with rules and procedures of the quality and utilization review program concerning medical necessity of care.

(6) *Medicare rules used as model.* The CHAMPUS Quality and Utilization Review Peer Review Organization program, based on specific statutory authority, follows many of the quality and utilization review requirements and procedures in effect for the Medicare Peer Review Organization program, subject to adaptations appropriate for the CHAMPUS program.

(b) *Objectives and general requirements of review system*—(1) *In general.* Broadly, the program of quality and utilization review has as its objective to review the quality, completeness and adequacy of care provided, as well as its necessity, appropriateness and reasonableness.

(2) *Payment exclusion for services provided contrary to utilization and quality standards.* (i) In any case in which health care services are provided in a manner determined to be contrary to quality or necessity standards established under the quality and utilization review program, payment may be wholly or partially excluded.

(ii) In any case in which payment is excluded pursuant to paragraph (b)(2)(i) of this section, the patient (or the patient's family) may not be billed for the excluded services.

(iii) Limited exceptions and other special provisions pertaining to the requirements established in paragraphs (b)(2) (i) and (ii) of this section, are set forth in § 199.4(h).

(3) *Review of services covered by DRG-based payment system.* Application of these objectives in the context of hospital services covered by the DRG-based payment system also includes a validation of diagnosis and procedural information that determines CHAMPUS reimbursement, and a review of the necessity and appropriateness of care for which payment is sought on an outlier basis.

(4) *Preauthorization and other utilization review procedures*—(i) *In general.* All health care services for which payment is sought under CHAMPUS are subject to review for appropriateness of utilization. The procedures for this review may be prospective (before the care is provided), concurrent (while the care is in process), or retrospective (after the care has been provided). Regardless of the procedures of this utilization review, the same generally accepted standards, norms and criteria for evaluating the necessity, appropriateness and reasonableness of the care involved shall apply. The Director, OCHAMPUS shall establish procedures for conducting reviews, including identification of types of health care services for which preauthorization or concurrent review shall be required. Preauthorization or concurrent review may be required for any categories of health care services. Except where required by law, the categories of health care services for which preauthorization or concurrent review is required may vary in different geographical locations or for different types of providers.

(ii) *Preauthorization procedures.* With respect to categories of health care (inpatient or outpatient) for which preauthorization is required, the following procedures shall apply:

(A) The requirement for preauthorization shall be widely publicized to beneficiaries and providers.

(B) All requests for preauthorization shall be responded to in writing. Notification of approval or denial shall be sent to the beneficiary. Approvals shall specify the health care services and supplies approved and identify any special limits or further requirements applicable to the particular case.

(C) An approved preauthorization shall state the number of days, appropriate for the type of care involved, for which it is valid. In general, preauthorizations will be valid for 30 days. If the services or supplies are not obtained within the number of days specified, a new preauthorization request is required.

(iii) *Payment reduction for noncompliance with required utilization review procedures.* (A) Paragraph (b)(4)(iii) of this section applies to any case in which:

(*1*) A provider was required to obtain preauthorization or continued stay (in connection with required concurrent review procedures) approval.

(*2*) The provider failed to obtain the necessary approval; and

(*3*) The health care services have not been disallowed on the basis of necessity, appropriateness or reasonableness.

In such a case, reimbursement will be reduced, unless such reduction is waived based on special circumstances.

(B) In a case described in paragraph (b)(4)(iii)(A) of this section, reimbursement will be reduced, unless such reduction is waived based on special circumstances. The amount of this reduction shall be ten percent of the amount otherwise allowable for services for which preauthorization (including preauthorization for continued stays in connection with concurrent review requirements) approval should have been obtained, but was not obtained. In the case of hospital admissions reimbursed under the DRG-based payment system, the reduction shall be taken against the percentage (between zero and 100 percent) of the total reimbursement equal to the number of days of care provided without preauthorization approval, divided by the total length of stay for the admission. In the case of institutional payments based on per diem payments, the reduction shall be taken only against the days of care provided without preauthorization approval. For care for which payment is on a per service basis, the reduction shall be taken only against the amount that relates to the services provided without preauthorization approval. Unless otherwise specifically provided under procedures issued by the Director, OCHAMPUS, the effective date of any preauthorization approval shall be the date on which a properly submitted request was received by the review organization designated for that purpose.

(C) The payment reduction set forth in paragraph (b)(4)(iii)(B) of this section may be waived by the Director, OCHAMPUS when the provider could not reasonably have been expected to know of the preauthorization

requirement or some other special circumstance justifies the waiver.

(D) Services for which payment is disallowed under paragraph (b)(4)(iii) of this section may not be billed to the patient (or the patient's family).

* * * * *

(f) *Special procedures in connection with certain types of health care services or certain types of review activities*—(1) *In general.* Many provisions of this section are directed to the context of services covered by the CHAMPUS DRG-based payment system. This section, however, is also applicable to other services. In addition, many provisions of this section relate to the context of peer review activities performed by Peer Review Organizations whose sole functions for CHAMPUS relate to the Quality and Utilization Review Peer Review Organization program. However, it also applies to review activities conducted by contractors who have responsibilities broader than those related to the quality and utilization review program. Paragraph (f) of this section authorizes certain special procedures that will apply in connection with such services and such review activities.

(2) *Services not covered by the DRG-based payment system.* In implementing the quality and utilization review program in the context of services not covered by the DRG-based payment system, the Director, OCHAMPUS may establish procedures, appropriate to the types of services being reviewed, substantively comparable to services covered by the DRG-based payment system regarding obligations of providers to cooperate in the quality and utilization review program, authority to require appropriate corrective actions and other procedures. The Director, OCHAMPUS may also establish such special, substantively comparable procedures in connection with review of health care services which, although covered by the DRG-based payment method, are also affected by some other special circumstances concerning payment method, nature of care, or other potential utilization or quality issue.

(3) *Peer review activities by contractors also performing other administration or management functions*—(i) *Sole-function PRO versus multi-function PRO.* In all cases, peer review activities under the Quality and Utilization Review Peer Review Organization program are carried out by physicians and other qualified health care professionals, usually under contract with OCHAMPUS. In some cases, the Peer Review Organization contractor's only functions are pursuant to the quality and utilization review program. In paragraph (f)(3) of this section, this type of contractor is referred to as a "sole function PRO." In other cases, the Peer Review Organization contractor is also performing other functions in connection with the administration and management of CHAMPUS. In paragraph (f)(3) of this section, this type of contractor is referred to as a "multi-function PRO." As an example of the latter type, managed care contractors may perform a wide range of functions regarding management of the delivery and financing of health care services under CHAMPUS, including but not limited to functions under the Quality and Utilization Review Peer Review Organization program.

(ii) *Special rules and procedures.* With respect to multi-function PROs, the Director, OCHAMPUS may establish special procedures to assure the independence of the Quality and Utilization Review Peer Review Organization program and otherwise advance the objectives of the program. These special rules and procedures include, but are not limited to, the following:

(A) A reconsidered determination that would be final in cases involving sole-function PROs under paragraph (i)(2) of this section will not be final in connection with multi-function PROs. Rather, in such cases (other than any case which is appealable under paragraph (i)(3) of this section), an opportunity for a second reconsideration shall be provided. The second reconsideration will be provided by OCHAMPUS or another contractor independent of the multi-function PRO that performed the review. The second reconsideration may not be further appealed by the provider.

(B) Procedures established by paragraphs (g) through (m) of this section shall not apply to any action of a multi-function PRO (or employee or other person or entity affiliated with the PRO) carried out in performance of functions other than functions under this section.

* * * * *

(i) *Appeals and hearings.* * * *

(4) For purposes of the hearing process, a PRO reconsidered determination shall be considered as the procedural equivalent of a formal review determination under § 199.10, unless revised at the initiative of the Director, OCHAMPUS prior to a hearing on the appeal, in which case the revised determination shall be considered as the procedural equivalent of a formal review determination under § 199.10.

* * * * *

8. Section 199.16 is amended by revising paragraphs (a)(1), (a)(3), (b), (c), (d) introductory text, (d)(2), (d)(3), (d)(4), and paragraph (e); and by adding paragraphs (d)(5) and (f)(3) to read as follows:

§ 199.16 Supplemental Health Care Program for active duty members.

(a) *Purpose and applicability.* (1) The purpose of this section is to implement, with respect to health care services provided under the supplemental health care program for active duty members of the uniformed services, the provision of 10 U.S.C. 1074(c). This section of law authorizes DoD to establish for the supplemental care program the same payment rules, subject to appropriate modifications, as apply under CHAMPUS.

* * * * *

(3) This section applies to all health care services covered by the CHAMPUS. For purposes of this section, health care services ordered by a military treatment facility (MTF) provider for an MTF patient (who is not an active duty member) for whom the MTF provider maintains responsibility are also covered by the supplemental care program and subject to the requirements of this section.

(b) *Obligation of providers concerning payment for supplemental health care for active duty members*—(1) *Hospitals covered by DRG-based payment system.* For a hospital covered by the CHAMPUS DRG-based payment system to maintain its status as an authorized provider for CHAMPUS pursuant to § 199.6, that hospital must also be a participating provider for purposes of the supplemental care program. As a participating provider, each hospital must accept the DRG-based payment system amount determined pursuant to § 199.14 as payment in full for the hospital services covered by the system. The failure of any hospital to comply with this obligation subjects that hospital to exclusion as a CHAMPUS-authorized provider.

(2) *Other participating providers.* For any institutional or individual provider, other than those described in paragraph (b)(1) of this section that is a participating provider, the provider must also be a participating provider for purposes of the supplemental care program. The provider must accept the CHAMPUS allowable amount determined pursuant to § 199.14 as payment in full for the hospital services covered by the system. The failure of any provider to comply with this

obligation subjects the provider to exclusion as a participating provider.

(c) *General rule for payment and administration.* Subject to the special rules and procedures in paragraph (d) of this section and the waiver authority in paragraph (e) of this section, as a general rule the provisions of § 199.14 shall govern payment and administration of claims under the supplemental care program as they do claims under CHAMPUS. To the extent necessary to interpret or implement the provisions of § 199.14, related provisions of this part shall also be applicable.

(d) *Special rules and procedures.* As exceptions to the general rule in paragraph (c) of this section, the special rules and procedures in this section shall govern payment and administration of claims under the supplemental care program. These special rules and procedures are subject to the waiver authority of paragraph (e) of this section.

* * * * *

(2) Preauthorization by the uniformed services of each service, except for services in cases of medical emergency (for which the definition in § 199.2 shall apply), is required for the supplemental care program. It is the responsibility of the active duty members to obtain preauthorization for each service. With respect to each emergency inpatient admission, after such time as the emergency condition is addressed, authorization for any proposed continued stay must be obtained within two working days of admission.

(3) With respect to the filing of claims and similar administrative matters for which this part refers to activities of the CHAMPUS fiscal intermediaries, for purposes of the supplemental care program, responsibilities for claims processing, payment and some other administrative matters may be assigned by the Director, OCHAMPUS to the same fiscal intermediaries, other contractor, or to the nearest military medical treatment facility or medical claims office.

(4) The annual cost pass-throughs for capital and direct medical education costs that are available under the CHAMPUS DRG-based payment system are also available, upon request, under the supplemental care program. To obtain payment include the number of active duty bed days as a separate line item on the annual request to the CHAMPUS fiscal intermediaries.

(5) For providers other than participating providers, the Director, OCHAMPUS may authorize payment in excess of CHAMPUS allowable amounts. No provider may bill an active duty member any amount in excess of the CHAMPUS allowable amount.

(e) *Waiver authority.* With the exception of statutory requirements, any restrictions or limitations pursuant to the general rule in paragraph (c) of this section, and special rules and procedures in paragraph (d) of this section, may be waived by the Director, OCHAMPUS, at the request of an authorized official of the uniformed service concerned, based on a determination that such waiver is necessary to assure adequate availability of health care services to active duty members.

(f) *Authorities.* * * *

(3) The Director, OCHAMPUS shall issue procedural requirements for the implementation of this section, including requirement for claims submission similar to those established by § 199.7.

Dated: October 28, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 763

[OPPTS-62114A; FRL-4635-7]

Asbestos, Manufacture, Importation, Processing and Distribution Prohibitions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Continuing restrictions on certain asbestos-containing products.

SUMMARY: EPA is announcing its factual determinations concerning the regulatory status of asbestos-containing product categories originally banned in the Asbestos Ban and Phaseout Rule. The United States Court of Appeals for the Fifth Circuit (the "Court") vacated and remanded most of the rule which prohibited the future manufacture, importation, processing, and distribution in commerce of certain asbestos-containing products, and required the labeling of those products in the interim. In a subsequent clarification, the Court noted that the rule continued to govern asbestos-containing products that were not being manufactured, imported, or processed on July 12, 1989. EPA has concluded that six asbestos-containing product categories were not being manufactured, processed, or imported on July 12, 1989, and thus are still subject to the rule. The remaining product categories were being manufactured, processed, or imported on July 12, 1989, and are no longer subject to the rule. In the near future EPA will publish a technical amendment to 40 CFR part 763 to bring it in line with the Court's ruling.

FOR FURTHER INFORMATION CONTACT: For general information contact: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554-1404, TDD: (202) 554-0551. For technical information contact: Mike Mattheisen, Chemical Management Division (7404), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202) 260-1866.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 12, 1989 (54 FR 29460), EPA issued a final rule under section 6 of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605. The rule prohibited, at staged intervals, the future manufacture, importation, processing, and distribution in commerce of almost all asbestos-containing products, and required labeling of such products in the interim (40 CFR 763.160 through 763.179). The first stage of the ban regulated any "new uses of asbestos," and certain specifically identified asbestos-containing products. "New uses of asbestos" means those commercial uses of asbestos not identified in 40 CFR 763.165, and not excluded specifically by the definition, the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989 (40 CFR 763.163). After August 27, 1990, the rule banned the manufacture, importation, and processing of all stage one products, and required that those products be labeled while they remained in distribution (40 CFR 763.165(a), 763.167(a), and 763.171(a)). After August 27, 1992, the rule also prohibited the distribution in commerce of all stage one products (40 CFR 763.169(a)). The second and third stages of the ban regulated additional types of asbestos-containing products. These two later stages of the rule contained provisions that were comparable to the first stage, but that were to take effect from 1992 through 1997 (40 CFR 763.165(b) through (e), 763.167(b) and (c), 763.169(b) through (d), and 763.171(b) and (c)).

On October 18, 1991, the United States Court of Appeals for the Fifth Circuit vacated and remanded most of the rule (*Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir., 1991)). The Court agreed with EPA's determination that asbestos is hazardous and presents similar risks throughout different industries. It also affirmed EPA's authority to issue rules that ban all uses of a toxic substance under TSCA. The Court, however, held that parts of the rule were not supported by substantial evidence because EPA failed to sustain its burden under TSCA section 6(a) of showing that the products banned by the rule present an unreasonable risk, and that a less burdensome regulation would not adequately protect against that risk. The Court also found that EPA failed to give adequate notice and opportunity to comment on the use of analogous exposure data to support some parts of the rule.

Although the Court vacated and remanded most of the rule, it left intact the portion of the rule that regulates products that were not being manufactured, produced, or imported when the rule was published on July 12, 1989. The Court concluded that it "will not disturb the agency's decision to ban products that no longer are being produced in or imported into the United States." *Id.* at 1229. In arriving at this decision, the Court found that TSCA gave EPA the general authority to ban future uses of asbestos. Moreover, the Court determined that EPA properly evaluated the benefits and risks of banning such products when it promulgated the rule. Petitioners had argued that the benefits outweighed the risks because the benefits of a product that is not being produced is more than zero, in that it may find a future use, while the estimated risk is zero. The Court noted, however, that this balance would soon change when the product returned to the marketplace. As a result, the Court found "it was not error on the part of the EPA" to ban products that "temporarily show[ed] no risk because they were not part of this country's present stream of commerce." *Id.* Even if some future use should arise for these products, the Court noted, manufacturers and importers have access to the waiver provisions in the rule. *Id.* Finally, the Court explicitly rejected Petitioners' argument that "EPA overstepped TSCA's bounds by seeking to ban products that once were, but no longer are, being produced in the United States." *Id.* at 1228.

Based upon the above language in the opinion, EPA tentatively concluded that the Court intended to leave in effect that part of the rule that governed products that were not being produced or imported. To ensure that it was properly interpreting the decision, however, EPA filed a Motion for Clarification ("the Motion") with the Court. In the Motion, EPA noted that, while one section of the opinion seemed to leave intact the portion of the rule that governed asbestos-containing products that were no longer being produced or imported, another section of the opinion could arguably be interpreted as vacating and remanding the entire rule. EPA asked the Court to resolve the possible inconsistency. *Id.* at 591–592. EPA specifically requested clarification with respect to the status of the various asbestos-containing products that were banned in the first phase of the rule, and thus were no longer being manufactured, produced, or imported.

The Petitioners, including the Asbestos Information Association (AIA), opposed the Motion. They argued that EPA had improperly suggested that portions of the rule were not vacated, and asserted that the Court had vacated and remanded the rule in its entirety. They also noted that there was some uncertainty regarding whether some products banned by EPA were being manufactured or imported as of July 12, 1989, and suggested that the Agency, rather than the Court, should resolve this issue. Petitioners' Response to EPA's Motion for Time Extension, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991)(No. 89–4596).

The Court granted EPA's Motion. It did not adopt Petitioners' argument that the entire rule was vacated. Instead, the Court clarified the identity of the class of asbestos-containing products that continue to be subject to the rule. It specified that the "holding in part V.D. of our opinion applies only to products that were not being manufactured, imported, or processed on July 12, 1989." *Id.* at 1230. It also left it to EPA to resolve any factual disputes regarding whether a particular product fell within that category. *Id.*

In light of this clarification, it is clear that the Court did not require EPA to go through an entirely new rulemaking process, but instead authorized a factual inquiry into the actual status of particular asbestos-containing products as necessary.

EPA also filed a Request for Rehearing, which the Court denied on November 27, 1991. The Government decided not to file a petition for a Writ of Certiorari to the United States Supreme Court.

Because the Court's date of July 12, 1989, corresponded to the date of publication, rather than to any time benchmark in the rule, EPA decided that additional information regarding the July 12, 1989, status of various asbestos-containing products would assist the Agency in identifying the products that continue to be subject to the rule. Although published in 1989, the Regulatory Impact Analysis (RIA) only contained information that was current as of 1986. (The purpose of a RIA is to show that the rule complies with the requirements of Executive Order 12291. The RIA includes information on the need for the rule, the available options, the costs and benefits of each option, and the justification for the option selected. In addition, the RIA supports the finding of "unreasonable risk" required under TSCA section 6(a), and the determination of the least burdensome requirements to protect adequately against the risk.) However, two surveys conducted by EPA in 1991 confirmed information in the RIA. Moreover, in pleadings in *Corrosion Proof Fittings*, AIA and the Asbestos Institute (AI) acknowledged to the Court that some products were not in production when the final rule was issued in 1989. Joint Brief of Petitioners, the Asbestos Information Association/ North America and the Asbestos Institute, at 94–95 and n. 241, *Corrosion Proof Fittings* (No. 89–4596). Other information submitted to EPA, however, raised questions about the status of some products.

As a result, EPA issued a notice in the **Federal Register** of April 2, 1992, (57 FR 11364) that requested information on the status of 14 product categories in the rule that, based on information contained in the RIA for the rule, may no longer have been manufactured, processed, or imported when the rule was published on July 12, 1989. The information was solicited in order to determine which of these categories were in fact no longer being manufactured, processed, or imported on July 12, 1989, and are, therefore, still subject to the rule. In addition, EPA solicited information on the status of any other product category in the rule that also may no longer have been manufactured, processed, or imported on July 12, 1989.

EPA supplemented the original information in the RIA with the comments received in response to the **Federal Register** notice and with additional research. In evaluating the information, EPA did not conclude that a product category was no longer being manufactured, processed, or imported simply because no information was available, or just because no comment was received in response to the **Federal Register** notice. Rather, EPA only

concluded that a product was no longer being manufactured, processed, or imported if there were a factual basis to support such a conclusion. Doubts were resolved in favor of concluding that a product was still being manufactured, processed, or imported.

This document gives EPA's final factual determinations and summarizes the information upon which each determination was made. The documents supporting EPA's conclusions have been deposited in the docket for this fact-finding.

II. Status of Products

In accordance with the Court decision, and based on information from the RIA for the rule, responses to EPA's April 2, 1992, notice in the **Federal Register**, and additional EPA research, EPA concludes that:

1. The six asbestos-containing product categories that are still subject to the rule are corrugated paper, rollboard, commercial paper, specialty paper, flooring felt, and new uses of asbestos.

2. The asbestos-containing product categories that are no longer subject to the rule are: asbestos-cement corrugated sheet, asbestos-cement flat sheet, asbestos clothing, pipeline wrap, roofing felt, vinyl-asbestos floor tile, asbestos-cement shingle, millboard, asbestos-cement pipe, automatic transmission components, clutch facings, friction materials, disc brake pads, drum brake linings, brake blocks, gaskets, non-roofing coatings, and roof coatings.

A. Products Still Subject to the Asbestos Ban

EPA has concluded that the Court in *Corrosion Proof Fittings* left intact the provisions of the rule that governed asbestos-containing products that were not being manufactured, produced, or imported on July 12, 1989. In its clarification, the Court recognized that EPA could undertake a factual inquiry into the July 12, 1989, status of particular products to determine whether such products continued to be regulated by the rule.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA, one of the Petitioners in *Corrosion Proof Fittings*, submitted comments stating that the decision voided the entire rule and that "bans on discontinued products must take the form of a new rule." As indicated previously, EPA does not believe that AIA's interpretation is supported by the language of the decision. See discussion in Unit I of this document. Therefore, EPA concludes that the following product catagories remain subject to the ban rule:

1. *New uses of asbestos.* By definition, new uses of asbestos are those that were not manufactured, processed, or imported on July 12, 1989. The rule defines "new uses of asbestos" as "commercial uses of asbestos not identified in § 763.165 the manufacture, importation, or processing of which would be initiated for the first time after August 25, 1989" (40 CFR 763.163). Based upon this definition, any product that was being manufactured, imported, or processed on July 12, 1989, automatically cannot be a "new use of asbestos" because the manufacture, importation, or processing of such a product would have been initiated on or before August 25, 1989. Thus, any product that is a "new use of asbestos" could not have been manufactured, imported, or processed on July 12, 1989, and continues to be governed by the rule pursuant to the Court's clarified decision.

2. *Corrugated paper.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of corrugated paper in 1986. Responses to EPA's April 2, 1992, **Federal Register** notice did not include any comment indicating that asbestos-containing corrugated paper was being manufactured, processed, or imported on July 12, 1989. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that asbestos-containing corrugated paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

3. *Rollboard.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of rollboard in 1986. Responses to EPA's April 2, 1992, **Federal Register** notice did not include any comment indicating that asbestos-containing rollboard was being manufactured, processed, or imported on July 12, 1989. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that asbestos-containing rollboard was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

4. *Commercial paper.* The 1989 RIA for the rule concluded that there were no longer any manufacturers, processors, or importers of commercial paper in 1986, although one company was selling small amounts out of inventory. Responses to EPA's April 2, 1992, **Federal Register** notice did not include any comment indicating that asbestos-containing commercial paper was being manufactured, processed, or imported on July 12, 1989. The company that was selling small amounts out of inventory, Quin-T, did not comment on commercial paper, although it did comment on pipeline wrap. Thus, EPA's conclusion in the RIA is not refuted. Therefore, EPA concludes that commercial paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

5. *Specialty paper.* The 1989 RIA for the rule assumed that two companies that were producing asbestos-containing specialty paper in 1981 were still producing specialty paper in 1986 because the companies did not respond to a 1985 survey. The RIA allocated 50 percent of the market for specialty paper to each company, indicating that there was no importation. In response to a phone inquiry from EPA in 1992, both companies reported that they stopped using asbestos before 1986.

In its response to the April 2, 1992, **Federal Register** notice, AIA expressly declined to address specialty paper, but stated that EPA's 1989 notice in the **Federal Register** "found [specialty paper] still in commerce," because "specialty paper was noted to still be in production, and cancers avoided by a ban were calculated." The 1989 **Federal Register** notice did include an estimate of the number of cancer cases avoided that would result from the ban on specialty paper. At the time, EPA assumed, for purposes of analysis, that the two companies that had been producing asbestos-containing specialty paper in 1981, were still producing asbestos-containing specialty paper. However, as indicated above, the companies reported that they actually had stopped using asbestos before 1986.

Responses to EPA's April 2, 1992, **Federal Register** notice did not provide any evidence that specialty paper was being manufactured, processed, or imported on July 12, 1989. Therefore, EPA concludes that asbestos-containing specialty paper was not being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

6. *Flooring felt.* The 1989 RIA for the rule concluded that there were no producers, processors, or importers of flooring felt in 1986.

In response to EPA's April 2, 1992, **Federal Register** notice, the Resilient Floor Covering Institute (RFCI) submitted a letter to EPA stating that its members had not manufactured or imported asbestos-containing products since the mid-80s. RFCI also submitted Department of Commerce import reports for 1989 and 1990 which showed importation of "asbestos vinyl tile" and "sheet vinyl flooring." RFCI asserted that "because vinyl tile containing

asbestos was imported during this time period, it is reasonable to assume that a portion of the sheet vinyl imports contained an asbestos felt backing." RFCI, however, did not submit any information that would support its assertion that that assumption would be reasonable, and EPA is not aware of any such information.

AIA expressly declined to submit information concerning the status of flooring felt. AIA simply alleged that EPA "found [flooring felt] still in commerce" in the preamble to the rule, because the preamble purportedly said that "flooring felt was 'largely' no longer produced in the U.S." The preamble statement referenced by AIA actually referred to several different types of felt product categories, including roofing felt, pipeline wrap and flooring felt, and provided that "these products are largely no longer produced in the U.S." 54 FR 29490. Because the statement was general in nature, referring to the status of several product categories, it cannot logically be relied upon to demonstrate that one particular category of felt product, flooring felt, was actually in production. Moreover, the preamble discussion of felt products specifically provides that there was "no current U.S. manufacture or import" of flooring felt.

EPA was not able to locate any company that manufactured, processed, or produced asbestos-containing flooring felt, and no direct evidence was submitted to show that asbestos-containing flooring felt was, in fact, being manufactured, processed, or imported in July 1989. Therefore, EPA concludes that asbestos-containing flooring felt was no longer being manufactured, processed, or imported on July 12, 1989, and is still subject to the rule.

B. Products No Longer Subject to the Asbestos Ban

Except as provided in Unit II.A of this document, EPA concludes that all other products originally subject to the ban rule were being manufactured, processed, or imported on July 12, 1989, and are therefore no longer subject to the ban rule. Of the 14 products mentioned in the April 2, 1992, **Federal Register** notice, the following eight are no longer subject to the ban rule:

1. *Pipeline wrap.* In the 1989 RIA for the rule, EPA concluded that in 1986, one former producer was selling pipeline wrap out of inventory and might restart production if demand warranted it, and that only one company was importing the product.

In response to EPA's April 2, 1992, **Federal Register** notice, the AIA submitted production summaries from the Quin-T Company indicating that it had produced asbestos-containing pipeline wrap until the end of 1989. AIA also submitted U.S. Customs Declarations that showed importation of asbestos-containing pipeline wrap after July 1989. Based upon this information, EPA concludes that asbestos-containing pipeline wrap was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

2. *Vinyl/asbestos tile.* The 1989 RIA for the rule concluded that there were no manufacturers, processors, or importers of vinyl/asbestos tile in 1986.

In response to EPA's April 2, 1992, **Federal Register** notice, RFCI stated that its members had not manufactured an asbestos-containing product since the mid-80s. But RFCI also submitted Department of Commerce import reports for 1989 and 1990 that showed importation of "vinyl/asbestos tile." Therefore, EPA concludes that vinyl/asbestos tile was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

3. *Millboard.* The 1989 RIA for the rule concluded that in 1986 there was one primary processor, one former processor that continued to sell out of inventory, and four secondary processors, but no importers of asbestos-containing millboard.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted production notes from the Quin-T Company that showed production of asbestos-containing millboard in 1989, 1990, and 1992, and Department of Commerce import reports for 1989 and 1990 that showed importation of "asbestos paper, millboard, and felt." Thus, EPA concludes that asbestos-containing millboard was still being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

4. *Asbestos clothing.* The 1989 RIA for the rule concluded that in 1986 "small quantities of asbestos-containing gloves and mittens have been and continue to be imported from foreign countries . . . but no specific data could be identified."

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted Department of Commerce import reports for 1989 and 1990 that showed importation of "asbestos clothing, accessories, and headgear excl. footwear." Therefore, EPA concludes that asbestos-containing clothing was still being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

5. *Asbestos-cement corrugated sheet.* The 1989 RIA for the rule concluded that asbestos-cement corrugated sheet was no longer produced in the U.S. and that there was only one importer in 1986.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted a number of documents to show that asbestos-cement corrugated sheet was still being processed or imported. Among the documents submitted by AIA were: (1) A January 1989, purchase order to Turner Building Products in Mission, British Columbia, Canada, from Western Specialty Products in San Jose, California, for Potlatch Corporation in Lewiston, Idaho, for "cavity deck roofing," (2) a March 1989, Canadian Customs export declaration from Turner to Western for "cavity deck," (3) a December 1990, Material Safety Data Sheet (MSDS) from Turner for "T Deck and Cavity Deck," and (4) undated product literature from Turner for "Asbestos Cement Roof Decks." AIA also submitted Department of Commerce import reports for "Corrugated Sheets of Asbestos Cement or Cellulose Fiber Cement or the like" that show imports in 1989.

One importer, AWMCO, stated that it had imported and fabricated asbestos-cement sheet until August 1990, and continued to sell asbestos-cement sheet out of inventory until 1992, when it resumed importing and fabrication after consultation with AIA. Therefore, EPA concludes that asbestos-cement corrugated sheet was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

6. *Asbestos-cement flat sheet.* The 1989 RIA for the rule concluded that there was one producer of asbestos-cement flat sheet and one importer in 1986.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted a number of documents to show that asbestos-cement flat sheet was still being processed or imported. Among the documents were: (1) Two 1989 Canadian Customs declarations from Turner to AWMCO, an MSDS from Turner, and product literature from Turner for asbestos-cement sheet products, (2) a 1989 Mexican Export Declaration and shipping papers from Versalite del Noroeste in Mexico to Supralite in the U.S. for asbestos-cement sheet, and (3) Department of Commerce import reports that show imports of "Sheets, Panels, Tiles and Similar Articles [Not Elsewhere Specified or Included] of Asbestos Cement, Cellulose Fiber Cement, or the like" in 1989 and 1990.

In its comments, AWMCO stated that it had imported and fabricated asbestos-cement sheet until August 1990, and

continued to sell out of inventory until 1992, when it resumed import and fabrication after consultation with AIA. Therefore, EPA concludes that asbestos-cement flat sheet was being manufactured, processed, or imported on July 12, 1989, and is no longer subject to the rule.

7. *Roofing felt.* The 1989 RIA for the rule concluded that, while there were no primary processors, there was one secondary processor, and one importer of asbestos-containing roofing felt in 1986.

The importer, Power Marketing Group, reported that it imported a large stock of asbestos-containing roofing felt before the ban went into effect, and continued to sell out of inventory until the stock was exhausted in 1991.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted product literature from Kingsey-Falls, Inc., for asbestos-containing roofing felt, and Canadian Customs declarations and shipping papers to show that asbestos-containing roofing felt was being imported in January and August 1989. AIA also submitted product literature from Supradur Manufacturing Corporation, an American manufacturer, that includes asbestos-containing roofing felt. EPA concludes that asbestos-containing roofing felt was still being processed, or imported in July 1989, and is no longer subject to the rule.

8. *Asbestos-cement shingle.* The 1989 RIA for the rule concluded that there was only one remaining domestic producer and one known importer of asbestos-cement shingle in 1986.

In response to EPA's April 2, 1992, **Federal Register** notice, AIA submitted product literature from the Supradur Manufacturing Corporation for asbestos-cement roofing shingles, and a letter from Supradur to AIA that stated Supradur was manufacturing asbestos-cement shingle in Pennsylvania "as of July 1, 1989" and "continued until 1992," and that asbestos-cement shingle products are "still being sold and applied in the U.S. market." As a result, EPA concludes that asbestos-cement shingles were still being manufactured, processed, or imported on July 12, 1989, and are no longer subject to the rule.

III. Public Record

EPA established a record (docket number OPPTS–62114) for comments submitted pursuant to the April 2, 1992, **Federal Register** notice, and for the information listed below regarding the July 12, 1989, status of asbestos-containing products received by EPA after the Court's decision. A public version of the record, from which all confidential business information has been deleted, is available for inspection in the TSCA Nonconfidential Information Center (NCIC), Rm. E–G102, 401 M St., SW, Washington, DC, from 8 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday, except legal holidays. These documents include:

1. Decision of the U.S. Court of Appeals for the Fifth Circuit in *Corrosion Proof Fittings vs. EPA*, No. 89–4596 (5th Cir., October 18, 1991).

2. U.S. Fifth Circuit Court of Appeals Clarification of its Decision in *Corrosion Proof Fittings vs. EPA*, No. 89–456 (5th Cir., November 15, 1991).

3. *Regulatory Impact Analysis of Controls on Asbestos and Asbestos Products*, Final Report, Volume III, Appendix F, January 19, 1989.

4. *RM2 Scoping Asbestos: Current Commercial Status of Seven Asbestos Product Categories*, Mathtech, December 20, 1991.

5. *RM2 Scoping Asbestos: Industry/Use Profile*, Mathtech, November 26, 1991.

6. *ABPO Rule Remand Activities*, November 6, 1992, briefing for the Assistant Administrator of the Office of Pollution Prevention and Toxics.

7. Record of phone call to the Bureau of Mines concerning asbestos producer survey, October 1992.

8. Record of phone call to Alsop Engineering and to Beaver Industries concerning asbestos use, September 1992.

9. Memo from ICF Incorporated to Kent Benjamin, EPA, concerning Asbestos Rulemaking Support, August 28, 1992.

10. Record of phone call to Tuyaux Atlas concerning asbestos use, August 1992.

List of Subjects in 40 CFR Part 763

Environmental protection, Asbestos.

Dated: October 22, 1993.

Victor J. Kimm,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 93–26994 Filed 11–4–93; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 7007

[NM 010–4210–06; NMNM 86825]

Withdrawal of Public Lands and Federal Minerals for the Ball Ranch Area of Critical Environmental Concern; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws 1,458.68 acres of public lands from surface entry and mining for a period of 20 years for the Bureau of Land Management to protect the rare and endemic plant populations and paleontological resources of the Ball Ranch Area of Critical Environmental Concern. The lands have been and will remain open to mineral leasing.

EFFECTIVE DATE: November 5, 1993.

FOR FURTHER INFORMATION CONTACT: Debby Lucero, BLM Rio Puerco Resource Area, 435 Montano NE., Albuquerque, New Mexico 87107, 505–761–8700.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described public lands are hereby withdrawn from settlement, sale, location, or entry under the general land laws, including the United States mining laws (30 U.S.C. ch. 2 (1988)), but not from leasing under the mineral leasing laws, to protect a Bureau of Land Management Area of Critical Environmental Concern:

New Mexico Principal Meridian

T. 13 N., R. 6 E.,
Sec. 4, lots 3 and 4, S½NW¼ and SW¼;
Sec. 5, lots 1 and 2, S½NE¼ and SE ¼.
T. 14 N., R. 6 E.,
Sec. 19, E½;
Sec. 20, W½;
Sec. 31, NE¼ and N½NE¼SE¼.

The areas described aggregate 1,458.68 acres in Sandoval County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.