

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 603**

RIN 1205-AB18

**Federal-State Unemployment
Compensation Program (UC);
Confidentiality and Disclosure of State
UC Information**AGENCY: Employment and Training
Administration, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (Department) is issuing this final rule to set forth the statutory confidentiality and disclosure requirements of Title III of the Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) concerning unemployment compensation (UC) information. The final rule also amends the Income and Eligibility Verification System (IEVS) regulations, a system of required information sharing primarily among State and local agencies administering several federally assisted programs.

DATES: *Effective Date:* This final rule is effective October 27, 2006.

Applicability Date: States that need to amend their laws, rules, procedures, or existing agreements in order to conform and comply with the requirements of this rule have two years from the effective date of the final rule to do so.

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SUPPLEMENTARY INFORMATION:**Background**

The first Notice of Proposed Rulemaking concerning confidentiality and disclosure of State UC information was issued in 1992. (57 FR 10063 (March 23, 1992).) Given the time that elapsed following this 1992 NPRM, the Department published a new NPRM on August 12, 2004. (69 FR 50022.) Comments were invited through October 12, 2004.

General Discussion of Final Rule

This final rule implements Federal UC laws concerning confidentiality and disclosure of UC information and establishes uniform minimum requirements for the payment of costs, safeguards, and data-sharing agreements

to ensure responsible use when UC information is disclosed. The confidentiality requirement implemented by this rule is derived from the “methods of administration” requirement of Section 303(a)(1), SSA. The disclosure requirements are from Sections 303(a)(7), (c)(1), (d), (e), (f), (h), and (i), SSA, and Section 3304(a)(16), FUTA. This rule revises the regulations at 20 CFR Part 603, to implement all of these statutory provisions. (The present rule at Part 603, which this final rule replaces, addresses only Section 303(f), SSA (concerning IEVS)). These statutory provisions each address disclosure to governmental entities, but they vary with respect to the specific information to be disclosed and the terms and conditions of disclosure.

The confidentiality and disclosure requirements in Title III of the SSA relating to UC information are conditions for receipt of grants by the States for UC administration. The disclosure requirements in the FUTA are conditions required of a State in order for employers in that State to receive credit against the Federal unemployment tax under 26 U.S.C. 3302.

Other Federal laws may require use or disclosure of confidential UC information. For example, the Workforce Investment Act (WIA) of 1998, Public Law 105-220, requires States to measure their progress in providing services funded under Title I of the WIA against State and local performance measures using “quarterly wage records, consistent with State law.” 29 U.S.C. 2871(f)(2); 20 CFR 666.150(a). Because these laws do not condition receipt of UC grants under the SSA or certification for employer tax credits under the FUTA on such use or disclosure, the rule does not implement these laws. However, the disclosure of confidential UC information in compliance with the WIA and other Federal laws is permitted under the general exceptions to confidentiality in § 603.5 of this final rule. (For more information on the requirement to use wage records under the WIA, see 20 CFR 666.150.) The Department stated previously and repeats here that it strongly encourages States to amend their laws to permit disclosure for WIA purposes if their State laws do not already provide for such disclosure.

Comments Received on the NPRM

The Department received 38 pieces of correspondence commenting on the NPRM by the close of the comment period. The majority of the comments—24—were from State UC agencies. Eight commenters—all State UC agencies—

objected to the rule. The remaining 16 State UC agencies appeared neutral, or even supported the objectives of the rule, while offering technical comments. Other commenters included employer interest groups, researchers, the U.S. Census Bureau, and the National Association of State Workforce Agencies. All timely comments were considered and are included in the rulemaking record. Several comments were not germane to this rulemaking and, therefore, are not addressed.

Discussion of Comments—General

Rule not necessary. Several commenters stated that the rule was not necessary because the UC program has functioned for 60 years without such a rule and there was no evidence of a problem that would be rectified by a Federal rule, which one commenter said was an “overreaction” to any abuses that may have occurred.

While the Department appreciates that States have long protected certain UC information, the rule is necessary to comply with statutory mandates in the SSA. The SSA provides that the Department establish safeguards “in regulations” to insure that information required to be disclosed to certain governmental entities is used only for the purposes for which it is disclosed. Sections 303(d)(1)(B), (e)(1)(B), and (i)(1)(B), SSA. Section 303(h)(1)(C), SSA, also provides that the Department establish “safeguards” although it does not explicitly refer to regulations. Applying the regulation to *all* disclosed UC information will result in more uniform treatment among entities and, thereby, a certain degree of simplicity.

Moreover, absent this regulation, information that is highly protected when collected for other Federal purposes (for example, Social Security and Federal income tax) would lack explicit protection under Federal laws and regulations when it is collected for purposes of the Federal-State UC program. Indeed, much of the demand for use of UC information for non-UC purposes exists because information collected for the UC program is currently subject to less stringent legal protections, although it is no less sensitive. That demand has been increasing as technology makes data sharing easier and as UC information is used for program evaluations. Thus, while the Department believes that a considerable degree of State flexibility should exist with regard to confidentiality and that data should be shared under certain circumstances, we do not believe it is appropriate to be passive in this matter, particularly in a

climate of heightened concern regarding identity theft.

Requirements of the Rule. Several comments indicated confusion concerning the requirements of the rule. For example, some commenters viewed the rule as requiring that certain records must be open to the public or requiring certain disclosures that are merely optional on the part of the States.

In response, we note that the rule has two distinct aspects. First, it sets minimum requirements concerning what UC information must be kept confidential and for the payment of costs, safeguards, and data-sharing agreements. Nothing prohibits States from having more stringent confidentiality provisions than those imposed by the rule, except for certain required disclosures (discussed in the next paragraph). For example, States may keep appellate records confidential even though the rule does not require it.

Second, the rule implements certain provisions of Federal law requiring that certain UC information must be disclosed to certain governmental entities. For example, Section 303(e)(1), SSA, requires States to disclose information to State child support agencies for purposes of establishing certain child support obligations. These required disclosure provisions address what information must be disclosed to the relevant governmental entities. However, we note that the rule also permits, at State option, disclosure to public officials in the performance of their duties. As a result, the rule does not prohibit the State from disclosing more information to a governmental entity than is required under Federal UC law, provided such disclosures otherwise meet the conditions of the rule (such as payment of costs).

Also, several State UC agencies requested more specificity regarding the regulation's application in certain areas or the meaning of certain words. While these comments have resulted in certain clarifications (discussed in the Summary of Comments), in other cases no change to the rule resulted. In keeping with the principle that the rule establishes minimum requirements, the Department has chosen to leave many specific details of implementation to the States. For example, although the rule requires that penalties be assessed under State law for unlawful disclosure of confidential UC information, it does not specify what these penalties must be. Similarly, although the rule addresses disposition of confidential UC information when it is disclosed to governmental agencies or private entities, the Department, consistent with its long-established practice, has chosen

not to regulate State court practices involving the UC program. States are, therefore, free to address disposition by their courts as they see fit. In addition, the Department does not believe it is necessary to define certain commonly used terms (such as "audit"), as one commenter requested.

Finally, several commenters expressed concerns about the limited scope of the mandatory disclosure provisions. For example, one commenter noted that the disclosure provision in § 603.6(b)(3) required disclosure of certain information to "officers and employees of any State food stamp agency," but not to "county social service agencies [that] carry out Food Stamp eligibility determinations under the policy direction of the State Food Stamp agency." In this case, the rule reflects Federal law, which requires disclosure only to "any State food stamp agency." (See Section 303(d)(1)(A), SSA.) However, nothing prohibits disclosure to public officials employed by a county when such disclosure is for use in the performance of a public official's duties and is otherwise consistent with the rule. (See § 603.5(e))

Effect of Rule. One commenter expressed concern that any rule should "(1) encourage uniform procedures among the States, preferably by including a model State law in the rulemaking, and (2) avoid unnecessary State legislation." That commenter was also concerned about why a "State law" needed to specifically address disclosure of "an individual's information to that individual, or an employer's information to that employer." In a similar vein, another commenter stated that the definition of "State law" should be expanded to include "an administrative rule, written policy or administrative interpretation," thereby avoiding State legislation.

The Department does not believe model legislation is necessary or desirable. All State UC laws currently contain confidentiality provisions, which have been interpreted over the years through regulations, court cases, and administrative rulings. State UC agencies are aware of these interpretations, which will influence their implementation of the regulation's requirements, including their determination of whether amendments to the State code, rules, or procedures are necessary to specifically address the requirements of the regulation.

The Department considers regulations and administrative rulings to be part of the "State UC law" for purposes of conformity with Federal law. Since these regulations and rulings are treated as law, the Department does not believe

there is need to change the definition of "State law."

One commenter expressed the concern that the rule would lead to a "lack of uniformity" among States. Other commenters believed that the rule would undermine State laws that are currently more restrictive than the rule. The Department believes that the rule will result in greater, rather than less, uniformity among States because it requires some States to raise their confidentiality requirements to meet the minimum requirements of this rule. The Department appreciates that States have valid reasons for maintaining UC confidentiality laws that are stricter than those required by the rule. On balance, we believe that the rule will serve to enhance confidentiality requirements by making disclosure subject to the minimum requirements of the rule, while permitting States to provide additional protections.

Rule would increase costs and burdens. Several State UC agencies objected to the rule on the grounds that it would result in substantial new costs, would be excessively burdensome, or would be a distraction to program administration.

The rule is, to the extent possible, written to minimize the burden on the States, recognize existing State practices, and permit implementation within existing resource levels. Our analysis of the objections regarding costs and burdens indicate that most were based on misunderstanding of the requirements of the rule. Notably, some commenters read the rule to require formal agreements before disclosure may be made to an individual's agent, and some commenters objected to the requirement that States "periodically audit" every entity receiving UC information, including the individual's agent. (See §§ 603.10(b)(2) and 603.9(b)(2), respectively.) However, both of these requirements pertained only to ongoing disclosures made to a third party (other than an agent), who typically requests many individuals to authorize the disclosure of information to them. (For example, mortgage lenders once routinely asked applicants to authorize disclosure of their confidential UC information.) Also, these types of ongoing disclosures are entirely optional on the part of the State.

Similarly, some commenters read the rule to require States to charge for the costs associated with disclosing an individual's information to that individual or an agent, and stated that the administrative costs of establishing such a collection system would be burdensome. However, such a collection system would only be necessary where

the disclosure of information is for non-UC purposes and where the associated costs for the disclosure are not nominal (as determined on a case-by-case basis) and which, therefore, must be reimbursed. (See § 603.8(b).) While nominal costs need not be reimbursed under this final rule, the State or State UC agency is not precluded from charging for the costs of such disclosures.

Another notable area concerning burden was that some commenters read the notification provisions of § 603.11 (pertaining to claimants and employers) to require far greater effort than they actually require. The content of the notice to claimants and employers need not be complex or lengthy, and need not specify all potential uses of confidential UC information. The notice may simply state that confidential UC information will be used for other governmental purposes, including verifying an individual's eligibility for other governmental programs. Because the current rule at § 603.4 already requires notice to claimants that information will be used for IEVS purposes, the Department does not believe that the new notification requirements materially increase the burden on States.

As a result of these comments, the final rule has been edited for clarity. Specific clarifications are discussed in the Summary of Comments. Also discussed in the Summary of Comments are revisions to the provisions requiring a motion to quash subpoenas to recognize that States may have more informal, less costly means of prevailing against subpoenas without actually filing a motion to quash. (See discussion of § 603.7(a).)

Some commenters were concerned that the rule would be "an unfunded mandate" on State UC agencies or on requesting entities. One commenter disagreed with our determination that the rule was not "economically significant" because of the costs that recipients of UC data would incur under the rule. In response, the Department notes that the final rule—like the proposed rule—requires that costs of providing UC information for non-UC purposes must be paid by the requesting entity. The final rule further provides that such costs may be paid, if applicable, by another source paying on behalf of the recipient. Thus, with regard to UC agencies, which this rule regulates, it will not create an unfunded mandate.

The sharing of UC information for non-UC purposes has never been a permissible cost of administering the State's UC law. (Specifically, Section

302(a), SSA, permits the Secretary to certify as payable to States only amounts "necessary for the proper and efficient administration of" the State's UC law. Further, Section 303(a)(8), SSA, limits the use of the State's UC grant to the "proper and efficient administration of" the State's UC law.) State UC agencies should already be charging for all costs associated with disclosures that incur more than incidental costs. Thus, on this point, the rule merely reflects current law. For this reason, we do not believe the rule is "economically significant" because, based on the information available to the Department, almost all States already charge recipients for the costs of disclosure.

Confidentiality Principles. Two commenters raised questions concerning the confidentiality principles that were contained in the preamble of the proposed rule.

One commenter noted that, although one fair information principle provided that subjects of an information collection "should have the right to access and amend information about them," the rule itself did not specifically address the right to amend. The commenter expressed concern that, if amendment of the wage record were required, this would create new costs and questioned whether these costs would be payable through UC grant funds.

This commenter is correct that the right to amend is not explicitly addressed in the rule. As a result, States are left to decide when allegations of erroneous wage records would be investigated and when amendment would occur. Because most wage records are purged without ever being used for UC purposes, it is unnecessary to attempt to correct every alleged erroneous wage record. Further, correcting wage records might impose a substantial, but unnecessary, burden on the State. For example, prior to correcting a wage record, an audit may be needed to resolve an individual's allegation that an employer failed to report wages, or whether the individual was properly classified as an independent contractor, in which case no wages would be reportable. States may use such assertions in targeting employers for UC audits, which may be paid from UC grants. However, if such corrections do not in any way serve the administration of the UC program (such as correcting a wage record that is no longer in the State's base period and that does not affect taxes owed by the employer), the costs of these corrections may not be paid from grant funds because they are not necessary for the proper and efficient administration of

the UC program. Therefore, under the rule, the State is not required to make such corrections.

The Department's expectation is that wage records will be corrected as necessary in the course of the routine administration of the State's UC law. This usually occurs during the claims determination process or in the process of determining if the worker's services were performed in covered employment.

Another commenter stated it would be helpful to "provide further illumination of these fair information principles because it would be helpful for State agencies in explaining the rationale behind the federal rule." The Department believes sufficient explanation of these principles in terms of the UC program and the rationale for promulgating this rule were provided in the preamble to the proposed rule.

Timeframe for Compliance with Rule. Several commenters asked questions concerning the effective date of the rule. The rule is effective 30 days after publication and States should make reasonable efforts to implement its requirements by that date, especially in cases where the rule involves only minor changes to State procedures. However, the Department recognizes that States may need additional time to change laws, rules, procedures, or existing agreements. As such, States will be given two years from the effective date of this rule to conform and comply with its requirements, as provided in the "Applicability Date" section of this preamble.

Use of Social Security Account Numbers for UC Purposes. One commenter, representing employer interests, encouraged the Department "to require all State UC agencies to use the [social security account number] as the sole UC claim record identifier" or, alternatively, to create a "uniform record identifier, which attaches to an existing [social security account number] after the filing of a claim." Essentially, this comment reflected concerns that employers may not be able to identify claimants, and therefore participate in the UC eligibility process, if the social security account number is not used.

The Department appreciates this concern. However, the Department believes this comment is beyond the scope of this rulemaking, which sets minimum requirements for States in preserving the confidentiality of UC information. Instead, the Department is addressing this commenter's concern by working with the States to assure that employer participation in the UC program is not impinged. The

Department issued Unemployment Insurance Program Letter (UIPL) 21-05 to raise awareness of this concern.

Comments that are not addressed in the above general discussion are discussed below in the Summary of Comments. Also discussed below are any substantive changes made to the rule, stemming primarily from the comments received. Non-substantive changes are not discussed. The following Summary is organized sequentially by section heading.

Summary of Comments

To efficiently respond to public comments and explain changes to the rule resulting, in large part, from those comments, only the pertinent portions of the rule are discussed below. The basic format of the below summary of comments begins with a review of the proposed rule provision, followed by a discussion of the public comments, and concludes with what, if any, resulting changes are reflected in the final rule.

Section 603.2 What definitions apply to this part?

(c) Public Domain Information

The proposed rule included appeals records and decisions, and precedential determinations on coverage or employers, employment, and wages within the definition of public domain. The inclusion of these records within this definition was intended to afford States discretion in choosing whether to permit the disclosure of such information, since the proposed rule would not have required that information in the public domain be kept confidential.

However, several commenters expressed concern about treating appeals records and decisions as public domain information. They apparently interpreted the treatment of appeals records and decisions as being in the "public domain" to imply that the public had a right to such decisions. To establish that this is not the case, and to insure that some appeals information such as social security account numbers remain confidential, appeals records and decisions have been removed from the definition of public domain information in the final rule.

Appeals records and decisions, as well as precedential determinations on coverage of employers, employment, and wages (which often are appellate decisions), are now treated in the final rule under § 603.5(b) as exceptions to the confidentiality requirement. This means that a State may, but need not, disclose this information. These matters

are addressed more fully in the discussion relating to § 603.5(b).

(d) Public Official

The proposed rule limited disclosures for legislators (elected officials) to those who need confidential UC information for "oversight" purposes. Commenters expressed concern that this standard, as it related to elected officials, was vague and that, as a result, it would be difficult to implement and difficult to determine whether a particular elected official was performing "oversight" functions. In response to these comments, the Department has omitted the reference to "oversight" in the definition of "public official" in the final rule.

Some commenters also expressed concern that the proposed rule would impinge upon an elected official's need and ability to address constituent inquiries concerning a UC matter. However, the proposed rule would have permitted an elected official performing constituent services to obtain confidential UC information because the elected official is acting as the agent of the constituent who requested the elected official's assistance. The final rule clarifies this treatment of elected officials and this clarification is further discussed in § 603.5(d)(1) (pertaining to agents).

Section 603.4 What is the confidentiality requirement of Section 303(a)(1) of the SSA?

(b) Interpretation

The proposed rule set forth the Department's interpretation of Section 303(a)(1), SSA, as including a basic requirement of confidentiality. It explained that States are required to maintain the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and to bar the disclosure of such information, except as provided in the rule.

Moreover, the proposed rule explained that the confidentiality requirement has its origin in the beginning of the program and is derived from Section 303(a)(1), SSA. Section 303(a)(1), SSA, requires States to provide in their laws, as a condition of administrative grants, for such "methods of administration" as the Secretary determines are "reasonably calculated to insure full payment of unemployment compensation when due." From the early years of the

program this provision has been interpreted to require the confidentiality of information collected from individuals and employers for UC program administration. Confidentiality is necessary to avoid deterring individuals from claiming benefits or exercising their rights, to encourage employers to provide information necessary for program operations, to avoid interference with the administration of the UC program, and to avoid notoriety for the program if program information were misused.

Two commenters, while generally agreeing that UC information should be kept confidential, objected to using the "methods of administration" requirement of Section 303(a)(1), SSA, as a statutory basis for the rule. One noted that this section's language does not "lead to the conclusion that confidentiality is required by federal law." While the Department agrees that this section of the law contains no explicit reference to confidentiality, it does give the Secretary the authority to determine what "methods of administration" are necessary. For the reasons explained above, the Department has long interpreted Section 303(a)(1), SSA, to require confidentiality of certain UC information as a "method of administration * * * reasonably calculated to insure full payment of unemployment compensation when due." Also, Congress has several times directed the Department to establish safeguards "in regulations" to insure that certain information is used only for the purposes for which it is disclosed. Since it makes no sense to require States to assure the continued confidentiality of disclosed information if that information is not, in the first place, considered confidential, the Department believes Congress recognized a longstanding Federal requirement that UC information be confidential. Section 303(a)(1), SSA, is the source of that requirement. No change to the final rule resulted from the above comments.

Two other commenters asserted that Section 906, SSA, which relates to the Secretary establishing a program of research for the UC system, should be used as a statutory basis for the rule. While some research conducted under Section 906 may result in the Secretary (or her agents) obtaining confidential UC information from the States, it does not in any way place any requirements on the States. Therefore, the Department has not added Section 906 to the statutory authority.

Section 603.5 What are the exceptions to the confidentiality requirement?

This section of the proposed rule sets forth the permissible exceptions to the confidentiality requirement. Only those paragraphs for which comments were received are discussed below.

(a) Public Domain Information

The confidentiality requirement does not apply to information in the public domain, as defined in § 603.2(c). This means the determination of whether and how much information is open to the public or is kept confidential is left to the State.

Some UC information, such as employer names and addresses, is public in the sense that it is available from other public sources like telephone directories, but it is not public domain information for the purposes of this final rule and, therefore, must be kept confidential by the State or State UC agency because it is collected from employers expressly for purposes of administering the UC program. Since the scope of this final rule applies to State and State UC agencies, it does not attempt to restrict access to information that may be available from other public resources.

As noted previously and detailed below, the final rule differs from the proposed rule in that "appeals records and decisions" are no longer listed as being public domain information, although "precedential decisions on benefit eligibility" would be public domain information, as are any other precedential decision. Appeals records and decisions are now treated under paragraph (b) of § 603.5.

(b) UC Appeals Records ("Administration of the UC Program" in the Proposed Rule)

In the proposed rule, paragraph (b) of § 603.5 addressed the inapplicability of the confidentiality requirement when disclosure was necessary for the proper administration of the UC program. However, paragraph (a) of § 603.6 of the proposed rule also required the disclosure of confidential UC information necessary for the proper administration of the UC program. Because the rule requires this disclosure, the Department determined that the exception at paragraph (b) of § 603.5 relating to "administration of the UC program" was repetitive and unnecessary. As a result, proposed paragraph (b) of § 603.5 has been deleted from the final rule and replaced with the new paragraph on "UC appeals records".

This new paragraph on UC appeals records was developed to minimize the

confusion on the part of commenters, caused by its original placement within the definition of "public domain." In the proposed rule, appeals records were treated as being excluded from the confidentiality requirements because they were identified as "public domain" information. Because some commenters took this to mean that appeals records *must* be in the public domain, the Department has placed "UC appeals records" in paragraph (b) as an exception to the confidentiality requirement. Thus it should be clear that a State may, but need not, disclose these records.

Two commenters argued that hearing records and appeals decisions should be closed to the public. One commenter noted that employers may have to disclose "trade secrets such as customer lists, cost and price data, sales forecasts, and financial reports during [the] proceeding." This commenter noted that parties may also have to "submit information that may be embarrassing, such as drug test results, or inflammatory, such as allegations of sexual harassment" and that "a critical element of a case may require disclosure of information that would be protected by law in other contexts, such as personal medical information."

Although the Department recognizes that these are strong arguments for closing appeals hearings and keeping all appeals records confidential, there are also arguments for open hearings and records. The Department has historically held that the public interest in proper administration of the UC program, specifically in payments of benefits only to eligible individuals, and in open governmental adjudicatory proceedings is served by open hearings and hearing records. Further, public access to hearings ensures fair treatment by the appeals tribunal. Thus, in recognition of these competing views, the Department continues to believe that any determination of whether to close appellate hearings and keep records confidential should be left to the States. As a result, the final rule maintains the position that appeals records and decisions are not subject to the confidentiality requirement.

One commenter addressed the issue of redacting information that may identify the individual or claimant. The Department agrees that social security account numbers should be redacted from appeals records and decisions before they may be made available to the public. Identity theft related to misuse of social security account numbers is a growing concern, and, as a result, an individual may be reluctant to pursue an appeal if it results in his

or her social security account number becoming publicly available. While the Department does not believe redaction of an individual or employer's name is necessary, the final rule does not prohibit States from redacting more information than is required to be kept confidential. Indeed, we recognize that redaction of such information already occurs in some States and may be mandated by both the State's UC law and other State confidentiality statutes. Recognizing this, the final rule provides that disclosure of appeals records and decisions, including precedential decisions, is conditioned upon the above redactions as consistent with applicable laws.

As a result of these comments, the final rule has been revised to provide that appeals records and decisions are excluded from the confidentiality requirement as are precedential determinations on coverage of employers, employment, and wages (which usually are appellate decisions). The final rule also conditions disclosure of these records upon the redaction of social security account numbers, provided that such disclosure is otherwise consistent with Federal and State law.

(d) Informed Consent

The proposed rule provided for disclosure of confidential UC information on the basis of informed consent to an "agent or attorney" of the individual or employer about whom the information pertains and to "third parties." Under both informed consent provisions, a written release from the individual or employer was required; however, additional conditions were placed upon disclosures to "third parties" because of the greater potential for misuse of the information. The "third parties" provision was intended to capture those requests for confidential UC information that occur on an ongoing basis (such as an income verification service for lenders), not requests wherein the entity is acting as an agent, that is, someone who is working on behalf of the individual or employer (such as an attorney representing an individual or employer in the litigation of a UC claim). This distinction was not clear to commenters and led to confusion as to the intent and actual requirements of each provision.

As a result of comments, the Department has made several changes in paragraph (d) in the final rule. The paragraph has been restructured to eliminate confusion regarding the requirements of each provision (including the requirements associated with written releases). Further, we re-

titled paragraph (d)(2) and we clarified that it applies to instances where an entity is not acting as an agent and to instances where disclosure is made on an ongoing basis. Specific changes relating to the each provision are addressed below following a discussion of the comments that led to those changes.

As a general note, the Department emphasizes that this provision imposes *minimum* requirements on disclosure. The final rule does not require States to disclose information under this exception. Also, if a State authorizes disclosure based on informed consent, the final rule does not prohibit States from placing additional restrictions on such disclosures.

Paragraph (d)(1)—Agent (“Agent or Attorney” in the Proposed Rule)

The title of paragraph (d)(1) was changed from “Agent or attorney” in the proposed rule to “Agent” in the final rule with explanation provided as to the meaning of “agent,” which would include an attorney. These changes resulted from confusion expressed by commenters and to better distinguish between paragraph (d)(1) and paragraph (d)(2) (discussed below) and their differing requirements. It was and still is intended that disclosures under paragraph (d)(1) will generally be one-time only events in terms of both the individual (or employer) requesting the disclosure and the agent receiving the information.

Two commenters requested explanation of the term “agent.” Under common usage, the term “agent” describes one who acts for or in the place of an individual or employer by the authority of that individual or employer. In response to such comments, paragraph (d)(1) of the final rule has been changed to include this description of “agent.”

Several commenters expressed concern that the proposed rule did not permit disclosure to elected officials performing constituent services. (This was discussed above under § 603.2 regarding disclosure to public officials.) The Department disagrees. When an elected official is acting in response to a constituent’s inquiry about a UC matter, such as the individual’s UC claim, the elected official is acting on the individual’s behalf and, therefore, is effectively the individual’s agent in resolving issues related to the claim. This general principle of acting on behalf of an individual (or employer) may apply to other situations, such as a governor’s ombudsman acting on the individual’s (or employer’s) behalf. We do not believe it practical to attempt to

list all possible applications of this principle in the final rule. However, to eliminate the confusion regarding constituent services, the final rule now explicitly acknowledges that an elected official performing constituent services is acting as an agent of the constituent.

The following discussion pertains to comments on the proposed written release requirements associated with disclosures to an agent under paragraph (d)(1).

Some commenters noted that many States have established “electronic” relationships with claimants and employers and questioned whether the requirement for “written releases” would mean that States could not do business electronically. In response to such comments, paragraph (d)(1) of the final rule was revised to permit a State to disclose confidential UC information based on an electronically submitted release, if the State determines that the release is authentic. The final rule does not prescribe requirements for determining if a written (including electronic) release is authentic. Rather, such a determination would depend upon the State’s own practices and whether the State has established such “electronic relationships”.

Another commenter pointed out that elected officials may receive requests for assistance that do not specifically authorize the disclosure of confidential UC information, even though such disclosure is necessary for the official to adequately respond to the constituent. In response, the final rule has been revised by adding language in paragraph (d)(1) that permits the elected official to present reasonable evidence of a request for assistance, such as a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer rather than being required to present the “written release” described in the proposed rule. It is the Department’s experience that, in most cases, a U.S. Congressman’s request for the Department’s assistance in reviewing a particular claim includes such reasonable evidence and, as a result, it is unnecessary to request further evidence from the Congressman.

One commenter argued that an attorney’s legal and ethical obligations would sufficiently protect the party about whom information is requested without the need for written releases. While the Department recognizes these obligations, we are not convinced that an attorney should in all cases automatically be given any information regarding a client without the client’s knowledge, which is evinced through a written release. However, the

Department agrees that an attorney’s assertion that he or she has been retained to represent an individual or employer *on a UC matter* is sufficient to authorize the disclosure of confidential UC information to the attorney. As in the above case of disclosure to an elected official performing constituent services, when the individual or employer retains an attorney for UC purposes, the expectation is that the attorney will have access to the confidential UC information necessary to act on behalf of the individual or employer. As a result, paragraph (d)(1) of the final rule has been revised to permit disclosure when the attorney asserts that he or she has been retained to represent the individual or employer on a UC matter.

Paragraph (d)(2)—Third Party (Other Than an Agent) or Disclosures Made on an Ongoing Basis (“Third Party” in the Proposed Rule)

As mentioned previously, the title of paragraph (d)(2) was changed from “Third party” in the proposed rule to “Third party (other than an agent) or disclosures made on an ongoing basis” in the final rule in an effort to better distinguish it from paragraph (d)(1).

The purpose behind this provision is to permit disclosure of confidential UC information, under certain conditions, to third parties who are not acting as the agent of the individual or employer and to third parties who may reasonably be expected to obtain confidential UC information on an ongoing basis. These often include situations where an entity requests or encourages an individual to permit the disclosure of confidential UC information through signing a release form. One such example is the disclosure of wage records to a third party for purposes of determining if an individual qualifies for a mortgage. Such a practice, when routinely followed, may result in the entity compiling considerable information pertaining to individuals. (The Department notes that, if the third party entity is a governmental entity, then the governmental entity may be able to obtain information under paragraph (e), permitting disclosure to public officials for use in the performance of his or her official duties, without such a written release.)

As explained in the proposed rule, the Department believes that additional protections, including additional conditions attached to the written release, are necessary for these types of third party disclosures because of the greater potential threat to employer or individual privacy posed by the entity’s collection, storage, maintenance, use,

and possible misuse of confidential UC information. (This question was dealt with in Unemployment Insurance Program Letter 23-96 ("Disclosure of Confidential Employment information to Private Entities," 61 FR 28236), which is superseded by this final rule.) The purpose specified in the release must be limited to providing a service or benefit to the individual signing the release that such individual expects to receive as a result of signing the release, or carrying out administration or evaluation of a public program to which the release pertains. If the release does not meet these requirements, the State may not disclose confidential UC information. It is expected that the entity requesting information on an ongoing basis would create a standard release form, approved by the State agency, that would meet all these requirements. States are expected to use their judgment in confirming whether a release provides a service or benefit to the individual.

Additional requirements are payment of costs, safeguards, and agreements, as provided in §§ 603.8 through 603.10. Also, the States are required by §§ 603.9 and 603.10 to impose certain penalties for the misuse of data and to maintain systems sufficient to allow an audit of disclosed information, among other things.

One commenter argued that the rule should permit sharing information for purposes of evaluating education and training programs established under State law. The commenter stated that "States should also be allowed to share data on an interagency basis where the same level of confidentiality protections are in place within the State" without requiring "informed consent." The Department agrees and notes that the rule already provides for the type of data-sharing addressed in the comment. Where sharing occurs with another governmental entity for purposes of administering a law, disclosure of confidential UC information is permitted under paragraph (e) (discussed below) without any "informed consent" on the part of the individual. Further, under this rule, administering a law includes conducting research with respect to whatever program(s) are administered under the law. This is discussed in paragraph (e) (exception pertaining to disclosures to "public officials") since it relates directly to that exception and serves to clarify an element of that provision. No change is made in paragraph (d)(2) of the final rule as a result of this comment.

Another commenter stated that the Department should permit a system

where confidential UC information will automatically be disclosed for certain purposes under the Workforce Investment Act unless the individual "opts out" from disclosing personal information. Under the proposed and the final rule, this type of system would be permissible when disclosure is solely to public officials in the performance of his or her official duties. However, for non-governmental entities, the Department believes that any sharing of confidential UC information in this regard should be made only following an affirmative release by the individual. A passive system, such as an "opt out" system, does not guarantee that the individual fully understands the purposes of the disclosure and may result in the individual feeling coerced to disclose data. No change in the final rule is made as a result of this comment.

(e) Public Official

The proposed rule provided for disclosure of confidential UC information to a public official in the performance of his or her official duties. Since the 1970s, the Department's guidance to States has recognized this exception, which allows for a variety of uses of confidential UC information that the Department believes are beneficial, such as law enforcement, fraud and benefit accuracy in programs not addressed by Federal UC law (for example, Black Lung and State workers' compensation programs), program assessment (for example, of WIA and Vocational Education programs), and research.

The proposed rule described "performance of official duties" as administration or enforcement of law or, in the case of the legislative branch, oversight of UC law. It also stated that although research by a public official was permitted under this exception, this exception did not include research by an individual at a public or private university. However, it also stated that, where appropriate, a researcher could obtain access to confidential UC information under the exceptions provided for in proposed paragraph (f) (agent or contractor of a public official) or proposed paragraph (d)(2) (third party). Under paragraph (f) of the proposed rule, the public official would maintain the responsibility of insuring that the confidential UC information is safeguarded by its agent (for example, the researcher). The Department continues to believe that there is less risk of unauthorized use or disclosure of confidential UC information if responsibility for safeguarding confidentiality remains within the

executive or legislative branches of government.

As discussed above in § 603.2 (d) (definition of public official), commenters expressed concern that limiting disclosure to only those legislators with "oversight" responsibility for the UC program was vague and, as a result, difficult to implement and determine as to the performance of "oversight" functions. In response, this reference to "oversight" was removed from the final rule. In so doing, paragraph (e) also required revision since it, too, included the "oversight" limitation as to elected officials (with regard to the meaning of "performance of official duties").

As a result, paragraph (e) of the final rule has been revised so that "performance of official duties" now means "administration or enforcement of law or the execution of the official responsibilities of a Federal, State, or local elected official." For further clarification, it also now provides that "administration of law" includes research related to the law administered by the public official. This sentence has been added to the final rule to eliminate any confusion regarding whether research conducted by a public official is part of the administration of its law.

In addition, new language has been added to the final rule to explain that "execution of official responsibilities" does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party. This language has been added to make it clear that UC records are not to be used to identify subjects for campaign solicitations.

(f) Agent or Contractor of Public Official

The proposed rule provided for disclosure of confidential UC information to an agent or contractor of a public official to whom disclosure is permissible under paragraph (e) (public official). This provision took into account that certain functions, including research, are often contracted out by public agencies. If confidential UC information could not be disclosed to agents or contractors of public officials, valuable research might be forgone or become more expensive, as agencies would have to undertake interviews of program participants in order to gather program evaluation information. A public official, ideally one with responsibility for the program or initiative on which research is being conducted, would be required to enter into the written agreement required by § 603.10 and be held responsible for use of the information by the contractor or

agent. Redisclosure of such information by a public official to an agent or contractor would be permitted only as provided in § 603.9(c).

One commenter suggested that the regulation be expanded “to allow State agencies to disclose [confidential] UC information to researchers if the State agencies believe that the results of such research would be beneficial to the agency for the administration of agency programs,” in light of the fact “States do not have to pay” for research from which they benefit. Another commenter, from a university, indicated concern that the public official must actually pay for the research as opposed to private foundations. The same commenter expressed concern that a university could not be viewed as an “agent” of the public official if the university was performing research of privately funded programs, such as employer-funded training or those supported by entities such as the United Way. The commenter stated that this “significantly narrowed” allowable uses of data.

In response, the Department notes that neither the proposed nor this final rule prohibits the sharing of information with researchers when an official of a public agency believes the research would be beneficial to the public agency. In such case, the researcher functions as the public agency’s “agent,” even if the research was not initiated or funded by the agency, or even if the research may have applicability beyond the agency itself. To address the commenter’s example of private training programs, the Department believes that allowing a public agency to correlate results of private research initiatives with its own programs would be beneficial to the public agency and, thus, the public agency could be persuaded to accept responsibility for the disclosure and use of confidential UC information. The Department believes this properly balances the need to protect confidential UC information with the desire to not restrict research. Therefore, no change is made in the final rule.

The Department emphasizes (as it stated in the preamble to the proposed rule) that States should provide non-confidential UC information to researchers in lieu of confidential UC information. Indeed, the expectation is that State agencies would explore this approach prior to providing confidential UC information. State agencies may, for example, encrypt identifiers before providing data to a researcher so that the researcher cannot identify individuals or employers. The agency could add subsequent years of data for the researcher using the same

encryption so that the researcher can conduct longitudinal studies.

(g) Bureau of Labor Statistics

The proposed rule provided that the confidentiality requirement did not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS) and that Part 603 did not restrict or impose any condition on the transfer of any other information to the BLS under an agreement, or the BLS’s disclosure or use of such information.

Under the proposed rule, transfers of information to the BLS were excepted from the confidentiality requirement because the conditions under which they occur already satisfied the requirements of the confidentiality rule, and the Department did not wish to interfere with the BLS’ existing agreements or the ability of the BLS to carry out its statistical programs. Specifically, safeguards, agreements, and payment of costs are already in place. The BLS funds States for collection and disclosure of information. The BLS applies strict safeguards to protect the confidentiality of information it receives. Transfers of information to the BLS are governed by agreements that provide assurance that these safeguards will be followed. Moreover, the exemption for BLS is also based on the fact that its data is integrally related to the administration of the UC program. The collection and reporting authority of BLS is based on existing Federal law (29 U.S.C. 2) and subject to the confidentiality protections outlined in the Secretary of Labor’s Order No. 9–75.

The U.S. Census Bureau commented on the proposed rule and expressed concern that “several components of the proposed rule, if enacted, would be problematic for the Census Bureau’s need to continue accessing [UC information].” Further, the Census Bureau wanted to ensure that its activities would not be hampered by implementation of the confidentiality rule. As such, the Census Bureau requested it be afforded the same exemption as BLS from the confidentiality requirement. Another commenter also expressed support for exempting the Census Bureau from the confidentiality requirement.

The Department fully supports the Census Bureau’s analytical efforts and its policy-relevant research. However, based on the Census Bureau’s description of its current processes for securing and protecting confidential UC information and the fact that it is a public agency (to whose officials States

are permitted to disclose confidential UC information), it appears that the rule would not inhibit its ability to obtain this information. Indeed, the rule merely sets forth the Department’s long-standing guidance to States regarding disclosure to public officials and the terms and conditions which apply. States should already be following this guidance when disclosing to the Census Bureau. Therefore, no change to the rule is made as a result of these comments.

(i) UC Program Oversight and Audits (“As Required by Federal Law” in the Proposed Rule)

This paragraph of the proposed rule provided for the disclosure of confidential UC information as required by “Federal Law.” However, other Federal agencies would already be covered under § 603.5(e) (disclosure to public officials, including disclosure to the IRS for Health Coverage Tax Credit (HCTC) purposes), § 603.5 (h) (disclosure in response to a court order or to an official with subpoena authority), or § 603.6(a) (disclosure necessary for the proper administration of the UC program, including disclosures to the Internal Revenue Service for purposes of UC tax administration). Given the unnecessary duplication it presented, proposed paragraph (i) (as required by Federal law) has been revised in the final rule (as discussed below).

To be more specific regarding its scope, paragraph (i) of the final rule is now limited to UC program oversight and audits. The proposed rule lacked such a provision (unlike the 1992 proposed rule) and the Department believes it is necessary to explicitly address the inapplicability of the confidentiality requirement to any disclosure to the Federal Government for purposes of UC program oversight and audits. As a result, paragraph (i) of the final rule provides that the confidentiality requirement does not apply to any disclosures to a Federal official for purposes of UC program oversight and audits, including disclosures necessary under the Department’s rules at 20 CFR part 601 and 29 CFR parts 96 and 97.

The Department notes that the final rule does not implement the Secretary of Labor’s authority under Section 303(a)(6), SSA. Section 303(a)(6) requires that State UC laws include provision for “[t]he making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require * * * Section 303(a)(6) stands as a basis for requiring disclosure to the Department.

Section 603.6 What disclosures are required by this subpart?

(“What disclosures are required by Federal UC law” in the proposed rule.) In the proposed rule, this section was entitled, “What disclosures are required by Federal UC law?” The Department determined, upon further review, that a more appropriate characterization of this section is “disclosures required by this subpart” since the regulation is the mechanism that effectively implements the provisions of Federal UC law.

Paragraph (a) of the proposed rule set forth the Department’s interpretation of Section 303(a)(1), SSA, as requiring disclosure of all information necessary for the proper administration of the UC program. This included disclosure to the Internal Revenue Service for purposes of UC tax administration or to the U.S. Citizenship and Immigration Services for purposes of verifying a claimant’s immigration status. It also required disclosure for purposes of interstate and cross-program offsets under Section 303(g), SSA.

The Department believes it is necessary to clarify that the disclosures required under paragraph (a) are not subject to the confidentiality requirement. As a result, the final rule explicitly provides that the confidentiality requirement of 303(a)(1), SSA, and § 603.4 are not applicable to the disclosures required under paragraph (a). This paragraph continues to provide that “administration of the UC program” includes disclosures to claimants, employers, the Internal Revenue Service (for purposes of UC tax administration), and the U.S. Citizenship and Immigration Services (for purposes of verifying a claimant’s immigration status).

Section 603.7 What requirements apply to subpoenas, other compulsory process, and disclosure to officials with subpoena authority?

(a) In General

In the proposed rule, this section set forth the Department’s long-standing position on State responses to subpoenas and other compulsory processes attempting to obtain confidential UC information. Under certain conditions, it required the State or State UC agency to file and pursue a motion to quash, in the appropriate forum, when a subpoena or other compulsory process of a lawful authority, which required the production of or appearance for testimony about such information, is served upon the State UC agency or the State. If such a motion were denied, after a hearing in the appropriate forum,

confidential UC information may be disclosed, but only upon such terms as the court or other forum may order, including that the recipient protect the disclosed information and pay the State’s or State UC agency’s costs of disclosure.

Several State UC agencies noted that the proposed rule appeared to require a motion to quash a subpoena even though most subpoenas can be avoided or resolved through other means that are far more efficient and economical. These commenters recommended that the rule recognize these other means. Another commenter noted that the court may order the disclosure of information through “a true court order, and not merely a subpoena,” and questioned the application of the rule in such cases. The Department agrees with these comments. As a result, this provision of the final rule has been revised to recognize that other means of avoiding disclosure of confidential UC information may be pursued before the need to file a motion to quash. Also, the final rule now recognizes that a motion to quash is necessary only if the court has not already ruled on the disclosure.

(b) Exceptions

The proposed rule provided two exceptions to the requirement to quash a subpoena: First, where a court has previously issued a binding precedential decision that requires such disclosures and, second, when confidential UC information is requested by an official of State or Federal government, other than a clerk of court on behalf of a litigant, with authority to obtain the information by subpoena under State or Federal law. These proposed exceptions recognized that filing a motion to quash in these circumstances may indeed be futile and a waste of administrative resources. They would also facilitate State cooperation with law enforcement.

Commenters requested clarification of the reference to “binding legal precedent,” noting that courts routinely deny motions to quash or otherwise order disclosure of confidential UC information without ever publishing a decision that may be considered precedential. In the same vein, another commenter objected to “futile” motions to quash, while another addressed this situation by urging an exception for situations “where the obligation to disclose such data has been well established by a pattern of prior judicial decisions.” The Department agrees that well-established patterns of judicial decisions may be treated as precedent. As a result, the final rule has been revised to permit disclosure where a

well-established pattern of prior court decisions have required the same type of disclosure. Nonetheless, the Department encourages those States within which courts routinely deny motions to quash, to examine their laws and regulations to determine if an amendment may result in such motions being upheld.

Two State UC agencies noted the proposed rule’s exception from filing a motion to quash applied to State or Federal governmental officials with subpoena authority, but did not apply to county or metropolitan governmental officials with the authority to subpoena records, such as prosecutors. The Department notes that, generally, a governmental official will need to exercise subpoena authority only when State UC law does not specifically allow the disclosure to such official. However, the Department did not intend to prohibit these officials from obtaining information for administration of their official duties. As a result, the final rule has been revised to include “local” governmental officials within this exception.

One commenter noted that § 603.7(b) of the proposed rule was “confusing” because it stated that the exceptions to filing a motion to quash a subpoena applied “regardless of whether a subpoena was issued.” The quoted language was included to permit the State UC agency, if it so chose, to disclose information that was requested by a public official with subpoena authority without forcing the public official to actually issue the subpoena. To more accurately reflect this option, the Department has changed the final rule to clarify that the State or State UC agency may disclose the requested confidential UC information to a public official with subpoena authority without the actual issuance of a subpoena.

The Department believes that filing motions to quash subpoenas involving the disclosure of confidential UC information is an important means of avoiding unnecessary or unlawful disclosures, which might deter claimants from exercising their rights or employers from providing information. Where the exceptions apply, a State may still file such a motion if warranted, or may file a motion to require that the recipient protect the disclosed information or for reimbursement of costs. (As described in § 603.8(b), seeking reimbursement in some manner is required if grant funds are used to cover the costs of the disclosure.) If the State law is sufficiently rigorous concerning the disclosure of confidential UC information, the courts may be less inclined to enforce

subpoenas; so, States may wish to review their State laws in this regard. To conserve time and funds, States may wish to pursue a motion to quash by mail or by telephone if permitted by State law.

Finally, some commenters questioned the need for the proposed rule to address disclosing confidential UC information to public officials with subpoena authority given that § 603.5(e) permits disclosure to public officials. The Department's answer is that disclosures under § 603.5(e) must be made under the agreements described in § 603.10, which require, among other things, the payment of costs and the safeguarding of information, before any information may be disclosed. Thus, that provision is limited to cases where disclosure is explicitly authorized or required under the State UC law. The subpoena exception, however, pertains to situations where governmental officials have the authority to demand information under *their* laws, but where State UC law may not permit such disclosure or where an agreement may not have been entered into, thus necessitating the public official to obtain the confidential UC information through a subpoena. Therefore, no change is made in the final rule.

Section 603.8 What are the requirements for the payment of costs and program income?

(a) In General

This paragraph of the proposed rule explained, in general, that grant funds could not be used to pay any of the costs of making any disclosure (except as provided in paragraph (b) of this section). Upon review, clarifications to proposed paragraph (a) became necessary.

First, "disclosure to the IRS for HCTC purposes" was misidentified in proposed paragraph (a) as a reference to § 603.5(h) when it should have referenced § 603.5(i). However, as discussed previously, proposed paragraph (i) of § 603.5 was replaced with a new provision in the final rule concerning UC program oversight and audits. In the discussion concerning the changes to proposed paragraph (i), it was explained that "disclosure to the IRS for HCTC purposes," like disclosures to other Federal agencies, would already be covered under the provision relating to disclosure to public officials (§ 603.5(e)). As a result, rather than correct the misidentification in proposed paragraph (a) of § 603.8, we have deleted the reference to "disclosure to the IRS for HCTC purposes."

Second, revision to the final rule became necessary because the rule did not distinguish between the two types of informed consent disclosures (addressed in § 603.5(d)) as they related to the use of grant funds for the costs of such disclosures. Thus, revision to paragraph (a) (and to paragraph (b) of this section, as discussed below) became necessary to make explicit the fact that grant funds have never been allowed to be used for the costs of making disclosures to third parties (other than agents) on the basis of informed consent. Accordingly, the final rule was revised to explicitly state that grant funds may *not* be used to pay for the costs of disclosures under § 603.5(d)(2) (third party (other than an agent) or disclosures made on an ongoing basis).

(b) Use of Grant Funds Permitted

This paragraph of the proposed rule set forth the circumstances under which grant funds may be used to pay for the costs of disclosing confidential UC information. As discussed above, revision to this paragraph became necessary to clarify that grant funds may be used to pay for costs associated with disclosures to an agent on the basis of informed consent. Therefore, paragraph (b) of the final rule has been revised to make this permitted use of grant funds explicit.

As discussed previously, § 603.5(i) of the proposed rule was changed to explicitly address the inapplicability of the confidentiality requirement to any disclosure for purposes of UC program oversight and audits. In so doing, revision to § 603.8(b) of the proposed rule was also required in order to properly address those costs relating to disclosures for UC program oversight and audits under § 603.5(i) of the final rule. Accordingly, § 603.8 (b) of the final rule has been revised to specifically provide that grant funds may be used to pay the costs associated with disclosures to the Department for oversight and audits.

(d) Payment of Costs

The proposed rule required the payment of costs, calculated in accordance with paragraph (c), to be paid by the recipient of the information either in advance or by way of reimbursement. If the recipient is not a public official, such costs, except for good reason, would be required to be paid in advance. Payment in advance means full payment of costs before or at the time the disclosed information is given in hand or sent to the recipient.

The proposed rule further provided that the requirement for payment of costs is met when a State UC agency has

in place a reciprocal data-sharing agreement or arrangement with another agency or entity. "Reciprocal" means that the relative benefits received by each party to the agreement or arrangement are approximately equal.

Two commenters observed that the proposed rule appeared to prohibit another entity from paying costs on behalf of the recipient and suggested that the rule be amended to permit such payments. The purpose of requiring payment of costs is to assure that UC grant funds are not used for purposes unrelated to the administration of the UC program. Receiving payment from an entity other than the recipient accomplishes this. As a result of these comments, the final rule has been revised to recognize that costs may be paid by another source on behalf of the recipient.

Two other commenters requested clarification regarding the proposed rule's statement that, if the recipient is not a public official, "costs, except for good reasons (such as when the disclosure involves minimal cost) must be paid" in advance. These commenters questioned whether the reference to "minimal costs" meant that the recipient need not pay any costs. As noted elsewhere in the rule, all costs incurred by a recipient must be paid except when there "is not more than an incidental amount of [UC agency] staff time and no more than nominal processing costs" are involved. (§ 603.8(b).) Thus, the reference to minimal costs only relates to the advance payment of costs. To avoid confusion, the Department has deleted the reference to minimal costs from the final rule.

(e) Program Income

The proposed rule provided that reimbursed costs and any funds generated by the disclosure of information are program income and may be used only as permitted by 29 CFR 97.25(g) (on program income). It also provided that program income may not be used to benefit a State's general fund or another program.

One commenter expressed concern about how the cost requirements would impact the Wage Record Interchange System (WRIS), which is an interstate data exchange system that facilitates the exchange of UC wage records for assessing program performance under the WIA. Noting that the proposed rule provided that UC grant funds may be used to pay if disclosure does not result in "more than an incidental amount of staff time and no more than nominal processing costs are involved," the commenter stated a belief that WRIS

costs are “relatively minor” and therefore should be considered incidental or nominal. The Department does not agree. By permitting the use of UC grants where costs of disclosure are incidental or nominal, we merely recognize that some costs are so small that there may be no practical purpose served by attempting to recover these costs. Generally, these will be one-time only, ad hoc requests from individuals or their agents. The Department does not believe that the costs of setting up agreements, establishing data exchange protocols, and exchanging data on an ongoing basis can be said to be incidental or nominal. No change in the final rule is made as a result of this comment.

Section 603.9 What safeguards and security requirements apply to disclosed information?

(b) Safeguards To Be Required of Recipients

Paragraph (b) of the proposed rule set forth the safeguards that the State or State UC agency had to require of recipients.

Paragraph (b)(1)(vii) of the proposed rule required States to maintain a tracking system sufficient to allow an audit of compliance with the requirements of this subpart. The purpose of maintaining this system was to ensure that recipients of disclosed information were complying with the required safeguards. The proposed rule provided that this responsibility could not be handed over to the recipient. It also provided that where recipients were required to pay for the costs of making a disclosure, the costs of maintaining this system should be reflected in the amount charged to the recipient. Thus, the maintenance of this system would not increase costs for State UC agencies.

Several commenters stated that it was impractical or expensive to maintain a “tracking system” that is “sufficient to allow an audit of compliance.” As a result of these comments, the requirement for a “tracking system” has been deleted from § 603.9(b)(1)(vii) of the final rule. However, the Department continues to believe that some system must exist for allowing an audit if there is to be any guarantee that confidential UC information received from a UC agency is not misused. Therefore, the final rule requires a system “sufficient to allow an audit of compliance.” While tracking individual transactions may be the most efficient means of monitoring certain disclosures, other methods may be equally effective. For example, in the case of wage records that are routinely

transmitted to another governmental agency, it is sufficient that, prior to any audit, the UC agency be able to re-run the computer program that generated the wage records that were transmitted and use that output for the basis of its audit. The Department also notes that not all disclosures must be subject to this system. For example, the safeguards required by § 603.9 do not apply to disclosures made to an individual (§ 603.5(c)) or the individual’s agent (§ 603.5(d)(1)).

Paragraph (b)(2) of the proposed rule specifically required the State to conduct, in the case of optional disclosures to entities on the basis of informed consent (§ 603.5(d)(2)), a periodic audit of sample transactions to assure that the entity receiving information has on file a written release authorizing each access. The audit was required to ensure that the information was not being used for any unauthorized purpose.

Several commenters expressed concern regarding this requirement, stating that such audits are costly and burdensome. As the Department noted in the general comments regarding increased costs and burden, this audit requirement is applicable only to disclosure made under § 603.5(d)(2) pertaining to a third party (other than an agent) or disclosures made on an ongoing basis. (The Department notes that, in cases involving governmental entities receiving information under §§ 603.5(e) or 603.6, the recipient is merely required to provide for “on-site inspections.” The final rule does not mandate audits in these cases given the nature of the governmental entities, which are also subject to their own confidentiality laws; however, the Department believes it is important to maintain the right to perform “on-site inspections” in the event any allegation of misuse arises.)

The Department believes States must take reasonable actions to periodically audit these third parties. As discussed previously, the Department is concerned that such disclosures have a greater potential threat to employer or individual privacy. As such, we do not believe it is responsible to provide confidential UC information to such third parties without some requirement for auditing. Therefore, no change is made to the final rule.

The proposed rule did not, as commenters appeared to assume, dictate when audits must occur, nor did it dictate the nature and the extent of the audit. The Department believes these matters are best left to the States, which are in the best position to determine how often a particular recipient should

be audited, taking into account volume, any past audit exceptions, and the nature of the recipient, such as whether the recipient is in the business of disclosing information for profit. What is important is that any audit process be sufficient to assure that no misuse of confidential UC information is taking place. The Department also notes that the costs of performing any such audits must be built into the agreement that authorizes disclosure of confidential UC information to the recipient. Thus, for example, the costs of auditing a private business that receives confidential UC information under an informed consent agreement are to be built into the disclosure agreement. No change is made in the final rule as a result of these comments.

Paragraph (b)(2) of the proposed rule also required that all employees of entities receiving access to information under § 603.5(d)(2) be subject to the same confidentiality requirements, and State criminal penalties for violation of those requirements, as are employees of the State UC agency.

The National Association of State Workforce Agencies questioned how penalties would be assessed for information that is sent from one State to another State, particularly in regard to the WRIS. The specific question was whether the law of the sending or receiving State would apply in the case of unauthorized disclosures. The Department believes that no State should disclose confidential UC information to another entity—including another State—unless it retains the authority to apply its legal sanctions for unauthorized uses. This is reflected in § 603.9(b)(1), regarding safeguards to be required of recipients, which provides that “The State or State UC agency must * * * (v) Require each recipient agency or entity to (A) Instruct all personnel having access to the disclosed information about * * * the sanctions specified in the State law for unauthorized disclosure of information * * *”.

As a practical matter, the Department recognizes that a receiving State is in a better position to apply sanctions on violators who reside in that State, provided its confidentiality law is applicable to such violation. As such, in the case of interstate data sharing arrangements such as WRIS, a wise additional step is to require the receiving State to take the lead in applying legal sanctions. Although no change to the rule is made as a result of this comment, a State must make certain that prior to the release of confidential UC information to an entity outside the State, some provision exists to protect

such information, either by the disclosing State or by the law of the receiving State within which the entity exists.

Section 603.11 How do States notify claimants and employers about the uses of their information?

(a) Claimants

This section of the proposed rule required State UC agencies to notify claimants and employers how confidential UC information about them may be requested and utilized. This section was derived from the current 20 CFR 603.4 (revised by this rule) but, unlike the current 20 CFR 603.4, it applied to employers as well as claimants. State privacy law may require more detailed notification.

(b) Employers

The proposed rule provided that current Part 603 (specifically, § 603.4 of that Part) implemented the notification requirement applicable to the IEVS of Section 1137(a)(6), SSA. The proposed rule restated the notification requirement of Section 1137(a)(6), SSA, as a general requirement of Section 303(a)(1), SSA. It further explained that notifying claimants and employers what use may be made of UC information is necessary to maintaining their confidence in the Federal-State UC system, which is critical to its proper and efficient administration.

With regard to claimant notification, several State UC agencies questioned the proposed requirement that claimants be notified “at the time of application, and periodically thereafter, in what situations confidential UC information pertaining to the claimant may be requested and utilized” and the similar requirement for employers. Some requested more detail about when the notification is provided, what is meant by “periodically thereafter,” and the contents of the notice, specifically with respect to the details of the “situations” the notice must cover. One commenter objected to orally informing claimants at the time of “initial claim intake” because of the costs involved. Others suggested that notification “at the time an initial claim is filed by an individual” would be adequate.

The requirement that claimants be notified “at the time of filing [a claim] and periodically thereafter” has been a requirement of Section 1137(a)(6), SSA, pertaining to the IEVS program, since 1984. As such, it became a part of the Department’s implementation of the IEVS program, currently found at 20 CFR 603.4 (revised by this rule). Thus, State UC agencies should already be

notifying claimants concerning sharing of confidential UC information under IEVS. This final rule merely expands this claimant notification requirement so that the notice refers to uses beyond the IEVS program. It also extends notification to employers as well as claimants.

Since the requirement that claimants be notified “periodically thereafter” is a statutory requirement, States *must* periodically notify claimants. The Department recognizes that “periodic” notice to UC claimants is not always necessary due to the relatively short duration of UC claims. Although some commenters asked for clarification as to how this “periodic” requirement could be met, we believe that the rule is clear that “notice on or attached to subsequent additional claims will satisfy the requirements for periodic notice thereafter.” States are not required to offer other forms of periodic notice to claimants if they offer such notice as part of taking an additional claim.

The content of the notice to claimants need not be complex or lengthy. It could, for example, simply state that confidential UC information will be used for other governmental purposes, including verifying an individual’s eligibility for other governmental programs. Although the statutory requirement appears to permit oral notice, the Department prefers, but does not require, that notice be written. Such written notification may be, for example, in the form of a benefit rights pamphlet or a special enclosure in a routine mailing to the claimant that is associated with the initial application. In the case of Internet claims, a special screen may advise the claimant of the uses of confidential UC information. The notice need not say that UC information will be used for UC purposes, or address any releases that may be authorized by the claimant. At the same time, this rule does not prohibit States from providing such information.

Concerns relating to the content of the notification may have been a result of the language in the proposed rule referring to identifying the “situations” within which confidential UC information may be requested and utilized. The use of the word “situations” was not intended to require that the notice contain an exhaustive listing of all potential recipients of confidential UC information. In response to any misperception and to provide more guidance on the actual contents of the notice (including assuring any notice meets the IEVS requirement), § 603.11(a) is revised to

provide that claimants must be notified “at the time of application, and periodically thereafter, that confidential UC information pertaining to the claimant may be requested and utilized for other governmental purposes, including, but not limited to, verification of eligibility under other government programs.”

With regard to employer notification, the content of such notice may be as simple as that which is given to the claimant. It is sufficient that employers be notified annually with their yearly contribution rate notices (although special provision would need to be made for reimbursing employers since they do not receive annual rate notices), through any agency UC letter sent to all employers, or a statement on the quarterly wage report form. To parallel the revision to § 603.11(a) (concerning claimant notification), § 603.11(b) is revised to provide that employers must be notified “that wage information and other confidential UC information may be requested and utilized for other governmental purposes, including, but not limited to, verification of an individual’s eligibility for other government programs.”

Executive Order 12866

This final rule is a “significant regulatory action” within the meaning of Executive Order 12866 because it meets the criteria of Section 3(f)(4) of that Order in that it raises novel or legal policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Accordingly, the final rule has been submitted to, and reviewed by, the Office of Management and Budget (OMB).

However, the final rule is not “economically significant” because it does not have an annual effect on the economy of \$100 million or more. The Department has also determined that the final rule has no adverse material impact upon the economy and that it does not materially alter the budgeting impact of entitlement, grants, user fees or loan programs, or the rights and obligations of recipients thereof.

Further, the Department has evaluated the final rule and found it consistent with the regulatory philosophy and principles set forth in Executive Order 12866, which governs agency rulemaking. Although it impacts States and State UC agencies, it does not adversely affect them in a material way. The final rule protects State UC agencies from becoming clearinghouses of confidential UC information and preserves UC grant funds for program purposes. In addition, the final rule

maintains State flexibility in deciding whether to permit certain disclosures of confidential UC information for purposes other than the administration of the UC program so long as certain safeguards are followed.

Executive Order 13132

This rule was reviewed in accordance with Executive Order 13132. It was determined that the rule may have federalism implications. During an earlier stage in this rulemaking process, a federalism consultation with organizations representing State elected officials was held at the Department on October 19, 2000. These organizations expressed no concerns at that time or in the following months. Twenty-five States submitted comments on the 1992 proposed regulation, and these comments were considered in the development of the most recent proposed rule published in the **Federal Register** on August 12, 2004 (69 FR 50022).

In connection with the most recent proposed rule, federalism consultations with organizations representing State elected officials occurred on October 4 and 5, 2004. Again, these organizations expressed no concerns during the consultation process. The majority of comments received were from individual State agencies. The Department believes this final rule adequately addresses the concerns expressed in those comments.

Executive Order 12988

The Department drafted and reviewed this final regulation in accordance with Executive Order 12988, Civil Justice Reform, and it does not unduly burden the Federal court system. The final rule was written to minimize litigation and provide a clear legal standard for affected conduct, and was reviewed carefully to eliminate drafting errors and ambiguities.

Unfunded Mandates Reform Act of 1995 and Executive Order 12875

This final rule was reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et. seq.*) and Executive Order 12875. The Department has determined that this final rule does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement.

Paperwork Reduction Act

The following sections of this final rule contain information collection requirements or revises information collection requirements in current 20 CFR part 603: §§ 603.5, 603.6, 603.7, 603.8, 603.9, 603.10, 603.11, 603.22, and 603.23. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the information collection requirements in this final rule were submitted to the OMB for approval during the NPRM stage. This collection of information was approved under OMB control number 1205-0238 through August 31, 2007.

The annual burden associated with this final rule for all States combined is approximately 25,810 hours.

Regulatory Flexibility Act

This final rule does not have a "significant economic impact on a substantial number of small entities." The final rule affects States and State agencies, which are not within the definition of "small entity" under 5 U.S.C. 601(6). Under 5 U.S.C. 605(b), the Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Accordingly, no regulatory flexibility analysis is required.

Congressional Review Act

This final rule is not a "major rule" as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This final rule does not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Effect on Family Life

The Department certifies that this final rule was assessed in accordance with Pub. L. 105-277, 112 Stat. 2681, and that the final rule does not adversely affect the well-being of the nation's families.

List of Subjects in 20 CFR Part 603

Employment and Training Administration, Labor, and Unemployment Compensation.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance at No. 17.225, Unemployment Insurance.

Signed at Washington, DC on September 18, 2006.

Emily Stover DeRocco,

Assistant Secretary of Labor, Employment and Training Administration.

Words of Issuance

■ For the reasons set forth in the preamble, part 603 of Title 20, Code of Federal Regulations is revised as set forth below:

PART 603—FEDERAL-STATE UNEMPLOYMENT COMPENSATION (UC) PROGRAM; CONFIDENTIALITY AND DISCLOSURE OF STATE UC INFORMATION

Subpart A—In General

Sec.

603.1 What are the purpose and scope of this part?

603.2 What definitions apply to this part?

Subpart B—Confidentiality and Disclosure Requirements

603.3 What is the purpose and scope of this subpart?

603.4 What is the confidentiality requirement of Federal UC law?

603.5 What are the exceptions to the confidentiality requirement?

603.6 What disclosures are required by this subpart?

603.7 What requirements apply to subpoenas, other compulsory processes, and disclosure to officials with subpoena authority?

603.8 What are the requirements for payment of costs and program income?

603.9 What safeguards and security requirements apply to disclosed information?

603.10 What are the requirements for agreements?

603.11 How do States notify claimants and employers about the uses of their information?

603.12 How are the requirements of this part enforced?

Subpart C—Mandatory Disclosure for Income and Eligibility Verification System (IEVS)

603.20 What is the purpose and scope of this subpart?

603.21 What is a requesting agency?

603.22 What information must State UC agencies disclose for purposes of an IEVS?

603.23 What information must State UC agencies obtain from other agencies, and crossmatch with wage information, for purposes of an IEVS?

Authority: 42 U.S.C. 1302(a); Secretary's Order No. 4-75 (40 FR 18515) and Secretary's Order No. 14-75 (November 12, 1975).

Subpart A—In General

§ 603.1 What are the purpose and scope of this part?

The purpose of this part is to implement the requirements of Federal

UC law concerning confidentiality and disclosure of UC information. This part applies to States and State UC agencies, as defined in § 603.2(f) and (g).

§ 603.2 What definitions apply to this part?

For the purposes of this part:

(a)(1) *Claim information* means information about:

(i) Whether an individual is receiving, has received, or has applied for UC;

(ii) The amount of compensation the individual is receiving or is entitled to receive; and

(iii) The individual's current (or most recent) home address.

(2) For purposes of subpart C (IEVS), claim information also includes:

(i) Whether the individual has refused an offer of work and, if so, a description of the job offered including the terms, conditions, and rate of pay; and

(ii) Any other information contained in the records of the State UC agency that is needed by the requesting agency to verify eligibility for, and the amount of, benefits.

(b) *Confidential UC information* and *confidential information* mean any UC information, as defined in paragraph (j) of this section, required to be kept confidential under § 603.4.

(c) *Public domain information* means—

(1) Information about the organization of the State and the State UC agency and appellate authorities, including the names and positions of officials and employees thereof;

(2) Information about the State UC law (and applicable Federal law) provisions, rules, regulations, and interpretations thereof, including statements of general policy and interpretations of general applicability; and

(3) Any agreement of whatever kind or nature, including interstate arrangements and reciprocal agreements and any agreement with the Department of Labor or the Secretary, relating to the administration of the State UC law.

(d) *Public official* means an official, agency, or public entity within the executive branch of Federal, State, or local government who (or which) has responsibility for administering or enforcing a law, or an elected official in the Federal, State, or local government.

(e) *Secretary* and *Secretary of Labor* mean the cabinet officer heading the United States Department of Labor, or his or her designee.

(f) *State* means a State of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands.

(g) *State UC agency* means an agency charged with the administration of the State UC law.

(h) *State UC law* means the law of a State approved under Section 3304(a) of the Internal Revenue Code of 1986 (26 U.S.C. 3304(a)).

(i) *Unemployment compensation (UC)* means cash benefits payable to individuals with respect to their unemployment.

(j) *UC information* and *State UC information* means information in the records of a State or State UC agency that pertains to the administration of the State UC law. This term includes those State wage reports collected under the IEVS (Section 1137 of the Social Security Act (SSA)) that are obtained by the State UC agency for determining UC monetary eligibility or are downloaded to the State UC agency's files as a result of a crossmatch but does not otherwise include those wage reports. It does not include information in a State's Directory of New Hires, but does include any such information that has been disclosed to the State UC agency for use in the UC program. It also does not include the personnel or fiscal information of a State UC agency.

(k) *Wage information* means information in the records of a State UC agency (and, for purposes of § 603.23 (IEVS)), information reported under provisions of State law which fulfill the requirements of Section 1137, SSA) about the—

(1) Wages paid to an individual,

(2) Social security account number (or numbers, if more than one) of such individual, and

(3) Name, address, State, and the Federal employer identification number of the employer who paid such wages to such individual.

Subpart B—Confidentiality and Disclosure Requirements

§ 603.3 What is the purpose and scope of this subpart?

This subpart implements the basic confidentiality requirement derived from Section 303(a)(1), SSA, and the disclosure requirements of Sections 303(a)(7), (c)(1), (d), (e), (h), and (i), SSA, and Section 3304(a)(16), Federal Unemployment Tax Act (FUTA). This subpart also establishes uniform minimum requirements for the payment of costs, safeguards, and data-sharing agreements when UC information is disclosed, and for conformity and substantial compliance with this proposed rule. This subpart applies to States and State UC agencies, as defined in § 603.2(f) and (g), respectively.

§ 603.4 What is the confidentiality requirement of Federal UC law?

(a) *Statute*. Section 303(a)(1) of the SSA (42 U.S.C. 503(a)(1)) provides that, for the purposes of certification of payment of granted funds to a State under Section 302(a) (42 U.S.C. 502(a)), State law must include provision for such methods of administration as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

(b) *Interpretation*. The Department of Labor interprets Section 303(a)(1), SSA, to mean that "methods of administration" that are reasonably calculated to insure the full payment of UC when due must include provision for maintaining the confidentiality of any UC information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part.

(c) *Application*. Each State law must contain provisions that are interpreted and applied consistently with the interpretation in paragraph (b) of this section and with this subpart, and must provide penalties for any disclosure of confidential UC information that is inconsistent with any provision of this subpart.

§ 603.5 What are the exceptions to the confidentiality requirement?

The following are exceptions to the confidentiality requirement. Disclosure of confidential UC information is permissible under the exceptions in paragraphs (a) through (g) of this section only if authorized by State law and if such disclosure does not interfere with the efficient administration of the State UC law. Disclosure of confidential UC information is permissible under the exceptions in paragraphs (h) and (i) of this section without such restrictions.

(a) *Public domain information*. The confidentiality requirement of § 603.4 does not apply to public domain information, as defined at § 603.2(c).

(b) *UC appeals records*. Disclosure of appeals records and decisions, and precedential determinations on coverage of employers, employment, and wages, is permissible provided all social security account numbers have been removed and such disclosure is otherwise consistent with Federal and State law.

(c) *Individual or employer*. Disclosure for non-UC purposes, of confidential UC

information about an individual to that individual, or of confidential UC information about an employer to that employer, is permissible.

(d) *Informed consent.* Disclosure of confidential UC information on the basis of informed consent is permissible in the following circumstances—

(1) *Agent*—to one who acts for or in the place of an individual or an employer by the authority of that individual or employer if—

(i) In general—

(A) The agent presents a written release (which may include an electronically submitted release that the State determines is authentic) from the individual or employer being represented;

(B) When a written release is impossible or impracticable to obtain, the agent presents such other form of consent as is permitted by the State UC agency in accordance with State law;

(ii) In the case of an elected official performing constituent services, the official presents reasonable evidence (such as a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer) that the individual or employer has authorized such disclosure; or

(iii) In the case of an attorney retained for purposes related to the State's UC law, the attorney asserts that he or she is representing the individual or employer.

(2) *Third party (other than an agent) or disclosure made on an ongoing basis*—to a third party that is not acting as an agent or that receives confidential information following an informed consent disclosure on an ongoing basis (even if such entity is an agent), but only if that entity obtains a written release from the individual or employer to whom the information pertains.

(i) The release must be signed and must include a statement—

(A) Specifically identifying the information that is to be disclosed;

(B) That State government files will be accessed to obtain that information;

(C) Of the specific purpose or purposes for which the information is sought and a statement that information obtained under the release will only be used for that purpose or purposes; and

(D) Indicating all the parties who may receive the information disclosed.

(ii) The purpose specified in the release must be limited to—

(A) Providing a service or benefit to the individual signing the release that such individual expects to receive as a result of signing the release; or

(B) Carrying out administration or evaluation of a public program to which the release pertains.

Note to paragraph (d): The Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), Pub. L. 106-229, may apply where a party wishes to effectuate electronically an informed consent release (§ 603.5(d)(2)) or a disclosure agreement (§ 603.10(a)) with an entity that uses informed consent releases. E-Sign, among other things, sets forth the circumstances under which electronic signatures, contracts, and other records relating to such transactions (in lieu of paper documents) are legally binding. Thus, an electronic communication may suffice under E-Sign to establish a legally binding contract. The States will need to consider E-Sign's application to these informed consent releases and disclosure agreements. In particular, a State must, to conform and substantially comply with this regulation, assure that these informed consent releases and disclosure agreements are legally enforceable. If an informed consent release or disclosure agreement is to be effectuated electronically, the State must determine whether E-Sign applies to that transaction, and, if so, make certain that the transaction satisfies the conditions imposed by E-Sign. The State must also make certain that the electronic transaction complies with every other condition necessary to make it legally enforceable.

(e) *Public official.* Disclosure of confidential UC information to a public official for use in the performance of his or her official duties is permissible. "Performance of official duties" means administration or enforcement of law or the execution of the official responsibilities of a Federal, State, or local elected official. Administration of law includes research related to the law administered by the public official. Execution of official responsibilities does not include solicitation of contributions or expenditures to or on behalf of a candidate for public or political office or a political party.

(f) *Agent or contractor of public official.* Disclosure of confidential UC information to an agent or contractor of a public official to whom disclosure is permissible under paragraph (e) of this section.

(g) *Bureau of Labor Statistics.* The confidentiality requirement does not apply to information collected exclusively for statistical purposes under a cooperative agreement with the Bureau of Labor Statistics (BLS). Further, this part does not restrict or impose any condition on the transfer of any other information to the BLS under an agreement, or the BLS's disclosure or use of such information.

(h) *Court order; official with subpoena authority.* Disclosure of confidential UC information in response to a court order or to an official with subpoena authority is permissible as specified in § 603.7(b).

(i) *UC Program Oversight and Audits.* The confidentiality requirement does

not apply to any disclosure to a Federal official for purposes of UC program oversight and audits, including disclosures under 20 CFR part 601 and 29 CFR parts 96 and 97.

§ 603.6 What disclosures are required by this subpart?

(a) The confidentiality requirement of 303(a)(1), SSA, and § 603.4 are not applicable to this paragraph (a) and the Department of Labor interprets Section 303(a)(1), SSA, as requiring disclosure of all information necessary for the proper administration of the UC program. This includes disclosures to claimants, employers, the Internal Revenue Service (for purposes of UC tax administration), and the U.S. Citizenship and Immigration Services (for purposes of verifying a claimant's immigration status).

(b) In addition to Section 303(f), SSA (concerning an IEVS), which is addressed in subpart C, the following provisions of Federal UC law also specifically require disclosure of State UC information and State-held information pertaining to the Federal UC and benefit programs of Unemployment Compensation for Federal Employees (UCFE), Unemployment Compensation for Ex-Servicemembers (UCX), Trade Adjustment Assistance (TAA) (except for confidential business information collected by States), Disaster Unemployment Assistance (DUA), and any Federal UC benefit extension program:

(1) Section 303(a)(7), SSA, requires State law to provide for making available, upon request, to any agency of the United States charged with the administration of public works or assistance through public employment, disclosure of the following information with respect to each recipient of UC—

- (i) Name;
- (ii) Address;
- (iii) Ordinary occupation;
- (iv) Employment status; and
- (v) A statement of such recipient's rights to further compensation under the State law.

(2) Section 303(c)(1), SSA, requires each State to make its UC records available to the Railroad Retirement Board, and to furnish such copies of its UC records to the Railroad Retirement Board as the Board deems necessary for its purposes.

(3) Section 303(d)(1), SSA, requires each State UC agency, for purposes of determining an individual's eligibility benefits, or the amount of benefits, under a food stamp program established under the Food Stamp Act of 1977, to disclose, upon request, to officers and

employees of the Department of Agriculture, and to officers or employees of any State food stamp agency, any of the following information contained in the records of the State UC agency—

- (i) Wage information,
- (ii) Whether an individual is receiving, has received, or has made application for, UC, and the amount of any such compensation being received, or to be received, by such individual,
- (iii) The current (or most recent) home address of such individual, and
- (iv) Whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefore.

(4) Section 303(e)(1), SSA, requires each State UC agency to disclose, upon request, directly to officers or employees of any State or local child support enforcement agency, any wage information contained in the records of the State UC agency for purposes of establishing and collecting child support obligations (not to include custodial parent support obligations) from, and locating, individuals owing such obligations.

(5) Section 303(h), SSA, requires each State UC agency to disclose quarterly, to the Secretary of Health and Human Services (HHS), wage information and claim information as required under Section 453(i)(1) of the SSA (establishing the National Directory of New Hires), contained in the records of such agency, for purposes of Subsections (i)(1), (i)(3), and (j) of Section 453, SSA (establishing the National Directory of New Hires and its uses for purposes of child support enforcement, Temporary Assistance to Needy Families (TANF), TANF research, administration of the earned income tax credit, and use by the Social Security Administration).

(6) Section 303(i), SSA, requires each State UC agency to disclose, upon request, to officers or employees of the Department of Housing and Urban Development (HUD) and to representatives of a public housing agency, for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under a housing assistance program of HUD, any of the following information contained in the records of such State agency about any individual applying for or participating in any housing assistance program administered by HUD who has signed a consent form approved by the Secretary of HUD—

- (i) Wage information, and
- (ii) Whether the individual is receiving, has received, or has made

application for, UC, and the amount of any such compensation being received (or to be received) by such individual.

(7) Section 3304(a)(16), FUTA requires each State UC agency—

- (i) To disclose, upon request, to any State or political subdivision thereof administering a Temporary Assistance to Needy Families Agency (TANF) program funded under part A of Title IV of the SSA, wage information contained in the records of the State UC agency which is necessary (as determined by the Secretary of HHS in regulations) for purposes of determining an individual's eligibility for TANF assistance or the amount of TANF assistance; and

- (ii) To furnish to the Secretary of HHS, in accordance with that Secretary's regulations at 45 CFR 303.108, wage information (as defined at 45 CFR 303.108(a)(2)) and UC information (as defined at 45 CFR 303.108(a)(3)) contained in the records of such agency for the purposes of the National Directory of New Hires established under Section 453(i) of the SSA.

(c) Each State law must contain provisions that are interpreted and applied consistently with the requirements listed in this section.

§ 603.7 What requirements apply to subpoenas, other compulsory processes, and disclosure to officials with subpoena authority?

(a) *In general.* Except as provided in paragraph (b) of this section, when a subpoena or other compulsory process is served upon a State UC agency or the State, any official or employee thereof, or any recipient of confidential UC information, which requires the production of confidential UC information or appearance for testimony upon any matter concerning such information, the State or State UC agency or recipient must file and diligently pursue a motion to quash the subpoena or other compulsory process if other means of avoiding the disclosure of confidential UC information are not successful or if the court has not already ruled on the disclosure. Only if such motion is denied by the court or other forum may the requested confidential UC information be disclosed, and only upon such terms as the court or forum may order, such as that the recipient protect the disclosed information and pay the State's or State UC agency's costs of disclosure.

(b) *Exceptions.* The requirement of paragraph (a) of this section to move to quash subpoenas shall not be applicable, so that disclosure is permissible, where—

(1) *Court Decision*—a subpoena or other compulsory legal process has been served and a court has previously issued a binding precedential decision that requires disclosures of this type, or a well-established pattern of prior court decisions have required disclosures of this type, or

(2) *Official with Subpoena Authority*—Confidential UC information has been subpoenaed, by a local, State or Federal governmental official, other than a clerk of court on behalf of a litigant, with authority to obtain such information by subpoena under State or Federal law. The State or State UC agency may choose to disclose such confidential UC information to these officials without the actual issuance of a subpoena.

§ 603.8 What are the requirements for payment of costs and program income?

(a) *In general.* Except as provided in paragraph (b) of this section, grant funds must not be used to pay any of the costs of making any disclosure of UC information. Grant funds may not be used to pay any of the costs of making any disclosures under § 603.5(d)(2) (third party (other than an agent) or disclosure made on an ongoing basis), § 603.5(e) (optional disclosure to a public official), § 603.5(f) (optional disclosure to an agent or contractor of a public official), and § 603.5(g) (optional disclosure to BLS), § 603.6(b) (mandatory disclosures for non-UC purposes), or § 603.22 (mandatory disclosure for purposes of an IEVS).

(b) *Use of grant funds permitted.* Grant funds paid to a State under Section 302(a), SSA, may be used to pay the costs of only those disclosures necessary for proper administration of the UC program. (This may include some disclosures under § 603.5(a) (concerning public domain information), § 603.5(c) (to an individual or employer), and § 603.5(d)(1) (to an agent).) In addition, grant funds may be used to pay costs of disclosures under § 603.5(i) (for UC Program Oversight and Audits) and § 603.6(a) (for the proper administration of the UC program). Grant funds may also be used to pay costs associated with disclosures under § 603.7(b)(1) (concerning court-ordered compliance with subpoenas) if a court has denied recovery of costs, or to pay costs associated with disclosures under § 603.7(b)(2) (to officials with subpoena authority) if the State UC agency has attempted but not been successful in obtaining reimbursement of costs. Finally, grant funds may be used to pay costs associated with any disclosure of UC information if not more than an

incidental amount of staff time and no more than nominal processing costs are involved in making the disclosure.

(c) *Calculation of costs.* The costs to a State or State UC agency of processing and handling a request for disclosure of information must be calculated in accordance with the cost principles and administrative requirements of 29 CFR part 97 and Office of Management and Budget Circular No. A-87 (Revised). For the purpose of calculating such costs, any initial start-up costs incurred by the State UC agency in preparation for making the requested disclosure(s), such as computer reprogramming necessary to respond to the request, and the costs of implementing safeguards and agreements required by §§ 603.9 and 603.10, must be charged to and paid by the recipient. (Start-up costs do not include the costs to the State UC agency of obtaining, compiling, or maintaining information for its own purposes.) Postage or other delivery costs incurred in making any disclosure are part of the costs of making the disclosure. Penalty mail, as defined in 39 U.S.C. 3201(1), must not be used to transmit information being disclosed, except information disclosed for purposes of administration of State UC law. As provided in Sections 453(e)(2) and 453(g) of the SSA, the Secretary of HHS has the authority to determine what constitutes a reasonable amount for the reimbursement for disclosures under Section 303(h), SSA, and Section 3304(a)(16)(B), FUTA.

(d) *Payment of costs.* The costs to a State or State UC agency of making a disclosure of UC information, calculated in accordance with paragraph (c) of this section, must be paid by the recipient of the information or another source paying on behalf of the recipient, either in advance or by way of reimbursement. If the recipient is not a public official, such costs, except for good reason must be paid in advance. For the purposes of this paragraph (d), payment in advance means full payment of all costs before or at the time the disclosed information is given in hand or sent to the recipient. The requirement of payment of costs in this paragraph is met when a State UC agency has in place a reciprocal cost agreement or arrangement with the recipient. As used in this section, *reciprocal* means that the relative benefits received by each are approximately equal. Payment or reimbursement of costs must include any initial start-up costs associated with making the disclosure.

(e) *Program income.* Costs paid as required by this section, and any funds generated by the disclosure of UC information under this part, are program

income and may be used only as permitted by 29 CFR 97.25(g) (on program income). Such income may not be used to benefit a State's general fund or other program.

§ 603.9 What safeguards and security requirements apply to disclosed information?

(a) *In general.* For disclosures of confidential UC information under § 603.5(d)(2) (to a third party (other than an agent) or disclosures made on an ongoing basis); § 603.5(e) (to a public official), except as provided in paragraph (d) of this section; § 603.5(f) (to an agent or contractor of a public official); § 603.6(b)(1) through (4), (6), and (7)(i) (as required by Federal UC law); and § 603.22 (to a requesting agency for purposes of an IEVS), a State or State UC agency must require the recipient to safeguard the information disclosed against unauthorized access or redisclosure, as provided in paragraphs (b) and (c) of this section, and must subject the recipient to penalties provided by the State law for unauthorized disclosure of confidential UC information.

(b) *Safeguards to be required of recipients.* (1) The State or State UC agency must:

(i) Require the recipient to use the disclosed information only for purposes authorized by law and consistent with an agreement that meets the requirements of § 603.10;

(ii) Require the recipient to store the disclosed information in a place physically secure from access by unauthorized persons;

(iii) Require the recipient to store and process disclosed information maintained in electronic format, such as magnetic tapes or discs, in such a way that unauthorized persons cannot obtain the information by any means;

(iv) Require the recipient to undertake precautions to ensure that only authorized personnel are given access to disclosed information stored in computer systems;

(v) Require each recipient agency or entity to:

(A) Instruct all personnel having access to the disclosed information about confidentiality requirements, the requirements of this subpart B, and the sanctions specified in the State law for unauthorized disclosure of information, and

(B) Sign an acknowledgment that all personnel having access to the disclosed information have been instructed in accordance with paragraph (b)(1)(v)(A) of this section and will adhere to the State's or State UC agency's confidentiality requirements and

procedures which are consistent with this subpart B and the agreement required by § 603.10, and agreeing to report any infraction of these rules to the State UC agency fully and promptly,

(vi) Require the recipient to dispose of information disclosed or obtained, and any copies thereof made by the recipient agency, entity, or contractor, after the purpose for which the information is disclosed is served, except for disclosed information possessed by any court.

Disposal means return of the information to the disclosing State or State UC agency or destruction of the information, as directed by the State or State UC agency. Disposal includes deletion of personal identifiers by the State or State UC agency in lieu of destruction. In any case, the information disclosed must not be retained with personal identifiers for longer than such period of time as the State or State UC agency deems appropriate on a case-by-case basis; and

(vii) Maintain a system sufficient to allow an audit of compliance with the requirements of this part.

(2) In the case of disclosures made under § 603.5(d)(2) (to a third party (other than an agent) or disclosures made on an ongoing basis), the State or State UC agency must also—

(i) Periodically audit a sample of transactions accessing information disclosed under that section to assure that the entity receiving disclosed information has on file a written release authorizing each access. The audit must ensure that the information is not being used for any unauthorized purpose;

(ii) Ensure that all employees of entities receiving access to information disclosed under § 603.5(d)(2) are subject to the same confidentiality requirements, and State criminal penalties for violation of those requirements, as are employees of the State UC agency.

(c) *Redisclosure of confidential UC information.* (1) A State or State UC agency may authorize any recipient of confidential UC information under paragraph (a) of this section to redisclose information only as follows:

(i) To the individual or employer who is the subject of the information;

(ii) To an attorney or other duly authorized agent representing the individual or employer;

(iii) In any civil or criminal proceedings for or on behalf of a recipient agency or entity;

(iv) In response to a subpoena only as provided in § 603.7;

(v) To an agent or contractor of a public official only if the person redisclosing is a public official, if the redisclosure is authorized by the State

law, and if the public official retains responsibility for the uses of the confidential UC information by the agent or contractor;

(vi) From one public official to another if the redisclosure is authorized by the State law;

(vii) When so authorized by Section 303(e)(5), SSA, (redisclosure of wage information by a State or local child support enforcement agency to an agent under contract with such agency for purposes of carrying out child support enforcement) and by State law; or

(viii) When specifically authorized by a written release that meets the requirements of § 603.5(d) (to a third party with informed consent).

(2) Information redisclosed under paragraphs (c)(1)(v) and (vi) of this section must be subject to the safeguards in paragraph (b) of this section.

(d) The requirements of this section do not apply to disclosures of UC information to a Federal agency which the Department has determined, by notice published in the **Federal Register**, to have in place safeguards adequate to satisfy the confidentiality requirement of Section 303(a)(1), SSA.

§ 603.10 What are the requirements for agreements?

(a) *Requirements.* (1) For disclosures of confidential UC information under § 603.5(d)(2) (to a third party (other than an agent) or disclosures made on an ongoing basis); § 603.5(e) (to a public official), except as provided in paragraph (d) of this section; § 603.5(f) (to an agent or contractor of a public official); § 603.6(b)(1) through (4), (6), and (7)(i) (as required by Federal UC law); and § 603.22 (to a requesting agency for purposes of an IEVS), a State or State UC agency must enter into a written, enforceable agreement with any agency or entity requesting disclosure(s) of such information. The agreement must be terminable if the State or State UC agency determines that the safeguards in the agreement are not adhered to.

(2) For disclosures referred to in § 603.5(f) (to an agent or contractor of a public official), the State or State UC agency must enter into a written, enforceable agreement with the public official on whose behalf the agent or contractor will obtain information. The agreement must hold the public official responsible for ensuring that the agent or contractor complies with the safeguards of § 603.9. The agreement must be terminable if the State or State UC agency determines that the safeguards in the agreement are not adhered to.

(b) *Contents of agreement.* (1) *In general.* Any agreement required by paragraph (a) of this section must include, but need not be limited to, the following terms and conditions:

(i) A description of the specific information to be furnished and the purposes for which the information is sought;

(ii) A statement that those who request or receive information under the agreement will be limited to those with a need to access it for purposes listed in the agreement;

(iii) The methods and timing of requests for information and responses to those requests, including the format to be used;

(iv) Provision for paying the State or State UC agency for any costs of furnishing information, as required by § 603.8 (on costs);

(v) Provision for safeguarding the information disclosed, as required by § 603.9 (on safeguards); and

(vi) Provision for on-site inspections of the agency, entity, or contractor, to assure that the requirements of the State's law and the agreement or contract required by this section are being met.

(2) In the case of disclosures under § 603.5(d)(2) (to a third party (other than an agent) or disclosures made on an ongoing basis), the agreement required by paragraph (a) of this section must assure that the information will be accessed by only those entities with authorization under the individual's or employer's release, and that it may be used only for the specific purposes authorized in that release.

(c) *Breach of agreement.* (1) *In general.* If an agency, entity, or contractor, or any official, employee, or agent thereof, fails to comply with any provision of an agreement required by this section, including timely payment of the state's or state UC agency's costs billed to the agency, entity, or contractor, the agreement must be suspended, and further disclosure of information (including any disclosure being processed) to such agency, entity, or contractor is prohibited, until the State or State UC agency is satisfied that corrective action has been taken and there will be no further breach. In the absence of prompt and satisfactory corrective action, the agreement must be canceled, and the agency, entity, or contractor must be required to surrender to the state or state UC agency all confidential UC information (and copies thereof) obtained under the agreement which has not previously been returned to the state or state UC agency, and any other information relevant to the agreement.

(2) *Enforcement.* In addition to the actions required to be taken by paragraph (c)(1) of this section, the state or state UC agency must undertake any other action under the agreement, or under any law of the State or of the United States, to enforce the agreement and secure satisfactory corrective action or surrender of the information, and must take other remedial actions permitted under State or Federal law to effect adherence to the requirements of this subpart B, including seeking damages, penalties, and restitution as permitted under such law for any charges to granted funds and all costs incurred by the state or the state UC agency in pursuing the breach of the agreement and enforcement as required by this paragraph (c).

(d) The requirements of this section do not apply to disclosures of UC information to a Federal agency which the Department has determined, by notice published in the **Federal Register**, to have in place safeguards adequate to satisfy the confidentiality requirement of Section 303(a)(1), SSA, and an appropriate method of paying or reimbursing the State UC agency (which may involve a reciprocal cost arrangement) for costs involved in such disclosures. These determinations will be published in the **Federal Register**.

§ 603.11 How do States notify claimants and employers about the uses of their information?

(a) *Claimants.* Every claimant for compensation must be notified, at the time of application, and periodically thereafter, that confidential UC information pertaining to the claimant may be requested and utilized for other governmental purposes, including, but not limited to, verification of eligibility under other government programs. Notice on or attached to subsequent additional claims will satisfy the requirement for periodic notice thereafter.

(b) *Employers.* Every employer subject to a State's law must be notified that wage information and other confidential UC information may be requested and utilized for other governmental purposes, including, but not limited to, verification of an individual's eligibility for other government programs.

§ 603.12 How are the requirements of this part enforced?

(a) *Resolving conformity and compliance issues.* For the purposes of resolving issues of conformity and substantial compliance with the requirements set forth in subparts B and C, the provisions of 20 CFR 601.5(b) (informal discussions with the

Department of Labor to resolve conformity and substantial compliance issues), and 20 CFR 601.5(d) (Secretary of Labor's hearing and decision on conformity and substantial compliance) apply.

(b) *Conformity and substantial compliance.* Whenever the Secretary of Labor, after reasonable notice and opportunity for a hearing to the State UC agency of a State, finds that the State law fails to conform, or that the State or State UC agency fails to comply substantially, with:

(1) The requirements of Title III, SSA, implemented in subparts B and C of this part, the Secretary of Labor shall notify the Governor of the State and such State UC agency that further payments for the administration of the State UC law will not be made to the State until the Secretary of Labor is satisfied that there is no longer any such failure. Until the Secretary of Labor is so satisfied, the Department of Labor shall make no further payments to such State.

(2) The FUTA requirements implemented in this subpart B, the Secretary of Labor shall make no certification under that section to the Secretary of the Treasury for such State as of October 31 of the 12-month period for which such finding is made.

Subpart C—Mandatory Disclosure for Income and Eligibility Verification System (IEVS)

§ 603.20 What is the purpose and scope of this subpart?

(a) *Purpose.* Subpart C implements Section 303(f), SSA. Section 303(f) requires States to have in effect an income and eligibility verification system, which meets the requirements of Section 1137, SSA, under which information is requested and exchanged for the purpose of verifying eligibility for, and the amount of, benefits available under several federally assisted programs, including the Federal-State UC program.

(b) *Scope.* This subpart C applies only to a State UC agency.

Note to paragraph (b): Although not implemented in this part 603, Section

1137(a)(1), SSA, provides that each State must require claimants for compensation to furnish to the State UC agency their social security account numbers, as a condition of eligibility for compensation, and further requires States to utilize such account numbers in the administration of the State UC laws. Section 1137(a)(3), SSA, further provides that employers must make quarterly wage reports to a State UC agency, or an alternative agency, for use in verifying eligibility for, and the amount of, benefits. Section 1137(d)(1), SSA, provides that each State must require claimants for compensation, as a condition of eligibility, to declare in writing, under penalty of perjury, whether the individual is a citizen or national of the United States, and, if not, that the individual is in a satisfactory immigration status. Other provisions of Section 1137(d), SSA, not implemented in this regulation require the States to obtain, and individuals to furnish, information which shows immigration status, and require the States to verify immigration status with the Bureau of Citizenship and Immigration Services.

§ 603.21 What is a requesting agency?

For the purposes of this subpart C, *requesting agency* means:

(a) *Temporary Assistance to Needy Families Agency*—Any State or local agency charged with the responsibility of administering a program funded under part A of Title IV of the SSA.

(b) *Medicaid Agency*—Any State or local agency charged with the responsibility of administering the provisions of the Medicaid program under a State plan approved under Title XIX of the SSA.

(c) *Food Stamp Agency*—Any State or local agency charged with the responsibility of administering the provisions of the Food Stamp Program under the Food Stamp Act of 1977.

(d) *Other SSA Programs Agency*—Any State or local agency charged with the responsibility of administering a program under a State plan approved under Title I, X, XIV, or XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the SSA.

(e) *Child Support Enforcement Agency*—Any State or local child support enforcement agency charged with the responsibility of enforcing child support obligations under a plan

approved under part D of Title IV of the SSA.

(f) *Social Security Administration*—Commissioner of the Social Security Administration in establishing or verifying eligibility or benefit amounts under Titles II (Old-Age, Survivors, and Disability Insurance Benefits) and XVI (Supplemental Security Income for the Aged, Blind, and Disabled) of the SSA.

§ 603.22 What information must State UC agencies disclose for purposes of an IEVS?

(a) *Disclosure of information.* Each State UC agency must disclose, upon request, to any requesting agency, as defined in § 603.21, that has entered into an agreement required by § 603.10, wage information (as defined at § 603.2(k)) and claim information (as defined at § 603.2(a)) contained in the records of such State UC agency.

(b) *Format.* The State UC agency must adhere to standardized formats established by the Secretary of HHS (in consultation with the Secretary of Agriculture) and set forth in 42 CFR 435.960 (concerning standardized formats for furnishing and obtaining information to verify income and eligibility).

§ 603.23 What information must State UC agencies obtain from other agencies, and crossmatch with wage information, for purposes of an IEVS?

(a) *Crossmatch with information from requesting agencies.* Each State UC agency must obtain such information from the Social Security Administration and any requesting agency as may be needed in verifying eligibility for, and the amount of, compensation payable under the State UC law.

(b) *Crossmatch of wage and benefit information.* The State UC agency must crossmatch quarterly wage information with UC payment information to the extent that such information is likely, as determined by the Secretary of Labor, to be productive in identifying ineligibility for benefits and preventing or discovering incorrect payments.

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