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CODE OF FEDERAL REGULATIONS

Title 20
Employees' Benefits

Part 657 to End

Revised as of April 1, 2017

Containing a codification of documents
of general applicability and future effect

As of April 1, 2017

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To cite the regulations in this volume use title, part and section number. Thus, 20 CFR 658.400 *refers to title 20, part 658, section 400.*

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Title 17 through Title 27.....as of April 1
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An index to the text of ''Title 3—The President'' is carried within that volume.

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OLIVER A. POTTS,
Director,
Office of the Federal Register.
April 1, 2017.

THIS TITLE

Title 20—EMPLOYEES' BENEFITS is composed of four volumes. The first volume, containing parts 1–399, includes current regulations issued by the Office of Workers' Compensation Programs, Department of Labor and the Railroad Retirement Board. The second volume, containing parts 400–499, includes all current regulations issued by the Social Security Administration. The third volume, containing parts 500 to 656, includes current regulations issued by the Employees' Compensation Appeals Board, and the Employment and Training Administration. The fourth volume, containing part 657 to End, includes the current regulations issued by the Office of Workers' Compensation Programs, the Benefits Review Board, the Office of the Assistant Secretary for Veterans' Employment and Training Service (all of the Department of Labor) and the Joint Board for the Enrollment of Actuaries. The contents of these volumes represent all current regulations codified under this title of the CFR as of April 1, 2017.

An index to chapter III appears in the second volume.

For this volume, Michele Bugenhagen was Chief Editor. The Code of Federal Regulations publication program is under the direction of the John Hyrum Martinez, assisted by Stephen J. Frattini.

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(This book contains part 657 to end)

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Subpart A–D [Reserved]

Subpart E—Employment Service and Employment-Related Law Complaint System (Complaint System)

§ 658.400 Purpose and scope of subpart.

(a) This subpart sets forth the regulations governing the Complaint System for the Wagner-Peyser Act Employment Service (ES) at the State and Federal levels. Specifically, the Complaint System handles complaints against an employer about the specific job to which the applicant was referred through the ES and complaints involving the failure to comply with the ES regulations under parts 651, 652, 653, and 654 of this chapter and this part. As noted in §658.411(d)(6), this subpart only covers ES-related complaints made within 2 years of the alleged violation.

(b) Any complaints alleging violations under the Unemployment Insurance program, under Workforce Innovation and Opportunity Act (WIOA) title I programs, or complaints by veterans alleging employer violations of the mandatory listing requirements under 38 U.S.C. 4212 are not covered by this subpart and must be referred to the appropriate administering agency which would follow the procedures set forth in the respective regulations.

(c) The Complaint System also accepts, refers, and, under certain circumstances, tracks complaints involving employment-related laws as defined in § 651.10 of this chapter.

(d) A complainant may designate an individual to act as his/her representative.

COMPLAINTS FILED AT THE LOCAL AND STATE LEVEL

§ 658.410 Establishment of local and State complaint systems.

(a) Each State Workforce Agency (SWA) must establish and maintain a Complaint System pursuant to this subpart.

(b) The State Administrator must have overall responsibility for the operation of the Complaint System. At the ES office level the manager must be responsible for the operation of the Complaint System.

(c) SWAs must ensure centralized control procedures are established for the processing of complaints. The manager of the ES office and the SWA Administrator must ensure a central complaint log is maintained, listing all complaints taken by the ES office or the SWA, and specifying for each complaint:

(1) The name of the complainant;

(2) The name of the respondent (employer or State agency);

(3) The date the complaint is filed;

(4) Whether the complaint is by or on behalf of a migrant and seasonal farmworker (MSFW);

(5) Whether the complaint concerns an employment-related law or the ES regulations; and

(6) The action taken and whether the complaint has been resolved.

(d) State agencies must ensure information pertaining to the use of the Complaint System is publicized, which must include, but is not limited to, the prominent display of an Employment and Training Administration (ETA)-approved Complaint System poster in each one-stop center.

(e) Each one-stop center must ensure there is appropriate staff available during regular office hours to take complaints.

(f) Complaints may be accepted in any one-stop center, or by a State Workforce Agency, or elsewhere by an outreach worker.

(g) All complaints filed through the local ES office must be handled by a trained Complaint System representative.

(h) All complaints received by a SWA must be assigned to a State agency official designated by the State Administrator, provided that the State agency official designated to handle MSFW complaints must be the State Monitor Advocate (SMA).

(i) State agencies must ensure any action taken by the Complaint System representative, including referral on a complaint from an MSFW is fully documented containing all relevant information, including a notation of the type of each complaint pursuant to Department guidance, a copy of the original complaint form, a copy of any ES-related reports, any relevant correspondence, a list of actions taken, a record of pertinent telephone calls and all correspondence relating thereto.

(j) Within 1 month after the end of the calendar quarter, the ES office manager must transmit an electronic copy of the quarterly Complaint System log described in paragraph (c) of this section to the SMA. These logs must be made available to the Department upon request.

(k) The appropriate SWA or ES office representative handling a complaint must offer to assist the complainant through the provision of appropriate services.

(l) The State Administrator must establish a referral system for cases where a complaint is filed alleging a violation that occurred in the same State but through a different ES office.

(m) Follow-up on unresolved complaints. When a complaint is submitted or referred to a SWA, the Complaint

System representative (where the complainant is an MSFW, the Complaint System representative will be the SMA), must follow-up monthly regarding MSFW complaints, and must inform the complainant of the status of the complaint. No follow-up with the complainant is required for non-MSFW complaints.

(n) When a complainant is an English Language Learner (ELL), all written correspondence with the complainant under part 658, subpart E must include a translation into the complainant's native language.

(o) A complainant may designate an individual to act as his/her representative throughout the filing and processing of a complaint.

§ 658.411 Action on complaints.

(a) *Filing complaints.* (1) Whenever an individual indicates an interest in filing a complaint under this subpart with an ES office or SWA representative, or an outreach worker, the individual receiving the complaint must offer to explain the operation of the Complaint System and must offer to take the complaint in writing.

(2) During the initial discussion with the complainant, the staff taking the complaint must:

(i) Make every effort to obtain all the information he/she perceives to be necessary to investigate the complaint;

(ii) Request that the complainant indicate all of the physical addresses, email, and telephone numbers through which he/she might be contacted during the investigation of the complaint; and

(iii) Request that the complainant contact the Complaint System representative before leaving the area if possible, and explain the need to maintain contact during the investigation.

(3) The staff must ensure the complainant (or his/her representative) submits the complaint on the Complaint/Referral Form or another complaint form prescribed or approved by the Department or submits complaint information which satisfies paragraph (a)(4) of this section. The Complaint/Referral Form must be used for all complaints, including complaints about unlawful discrimination, except as provided in paragraph (a)(4) of this section. The staff must offer to assist the complainant in filling out the form and submitting all necessary information, and must do so if the complainant desires such assistance. If the complainant also represents several other complainants, all such complainants must be named. The complainant, or his/her representative, must sign the completed form in writing or electronically. The identity of the complainant(s) and any persons who furnish information relating to, or assisting in, an investigation of a complaint must be kept confidential to the maximum extent possible, consistent with applicable law and a fair determination of the complaint. A copy of the completed complaint submission must be given to the complainant(s), and the complaint form must be given to the appropriate Complaint System representative described in § 658.410(g).

(4) Any complaint in a reasonable form (letter or email) which is signed by the complainant, or his/her representative, and includes sufficient information to initiate an investigation must be treated as if it were a properly completed Complaint/Referral Form filed in person. A letter (via hard copy or email) confirming the complaint was received must be sent to the complainant and the document must be sent to the appropriate Complaint System representative. The Complaint System representative must request additional information from the complainant if the complainant has not provided sufficient information to investigate the matter expeditiously.

(b) *Complaints regarding an employment-related law.* (1) When a complaint is filed regarding an employment-related law with a ES office or a SWA the office must determine if the complainant is an MSFW.

(i) If the complainant is a non-MSFW, the office must immediately refer the complainant to the appropriate enforcement agency, another public agency, a legal aid organization, and/or a consumer advocate organization, as appropriate, for assistance. Upon completing the referral the local or State representative is not required to follow-up with the complainant.

(ii) If the complainant is a MSFW, the ES office or SWA Complaint System representative must:

(A) Take from the MSFW or his/her representative, in writing (hard copy or electronic), the complaint(s) describing the alleged violation(s) of the employment-related law(s); and

(B) Attempt to resolve the issue informally at the local level, except in cases where the complaint was submitted to the SWA and the SMA determines that he/she must take immediate action and except in cases where informal resolution at the local level would be detrimental to the complainant(s). In cases where informal resolution at the local level would be detrimental to the complainant(s), the Complaint System Representative or SMA (depending on where the complaint was filed) must immediately refer the complaint to the appropriate enforcement agency. Concurrently, the Complaint System representative must offer to refer the MSFW to other employment services should the MSFW be interested.

(C) If the issue is not resolved within 5 business days, the Complaint System representative must refer the complaint to the appropriate enforcement agency (or another public agency, a legal aid organization, or a consumer advocate organization, as appropriate) for further assistance.

(D) If the ES office or SWA Complaint System representative determines that the complaint must be referred to a State or Federal agency, he/she must refer the complaint to the SMA who must immediately refer the complaint to the appropriate enforcement agency for prompt action.

(E) If the complaint was referred to the SMA under paragraph (b)(1)(ii)(D) of this section, the representative must provide the SMA's contact information to the complainant. The SMA must notify the complainant of the enforcement agency to which the complaint was referred.

(2) If an enforcement agency makes a final determination that the employer violated an employment-related law and the complaint is connected to a job order, the SWA must initiate procedures for discontinuation of services immediately in accordance with subpart F of this part. If this occurs, the SWA must notify the complainant and the employer of this action.

(c) *Complaints alleging a violation of rights under the Equal Employment Opportunity Commission (EEOC) regulations or enforced by the Department of Labor's Civil Rights Center (CRC).* (1) All complaints received by a ES office or a SWA alleging unlawful discrimination, as well as reprisal for protected activity, in violation of EEOC regulations, must be logged and immediately referred to either a local Equal Opportunity (EO) representative, the State EO representative, or the EEOC. The Complaint System representative must notify the complainant of the referral in writing.

(2) Any complaints received either at the local and State level or at the ETA regional office, that allege violations of civil rights laws and regulations such as those under title VI of the Civil Rights Act or sec. 188 of WIOA, including for beneficiaries (as defined in 29 CFR 38.4) only, on the basis of citizenship status or participant status, as well as reprisal for protected activity, must immediately be logged and directed or forwarded to the recipient's Equal Opportunity Officer or the CRC.

(d) *Complaints regarding the ES regulations (ES complaints).* (1) When an ES complaint is filed with a ES office or a SWA the following procedures apply:

(i) When an ES complaint is filed against an employer, the proper office to handle the complaint is the ES office serving the area in which the employer is located.

(ii) When a complaint is against an employer in another State or against another SWA:

(A) The ES office or SWA receiving the complaint must send, after ensuring that the Complaint/Referral Form is adequately completed, a copy of the Complaint/Referral Form and copies of any relevant documents to the SWA in the other State. Copies of the referral letter must be sent to the complainant, and copies of the complaint and referral letter must be sent to the ETA Regional Office(s) with jurisdiction over the transferring and receiving State agencies. All such copies must be sent via hard copy or electronic mail.

(B) The SWA receiving the complaint must handle the complaint as if it had been initially filed with that SWA.

(C) The ETA regional office with jurisdiction over the receiving SWA must follow-up with it to ensure the complaint is handled in accordance with these regulations.

(D) If the complaint is against more than one SWA, the complaint must so clearly state. Additionally, the complaints must be processed as separate complaints and must be handled according to procedures in this paragraph (d).

(iii) When an ES complaint is filed against a ES office, the proper office to handle the complaint is the ES office serving the area in which the alleged violation occurred.

(iv) When an ES complaint is filed against more than one ES offices and is in regard to an alleged agency-wide violation the SWA representative or his/her designee must process the complaint.

(v) When a complaint is filed alleging a violation that occurred in the same State but through a different ES office, the ES office where the complaint is filed must ensure that the Complaint/Referral Form is adequately completed and send the form to the appropriate local ES office for tracking, further referral if necessary, and follow-up. A copy of the referral letter must be sent to the complainant via hard copy or electronic mail.

(2)(i) If a complaint regarding an alleged violation of the ES regulations is filed in a ES office by either a non-MSFW or MSFW, or their representative(s) (or if all necessary information has been submitted to the office pursuant to paragraph (a)(4) of this section), the appropriate ES office Complaint System representative must investigate and attempt to resolve the complaint immediately upon receipt.

(ii) If resolution has not been achieved to the satisfaction of the complainant within 15 working days after receipt of the complaint, or 5 working days with respect to complaints filed by or on behalf of MSFWs, (or after all necessary information has been submitted to the ES office pursuant to paragraph (a)(4) of this section), the Complaint System representative must send the complaint to the SWA for resolution or further action.

(iii) The ES office must notify the complainant and the respondent, in writing (via hard copy or electronic mail), of the determination (pursuant to paragraph (d)(5) of this section) of its investigation under paragraph (d)(2)(i) of this section, or of the referral to the SWA (if referred).

(3) When a non-MSFW or his/her representative files a complaint regarding the ES regulations with a SWA, or when a non-MSFW complaint is referred from a ES office the following procedures apply:

(i) If the complaint is not transferred to an enforcement agency under paragraph (b)(1)(i) of this section the Complaint System representative must investigate and attempt to resolve the complaint immediately upon receipt.

(ii) If resolution at the SWA level has not been accomplished within 30 working days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), whether the complaint was received directly or from a ES office pursuant to paragraph (d)(2)(ii) of this section, the SWA must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination must follow the procedures set forth in paragraph (d)(5) of this section.

(4)(i) When a MSFW or his/her representative files a complaint regarding the ES regulations directly with a SWA, or when a MSFW complaint is referred from a ES office, the SMA must investigate and attempt to resolve the complaint immediately upon receipt and may, if necessary, conduct a further investigation.

(ii) If resolution at the SWA level has not been accomplished within 20 business days after the complaint was received by the SWA (or after all necessary information has been submitted to the SWA pursuant to paragraph (a)(4) of this section), the SMA must make a written determination regarding the complaint and must send electronic copies to the complainant and the respondent. The determination

must follow the procedures set forth in paragraph (d)(5) of this section.

(5)(i) All written determinations by ES or SWA officials on complaints under the ES regulations must be sent by certified mail (or another legally viable method) and a copy of the determination may be sent via electronic mail. The determination must include all of the following:

(A) The results of any SWA investigation;

(B) The conclusions reached on the allegations of the complaint;

(C) If a resolution was not reached, an explanation of why the complaint was not resolved; and

(D) If the complaint is against the SWA, an offer to the complainant of the opportunity to request, in writing, a hearing within 20 business days after the certified date of receipt of the notification.

(ii) If the SWA determines that the employer has not violated the ES regulations, the SWA must offer to the complainant the opportunity to request a hearing within 20 working days after the certified date of receipt of the notification.

(iii) If the SWA, within 20 business days from the certified date of receipt of the notification provided for in paragraph (d)(5) of this section, receives a written request (via hard copy or electronic mail) for a hearing, the SWA must refer the complaint to a State hearing official for hearing. The SWA must, in writing (via hard copy or electronic mail), notify the respective parties to whom the determination was sent that:

(A) The parties will be notified of the date, time, and place of the hearing;

(B) The parties may be represented at the hearing by an attorney or other representative;

(C) The parties may bring witnesses and/or documentary evidence to the hearing;

(D) The parties may cross-examine opposing witnesses at the hearing;

(E) The decision on the complaint will be based on the evidence presented at the hearing;

(F) The State hearing official may reschedule the hearing at the request of a party or its representative; and

(G) With the consent of the SWA's representative and of the State hearing official, the party who requested the hearing may withdraw the request for hearing in writing before the hearing.

(iv) If the State agency makes a final determination that the employer who has or is currently using the ES has violated the ES regulations, the determination, pursuant to paragraph (d)(5) of this section, must state that the State will initiate procedures for discontinuation of services to the employer in accordance with subpart F of this part.

(6) A complaint regarding the ES regulations must be handled to resolution by these regulations only if it is made within 2 years of the alleged occurrence.

(e) *Resolution of complaints.* A complaint is considered resolved when:

(1) The complainant indicates satisfaction with the outcome via written correspondence;

(2) The complainant chooses not to elevate the complaint to the next level of review;

(3) The complainant or the complainant's authorized representative fails to respond to a request for information under paragraph (a)(4) of this section within 20 working days or, in cases where the complainant is an MSFW, 40 working days of a written request by the appropriate ES office or State agency;

(4) The complainant exhausts all available options for review; or

(5) A final determination has been made by the enforcement agency to which the complaint was referred.

(f) *Reopening of case after resolution.* If the complainant or the complainant's authorized representative fails to respond pursuant to paragraph (e)(3) of this section, the complainant or the complainant's authorized representative may reopen the case within 1 year after the SWA has closed the case.

§ 658.417 State hearings.

(a) The hearing described in § 658.411(d)(5) must be held by State hearing officials. A State hearing official may be any State official authorized to hold hearings under State law.

Examples of hearing officials are referees in State unemployment compensation hearings and officials of the State agency authorized to preside at State administrative hearings.

(b) The State hearing official may decide to conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously if conducted together.

(c) The State hearing official, upon the referral of a case for a hearing, must:

(1) Notify all involved parties of the date, time, and place of the hearing; and

(2) Reschedule the hearing, as appropriate.

(d) In conducting a hearing, the State hearing official must:

(1) Regulate the course of the hearing;

(2) Issue subpoenas if necessary, provided the official has the authority to do so under State law;

(3) Ensure that all relevant issues are considered;

(4) Rule on the introduction of evidence and testimony; and

(5) Take all actions necessary to ensure an orderly proceeding.

(e) All testimony at the hearing must be recorded and may be transcribed when appropriate.

(f) The parties must be afforded the opportunity to present, examine, and cross-examine witnesses.

(g) The State hearing official may elicit testimony from witnesses, but may not act as advocate for any party.

(h) The State hearing official must receive and include in the record, documentary evidence offered by any party and accepted at the hearing. Copies thereof must be made available by the party submitting the document to other parties to the hearing upon request.

(i) Federal and State rules of evidence do not apply to hearings conducted pursuant to this section; however rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, must be applied where reasonably necessary by the State hearing official. The State hearing official may exclude irrelevant, immaterial, or unduly repetitious evidence.

(j) The case record, or any portion thereof, must be available for inspection and copying by any party at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual.

(k) The State hearing official must, if feasible, resolve the dispute at any time prior to the conclusion of the hearing.

(l) At the State hearing official's discretion, other appropriate individuals, organizations, or associations may be permitted to participate in the hearing as amicus curiae (friends of the court) with respect to any legal or factual issues relevant to the complaint. Any documents submitted by the amicus curiae must be included in the record.

(m) If the parties to the hearing are located in more than one State or are located in the same State but access to the hearing location is extremely inconvenient for one or more parties as determined by the State hearing official, the hearing official must:

(1) Whenever possible, hold a single hearing at a location convenient to all parties or their representatives wishing to appear and present evidence, with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the State hearing official under paragraph (m)(1) of this section, the State hearing official may conduct, with the consent of the parties, the hearing by a telephone conference call from a State agency office. If the hearing is conducted via telephone conference call the parties and their representatives must have the option to participate in person or via telephone.

(3) Where the State agency is not able, for any reason, to conduct a telephonic hearing under paragraph (m)(2) of this section, the State agencies in the States where the parties are located must take evidence and hold the hearing in the same manner as used for appealed interstate unemployment claims in those States, to the extent

that such procedures are consistent with this section.

§ 658.418 Decision of the State hearing official.

(a) The State hearing official may:

(1) Rule that it lacks jurisdiction over the case;

(2) Rule that the complaint has been withdrawn properly in writing;

(3) Rule that reasonable cause exists to believe that the request has been abandoned; or

(4) Render such other rulings as are appropriate to resolve the issues in question.

However, the State hearing official does not have authority or jurisdiction to consider the validity or constitutionality of the ES regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including the investigations and determinations of the ES offices and State agencies and any evidence provided at the hearing, the State hearing official must prepare a written decision. The State hearing official must send a copy of the decision stating the findings of fact and conclusions of law, and the reasons therefor to the complainant, the respondent, entities serving as amicus capacity (if any), the State agency, the Regional Administrator, and the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, Department of Labor, Room N2101, 200 Constitution Avenue NW., Washington, DC 20210. The notification to the complainant and respondent must be sent by certified mail or by other legally viable means.

(c) All decisions of a State hearing official must be accompanied by a written notice informing the parties (not including the Regional Administrator, the Solicitor of Labor, or entities serving in an amicus capacity) that they may appeal the judge's decision within 20 working days of the certified date of receipt of the decision, and they may file an appeal in writing with the Regional Administrator. The notice must give the address of the Regional Administrator.

§ 658.419 Apparent violations.

(a) If a SWA, ES office employee, or outreach worker, observes, has reason to believe, or is in receipt of information regarding a suspected violation of employment-related laws or ES regulations by an employer, except as provided at § 653.503 of this chapter (field checks) or § 658.411 (complaints), the employee must document the suspected violation and refer this information to the ES office manager.

(b) If the employer has filed a job order with the ES office within the past 12 months, the ES office must attempt informal resolution provided at § 658.411.

(c) If the employer has not filed a job order with the ES office during the past 12 months, the suspected violation of an employment-related law must be referred to the appropriate enforcement agency in writing.

WHEN A COMPLAINT RISES TO THE FEDERAL LEVEL

§ 658.420 Responsibilities of the Employment and Training Administration regional office.

(a) Each Regional Administrator must establish and maintain a Complaint System within each ETA regional office.

(b) The Regional Administrator must designate Department of Labor officials to handle ES regulation-related complaints as follows:

(1) Any complaints received either at the local and State level or at the ETA regional office, that allege violations of civil rights laws and regulations such as those under Title VI of the Civil Rights Act or sec. 188 of WIOA, including for beneficiaries (as defined in 29 CFR 38.4) only, on the basis of citizenship status or participant status, as well as reprisal for protected activity, must immediately be logged and directed or forwarded to the recipient's Equal Opportunity Officer or the CRC.

(2) All complaints alleging discrimination on the basis of genetic information must be assigned to a Regional Director for Equal Opportunity and Special Review and, where appropriate, handled in accordance with procedures Coordinated Enforcement at 29 CFR part 31.

(3) All complaints other than those described in paragraphs (b)(1) and (2) of this section, must be assigned to a regional office official designated by the Regional Administrator, provided that the regional office official designated to handle MSFW complaints must be the Regional Monitor Advocate (RMA).

(c) Except for those complaints under paragraphs (b)(1) and (2) of this section, the Regional Administrator must designate Department of Labor officials to handle employment-related law complaints in accordance with § 658.411, provided that the regional official designated to handle MSFW employment-related law complaints must be the RMA. The RMA must follow up monthly on all complaints filed by MSFWs including complaints under paragraphs (b)(1) and (2) of this section.

(d) The Regional Administrator must ensure that all complaints and all related documents and correspondence are logged with a notation of the nature of each item.

§ 658.421 Handling of Wagner-Peyser Act Employment Service regulation-related complaints.

(a)(1) Except as provided below in paragraph (a)(2) of this section, no complaint alleging a violation of the ES regulations may be handled at the ETA regional office level until the complainant has exhausted the SWA administrative remedies set forth at §§ 658.411 through 658.418. If the Regional Administrator determines that a complaint has been prematurely filed with an ETA regional office, the Regional Administrator must inform the complainant within 10 working days in writing that the complainant must first exhaust those remedies before the complaint may be filed in the regional office. A copy of this letter and a copy of the complaint also must be sent to the State Administrator.

(2) If a complaint is submitted directly to the Regional Administrator and if he/she determines that the nature and scope of a complaint described in paragraph (a) of this section is such that the time required to exhaust the administrative procedures at the SWA level would adversely affect a significant number of individuals, the RA must accept the complaint and take the following action:

(i) If the complaint is filed against an employer, the regional office must handle the complaint in a manner consistent with the requirements imposed upon State agencies by §§ 658.411 and 658.418. A hearing must be offered to the parties once the Regional Administrator makes a determination on the complaint.

(ii) If the complaint is filed against a SWA, the regional office must follow procedures established at § 658.411(d).

(b) The ETA regional office is responsible for handling appeals of determinations made on complaints at the SWA level. An appeal includes any letter or other writing which the Regional Administrator reasonably understands to be requesting review if it is received by the regional office and signed by a party to the complaint.

(c)(1) Once the Regional Administrator receives a timely appeal, he/she must request the complete SWA file, including the original Complaint/Referral Form from the appropriate SWA.

(2) The Regional Administrator must review the file in the case and must determine within 10 business days whether any further investigation or action is appropriate; however if the Regional Administrator determines that he/she needs to request legal advice from the Office of the Solicitor at the U.S. Department of Labor then the Regional Administrator is allowed 20 business days to make this determination.

(d) If the Regional Administrator determines that no further action is warranted, the Regional Administrator will send his/her determination in writing to the appellant within 5 days of the determination, with a notification that the appellant may request a hearing before a Department of Labor Administrative Law Judge (ALJ) by filing a hearing request in writing with the Regional Administrator within 20 working days of the appellant's receipt of the notification.

(e) If the Regional Administrator determines that further investigation or other action is warranted, the Regional Administrator must undertake such an investigation or other action necessary to resolve the complaint.

(f) After taking the actions described in paragraph (e) of this section, the Regional Administrator must either affirm, reverse, or modify the decision of the State hearing official, and must notify each party to the State hearing official's hearing or to whom the State office determination was sent, notice of the determination and notify the parties that they may appeal the determination to the Department of Labor's Office of Administrative Law Judges within 20 business days of the party's receipt of the notice.

(g) If the Regional Administrator finds reason to believe that a SWA or one of its ES offices has violated ES regulations, the Regional Administrator must follow the procedures set forth at subpart H of this part.

§ 658.422 Handling of employment-related law complaints by the Regional Administrator.

(a) This section applies to all complaints submitted directly to the Regional Administrator or his/her representative.

(b) Each complaint filed by an MSFW alleging violation(s) of employment-related laws must be taken in writing, logged, and referred to the appropriate enforcement agency for prompt action.

(c) Each complaint submitted by a non-MSFW alleging violation(s) of employment-related laws must be logged and referred to the appropriate enforcement agency for prompt action.

(d) Upon referring the complaint in accordance with paragraphs (b) and (c) of this section, the regional official must inform the complainant of the enforcement agency (and individual, if known) to which the complaint was referred.

§ 658.424 Proceedings before the Office of Administrative Law Judges.

(a) If a party requests a hearing pursuant to § 658.421 or § 658.707, the Regional Administrator must:

(1) Send the party requesting the hearing, and all other parties to the prior State level hearing, a written notice (hard copy or electronic) that the matter will be referred to the Office of Administrative Law Judges for a hearing;

(2) Compile four hearing files (hard copy or electronic) containing copies of all documents relevant to the case, indexed and compiled chronologically; and

(3) Send simultaneously one hearing file to the Department of Labor Chief Administrative Law Judge, 800 K Street NW., Suite 400N, Washington, DC 20001–8002, one hearing file to the OWI Administrator, and one hearing file to the Solicitor of Labor, Attn: Associate Solicitor for Employment and Training Legal Services, and retain one hearing file.

(b) Proceedings under this section are governed by the rules of practice and procedure at subpart A of 29 CFR part 18, Rule of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, except where otherwise specified in this section or at § 658.425.

(c) Upon receipt of a hearing file, the ALJ designated to the case must notify the party requesting the hearing, all parties to the prior State hearing official hearing (if any), the State agency, the Regional Administrator, the OWI Administrator, and the Solicitor of Labor of the receipt of the case. After conferring all the parties, the ALJ may decide to make a determination on the record in lieu of scheduling a hearing.

(d) The ALJ may decide to consolidate cases and conduct hearings on more than one complaint concurrently if he/she determines that the issues are related or that the complaints will be handled more expeditiously.

(e) If the parties to the hearing are located in more than one State or are located in the same State but access to the hearing location is extremely inconvenient for one or more parties as determined by the ALJ, the ALJ must:

(1) Whenever possible, hold a single hearing, at a location convenient to all parties or their representatives wishing to appear and present evidence, with all such parties and/or their representatives present.

(2) If a hearing location cannot be established by the ALJ at a location pursuant to paragraph (e)(1) of this section, the ALJ may conduct, with the consent of the parties, the hearing by a

telephone conference call. If the hearing is conducted via telephone conference call the parties and their representatives must have the option to participate in person or via telephone.

(3) Where the ALJ is unable, for any reason, to conduct a telephonic hearing under paragraph (e)(2) of this section, the ALJ must confer with the parties on how to proceed.

(f) Upon deciding to hold a hearing, the ALJ must notify all involved parties of the date, time, and place of the hearing.

(g) The parties to the hearing must be afforded the opportunity to present, examine, and cross-examine witnesses. The ALJ may elicit testimony from witnesses, but may not act as advocate for any party. The ALJ has the authority to issue subpoenas.

(h) The ALJ must receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing, provided that copies of such evidence is provided to the other parties to the proceeding prior to the hearing at the time required by the ALJ.

(i) Technical rules of evidence do not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination must be applied where reasonably necessary by the ALJ conducting the hearing. The ALJ may exclude irrelevant, immaterial, or unduly repetitious evidence.

(j) The case record, or any portion thereof, must be available for inspection and copying by any party to the hearing at, prior to, or subsequent to the hearing upon request. Special procedures may be used for disclosure of medical and psychological records such as disclosure to a physician designated by the individual concerned.

(k) The ALJ must, if feasible, encourage resolution of the dispute by conciliation at any time prior to the conclusion of the hearing.

§ 658.425 Decision of Department of Labor Administrative Law Judge.

(a) The ALJ may:

(1) Rule that he/she lacks jurisdiction over the case;

(2) Rule that the appeal has been withdrawn, with the written consent of all parties;

(3) Rule that reasonable cause exists to believe that the appeal has been abandoned; or

(4) Render such other rulings as are appropriate to the issues in question. However, the ALJ does not have jurisdiction to consider the validity or constitutionality of the ES regulations or of the Federal statutes under which they are promulgated.

(b) Based on the entire record, including any legal briefs, the record before the State agency, the investigation (if any) and determination of the Regional Administrator, and evidence provided at the hearing, the ALJ must prepare a written decision. The ALJ must send a copy of the decision stating the findings of fact and conclusions of law to the parties to the hearing, including the State agency, the Regional Administrator, the OWI Administrator, and the Solicitor, and to entities filing amicus briefs (if any).

(c) The decision of the ALJ serves as the final decision of the Secretary.

§ 658.426 Complaints against the United States Employment Service.

(a) Complaints alleging that an ETA regional office or the National Office has violated ES regulations must be mailed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, DC 20210. Such complaints must include:

(1) A specific allegation of the violation;

(2) The date of the incident;

(3) Location of the incident;

(4) The individual alleged to have committed the violation; and

(5) Any other relevant information available to the complainant.

(b) The Assistant Secretary or the Regional Administrator as designated must make a determination and respond to the complainant after investigation of the complaint.

Subpart F—Discontinuation of Services to Employers by the Wagner-Peyser Act Employment Service

§ 658.500 Scope and purpose of subpart.

This subpart contains the regulations governing the discontinuation of services provided pursuant part 653 of this chapter to employers by the ETA, including SWAs.

§ 658.501 Basis for discontinuation of services.

(a) The SWA must initiate procedures for discontinuation of services to employers who:

(1) Submit and refuse to alter or withdraw job orders containing specifications which are contrary to employment-related laws;

(2) Submit job orders and refuse to provide assurances, in accordance with the Agricultural Recruitment System for U.S. Workers at part 653, subpart F, of this chapter, that the jobs offered are in compliance with employment-related laws, or to withdraw such job orders;

(3) Are found through field checks or otherwise to have either misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders;

(4) Are found by a final determination by an appropriate enforcement agency to have violated any employment-related laws and notification of this final determination has been provided to the Department or the SWA by that enforcement agency;

(5) Are found to have violated ES regulations pursuant to § 658.411;

(6) Refuse to accept qualified workers referred through the clearance system;

(7) Refuse to cooperate in the conduct of field checks conducted pursuant to § 653.503 of this chapter; or

(8) Repeatedly cause the initiation of the procedures for discontinuation of services pursuant to paragraphs (a)(1) through (7) of this section.

(b) The SWA may discontinue services immediately if, in the judgment of the State Administrator, exhaustion of the administrative procedures set forth in this subpart in paragraphs (a)(1) through (7) of this section would cause substantial harm to a significant number of workers. In such instances, procedures at §§ 658.503 and 658.504 must be followed.

(c) If it comes to the attention of a ES office or SWA that an employer participating in the ES may not have complied with the terms of its temporary labor certification, under, for example the H–2A and H–2B visa programs, State agencies must engage in the procedures for discontinuation of services to employers pursuant to paragraphs (a)(1) through (8) of this section and simultaneously notify the Chicago National Processing Center (CNPC) of the alleged non-compliance for investigation and consideration of ineligibility pursuant to § 655.184 or § 655.73 of this chapter respectively for subsequent temporary labor certification.

§ 658.502 Notification to employers.

(a) The SWA must notify the employer in writing that it intends to discontinue the provision of employment services pursuant to this part and parts 652, 653, and 654 of this chapter, and the reason therefore.

(1) Where the decision is based on submittal and refusal to alter or to withdraw job orders containing specifications contrary to employment-related laws, the SWA must specify the date the order was submitted, the job order involved, the specifications contrary to employment-related laws and the laws involved. The SWA must notify the employer in writing that all employment services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the specifications are not contrary to employment-related laws; or

(ii) Withdraws the specifications and resubmits the job order in compliance with all employment-related laws; or

(iii) If the job is no longer available, makes assurances that all future job orders submitted will be in compliance with all employment-related laws; or

(iv) Requests a hearing from the SWA pursuant to § 658.417.

(2) Where the decision is based on the employer's submittal of an order and refusal to provide assurances that the job is in compliance with employment-

related laws or to withdraw the order, the SWA must specify the date the order was submitted, the job order involved, and the assurances involved. The employer must be notified that all employment services will be terminated within 20 working days unless the employer within that time:

(i) Resubmits the order with the appropriate assurances; or

(ii) If the job is no longer available, make assurances that all future job orders submitted will contain all necessary assurances that the job offered is in compliance with employment-related laws; or

(iii) Requests a hearing from the SWA pursuant to § 658.417.

(3) Where the decision is based on a finding that the employer has misrepresented the terms or conditions of employment specified on job orders or failed to comply fully with assurances made on job orders, the SWA must specify the basis for that determination. The employer must be notified that all employment services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that terms and conditions of employment were not misrepresented; or

(ii) Provides adequate evidence that there was full compliance with the assurances made on the job orders; or

(iii) Provides resolution of a complaint which is satisfactory to a complainant referred by the ES; and

(iv) Provides adequate assurance that specifications on future orders will accurately represent the terms and conditions of employment and that there will be full compliance with all job order assurances; or

(v) Requests a hearing from the SWA pursuant to § 658.417.

(4) Where the decision is based on a final determination by an enforcement agency, the SWA must specify the enforcement agency's findings of facts and conclusions of law. The employer must be notified that all employment services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the enforcement agency has reversed its ruling and that the employer did not violate employment-related laws; or

(ii) Provides adequate evidence that the appropriate fines have been paid and/or appropriate restitution has been made; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future.

(5) Where the decision is based on a finding of a violation of ES regulations under § 658.411, the SWA must specify the finding. The employer must be notified that all employment services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the employer did not violate ES regulations; or

(ii) Provides adequate evidence that appropriate restitution has been made or remedial action taken; and

(iii) Provides assurances that any policies, procedures, or conditions responsible for the violation have been corrected and the same or similar violations are not likely to occur in the future; or

(iv) Requests a hearing from the SWA pursuant to § 658.417.

(6) Where the decision is based on an employer's failure to accept qualified workers referred through the clearance system, the SWA must specify the workers referred and not accepted. The employer must be notified that all employment services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that the workers were accepted; or

(ii) Provides adequate evidence that the workers were not available to accept the job; or

(iii) Provides adequate evidence that the workers were not qualified; and

(iv) Provides adequate assurances that qualified workers referred in the future will be accepted; or

(v) Requests a hearing from the SWA pursuant to § 658.417.

(7) Where the decision is based on lack of cooperation in the conduct of field checks, the SWA must specify the lack of cooperation. The employer must be notified that all employment

services will be terminated in 20 working days unless the employer within that time:

(i) Provides adequate evidence that he/she did cooperate; or

(ii) Cooperates immediately in the conduct of field checks; and

(iii) Provides assurances that he/she will cooperate in future field checks in further activity; or

(iv) Requests a hearing from the SWA pursuant to § 658.417.

(b) If the employer chooses to respond pursuant to this section by providing documentary evidence or assurances, he/she must at the same time request a hearing if such hearing is desired in the event that the SWA does not accept the documentary evidence or assurances as adequate.

(c) Where the decision is based on repeated initiation of procedures for discontinuation of services, the employer must be notified that services have been terminated.

(d) If the employer makes a timely request for a hearing, in accordance with this section, the SWA must follow procedures set forth at § 658.411 and notify the complainant whenever the discontinuation of services is based on a complaint pursuant to § 658.411.

§ 658.503 Discontinuation of services.

(a) If the employer does not provide a satisfactory response in accordance with § 658.502, within 20 working days, or has not requested a hearing, the SWA must immediately terminate services to the employer.

(b) If services are discontinued to an employer subject to Federal Contractor Job Listing Requirements, the SWA must notify the ETA regional office immediately.

§ 658.504 Reinstatement of services.

(a) Services may be reinstated to an employer after discontinuation under § 658.503(a) and (b), if:

(1) The State is ordered to do so by a Federal ALJ Judge or Regional Administrator; or

(2)(i) The employer provides adequate evidence that any policies, procedures or conditions responsible for the previous discontinuation of services have been corrected and that the same or similar circumstances are not likely to occur in the future; and

(ii) The employer provides adequate evidence that he/she has responded adequately to any findings of an enforcement agency, SWA, or ETA, including restitution to the complainant and the payment of any fines, which were the basis of the discontinuation of services.

(b) The SWA must notify the employer requesting reinstatement within 20 working days whether his/her request has been granted. If the State denies the request for reinstatement, the basis for the denial must be specified and the employer must be notified that he/she may request a hearing within 20 working days.

(c) If the employer makes a timely request for a hearing, the SWA must follow the procedures set forth at § 658.417.

(d) The SWA must reinstate services to an employer if ordered to do so by a State hearing official, Regional Administrator, or Federal ALJ as a result of a hearing offered pursuant to paragraph (c) of this section.

Subpart G—Review and Assessment of State Workforce Agency Compliance With Employment Service Regulations

§ 658.600 Scope and purpose of subpart.

This subpart sets forth the regulations governing review and assessment of State Workforce Agency (SWA) compliance with the ES regulations at this part and parts 651, 652, 653, and 654 of this chapter. All recordkeeping and reporting requirements contained in this part and part 653 of this chapter have been approved by the Office of Management and Budget as required by the Paperwork Reduction Act of 1980.

§ 658.601 State Workforce Agency responsibility.

(a) Each SWA must establish and maintain a self-appraisal system for ES operations to determine success in reaching goals and to correct deficiencies in performance. The self-appraisal system must include numerical (quantitative) appraisal and non-numerical (qualitative) appraisal.

(1) Numerical appraisal at the ES office level must be conducted as follows:

(i) Performance must be measured on a quarterly-basis against planned service levels as stated in the Unified or Combined State Plan (''State Plan''). The State Plan must be consistent with numerical goals contained in ES office plans.

(ii) To appraise numerical activities/indicators, actual results as shown on the Department's ETA 9002A report, or any successor report required by the Department must be compared to planned levels. Differences between achievement and plan levels must be identified.

(iii) When the numerical appraisal of required activities/indicators identifies significant differences from planned levels, additional analysis must be conducted to isolate possible contributing factors. This data analysis must include, as appropriate, comparisons to past performance, attainment of State Plan goals and consideration of pertinent non-numerical factors.

(iv) Results of ES office numerical reviews must be documented and significant deficiencies identified. A corrective action plan as described in paragraph (a)(6) of this section must be developed to address these deficiencies.

(v) The result of ES office appraisal, including corrective action plans, must be communicated in writing to the next higher level of authority for review. This review must cover adequacy of analysis, appropriateness of corrective actions, and need for higher level involvement. When this review is conducted at an area or district office, a report describing ES office performance within the area or district jurisdiction must be communicated to the SWA on a quarterly basis.

(2) Numerical appraisal at the SWA level must be conducted as follows:

(i) Performance must be measured on a quarterly basis against planned service levels as stated in the State Plan. The State Plan must be consistent with numerical goals contained in ES office plans.

(ii) To appraise these key numerical activities/indicators, actual results as shown on the ETA 9002A report, or any successor report required by the Department must be compared to planned levels. Differences between achievement and plan levels must be identified.

(iii) The SWA must review statewide data and performance against planned service levels as stated in the State Plan on at least a quarterly basis to identify significant statewide deficiencies and to determine the need for additional analysis, including identification of trends, comparisons to past performance, and attainment of State Plan goals.

(iv) Results of numerical reviews must be documented and significant deficiencies identified. A corrective action plan as described in paragraph (a)(5) of this section must be developed to address these deficiencies. These plans must be submitted to the ETA Regional Office as part of the periodic performance process described at § 658.603(d)(2).

(3) Non-numerical (qualitative) appraisal of ES office activities must be conducted at least annually as follows:

(i) Each ES office must assess the quality of its services to applicants, employers, and the community and its compliance with Federal regulations.

(ii) At a minimum, non-numerical review must include an assessment of the following factors:

(A) Appropriateness of services provided to participants and employers;

(B) Timely delivery of services to participants and employers;

(C) Staff responsiveness to individual participants and employer needs;

(D) Thoroughness and accuracy of documents prepared in the course of service delivery; and

(E) Effectiveness of ES interface with external organizations, such as other ETA-funded programs, community groups, etc.

(iii) Non-numerical review methods must include:

(A) Observation of processes;

(B) Review of documents used in service provisions; and

(C) Solicitation of input from applicants, employers, and the community.

(iv) The result of non-numerical reviews must be documented and deficiencies identified. A corrective action plan addressing these deficiencies as described in paragraph (a)(6) of this section must be developed.

(v) The result of ES office non-numerical appraisal, including corrective actions, must be communicated in writing to the next higher level of authority for review. This review must cover thoroughness and adequacy of ES office appraisal, appropriateness of corrective actions, and need for higher level involvement. When this review is conducted at an area or district level, a report summarizing local ES office performance within that jurisdiction must be communicated to the SWA on an annual basis.

(4) As part of its oversight responsibilities, the SWA must conduct on-site reviews in those ES offices which show continuing internal problems or deficiencies in performance as indicated by such sources as data analysis, non-numerical appraisal, or other sources of information.

(5) Non-numerical (qualitative) review of SWA ES activities must be conducted as follows:

(i) SWA operations must be assessed annually to determine compliance with Federal regulations.

(ii) Results of non-numerical reviews must be documented and deficiencies identified. A corrective action plan addressing these deficiencies must be developed.

(6) Corrective action plans developed to address deficiencies uncovered at any administrative level within the State as a result of the self-appraisal process must include:

(i) Specific descriptions of the type of action to be taken, the time frame involved, and the assignment of responsibility.

(ii) Provision for the delivery of technical assistance as needed.

(iii) A plan to conduct follow-up on a timely basis to determine if action taken to correct the deficiencies has been effective.

(7)(i) The provisions of the ES regulations which require numerical and non-numerical assessment of service to special applicant groups (*e.g.*, services to veterans at 20 CFR part 1001—Services for Veterans and services to MSFWs at this part and part 653 of this chapter), are supplementary to the provisions of this section.

(ii) Each State Administrator and ES office manager must ensure their staff know and carry out ES regulations, including regulations on performance standards and program emphases, and any corrective action plans imposed by the SWA or by the Department.

(iii) Each State Administrator must ensure the SWA complies with its approved State Plan.

(iv) Each State Administrator must ensure to the maximum extent feasible the accuracy of data entered by the SWA into Department-required management information systems. Each SWA must establish and maintain a data validation system pursuant to Department instructions. The system must review every local ES office at least once every 4 years. The system must include the validation of time distribution reports and the review of data gathering procedures.

(b) [Reserved]

§ 658.602 Employment and Training Administration National Office responsibility.

The ETA National Office must:

(a) Monitor ETA Regional Offices' operations under ES regulations;

(b) From time to time, conduct such special reviews and audits as necessary to monitor ETA regional office and SWA compliance with ES regulations;

(c) Offer technical assistance to the ETA regional offices and SWAs in carrying out ES regulations and programs;

(d) Have report validation surveys conducted in support of resource allocations; and

(e) Develop tools and techniques for reviewing and assessing SWA performance and compliance with ES regulations.

(f) ETA must appoint a National Monitor Advocate (NMA), who must devote full time to the duties set forth in this subpart. The NMA must:

(1) Review the effective functioning of the Regional Monitor Advocates (RMAs) and SMAs;

(2) Review the performance of SWAs in providing the full range of employment services to MSFWs;

(3) Take steps to resolve or refer ES-related problems of MSFWs which come to his/her attention;

(4) Take steps to refer non ES-related problems of MSFWs which come to his/her attention;

(5) Recommend to the Administrator changes in policy toward MSFWs; and

(6) Serve as an advocate to improve services for MSFWs within the ES system. The NMA must be a member of the National Farm Labor Coordinated Enforcement Staff Level Working Committee and other Occupational Safety and Health Administration (OSHA) and Wage and Hour Division (WHD) task forces, and other committees as appropriate.

(g) The NMA must be appointed by the Office of Workforce Investment Administrator (Administrator) after informing farmworker organizations and other organizations with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. Among qualified candidates, determined through merit systems procedures, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in SWA self-monitoring requirements at § 653.108(b) of this chapter.

(h) The NMA must be assigned staff necessary to fulfill effectively all the responsibilities set forth in this subpart.

(i) The NMA must submit the Annual Report to the OWI Administrator, the ETA Assistant Secretary, and the National Farm Labor Coordinated Enforcement Committee covering the matters set forth in this subpart.

(j) The NMA must monitor and assess SWA compliance with ES regulations affecting MSFWs on a continuing basis. His/her assessment must consider:

(1) Information from RMAs and SMAs;

(2) Program performance data, including the service indicators;

(3) Periodic reports from regional offices;

(4) All Federal on-site reviews;

(5) Selected State on-site reviews;

(6) Other relevant reports prepared by the ES;

(7) Information received from farmworker organizations and employers; and

(8) His/her personal observations from visits to SWAs, ES offices, agricultural work sites, and migrant camps. In the Annual Report, the NMA must include both a quantitative and qualitative analysis of his/her findings and the implementation of his/her recommendations by State and Federal officials, and must address the information obtained from all of the foregoing sources.

(k) The NMA must review the activities of the State/Federal monitoring system as it applies to services to MSFWs and the Complaint System including the effectiveness of the regional monitoring function in each region and must recommend any appropriate changes in the operation of the system. The NMA's findings and recommendations must be fully set forth in the Annual Report.

(l) If the NMA finds the effectiveness of any RMA has been substantially impeded by the Regional Administrator or other regional office official, he/she must, if unable to resolve such problems informally, report and recommend appropriate actions directly to the OWI Administrator. If the NMA receives information that the effectiveness of any SMA has been substantially impeded by the State Administrator or other State or Federal ES official, he/she must, in the absence of a satisfactory informal resolution at the regional level, report and recommend appropriate actions directly to the OWI Administrator.

(m) The NMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. The NMA must advise the Administrator concerning all such proposed changes which may adversely affect MSFWs. The NMA must propose directly to the OWI Administrator changes in ES policy and administration which may substantially improve the delivery of services to MSFWs. He/she also must recommend changes in the funding of SWAs and/or adjustment or reallocation of the discretionary portions of funding formulae.

(n) The NMA must participate in the review and assessment activities required in this section and §§ 658.700 through 658.711. As part of such participation, the NMA, or if he/she is unable

to participate, a RMA must accompany the National Office review team on National Office on-site reviews. The NMA must engage in the following activities in the course of each State on-site review:

(1) He/she must accompany selected outreach workers on their field visits.

(2) He/she must participate in a random field check(s) of migrant camps or work site(s) where MSFWs have been placed on inter or intrastate clearance orders.

(3) He/she must contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review, and, discuss with representatives of these organizations current trends and any other pertinent information concerning MSFWs.

(4) He/she must meet with the SMA and discuss the full range of the employment services to MSFWs, including monitoring and the Complaint System.

(o) In addition to the duties specified in paragraph (f)(8) of this section, the NMA each year during the harvest season must visit the four States with the highest level of MSFW activity during the prior fiscal year, if they are not scheduled for a National Office on-site review during the current fiscal year, and must:

(1) Meet with the SMA and other SWA staff to discuss MSFW service delivery; and

(2) Contact representatives of MSFW organizations and interested employer organizations to obtain information concerning ES delivery and coordination with other agencies.

(p) The NMA must perform duties specified in §§ 658.700 through 765.711. As part of this function, he/she must monitor the performance of regional offices in imposing corrective action. The NMA must report any deficiencies in performance to the Administrator.

(q) The NMA must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer organizations. He/she must attend conferences or meetings of these groups wherever possible and must report to the Administrator and the National Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. The NMA must include in the Annual Report recommendations about how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services as they pertain to MSFWs.

(r) In the event that any SMA or RMA, enforcement agency, or MSFW group refers a matter to the NMA which requires emergency action, he/she must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(s) Through all the mechanisms provided in this subpart, the NMA must aggressively seek to ascertain and remedy, if possible, systemic deficiencies in the provisions of employment services and protections afforded by these regulations to MSFWs. The NMA must:

(1) Use the regular reports on complaints submitted by SWAs and ETA regional offices to assess the adequacy of these systems and to determine the existence of systemic deficiencies.

(2) Provide technical assistance to ETA regional office and State Workforce Agency staff for administering the Complaint System, and any other employment services as appropriate.

(3) Recommend to the Regional Administrator specific instructions for action by regional office staff to correct any ES-related systemic deficiencies. Prior to any ETA review of regional office operations concerning employment services to MSFWs, the NMA must provide to the Regional Administrator a brief summary of ES-related services to MSFWs in that region and his/her recommendations for incorporation in the regional review materials as the Regional Administrator and ETA reviewing organization deem appropriate.

(4) Recommend to the National Farm Labor Coordinated Enforcement Committee specific instructions for action by WHD and OSHA regional office staff to correct any non-ES-related systemic deficiencies of which he/she is aware.

§ 658.603 Employment and Training Administration Regional Office responsibility.

(a) The Regional Administrator must have responsibility for the regular review and assessment of SWA performance and compliance with ES regulations.

(b) The Regional Administrator must participate with the National Office staff in reviewing and approving the State Plan for the SWAs within the region. In reviewing the State Plans the Regional Administrator and appropriate National Office staff must consider relevant factors including the following:

(1) State Workforce Agency compliance with ES regulations;

(2) State Workforce Agency performance against the goals and objectives established in the previous State Plan;

(3) The effect which economic conditions and other external factors considered by the ETA in the resource allocation process may have had or are expected to have on the SWA's performance;

(4) SWA adherence to national program emphasis; and

(5) The adequacy and appropriateness of the State Plan for carrying out ES programs.

(c) The Regional Administrator must assess the overall performance of SWAs on an ongoing basis through desk reviews and the use of required reporting systems and other available information.

(d) As appropriate, Regional Administrators must conduct or have conducted:

(1) Comprehensive on-site reviews of SWAs and their offices to review SWA organization, management, and program operations;

(2) Periodic performance reviews of SWA operation of ES programs to measure actual performance against the State Plan, past performance, the performance of other SWAs, etc.;

(3) Audits of SWA programs to review their program activity and to assess whether the expenditure of grant funds has been in accordance with the approved budget. Regional Administrators also may conduct audits through other agencies or organizations or may require the SWA to have audits conducted;

(4) Validations of data entered into management information systems to assess:

(i) The accuracy of data entered by the SWAs into the management information system;

(ii) Whether the SWAs' data validating and reviewing procedures conform to Department instructions; and

(iii) Whether SWAs have implemented any corrective action plans required by the Department to remedy deficiencies in their validation programs;

(5) Technical assistance programs to assist SWAs in carrying out ES regulations and programs;

(6) Reviews to assess whether the SWA has complied with corrective action plans imposed by the Department or by the SWA itself; and

(7) Random, unannounced field checks of a sample of agricultural work sites to which ES placements have been made through the clearance system to determine and document whether wages, hours, working and housing conditions are as specified on the job order. If regional office staff find reason to believe that conditions vary from job order specifications, findings must be documented on the Complaint/Apparent Violation Referral Form and provided to the State Workforce Agency to be handled as an apparent violation under § 658.419.

(e) The Regional Administrator must provide technical assistance to SWAs to assist them in carrying out ES regulations and programs.

(f) The Regional Administrator must appoint a RMA who must devote full time to the duties set forth in this subpart. The RMA must:

(1) Review the effective functioning of the SMAs in his/her region;

(2) Review the performance of SWAs in providing the full range of employment services to MSFWs;

(3) Take steps to resolve ES-related problems of MSFWs which come to his/her attention;

(4) Recommend to the Regional Administrator changes in policy towards MSFWs;

(5) Review the operation of the Complaint System; and

(6) Serve as an advocate to improve service for MSFWs within the ES. The RMA must be a member of the Regional Farm Labor Coordinated Enforcement Committee.

(g) The RMA must be appointed by the Regional Administrator after informing farmworker organizations and other organizations in the region with expertise concerning MSFWs of the opening and encouraging them to refer qualified applicants to apply through the Federal merit system. The RMA must have direct personal access to the Regional Administrator wherever he/she finds it necessary. Among qualified candidates, individuals must be sought who meet the criteria used in the selection of the SMAs, as provided in § 653.108(b) of this chapter.

(h) The Regional Administrator must ensure that staff necessary to fulfill effectively all the regional office responsibilities set forth in this section are assigned. The RMA must notify the Regional Administrator of any staffing deficiencies and the Regional Administrator must take appropriate action.

(i) The RMA within the first 3 months of his/her tenure must participate in a training session(s) approved by the National Office.

(j) At the regional level, the RMA must have primary responsibility for:

(1) Monitoring the effectiveness of the Complaint System set forth at subpart E of this part;

(2) Apprising appropriate State and ETA officials of deficiencies in the Complaint System; and

(3) Providing technical assistance to SMAs in the region.

(k) At the ETA regional level, the RMA must have primary responsibility for ensuring SWA compliance with ES regulations as it pertains to services to MSFWs is monitored by the regional office. He/she must independently assess on a continuing basis the provision of employment services to MSFWs, seeking out and using:

(1) Information from SMAs, including all reports and other documents;

(2) Program performance data;

(3) The periodic and other required reports from SWAs;

(4) Federal on-site reviews;

(5) Other reports prepared by the National Office;

(6) Information received from farmworker organizations and employers; and

(7) Any other pertinent information which comes to his/her attention from any possible source.

(8) In addition, the RMA must consider his/her personal observations from visits to ES offices, agricultural work sites, and migrant camps.

(l) The RMA must assist the Regional Administrator and other line officials in applying appropriate corrective and remedial actions to State agencies.

(m) The Regional Administrator's quarterly report to the National Office must include the RMA's summary of his/her independent assessment as required in paragraph (f)(5) of this section. The fourth quarter summary must include an annual summary from the region. The summary also must include both a quantitative and a qualitative analysis of his/her reviews and must address all the matters with respect to which he/she has responsibilities under these regulations.

(n) The RMA must review the activities and performance of the SMAs and the State monitoring system in the region, and must recommend any appropriate changes in the operation of the system to the Regional Administrator. The RMA's review must include a determination whether the SMA:

(1) Does not have adequate access to information;

(2) Is being impeded in fulfilling his/her duties; or

(3) Is making recommendations which are being consistently ignored by SWA officials. If the RMA believes that the effectiveness of any SMA has been substantially impeded by the State Administrator, other State agency officials, or any Federal officials, he/she must report and recommend appropriate actions to the Regional Administrator. Copies of the recommendations must be provided to the NMA electronically or in hard copy.

(o) The RMA must be informed of all proposed changes in policy and practice within the ES, including ES regulations, which may affect the delivery of services to MSFWs. He/she must advise the Regional Administrator on all such proposed changes which, in his/her opinion, may adversely affect MSFWs

or which may substantially improve the delivery of services to MSFWs.

The RMA also may recommend changes in ES policy or regulations, as well as changes in the funding of State Workforce Agencies and/or adjustments of reallocation of the discretionary portions of funding formulae as they pertain to MSFWs.

(p) The RMA must participate in the review and assessment activities required in this section and §§ 658.700 *through 658.711*. He/she, an assistant, or another RMA, must participate in National Office and regional office on-site statewide reviews of employment services to MSFWs in States in the region. The RMA must engage in the following activities in the course of participating in an on-site SWA review:

(1) Accompany selected outreach workers on their field visits;

(2) Participate in a random field check of migrant camps or work sites where MSFWs have been placed on intrastate or interstate clearance orders;

(3) Contact local WIOA sec. 167 National Farmworker Jobs Program grantees or other farmworker organizations as part of the on-site review, and must discuss with representatives of these organizations perceived trends, and/or other relevant information concerning MSFWs in the area; and

(4) Meet with the SMA and discuss the full range of the employment services to MSFWs, including monitoring and the Complaint System.

(q) During the calendar quarter preceding the time of peak MSFW activity in each State, the RMA must meet with the SMA and must review in detail the State Workforce Agency's capability for providing the full range of services to MSFWs as required by ES regulations, during the upcoming harvest season. The RMA must offer technical assistance and recommend to the SWA and/or the Regional Administrator any changes in State policy or practice that he/she finds necessary.

(r) The RMA each year during the peak harvest season must visit each State in the region not scheduled for an on-site review during that fiscal year and must:

(1) Meet with the SMA and other SWA staff to discuss MSFW service delivery; and

(2) Contact representatives of MSFW organizations to obtain information concerning ES delivery and coordination with other agencies and interested employer organizations.

(s) The RMA must initiate and maintain regular and personal contacts, including informal contacts in addition to those specifically required by these regulations, with SMAs in the region. In addition, the RMA must have personal and regular contact with the NMA. The RMA also must establish routine and regular contacts with WIOA sec. 167 National Farmworker Jobs Program grantees, other farmworker organizations and agricultural employers and/or employer organizations in his/her region. He/she must attend conferences or meetings of these groups wherever possible and must report to the Regional Administrator and the Regional Farm Labor Coordinated Enforcement Committee on these contacts when appropriate. He/she also must make recommendations as to how the Department might better coordinate ES and WIOA sec. 167 National Farmworker Jobs Program services to MSFWs.

(t) The RMA must attend MSFW-related public meeting(s) conducted in the region. Following such meetings or hearings, the RMA must take such steps or make such recommendations to the Regional Administrator, as he/she deems necessary to remedy problem(s) or condition(s) identified or described therein.

(u) The RMA must attempt to achieve regional solutions to any problems, deficiencies, or improper practices concerning services to MSFWs which are regional in scope. Further, he/she must recommend policies, offer technical assistance, or take any other necessary steps as he/she deems desirable or appropriate on a regional, rather than State-by-State basis, to promote region-wide improvement in the delivery of employment services to MSFWs. He/she must facilitate region-wide coordination and communication regarding provision of employment services to MSFWs among SMAs, State

Administrators, and Federal ETA officials to the greatest extent possible. In the event that any SWA or other RMA, enforcement agency, or MSFW group refers a matter to the RMA which requires emergency action, he/she must assist them in obtaining action by appropriate agencies and staff, inform the originating party of the action taken, and, upon request, provide written confirmation.

(v) The RMA must initiate and maintain such contacts as he/she deems necessary with RMAs in other regions to seek to resolve problems concerning MSFWs who work, live, or travel through the region. He/she must recommend to the Regional Administrator and/or the National Office inter-regional cooperation on any particular matter, problem, or policy with respect to which inter-regional action is desirable.

(w) The RMA must establish regular contacts with the regional agricultural coordinators from WHD and OSHA and any other regional staff from other Federal enforcement agencies and must establish contacts with the staff of other Department agencies represented on the Regional Farm Labor Coordinated Enforcement Committee and to the extent necessary, on other pertinent task forces or committees.

(x) The RMA must participate in the regional reviews of the State Plans, and must comment to the Regional Administrator as to the SWA compliance with the ES regulations as they pertain to services to MSFWs, including the staffing of ES offices.

§ 658.604 Assessment and evaluation of program performance data.

(a) State Workforce Agencies must compile program performance data required by the Department, including statistical information on program operations.

(b) The Department must use the program performance data in assessing and evaluating whether each SWA has complied with ES regulations and its State Plan.

(c) In assessing and evaluating program performance data, the Department must act in accordance with the following general principles:

(1) The fact that the program performance data from a SWA, whether overall or relative to a particular program activity, indicate poor program performance does not by itself constitute a violation of ES regulations or of the State Workforce Agency's responsibilities under its State Plan;

(2) Program performance data, however, may so strongly indicate that a SWA's performance is so poor that the data may raise a presumption (*prima facie* case) that a SWA is violating ES regulations or the State Plan. A SWA's failure to meet the operational objectives set forth in the State Plan raises a presumption that the agency is violating ES regulations and/or obligations under its State Plan. In such cases, the Department must afford the SWA an opportunity to rebut the presumption of a violation pursuant to the procedures at subpart H of this part.

(3) The Department must take into account that certain program performance data may measure items over which SWAs have direct or substantial control while other data may measure items over which the SWA has indirect or minimal control.

(i) Generally, for example, a SWA has direct and substantial control over the delivery of employment services such as referrals to jobs, job development contacts, counseling, referrals to career and supportive services, and the conduct of field checks.

(ii) State Workforce Agencies, however, have only indirect control over the outcome of services. For example, SWAs cannot guarantee that an employer will hire a referred applicant, nor can they guarantee that the terms and conditions of employment will be as stated on a job order.

(iii) Outside forces, such as a sudden heavy increase in unemployment rates, a strike by SWA employees, or a severe drought or flood, may skew the results measured by program performance data.

(4) The Department must consider a SWA's failure to keep accurate and complete program performance data required by ES regulations as a violation of the ES regulations.

§ 658.605 Communication of findings to State agencies.

(a) The Regional Administrator must inform SWAs in writing of the results of review and assessment activities and, as appropriate, must discuss with the State Administrator the impact or action required by the Department as a result of review and assessment activities.

(b) The ETA National Office must transmit the results of any review and assessment activities it conducted to the Regional Administrator who must send the information to the SWA.

(c) Whenever the review and assessment indicates a SWA violation of ES regulations or its State Plan, the Regional Administrator must follow the procedures set forth at subpart H of this part.

(d) Regional Administrators must follow-up any corrective action plan imposed on a SWA under subpart H of this part by further review and assessment of the State Workforce Agency pursuant to this subpart.

Subpart H—Federal Application of Remedial Action to State Workforce Agencies

§ 658.700 Scope and purpose of subpart.

This subpart sets forth the procedures which the Department must follow upon either discovering independently or receiving from other(s) information indicating that SWAs may not be adhering to ES regulations.

§ 658.701 Statements of policy.

(a) It is the policy of the Department to take all necessary action, including the imposition of the full range of sanctions set forth in this subpart, to ensure State Workforce Agencies comply with all requirements established by ES regulations.

(b) It is the policy of the Department to initiate decertification procedures against SWAs in instances of serious or continual violations of ES regulations if less stringent remedial actions taken in accordance with this subpart fail to resolve noncompliance.

(c) It is the policy of the Department to act on information concerning alleged violations by SWAs of the ES regulations received from any person or organization.

§ 658.702 Initial action by the Regional Administrator.

(a) The ETA Regional Administrator is responsible for ensuring that all SWAs in his/her region are in compliance with ES regulations.

(b) Wherever a Regional Administrator discovers or is apprised of possible SWA violations of ES regulations by the review and assessment activities under subpart G of this part, or through required reports or written complaints from individuals, organizations, or employers which are elevated to the Department after the exhaustion of SWA administrative remedies, the Regional Administrator must conduct an investigation. Within 10 business days after receipt of the report or other information, the Regional Administrator must make a determination whether there is probable cause to believe that a SWA has violated ES regulations.

(c) The Regional Administrator must accept complaints regarding possible SWA violations of ES regulations from employee organizations, employers or other groups, without exhaustion of the complaint process described at subpart E of this part, if the Regional Administrator determines that the nature and scope of the complaint are such that the time required to exhaust the administrative procedures at the State level would adversely affect a significant number of applicants. In such cases, the Regional Administrator must investigate the matter within 10 business days, may provide the SWA 10 business days for comment, and must make a determination within an additional 10 business days whether there is probable cause to believe that the SWA has violated ES regulations.

(d) If the Regional Administrator determines that there is no probable cause to believe that a SWA has violated ES regulations, he/she must retain all reports and supporting information in Department files. In all cases where the Regional Administrator has insufficient information to make a probable cause determination,

he/she must so notify the Administrator in writing and the time for the investigation must be extended 20 additional business days.

(e) If the Regional Administrator determines there is probable cause to believe a SWA has violated ES regulations, he/she must issue a Notice of Initial Findings of Non-compliance by registered mail (or other legally viable means) to the offending SWA. The notice will specify the nature of the violation, cite the regulations involved, and indicate corrective action which may be imposed in accordance with paragraphs (g) and (h) of this section. If the non-compliance involves services to MSFWs or the Complaint System, a copy of said notice must be sent to the NMA.

(f)(1) The SWA may have 20 business days to comment on the findings, or up to 20 additional days, if the Regional Administrator determines a longer period is appropriate. The SWA's comments must include agreement or disagreement with the findings and suggested corrective actions, where appropriate.

(2) After the period elapses, the Regional Administrator must prepare within 20 business days, written final findings which specify whether the SWA has violated ES regulations. If in the final findings the Regional Administrator determines the SWA has not violated ES regulations, the Regional Administrator must notify the State Administrator of this finding and retain supporting documents in his/her files. If the final finding involves services to MSFWs or the Complaint System, the Regional Administrator also must notify the NMA. If the Regional Administrator determines a SWA has violated ES regulations, the Regional Administrator must prepare a Final Notice of Noncompliance which must specify the violation(s) and cite the regulations involved. The Final Notice of Noncompliance must be sent to the SWA by registered mail or other legally viable means. If the noncompliance involves services to MSFWs or the Complaint System, a copy of the Final Notice must be sent to the NMA.

(g) If the violation involves the misspending of grant funds, the Regional Administrator may order in the Final Notice of Noncompliance a disallowance of the expenditure and may either demand repayment or withhold future funds in the amount in question. If the Regional Administrator disallows costs, the Regional Administrator must give the reasons for the disallowance, inform the SWA that the disallowance is effective immediately and that no more funds may be spent in the disallowed manner, and offer the SWA the opportunity to request a hearing pursuant to § 658.707. The offer, or the acceptance of an offer of a hearing, however, does not stay the effectiveness of the disallowance. The Regional Administrator must keep complete records of the disallowance.

(h) If the violation does not involve misspending of grant funds or the Regional Administrator determines that the circumstances warrant other action:

(1) The Final Notice of Noncompliance must direct the SWA to implement a specific corrective action plan to correct all violations. If the SWA's comment demonstrates with supporting evidence (except where inappropriate) that all violations have already been corrected, the Regional Administrator need not impose a corrective action plan and instead may cite the violation(s) and accept the SWA's resolution, subject to follow-up review, if necessary. If the Regional Administrator determines that the violation(s) cited had been found previously and that the corrective action(s) taken had not corrected the violation(s) contrary to the findings of previous follow-up reviews, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

(2) The Final Notice of Noncompliance must specify the time by which each corrective action must be taken. This period may not exceed 40 business days unless the Regional Administrator determines that exceptional circumstances necessitate corrective actions requiring a longer time period. In such cases, and if the violations involve services to MSFWs or the Complaint System, the Regional Administrator must notify the Administrator in writing of the exceptional circumstances which necessitate more time, and must specify the additional

time period. The specified time must commence with the date of signature on the registered mail receipt.

(3) When the time provided for in paragraph (h)(2) of this section elapses, Department staff must review the SWA's efforts as documented by the SWA to determine if the corrective action(s) has been taken and if the SWA has achieved compliance with ES regulations. If necessary, Department staff must conduct a follow-up visit as part of this review.

(4) If, as a result of this review, the Regional Administrator determines the SWA has corrected the violation(s), the Regional Administrator must record the basis for this determination, notify the SWA, send a copy to the Administrator, and retain a copy in Department files.

(5) If, as a result of this review, the Regional Administrator determines the SWA has taken corrective action but is unable to determine if the violation has been corrected due to seasonality or other factors, the Regional Administrator must notify in writing the SWA and the Administrator of his/her findings. The Regional Administrator must conduct further follow-up at an appropriate time to make a final determination if the violation has been corrected. If the Regional Administrator's follow-up reveals that violations have not been corrected, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

(6) If, as a result of the review the Regional Administrator determines the SWA has not corrected the violations and has not made good faith efforts and adequate progress toward the correction of the violations, the Regional Administrator must apply remedial actions to the SWA pursuant to § 658.704.

(7) If, as a result of the review, the Regional Administrator determines the SWA has made good faith efforts and adequate progress toward the correction of the violation and it appears the violation will be fully corrected within a reasonable amount of time, the SWA must be advised by registered mail or other legally viable means (with a copy sent to the Administrator) of this conclusion, of remaining differences, of further needed corrective action, and that all deficiencies must be corrected within a specified time period. This period may not exceed 40 business days unless the Regional Administrator determines exceptional circumstances necessitate corrective action requiring more time. In such cases, the Regional Administrator must notify the Administrator in writing of the exceptional circumstances which necessitate more time, and must specify that time period. The specified time commences with the date of signature on the registered mail receipt.

(8)(i) If the SWA has been given additional time pursuant to paragraph (h)(7) of this section, Department staff must review the SWA's efforts as documented by the SWA at the end of the time period. If necessary, the Department must conduct a follow-up visit as part of this review.

(ii) If the SWA has corrected the violation(s), the Regional Administrator must document that finding, notify in writing the SWA and the Administrator, and retain supporting documents in Department files. If the SWA has not corrected the violation(s), the Regional Administrator must apply remedial actions pursuant to § 658.704.

§ 658.703 Emergency corrective action.

In critical situations as determined by the Regional Administrator, where it is necessary to protect the integrity of the funds, or ensure the proper operation of the program, the Regional Administrator may impose immediate corrective action. Where immediate corrective action is imposed, the Regional Administrator must notify the SWA of the reason for imposing the emergency corrective action prior to providing the SWA an opportunity to comment.

§ 658.704 Remedial actions.

(a) If a SWA fails to correct violations as determined pursuant to § 658.702, the Regional Administrator must apply one or more of the following remedial actions to the SWA:

(1) Imposition of special reporting requirements for a specified time;

(2) Restrictions of obligational authority within one or more expense classifications;

(3) Implementation of specific operating systems or procedures for a specified time;

(4) Requirement of special training for SWA personnel;

(5) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, the elevation of specific decision-making functions from the State Administrator to the Regional Administrator;

(6) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, the imposition of Federal staff in key SWA positions;

(7) With the approval of the Assistant Secretary and after affording the State Administrator the opportunity to request a conference with the Assistant Secretary, funding of the SWA on a short-term basis or partial withholding of funds for a specific function or for a specific geographical area;

(8) Holding of public hearings in the State on the SWA's deficiencies;

(9) Disallowance of funds pursuant to § 658.702(g); or

(10) If the matter involves a serious or continual violation, the initiation of decertification procedures against the State Workforce Agency, as set forth in paragraph (e) of this section.

(b) The Regional Administrator must send, by registered mail, a Notice of Remedial Action to the SWA. The Notice of Remedial Action must set forth the reasons for the remedial action. When such a notice is the result of violations of regulations governing services to MSFWs (§§ 653.100 *through 653.113* of this chapter) or the Complaint System (§§ 658.400 through 658.426), a copy of said notice must be sent to the Administrator, who must publish the notice promptly in the FEDERAL REGISTER.

(c) If the remedial action is other than decertification, the notice must state the remedial action must take effect immediately. The notice also must state the SWA may request a hearing pursuant to § 658.707 by filing a request in writing with the Regional Administrator pursuant to § 658.707 within 20 business days of the SWA's receipt of the notice. The offer of hearing, or the acceptance thereof, however, does not stay or otherwise delay the implementation of remedial action.

(d) Within 60 business days after the initial application of remedial action, the Regional Administrator must conduct a review of the SWA's compliance with ES regulations unless the Regional Administrator determines more time is necessary. In such cases, the Regional Administrator must notify the Administrator in writing of the circumstances which necessitate more time, and specify that time period. If necessary, Department staff must conduct a follow-up visit as part of this review. If the SWA is in compliance with the ES regulations, the Regional Administrator must fully document these facts and must terminate the remedial actions. The Regional Administrator must notify the SWA of his/her findings. When the case involves violations of regulations governing services to MSFWs or the Complaint System, a copy of said notice must be sent to the Administrator, who must promptly publish the notice in the FEDERAL REGISTER. The Regional Administrator must conduct, within a reasonable time after terminating the remedial actions, a review of the SWA's compliance to determine whether any remedial actions must be reapplied.

(e) If, upon conducting the on-site review referred to in paragraph (c) of this section, the Regional Administrator finds the SWA remains in noncompliance, the Regional Administrator must continue the remedial action and/or impose different additional remedial actions. The Regional Administrator must fully document all such decisions and, when the case involves violations of regulations governing services to MSFWs or the Complaint System, must send copies to the Administrator, who must promptly publish the notice in the FEDERAL REGISTER.

(f)(1) If the SWA has not brought itself into compliance with ES regulations within 120 business days of the initial application of remedial action, the Regional Administrator must initiate decertification unless the Regional Administrator determines the circumstances necessitate continuing remedial action for more time. In such

cases, the Regional Administrator must notify the Administrator in writing of the circumstances which necessitate the extended time, and specify the time period.

(2) The Regional Administrator must notify the SWA by registered mail or by other legally viable means of the decertification proceedings, and must state the reasons therefor. Whenever such a notice is sent to a SWA, the Regional Administrator must prepare five copies (hard copies or electronic copies) containing, in chronological order, all the documents pertinent to the case along with a request for decertification stating the grounds therefor. One copy must be retained. Two must be sent to the ETA National Office, one must be sent to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, and, if the case involves violations of regulations governing services to MSFWs or the Complaint System, one copy must be sent to the NMA. All copies also must be sent electronically to each respective party. The notice sent by the Regional Administrator must be published promptly in the FEDERAL REGISTER.

§ 658.705 Decision to decertify.

(a) Within 30 business days of receiving a request for decertification, the ETA Assistant Secretary must review the case and must decide whether to proceed with decertification.

(b) The Assistant Secretary must grant the request for decertification unless he/she makes a finding that:

(1) The violations of ES regulations are neither serious nor continual;

(2) The SWA is in compliance; or

(3) The Assistant Secretary has reason to believe the SWA will achieve compliance within 80 business days unless exceptional circumstances necessitate more time, pursuant to the remedial action already applied or to be applied. (In the event the Assistant Secretary does not have sufficient information to act upon the request, he/she may postpone the determination for up to an additional 20 business days in order to obtain any available additional information.) In making a determination of whether violations are ''serious'' or ''continual,'' as required by paragraph (b)(1) of this section, the Assistant Secretary must consider:

(i) Statewide or multiple deficiencies as shown by performance data and/or on-site reviews;

(ii) Recurrent violations, even if they do not persist over consecutive reporting periods, and

(iii) The good faith efforts of the State to achieve full compliance with ES regulations as shown by the record.

(c) If the Assistant Secretary denies a request for decertification, he/she must write a complete report documenting his/her findings and, if appropriate, instructing an alternate remedial action or actions be applied. Electronic copies of the report must be sent to the Regional Administrator. Notice of the Assistant Secretary's decision must be published promptly in the FEDERAL REGISTER and the report of the Assistant Secretary must be made available for public inspection and copying.

(d) If the Assistant Secretary decides decertification is appropriate, he/she must submit the case to the Secretary providing written explanation for his/her recommendation of decertification.

(e) Within 30 business days after receiving the Assistant Secretary's report, the Secretary must determine whether to decertify the SWA. The Secretary must grant the request for decertification unless he/she makes one of the three findings set forth in paragraph (b) of this section. If the Secretary decides not to decertify, he/she must then instruct that remedial action be continued or that alternate actions be applied. The Secretary must write a report explaining his/her reasons for not decertifying the SWA and copies (hard copy and electronic) will be sent to the SWA. Notice of the Secretary's decision must be published promptly in the FEDERAL REGISTER, and the report of the Secretary must be made available for public inspection and copy.

(f) Where either the Assistant Secretary or the Secretary denies a request for decertification and orders further remedial action, the Regional Administrator must continue to monitor the SWA's compliance. If the SWA achieves compliance within the time established pursuant to paragraph (b)

of this section, the Regional Administrator must terminate the remedial actions. If the SWA fails to achieve full compliance within that time period after the Secretary's decision not to decertify, the Regional Administrator must submit a report of his/her findings to the Assistant Secretary who must reconsider the request for decertification pursuant to the requirements of paragraph (b) of this section.

§ 658.706 Notice of decertification.

If the Secretary decides to decertify a SWA, he/she must send a Notice of Decertification to the SWA stating the reasons for this action and providing a 10 business day period during which the SWA may request an administrative hearing in writing to the Secretary. The notice must be published promptly in the FEDERAL REGISTER.

§ 658.707 Requests for hearings.

(a) Any SWA which received a Notice of Decertification under § 658.706 or a notice of disallowance under § 658.702(g) may request a hearing on the issue by filing a written request for hearing with the Secretary within 10 business days of receipt of the notice. This request must state the reasons the SWA believes the basis of the decision to be wrong, and it must be signed by the State Administrator (electronic signatures may be accepted).

(b) When the Secretary receives a request for a hearing from a SWA, he/she must send copies of a file containing all materials and correspondence relevant to the case to the Assistant Secretary, the Regional Administrator, the Solicitor of Labor, and the Department of Labor Chief Administrative Law Judge. When the case involves violations of regulations governing services to MSFWs or the Complaint System, a copy must be sent to the NMA.

(c) The Secretary must publish notice of hearing in the FEDERAL REGISTER. This notice must invite all interested parties to attend and to present evidence at the hearing. All interested parties who make written request to participate must thereafter receive copies (hard copy and/or electronic) of all documents filed in said proceedings.

§ 658.708 Hearings.

(a) Upon receipt of a hearing file by the Chief Administrative Law Judge, the case must be docketed and notice sent by electronic mail, other means of electronic service, or registered mail, return receipt requested, to the Solicitor of Labor, Attention: Associate Solicitor for Employment and Training, the Administrator, the Regional Administrator and the State Administrator. The notice must set a time, place, and date for a hearing on the matter and must advise the parties that:

(1) They may be represented at the hearing;

(2) They may present oral and documentary evidence at the hearing;

(3) They may cross-examine opposing witnesses at the hearing; and

(4) They may request rescheduling of the hearing if the time, place, or date set are inconvenient.

(b) The Solicitor of Labor or the Solicitor's designee will represent the Department at the hearing.

§ 658.709 Conduct of hearings.

(a) Proceedings under this section are governed by secs. 5 through 8 of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* and the rules of practice and procedure at subpart A of 29 CFR part 18, except as otherwise specified in this section.

(b) Technical rules of evidence do not apply, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination, must be applied if necessary by the ALJ conducting the hearing. The ALJ may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record must be open to examination by the parties. Opportunity must be given to refute facts and arguments advanced on either side of the issue. A transcript must be made of the oral evidence except to the extent the substance thereof is stipulated for the record.

(c) Discovery may be conducted as provided in the rules of practice and procedure at 29 CFR 18.50 through 18.65.

(d) When a public officer is a respondent in a hearing in an official capacity

and during its pendency dies, resigns, or otherwise ceases to hold office, the proceeding does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution must be in the name of the substituted party, but any misnomer not affecting the substantive rights of the parties must be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order may not affect the substitution.

§ 658.710 Decision of the Administrative Law Judge.

(a) The ALJ has jurisdiction to decide all issues of fact and related issues of law and to grant or deny appropriate motions, but does not have jurisdiction to decide upon the validity of Federal statutes or regulations.

(b) The decision of the ALJ must be based on the hearing record, must be in writing, and must state the factual and legal basis of the decision. The ALJ's decision must be available for public inspection and copying.

(c) Except when the case involves the decertification of a SWA, the decision of the ALJ will be considered the final decision of the Secretary.

(d) If the case involves the decertification of an appeal to the SWA, the decision of the ALJ must contain a notice stating that, within 30 calendar days of the decision, the SWA or the Administrator may appeal to the Administrative Review Board, United States Department of Labor, by sending a written appeal to the Administrative Review Board.

§ 658.711 Decision of the Administrative Review Board.

(a) Upon the receipt of an appeal to the Administrative Review Board, United States Department of Labor, the ALJ must certify the record in the case to the Administrative Review Board, which must make a decision to decertify or not on the basis of the hearing record.

(b) The decision of the Administrative Review Board is the final decision of the Secretary on decertification appeals. It must be in writing, and must set forth the factual and legal basis for the decision. Notice of the Administrative Review Board's decision must be published in the FEDERAL REGISTER, and copies must be made available for public inspection and copying.

PART 660—INTRODUCTION TO THE REGULATIONS FOR WORKFORCE INVESTMENT SYSTEMS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Sec.

660.100 What is the purpose of title I of the Workforce Investment Act of 1998?
660.200 What do the regulations for workforce investment systems under title I of the Workforce Investment Act cover?
660.300 What definitions apply to the regulations for workforce investment systems under title I of WIA?

AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 65 FR 49388, Aug. 11, 2000, unless otherwise noted.

§ 660.100 What is the purpose of title I of the Workforce Investment Act of 1998?

The purpose of title I of the Workforce Investment Act of 1998 (WIA) is to provide workforce investment activities that increase the employment, retention and earnings of participants, and increase occupational skill attainment by participants, which will improve the quality of the workforce, reduce welfare dependency, and enhance the productivity and competitiveness of the Nation's economy. These goals are achieved through the workforce investment system. (WIA sec. 106.)

§ 660.200 What do the regulations for workforce investment systems under title I of the Workforce Investment Act cover?

The regulations found in 20 CFR parts 660 through 671 set forth the regulatory requirements that are applicable to programs operated with funds provided under title I of WIA. This part 660 describes the purpose of that Act, explains the format of these regulations and sets forth definitions for terms that apply to each part. Part 661 contains regulations relating to Statewide and local governance of the workforce investment system. Part 662 describes the One-Stop system and the roles of

One-Stop partners. Part 663 sets forth requirements applicable to WIA title I programs serving adults and dislocated workers. Part 664 sets forth requirements applicable to WIA title I programs serving youth. Part 665 contains regulations relating to Statewide activities. Part 666 describes the WIA title I performance accountability system. Part 667 sets forth the administrative requirements applicable to programs funded under WIA title I. Parts 668 and 669 contain the particular requirements applicable to programs serving Indians and Native Americans and Migrant and Seasonal Farmworkers, respectively. Parts 670 and 671 describe the particular requirements applicable to the Job Corps and other national programs, respectively. In addition, part 652 describes the establishment and functioning of State Employment Services under the Wagner-Peyser Act, and 29 CFR part 37 contains the Department's nondiscrimination regulations implementing WIA section 188.

§ 660.300 What definitions apply to the regulations for workforce investment systems under title I of WIA?

In addition to the definitions set forth at WIA section 101, the following definitions apply to the regulations in 20 CFR parts 660 through 671:

Department or DOL means the U.S. Department of Labor, including its agencies and organizational units.

Designated region means a combination of local areas that are partly or completely in a single labor market area, economic development region, or other appropriate contiguous subarea of a State, that is designated by the State under WIA section 116(c), or a similar interstate region that is designated by two or more States under WIA section 116(c)(4).

Employment and training activity means a workforce investment activity that is carried out for an adult or dislocated worker.

EO data means data on race and ethnicity, age, sex, and disability required by 29 CFR part 37 of the DOL regulations implementing section 188 of WIA, governing nondiscrimination.

ETA means the Employment and Training Administration of the U.S. Department of Labor.

Grant means an award of WIA financial assistance by the U.S. Department of Labor to an eligible WIA recipient.

Grantee means the direct recipient of grant funds from the Department of Labor. A grantee may also be referred to as a recipient.

Individual with a disability means an individual with any disability (as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)). For purposes of WIA section 188, this term is defined at 29 CFR 37.4.

Labor Federation means an alliance of two or more organized labor unions for the purpose of mutual support and action.

Literacy means an individual's ability to read, write, and speak in English, and to compute, and solve problems, at levels of proficiency necessary to function on the job, in the family of the individual, and in society.

Local Board means a Local Workforce Investment Board established under WIA section 117, to set policy for the local workforce investment system.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a funding period that will require payment by the recipient or subrecipient during the same or a future period. For purposes of the reallotment process described at 20 CFR 667.150, the Secretary also treats as State obligations any amounts allocated by the State under WIA sections 128(b) and 133(b) to a single area State or to a balance of State local area administered by a unit of the State government, and inter-agency transfers and other actions treated by the State as encumbrances against amounts reserved by the State under WIA sections 128(a) and 133(a) for Statewide workforce investment activities.

Outlying area means the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Participant means an individual who has registered under 20 CFR 663.105 or 664.215 and has been determined to be eligible to participate in and who is receiving services (except for follow up services) under a program authorized by WIA title I. Participation commences on the first day, following determination of eligibility, on which the individual begins receiving core, intensive, training or other services provided under WIA title I.

Recipient means an entity to which a WIA grant is awarded directly from the Department of Labor to carry out a program under title I of WIA. The State is the recipient of funds awarded under WIA sections 127(b)(1)(C)(I)(II), 132(b)(1)(B) and 132(b)(2)(B). The recipient is the entire legal entity that received the award and is legally responsible for carrying out the WIA program, even if only a particular component of the entity is designated in the grant award document.

Register means the process for collecting information to determine an individual's eligibility for services under WIA title I. Individuals may be registered in a variety ways, as described in 20 CFR 663.105 and 20 CFR 664.215.

Secretary means the Secretary of the U.S. Department of Labor.

Self certification means an individual's signed attestation that the information he/she submits to demonstrate eligibility for a program under title I of WIA is true and accurate.

State means each of the several States of the United States, the District of Columbia and the Commonwealth of Puerto Rico. The term ''State'' does not include outlying areas.

State Board means a State Workforce Investment Board established under WIA section 111.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money made under a grant by a grantee to an eligible subrecipient. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *Grant* in this part.

Subrecipient means an entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided. DOL's audit requirements for States, local governments, and non-profit organizations provides guidance on distinguishing between a subrecipient and a vendor at 29 CFR 99.210.

Unobligated balance means the portion of funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Vendor means an entity responsible for providing generally required goods or services to be used in the WIA program. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program. DOL's audit requirements for States, local governments, and non-profit organizations provides guidance on distinguishing between a subrecipient and a vendor at 29 CFR 99.210.

Wagner-Peyser Act means the Act of June 6, 1933, as amended, codified at 29 U.S.C. 49 *et seq*.

WIA regulations mean the regulations in 20 CFR parts 660 through 671, the Wagner-Peyser Act regulations in 20 CFR part 652, subpart C, and the regulations implementing WIA section 188 in 29 CFR part 37.

Workforce investment activities mean the array of activities permitted under title I of WIA, which include employment and training activities for adults and dislocated workers, as described in WIA section 134, and youth activities, as described in WIA section 129.

Youth activity means a workforce investment activity that is carried out for youth.

PART 661—STATEWIDE AND LOCAL GOVERNANCE OF THE WORKFORCE INVESTMENT SYSTEM UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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AUTHORITY: Sec. 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 65 FR 49390, Aug. 11, 2000, unless otherwise noted.

Subpart A—General Governance Provisions

§ 661.100 What is the workforce investment system?

Under title I of WIA, the workforce investment system provides the framework for delivery of workforce investment activities at the State and local levels to individuals who need those services, including job seekers, dislocated workers, youth, incumbent workers, new entrants to the workforce, veterans, persons with disabilities, and employers. Each State's Governor is required, in accordance with the requirements of this part, to establish a State Board; to designate local workforce investment areas; and to oversee the creation of Local Boards and One-Stop service delivery systems in the State.

§ 661.110 What is the role of the Department of Labor as the Federal governmental partner in the governance of the workforce investment system?

(a) Successful governance of the workforce investment system will be achieved through cooperation and coordination of Federal, State and local governments.

(b) The Department of Labor sees as one of its primary roles providing leadership and guidance to support a system that meets the objectives of title I of WIA, and in which State and local partners have flexibility to design systems and deliver services in a manner designed to best achieve the goals of WIA based on their particular needs. The WIA regulations provide the framework in which State and local officials can exercise such flexibility within the confines of the statutory requirements. Wherever possible, system features such as design options and categories of services are broadly defined, and are subject to State and local interpretation.

(c) The Secretary, in consultation with other Federal Agencies, as appropriate, may publish guidance on interpretations of statutory and regulatory provisions. State and local policies, interpretations, guidelines and definitions that are consistent with interpretations contained in such guidance will be considered to be consistent with the Act for purposes of § 661.120.

§ 661.120 What are the roles of the local and State governmental partner in the governance of the workforce investment system?

(a) Local areas should establish policies, interpretations, guidelines and definitions to implement provisions of title I of WIA to the extent that such policies, interpretations, guidelines and definitions are not inconsistent with the Act and the regulations issued under the Act, Federal statutes and regulations governing One-Stop partner programs, and with State policies.

(b) States should establish policies, interpretations, guidelines and definitions to implement provisions of title I of WIA to the extent that such policies, interpretations, guidelines and definitions are not inconsistent with the Act and the regulations issued under the Act, as well as Federal statutes and regulations governing One-Stop partner programs.

Subpart B—State Governance Provisions

§ 661.200 What is the State Workforce Investment Board?

(a) The State Board is a board established by the Governor in accordance with the requirements of WIA section 111 and this section.

(b) The membership of the State Board must meet the requirements of WIA section 111(b). The State Board must contain two or more members representing the categories described in WIA section 111(b)(1)(C)(iii)–(v), and special consideration must be given to chief executive officers of community colleges and community based organizations in the selection of members representing the entities identified in WIA section 111(b)(1)(C)(v).

(c) The Governor may appoint any other representatives or agency officials, such as agency officials responsible for economic development, child support and juvenile justice programs in the State.

(d) Members who represent organizations, agencies or other entities must be individuals with optimum policy making authority within the entities they represent.

(e) A majority of members of the State Board must be representatives of business. Members who represent business must be individuals who are owners, chief executive officers, chief operating officers, or other individuals with optimum policy making or hiring authority, including members of Local Boards.

(f) The Governor must appoint the business representatives from among individuals who are nominated by State business organizations and business trade associations. The Governor must appoint the labor representatives from among individuals who are nominated by State labor federations.

(g) The Governor must select a chairperson of the State Board from the business representatives on the board.

(h) The Governor may establish terms of appointment or other conditions governing appointment or membership on the State Board.

(i) For the programs and activities carried out by One-Stop partners, as described in WIA section 121(b) and 20 CFR 662.200 and 662.210, the State Board must include:

(1) The lead State agency officials with responsibility for such program, or

(2) In any case in which no lead State agency official has responsibility for such a program service, a representative in the State with expertise relating to such program, service or activity.

(3) If the director of the designated State unit, as defined in section 7(8)(B) of the Rehabilitation Act, does not represent the State Vocational Rehabilitation Services program (VR program) on the State Board, then the State must describe in its State plan how the member of the State Board representing the VR program will effectively represent the interests, needs, and priorities of the VR program and how the employment needs of individuals with disabilities in the State will be addressed.

(j) An individual may be appointed as a representative of more than one entity if the individual meets all the criteria for representation, including the criteria described in paragraphs (d) through (f) of this section, for each entity. (WIA sec. 111)

§ 661.203 What is meant by the terms "optimum policy making authority" and "expertise relating to [a] program, service or activity"?

For purposes of selecting representatives to State and local workforce investment boards:

(a) A representative with ''optimum policy making authority'' is an individual who can reasonably be expected to speak affirmatively on behalf of the entity he or she represents and to commit that entity to a chosen course of action.

(b) A representative with ''expertise relating to [a] program, service or activity'' includes a person who is an official with a One-stop partner program and a person with documented expertise relating to the One-stop partner program.

§ 661.205 What is the role of the State Board?

The State Board must assist the Governor in the:

(a) Development of the State Plan;

(b) Development and continuous improvement of a Statewide system of activities that are funded under subtitle B of title I of WIA, or carried out through the One-Stop delivery system, including—

(1) Development of linkages in order to assure coordination and nonduplication among the programs and activities carried out by One-Stop partners, including, as necessary, addressing any impasse situations in the development of the local Memorandum of Understanding; and

(2) Review of local plans;

(c) Commenting at least once annually on the measures taken under section 113(b)(14) of the Carl D. Perkins Vocational and Technical Education Act;

(d) Designation of local workforce investment areas,

(e) Development of allocation formulas for the distribution of funds for adult employment and training activities and youth activities to local areas,

as permitted under WIA sections 128(b)(3)(B) and 133(b)(3)(B);

(f) Development and continuous improvement of comprehensive State performance measures, including State adjusted levels of performance, to assess the effectiveness of the workforce investment activities in the State, as required under WIA section 136(b);

(g) Preparation of the annual report to the Secretary described in WIA section 136(d);

(h) Development of the Statewide employment statistics system described in section 15(e) of the Wagner-Peyser Act; and

(i) Development of an application for an incentive grant under WIA section 503. (WIA sec. 111(d).)

§ 661.207 How does the State Board meet its requirement to conduct business in an open manner under the "sunshine provision" of WIA section 111(g)?

The State Board must conduct its business in an open manner as required by WIA section 111(g), by making available to the public, on a regular basis through open meetings, information about the activities of the State Board. This includes information about the State Plan prior to submission of the plan; information about membership; the development of significant policies, interpretations, guidelines and definitions; and, on request, minutes of formal meetings of the State Board.

§ 661.210 Under what circumstances may the Governor select an alternative entity in place of the State Workforce Investment Board?

(a) The State may use any State entity that meets the requirements of WIA section 111(e) to perform the functions of the State Board.

(b) If the State uses an alternative entity, the State workforce investment plan must demonstrate that the alternative entity meets all three of the requirements of WIA section 111(e). Section 111(e) requires that such entity:

(1) Was in existence on December 31, 1997;

(2)(i) Was established under section 122 (relating to State Job Training Coordinating Councils) or title VII (relating to State Human Resource Investment Councils) of the Job Training Partnership Act (29 U.S.C.1501 *et seq.*), as in effect on December 31, 1997, or

(ii) Is substantially similar to the State Board described in WIA section 111(a), (b), and (c) and § 661.200; and

(3) Includes, at a minimum, two or more representatives of business in the State and two or more representatives of labor organizations in the State.

(c) If the alternative entity does not provide for representative membership of each of the categories of required State Board membership under WIA section 111(b), the State Plan must explain the manner in which the State will ensure an ongoing role for any unrepresented membership group in the workforce investment system. The State Board may maintain an ongoing role for an unrepresented membership group, including entities carrying out One-stop partner programs, by means such as regularly scheduled consultations with entities within the unrepresented membership groups, by providing an opportunity for input into the State Plan or other policy development by unrepresented membership groups, or by establishing an advisory committee of unrepresented membership groups.

(d) If the membership structure of the alternative entity is significantly changed after December 31, 1997, the entity will no longer be eligible to perform the functions of the State Board. In such case, the Governor must establish a new State Board which meets all of the criteria of WIA section 111(b).

(e) A significant change in the membership structure includes any significant change in the organization of the alternative entity or in the categories of entities represented on the alternative entity which requires a change to the alternative entity's charter or a similar document that defines the formal organization of the alternative entity, regardless of whether the required change to the document has or has not been made. A significant change in the membership structure is considered to have occurred when members are added to represent groups not previously represented on the entity. A significant change in the membership structure is not considered to have occurred when additional members are added to an existing membership category, when non-

voting members are added, or when a member is added to fill a vacancy created in an existing membership category.

(f) In 20 CFR parts 660 through 671, all references to the State Board also apply to an alternative entity used by a State.

§ 661.220 What are the requirements for the submission of the State Workforce Investment Plan?

(a) The Governor of each State must submit a State Workforce Investment Plan (State Plan) in order to be eligible to receive funding under title I of WIA and the Wagner-Peyser Act. The State Plan must outline the State's five year strategy for the workforce investment system.

(b) The State Plan must be submitted in accordance with planning guidelines issued by the Secretary of Labor. The planning guidelines set forth the information necessary to document the State's vision, goals, strategies, policies and measures for the workforce investment system (that were arrived at through the collaboration of the Governor, chief elected officials, business and other parties), as well as the information required to demonstrate compliance with WIA, and the information detailed by WIA and the WIA regulations, including 29 CFR part 37, and the Wagner-Peyser Act and the Wagner-Peyser regulations at 20 CFR part 652:

(c) The State Plan must contain a description of the State's performance accountability system, and the State performance measures in accordance with the requirements of WIA section 136 and 20 CFR part 666.

(d) The State must provide an opportunity for public comment on and input into the development of the State Plan prior to its submission. The opportunity for public comment must include an opportunity for comment by representatives of business, representatives of labor organizations, and chief elected official(s) and must be consistent with the requirement, at WIA section 111(g), that the State Board makes information regarding the State Plan and other State Board activities available to the public through regular open meetings. The State Plan must describe the State's process and timeline for ensuring a meaningful opportunity for public comment.

(e) The Secretary reviews completed plans and must approve all plans within ninety days of their submission, unless the Secretary determines in writing that:

(1) The plan is inconsistent with the provisions of title I of WIA or the WIA regulations, including 29 CFR part 37. For example, a finding of inconsistency would be made if the Secretary and the Governor have not reached agreement on the adjusted levels of performance under WIA section 136(b)(3)(A), or there is not an effective strategy in place to ensure development of a fully operational One-Stop delivery system in the State; or

(2) The portion of the plan describing the detailed Wagner-Peyser plan does not satisfy the criteria for approval of such plans as provided in section 8(d) of the Wagner-Peyser Act or the Wagner-Peyser regulations at 20 CFR part 652.

(3) A plan which is incomplete, or which does not contain sufficient information to determine whether it is consistent with the statutory or regulatory requirements of title I of WIA or of section 8(d) of the Wagner-Peyser Act, will be considered to be inconsistent with those requirements.

§ 661.230 What are the requirements for modification of the State Workforce Investment Plan?

(a) The State may submit a modification of its workforce investment plan at any time during the five-year life of the plan.

(b) Modifications are required when:

(1) Changes in Federal or State law or policy substantially change the assumptions upon which the plan is based.

(2) There are changes in the Statewide vision, strategies, policies, performance indicators, the methodology used to determine local allocation of funds, reorganizations which change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State Board or alternative entity and similar substantial changes to the State's workforce investment system.

(3) The State has failed to meet performance goals, and must adjust service strategies.

(c) Modifications are required in accordance with the Wagner-Peyser provisions at 20 CFR 652.212.

(d) Modifications to the State Plan are subject to the same public review and comment requirements that apply to the development of the original State Plan.

(e) State Plan modifications will be approved by the Secretary based on the approval standard applicable to the original State Plan under § 661.220(e).

§ 661.240 How do the unified planning requirements apply to the five-year strategic WIA and Wagner-Peyser plan and to other Department of Labor plans?

(a) A State may submit to the Secretary a unified plan for any of the programs or activities described in WIA section 501(b)(2). This includes the following DOL programs and activities:

(1) The five-year strategic WIA and Wagner-Peyser plan;

(2) Trade adjustment assistance activities and NAFTA-TAA;

(3) Veterans' programs under 38 U.S.C. Chapter 41;

(4) Programs authorized under State unemployment compensation laws;

(5) [Reserved]

(6) Senior Community Service Employment Programs under title V of the Older Americans Act.

(b) For purposes of paragraph (a) of this section:

(1) A State may submit, as part of the unified plan, any plan, application form or any other similar document, that is required as a condition for the approval of Federal funding under the applicable program. These plans include such things as the WIA plan. They do not include jointly executed funding instruments, such as grant agreements, or Governor/Secretary Agreements or items such as corrective actions plans.

(2) A state may submit a unified plan meeting the requirements of the Interagency guidance entitled *State Unified Plan, Planning Guidance for State Unified Plans Under Section 501 of the Workforce Investment Act of 1998*, in lieu of completing the individual State planning guidelines of the programs covered by the unified plan.

(c) A State which submits a unified plan covering an activity or program described in subsection 501(b) of WIA that is approved under subsection 501(d) of the Act will not be required to submit any other plan or application in order to receive Federal funds to carry out the activity or program.

(d) Each portion of a unified plan submitted under paragraph (a) of this section is subject to the particular requirements of Federal law authorizing the program. All grantees are still subject to such things as reporting and record-keeping requirements, corrective action plan requirements and other generally applicable requirements.

(e) A unified plan must contain the information required by WIA section 501(c) and will be approved in accordance with the requirements of WIA section 501(d).

[65 FR 49390, Aug. 11, 2000, as amended at 71 FR 35525, June 21, 2006]

§ 661.250 What are the requirements for designation of local workforce investment areas?

(a) The Governor must designate local workforce investment areas in order for the State to receive funding under title I of WIA.

(b) The Governor must take into consideration the factors described in WIA section 116(a)(1)(B) in making designations of local areas. Such designation must be made in consultation with the State Board, and after consultation with chief elected officials. The Governor must also consider comments received through the public comment process described in the State workforce investment plan under § 661.220(d).

(c) The Governor may approve a request for designation as a workforce investment area from any unit of general local government, including a combination of such units, if the State Board determines that the area meets the requirements of WIA section 116(a)(1)(B) and recommends designation.

(d) The Governor of any State that was a single service delivery area State under the Job Training Partnership Act as of July 1, 1998, and only those

States, may designate the State as a single local workforce investment area State. (WIA sec.116.)

§ 661.260 What are the requirements for automatic designation of workforce investment areas relating to units of local government with a population of 500,000 or more?

The requirements for automatic designation relating to units of local government with a population of 500,000 or more and to rural concentrated employment programs are contained in WIA section 116(a)(2). The Governor has authority to determine the source of population data to use in making these designations.

§ 661.270 What are the requirements for temporary and subsequent designation of workforce investment areas relating to areas that had been designated as service delivery areas under JTPA?

The requirements for temporary and subsequent designation relating to areas that had been designated as service delivery areas under JTPA are contained in WIA section 116(a)(3).

§ 661.280 What right does an entity have to appeal the Governor's decision rejecting a request for designation as a workforce investment area?

(a) A unit of local government (or combination of units) or a rural concentrated employment program grant recipient (as described at WIA section 116(a)(2)(B), which has requested but has been denied its request for designation as a workforce investment area under §§ 661.260 through 661.270, may appeal the decision to the State Board, in accordance with appeal procedures established in the State Plan.

(b) If a decision on the appeal is not rendered in a timely manner or if the appeal to the State Board does not result in designation, the entity may request review by the Secretary of Labor, under the procedures set forth at 20 CFR 667.640(a).

(c) The Secretary may require that the area be designated as a workforce investment area, if the Secretary determines that:

(1) The entity was not accorded procedural rights under the State appeals process; or

(2) The area meets the automatic designation requirements at WIA section 116(a)(2) or the temporary and subsequent designation requirements at WIA section 116(a)(3), as appropriate.

§ 661.290 Under what circumstances may States require Local Boards to take part in regional planning activities?

(a) The State may require Local Boards within a designated region (as defined at 20 CFR 660.300) to:

(1) Participate in a regional planning process that results in regional performance measures for workforce investment activities under title I of WIA. Regions that meet or exceed the regional performance measures may receive regional incentive grants;

(2) Share, where feasible, employment and other types of information that will assist in improving the performance of all local areas in the designated region on local performance measures; and

(3) Coordinate the provision of WIA title I services, including supportive services such as transportation, across the boundaries of local areas within the designated region.

(b) Two or more States may designate a labor market area, economic development region, or other appropriate contiguous subarea of the States as an interstate region. In such cases, the States may jointly exercise the State's functions described in this section.

(c) Designation of intrastate regions and interstate regions and their corresponding performance measures must be described in the respective State Plan(s). For interstate regions, the roles of the respective Governors, State Boards and Local Boards must be described in the respective State Plans.

(d) Unless agreed to by all affected chief elected officials and the Governor, these regional planning activities may not substitute for or replace the requirements applicable to each local area under other provisions of the WIA. (WIA sec. 116(a).)

Subpart C—Local Governance Provisions

§ 661.300 What is the Local Workforce Investment Board?

(a) The Local Workforce Investment Board (Local Board) is appointed by the chief elected official in each local area in accordance with State criteria established under WIA section 117(b), and is certified by the Governor every two years, in accordance with WIA section 117(c)(2).

(b) In partnership with the chief elected official(s), the Local Board sets policy for the portion of the Statewide workforce investment system within the local area.

(c) The Local Board and the chief elected official(s) may enter into an agreement that describes the respective roles and responsibilities of the parties.

(d) The Local Board, in partnership with the chief elected official, develops the local workforce investment plan and performs the functions described in WIA section 117(d). (WIA sec.117 (d).)

(e) If a local area includes more than one unit of general local government in accordance with WIA section 117 (c)(1)(B), the chief elected officials of such units may execute an agreement to describe their responsibilities for carrying out the roles and responsibilities. If, after a reasonable effort, the chief elected officials are unable to reach agreement, the Governor may appoint the members of the local board from individuals nominated or recommended as specified in WIA section 117(b).

(f) If the State Plan indicates that the State will be treated as a local area under WIA title I, the Governor may designate the State Board to carry out any of the roles of the Local Board.

§ 661.305 What is the role of the Local Workforce Investment Board?

(a) WIA section 117(d) specifies that the Local Board is responsible for:

(1) Developing the five-year local workforce investment plan (Local Plan) and conducting oversight of the One-Stop system, youth activities and employment and training activities under title I of WIA, in partnership with the chief elected official;

(2) Selecting One-Stop operators with the agreement of the chief elected official;

(3) Selecting eligible youth service providers based on the recommendations of the youth council, and identifying eligible providers of adult and dislocated worker intensive services and training services, and maintaining a list of eligible providers with performance and cost information, as required in 20 CFR part 663, subpart E;

(4) Developing a budget for the purpose of carrying out the duties of the Local Board, subject to the approval of the chief elected official;

(5) Negotiating and reaching agreement on local performance measures with the chief elected official and the Governor;

(6) Assisting the Governor in developing the Statewide employment statistics system under the Wagner-Peyser Act;

(7) Coordinating workforce investment activities with economic development strategies and developing employer linkages; and

(8) Promoting private sector involvement in the Statewide workforce investment system through effective connecting, brokering, and coaching activities through intermediaries such as the One-Stop operator in the local area or through other organizations, to assist employers in meeting hiring needs.

(b) The Local Board, in cooperation with the chief elected official, appoints a youth council as a subgroup of the Local Board and coordinates workforce and youth plans and activities with the youth council, in accordance with WIA section 117(h) and § 661.335.

(c) Local Boards which are part of a State designated region for regional planning must carry out the regional planning responsibilities required by the State in accordance with WIA section 116(c) and § 661.290. (WIA sec. 117.)

§ 661.307 How does the Local Board meet its requirement to conduct business in an open manner under the "sunshine provision" of WIA section 117(e)?

The Local Board must conduct its business in an open manner as required by WIA section 117(e), by making available to the public, on a regular basis

through open meetings, information about the activities of the Local Board. This includes information about the Local Plan prior to submission of the plan; information about membership; the development of significant policies, interpretations, guidelines and definitions; and, on request, minutes of formal meetings of the Local Board.

§ 661.310 Under what limited conditions may a Local Board directly be a provider of core services, intensive services, or training services, or act as a One-Stop Operator?

(a) A Local Board may not directly provide core services, or intensive services, or be designated or certified as a One-Stop operator, unless agreed to by the chief elected official and the Governor.

(b) A Local Board is prohibited from providing training services, unless the Governor grants a waiver in accordance with the provisions in WIA section 117(f)(1). The waiver shall apply for not more than one year. The waiver may be renewed for additional periods, but for not more than one additional year at a time.

(c) The restrictions on the provision of core, intensive, and training services by the Local Board, and designation or certification as One-Stop operator, also apply to staff of the Local Board. (WIA sec. 117(f)(1) and (f)(2).)

§ 661.315 Who are the required members of the Local Workforce Investment Boards?

(a) The membership of Local Board must be selected in accordance with criteria established under WIA section 117(b)(1) and must meet the requirements of WIA section 117(b)(2). The Local Board must contain two or more members representing the categories described in WIA section 117(b)(2)(A)(ii)–(v), and special consideration must be given to the entities identified in WIA section 117(b)(2)(A)(ii), (iv) and (v) in the selection of members representing those categories. The Local Board must contain at least one member representing each One-Stop partner.

(b) The membership of Local Boards may include individuals or representatives of other appropriate entities, including entities representing individuals with multiple barriers to employment and other special populations, as determined by the chief elected official.

(c) Members who represent organizations, agencies or other entities must be individuals with optimum policy making authority within the entities they represent.

(d) A majority of the members of the Local Board must be representatives of business in the local area. Members representing business must be individuals who are owners, chief executive officers, chief operating officers, or other individuals with optimum policy-making or hiring authority. Business representatives serving on Local Boards may also serve on the State Board.

(e) Chief elected officials must appoint the business representatives from among individuals who are nominated by local business organizations and business trade associations. Chief elected officials must appoint the labor representatives from among individuals who are nominated by local labor federations (or, for a local area in which no employees are represented by such organizations, other representatives of employees). (WIA sec. 117(b).)

(f) An individual may be appointed as a representative of more than one entity if the individual meets all the criteria for representation, including the criteria described in paragraphs (c) through (e) of this section, for each entity.

§ 661.317 Who may be selected to represent a particular One-Stop partner program on the Local Board when there is more than one partner program entity in the local area?

When there is more than one grant recipient, administrative entity or organization responsible for administration of funds of a particular One-stop partner program in the local area, the chief elected official may appoint one or more members to represent all of those particular partner program entities. In making such appointments, the local elected official may solicit nominations from the partner program entities.

§ 661.320 Who must chair a Local Board?

The Local Board must elect a chairperson from among the business representatives on the board. (WIA sec. 117(b)(5).)

§ 661.325 What criteria will be used to establish the membership of the Local Board?

The Local Board is appointed by the chief elected official(s) in the local area in accordance with State criteria established under WIA section 117(b), and is certified by the Governor every two years, in accordance with WIA section 117(c)(2). The criteria for certification must be described in the State Plan. (WIA sec. 117(c).)

§ 661.330 Under what circumstances may the State use an alternative entity as the Local Workforce Investment Board?

(a) The State may use any local entity that meets the requirements of WIA section 117(i) to perform the functions of the Local Board. WIA section 117(i) requires that such entity:

(1) Was established to serve the local area (or the service delivery area that most closely corresponds to the local area);

(2) Was in existence on December 31, 1997;

(3)(i) Is a Private Industry Council established under section 102 of the Job Training Partnership Act, as in effect on December 31, 1997; or

(ii) Is substantially similar to the Local Board described in WIA section 117 (a), (b), and (c) and (h)(1) and (2); and,

(4) Includes, at a minimum, two or more representatives of business in the local area and two or more representatives of labor organizations nominated by local labor federations or employees in the local area.

(b)(1) If the Governor certifies an alternative entity to perform the functions of the Local Board; the State workforce investment plan must demonstrate that the alternative entity meets the requirements of WIA section 117(i), set forth in paragraph (a) of this section.

(2) If the alternative entity does not provide for representative membership of each of the categories of required Local Board membership under WIA section 117(b), including all of the One-stop partner programs, the local workforce investment plan must explain the manner in which the Local Board will ensure an ongoing role for the unrepresented membership group in the local workforce investment system.

(3) The Local Board may provide an ongoing role for an unrepresented membership group, including entities carrying out One-stop partner programs, by means such as regularly scheduled consultations with entities within the unrepresented membership groups, by providing an opportunity for input into the local plan or other policy development by unrepresented membership groups, or by establishing an advisory committee of unrepresented membership groups. The Local Board must enter into good faith negotiations over the terms of the MOU with all entities carrying out One-stop partner programs, including programs not represented on the alternative entity.

(c) If the membership structure of an alternative entity is significantly changed after December 31, 1997, the entity will no longer be eligible to perform the functions of the Local Board. In such case, the chief elected official(s) must establish a new Local Board which meets all of the criteria of WIA section 117(a), (b), and (c) and (h)(1) and (2).

(d) A significant change in the membership structure includes any significant change in the organization of the alternative entity or in the categories of entities represented on the alternative entity which requires a change to the alternative entity's charter or a similar document that defines the formal organization of the alternative entity, regardless of whether the required change to the document has or has not been made. A significant change in the membership structure is considered to have occurred when members are added to represent groups not previously represented on the entity. A significant change in the membership structure is not considered to have occurred when additional members are added to an existing membership category, when nonvoting members (including a Youth

Council) are added, or when a member is added to fill a vacancy created in an existing membership category.

(e) In 20 CFR parts 660 through 671, all references to the Local Board must be deemed to also apply to an alternative entity used by a local area. (WIA sec. 117(i).)

§ 661.335 What is a youth council, and what is its relationship to the Local Board?

(a) A youth council must be established as a subgroup within each Local Board.

(b) The membership of each youth council must include:

(1) Members of the Local Board, such as educators, which may include special education personnel, employers, and representatives of human service agencies, who have special interest or expertise in youth policy;

(2) Members who represent service agencies, such as juvenile justice and local law enforcement agencies;

(3) Members who represent local public housing authorities;

(4) Parents of eligible youth seeking assistance under subtitle B of title I of WIA;

(5) Individuals, including former participants, and members who represent organizations, that have experience relating to youth activities; and

(6) Members who represent the Job Corps, if a Job Corps Center is located in the local area represented by the council.

(c) Youth councils may include other individuals, who the chair of the Local Board, in cooperation with the chief elected official, determines to be appropriate.

(d) Members of the youth council who are not members of the Local Board must be voting members of the youth council and nonvoting members of the Local Board.

§ 661.340 What are the responsibilities of the youth council?

The youth council is responsible for:

(a) Coordinating youth activities in a local area;

(b) Developing portions of the local plan related to eligible youth, as determined by the chairperson of the Local Board;

(c) Recommending eligible youth service providers in accordance with WIA section 123, subject to the approval of the Local Board;

(d) Conducting oversight with respect to eligible providers of youth activities in the local area, subject to the approval of the Local Board; and

(e) Carrying out other duties, as authorized by the chairperson of the Local Board, such as establishing linkages with educational agencies and other youth entities.

§ 661.345 What are the requirements for the submission of the local workforce investment plan?

(a) WIA section 118 requires that each Local Board, in partnership with the appropriate chief elected officials, develops and submits a comprehensive five-year plan to the Governor which identifies and describes certain policies, procedures and local activities that are carried out in the local area, and that is consistent with the State Plan.

(b) The Local Board must provide an opportunity for public comment on and input into the development of the local workforce investment plan prior to its submission, and the opportunity for public comment on the local plan must:

(1) Make copies of the proposed local plan available to the public (through such means as public hearings and local news media);

(2) Include an opportunity for comment by members of the Local Board and members of the public, including representatives of business and labor organizations;

(3) Provide at least a thirty (30) day period for comment, beginning on the date on which the proposed plan is made available, prior to its submission to the Governor; and

(4) Be consistent with the requirement, in WIA section 117(e), that the Local Board make information about the plan available to the public on a regular basis through open meetings.

(c) The Local Board must submit any comments that express disagreement with the plan to the Governor along with the plan.

§ 661.350 What are the contents of the local workforce investment plan?

(a) The local workforce investment plan must meet the requirements of WIA section 118(b). The plan must include:

(1) An identification of the workforce investment needs of businesses, jobseekers, and workers in the local area;

(2) An identification of current and projected employment opportunities and job skills necessary to obtain such opportunities;

(3) A description of the One-Stop delivery system to be established or designated in the local area, including:

(i) How the Local Board will ensure continuous improvement of eligible providers of services and ensure that such providers meet the employment needs of local employers and participants; and

(ii) A copy of the local Memorandum(s) of Understanding between the Local Board and each of the One-Stop partners concerning the operation of the local One-Stop delivery system;

(4) A description of the local levels of performance negotiated with the Governor and the chief elected official(s) to be used by the Local Board for measuring the performance of the local fiscal agent (where appropriate), eligible providers, and the local One-Stop delivery system;

(5) A description and assessment of the type and availability of adult and dislocated worker employment and training activities in the local area, including a description of the local ITA system and the procedures for ensuring that exceptions to the use of ITA's, if any, are justified under WIA section 134(d)(4)(G)(ii) and 20 CFR 663.430;

(6) A description of how the Local Board will coordinate local activities with Statewide rapid response activities;

(7) A description and assessment of the type and availability of youth activities in the local area, including an identification of successful providers of such activities;

(8) A description of the process used by the Local Board to provide opportunity for public comment, including comment by representatives of business and labor organizations, and input into the development of the local plan, prior to the submission of the plan;

(9) An identification of the fiscal agent, or entity responsible for the disbursal of grant funds;

(10) A description of the competitive process to be used to award grants and contracts for activities carried out under this subtitle I of WIA, including the process to be used to procure training services that are made as exceptions to the Individual Training Account process (WIA section 134(d)(4)(G)),

(11) A description of the criteria to be used by the Governor and the Local Board, under 20 CFR 663.600, to determine whether funds allocated to a local area for adult employment and training activities under WIA sections 133(b)(2)(A) or (3) are limited, and the process by which any priority will be applied by the One-Stop operator;

(12) In cases where an alternate entity functions as the Local Board, the information required at § 661.330(b), and

(13) Such other information as the Governor may require.

(b) The Governor must review completed plans and must approve all such plans within ninety days of their submission, unless the Governor determines in writing that:

(1) There are deficiencies identified in local workforce investment activities carried out under this subtitle that have not been sufficiently addressed; or

(2) The plan does not comply with title I of WIA and the WIA regulations, including the required consultations, the public comment provisions, and the nondiscrimination requirements of 29 CFR part 37.

(c) In cases where the State is a single local area:

(1) The Secretary performs the roles assigned to the Governor as they relate to local planning activities.

(2) The Secretary issues planning guidance for such States.

(3) The requirements found in WIA and in the WIA regulations for consultation with chief elected officials apply to the development of State and local plans and to the development and operation of the One-Stop delivery system.

(d) During program year 2000, if a local plan does not contain all of the

elements described in paragraph (a) of this section, the Governor may approve a local plan on a transitional basis. A transitional approval under this paragraph is considered to be a written determination that the local plan is not approved under paragraph (b) of this section.

§ 661.355 When must a local plan be modified?

The Governor must establish procedures governing the modification of local plans. Situations in which modifications may be required by the Governor include significant changes in local economic conditions, changes in the financing available to support WIA title I and partner-provided WIA services, changes to the Local Board structure, or a need to revise strategies to meet performance goals.

Subpart D—Waivers and Work-Flex Waivers

§ 661.400 What is the purpose of the General Statutory and Regulatory Waiver Authority provided at section 189(i)(4) of the Workforce Investment Act?

(a) The purpose of the general statutory and regulatory waiver authority is to provide flexibility to States and local areas and enhance their ability to improve the statewide workforce investment system.

(b) A waiver may be requested to address impediments to the implementation of a strategic plan, including the continuous improvement strategy, consistent with the key reform principles of WIA. These key reform principles include:

(1) Streamlining services and information to participants through a One-Stop delivery system;

(2) Empowering individuals to obtain needed services and information to enhance their employment opportunities;

(3) Ensuring universal access to core employment-related services;

(4) Increasing accountability of States, localities and training providers for performance outcomes;

(5) Establishing a stronger role for Local Boards and the private sector;

(6) Providing increased State and local flexibility to implement innovative and comprehensive workforce investment systems; and

(7) Improving youth programs through services which emphasize academic and occupational learning.

§ 661.410 What provisions of WIA and the Wagner-Peyser Act may be waived, and what provisions may not be waived?

(a) The Secretary may waive any of the statutory or regulatory requirements of subtitles B and E of title I of WIA, except for requirements relating to:

(1) Wage and labor standards;

(2) Non-displacement protections;

(3) Worker rights;

(4) Participation and protection of workers and participants;

(5) Grievance procedures and judicial review;

(6) Nondiscrimination;

(7) Allocation of funds to local areas;

(8) Eligibility of providers or participants;

(9) The establishment and functions of local areas and local boards;

(10) Procedures for review and approval of State and Local plans; and

(b) The Secretary may waive any of the statutory or regulatory requirements of sections 8 through 10 of the Wagner-Peyser Act (29 U.S.C. 49g–49i) except for requirements relating to:

(1) The provision of services to unemployment insurance claimants and veterans; and

(2) Universal access to the basic labor exchange services without cost to job seekers.

(c) The Secretary does not intend to waive any of the statutory or regulatory provisions essential to the key reform principles embodied in the Workforce Investment Act, described in § 661.400, except in extremely unusual circumstances where the provision can be demonstrated as impeding reform. (WIA sec. 189(i).)

§ 661.420 Under what conditions may a Governor request, and the Secretary approve, a general waiver of statutory or regulatory requirements under WIA section 189(i)(4)?

(a) A Governor may request a general waiver in consultation with appropriate chief elected officials:

(1) By submitting a waiver plan which may accompany the State's WIA 5-year strategic Plan; or

(2) After a State's WIA Plan is approved, by directly submitting a waiver plan.

(b) A Governor's waiver request may seek waivers for the entire State or for one or more local areas.

(c) A Governor requesting a general waiver must submit to the Secretary a plan to improve the Statewide workforce investment system that:

(1) Identifies the statutory or regulatory requirements for which a waiver is requested and the goals that the State or local area, as appropriate, intends to achieve as a result of the waiver and how those goals relate to the Strategic Plan goals;

(2) Describes the actions that the State or local area, as appropriate, has undertaken to remove State or local statutory or regulatory barriers;

(3) Describes the goals of the waiver and the expected programmatic outcomes if the request is granted;

(4) Describes the individuals affected by the waiver; and

(5) Describes the processes used to:

(i) Monitor the progress in implementing the waiver;

(ii) Provide notice to any Local Board affected by the waiver;

(iii) Provide any Local Board affected by the waiver an opportunity to comment on the request; and

(iv) Ensure meaningful public comment, including comment by business and organized labor, on the waiver.

(d) The Secretary issues a decision on a waiver request within 90 days after the receipt of the original waiver request.

(e) The Secretary will approve a waiver request if and only to the extent that:

(1) The Secretary determines that the requirements for which a waiver is requested impede the ability of either the State or local area to implement the State's plan to improve the Statewide workforce investment system;

(2) The Secretary determines that the waiver plan meets all of the requirements of WIA section 189(i)(4) and §§ 661.400 through 661.420; and

(3) The State has executed a Memorandum of Understanding with the Secretary requiring the State to meet, or ensure that the local area meets, agreed-upon outcomes and to implement other appropriate measures to ensure accountability.

(f) The Secretary will issue guidelines under which the States may request general waivers of WIA and Wagner-Peyser requirements. (WIA sec. 189(i).)

§ 661.430 Under what conditions may the Governor submit a Workforce Flexibility Plan?

(a) A State may submit to the Secretary, and the Secretary may approve, a workforce flexibility (work-flex) plan under which the State is authorized to waive, in accordance with the plan:

(1) Any of the statutory or regulatory requirements under title I of WIA applicable to local areas, if the local area requests the waiver in a waiver application, except for:

(i) Requirements relating to the basic purposes of title I of WIA;

(ii) Wage and labor standards;

(iii) Grievance procedures and judicial review;

(iv) Nondiscrimination;

(v) Eligibility of participants;

(vi) Allocation of funds to local areas;

(vii) Establishment and functions of local areas and local boards;

(viii) Review and approval of local plans;

(ix) Worker rights, participation, and protection; and

(x) Any of the statutory provisions essential to the key reform principles embodied in the Workforce Investment Act, described in § 661.400.

(2) Any of the statutory or regulatory requirements applicable to the State under section 8 through 10 of the Wagner-Peyser Act (29 U.S.C. 49g–49i), except for requirements relating to:

(i) The provision of services to unemployment insurance claimants and veterans; and

(ii) Universal access to basic labor exchange services without cost to job seekers; and

(3) Any of the statutory or regulatory requirements under the Older Americans Act of 1965 (OAA) (42 U.S.C. 3001 *et seq.*), applicable to State agencies on aging with respect to activities carried

out using funds allotted under OAA section 506(a)(3) (42 U.S.C. 3056d(a)(3)), except for requirements relating to:

(i) The basic purposes of OAA;

(ii) Wage and labor standards;

(iii) Eligibility of participants in the activities; and

(iv) Standards for agreements.

(b) A State's workforce flexibility plan may accompany the State's five-year Strategic Plan or may be submitted separately. If it is submitted separately, the workforce flexibility plan must identify related provisions in the State's five-year Strategic Plan.

(c) A workforce flexibility plan submitted under paragraph (a) of this section must include descriptions of:

(1) The process by which local areas in the State may submit and obtain State approval of applications for waivers;

(2) The statutory and regulatory requirements of title I of WIA that are likely to be waived by the State under the workforce flexibility plan;

(3) The statutory and regulatory requirements of sections 8 through 10 of the Wagner-Peyser Act that are proposed for waiver, if any;

(4) The statutory and regulatory requirements of the Older Americans Act of 1965 that are proposed for waiver, if any;

(5) The outcomes to be achieved by the waivers described in paragraphs (c)(1) to (4) of this section including, where appropriate, revisions to adjusted levels of performance included in the State or local plan under title I of WIA; and

(6) The measures to be taken to ensure appropriate accountability for Federal funds in connection with the waivers.

(d) The Secretary may approve a workforce flexibility plan for a period of up to five years.

(e) Before submitting a workforce flexibility plan to the Secretary for approval, the State must provide adequate notice and a reasonable opportunity for comment on the proposed waiver requests under the workforce flexibility plan to all interested parties and to the general public.

(f) The Secretary will issue guidelines under which States may request designation as a work-flex State.

§ 661.440 What limitations apply to the State's Workforce Flexibility Plan authority under WIA?

(a)(1) Under work-flex waiver authority a State must not waive the WIA, Wagner-Peyser or Older Americans Act requirements which are excepted from the work-flex waiver authority and described in § 661.430(a).

(2) Requests to waive statutory and regulatory requirements of title I of WIA applicable at the State level may not be granted under work-flex waiver authority granted to a State. Such requests may only be granted by the Secretary under the general waiver authority described at §§ 661.410 through 661.420.

(b) As required in § 661.430(c)(5), States must address the outcomes to result from work-flex waivers as part of its workforce flexibility plan. Once approved, a State's work-flex designation is conditioned on the State demonstrating it has met the agreed-upon outcomes contained in its workforce flexibility plan.

PART 662—DESCRIPTION OF THE ONE-STOP SYSTEM UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—General Description of the One-Stop Delivery System

Sec.

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SOURCE: 65 FR 49398, Aug. 11, 2000, unless otherwise noted.

Subpart A—General Description of the One-Stop Delivery System

§ 662.100 What is the One-Stop delivery system?

(a) In general, the One-Stop delivery system is a system under which entities responsible for administering separate workforce investment, educational, and other human resource programs and funding streams (referred to as One-Stop partners) collaborate to create a seamless system of service delivery that will enhance access to the programs' services and improve long-term employment outcomes for individuals receiving assistance.

(b) Title I of WIA assigns responsibilities at the local, State and Federal level to ensure the creation and maintenance of a One-Stop delivery system that enhances the range and quality of workforce development services that are accessible to individuals seeking assistance.

(c) The system must include at least one comprehensive physical center in each local area that must provide the core services specified in WIA section 134(d)(2), and must provide access to other programs and activities carried out by the One-Stop partners.

(d) While each local area must have at least one comprehensive center (and may have additional comprehensive centers), WIA section 134(c) allows for arrangements to supplement the center. These arrangements may include:

(1) A network of affiliated sites that can provide one or more partners' programs, services and activities at each site;

(2) A network of One-Stop partners through which each partner provides services that are linked, physically or technologically, to an affiliated site that assures individuals are provided information on the availability of core services in the local area; and

(3) Specialized centers that address specific needs, such as those of dislocated workers.

(e) The design of the local area's One-Stop delivery system, including the number of comprehensive centers and the supplementary arrangements, must be described in the local plan and be consistent with the Memorandum of Understanding executed with the One-Stop partners.

Subpart B—One-Stop Partners and the Responsibilities of Partners

§ 662.200 Who are the required One-Stop partners?

(a) WIA section 121(b)(1) identifies the entities that are required partners in the local One-Stop systems.

(b) The required partners are the entities that are responsible for administering the following programs and activities in the local area:

(1) Programs authorized under title I of WIA, serving:

(i) Adults;

(ii) Dislocated workers;

(iii) Youth;

(iv) Job Corps;

(v) Native American programs;

(vi) Migrant and seasonal farmworker programs; and

(vii) Veterans' workforce programs; (WIA sec. 121(b)(1)(B)(i));

(2) Programs authorized under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*); (WIA sec. 121(b)(1)(B)(ii));

(3) Adult education and literacy activities authorized under title II of WIA; (WIA sec. 121(b)(1)(B)(iii));

(4) Programs authorized under parts A and B of title I of the Rehabilitation Act (29 U.S.C. 720 *et seq.*); (WIA sec. 121(b)(1)(B)(iv));

(5) [Reserved]

(6) Senior community service employment activities authorized under title V of the Older Americans Act of 1965 (42 U.S.C. 3056 *et seq.*); (WIA sec. 121(b)(1)(B)(vi));

(7) Postsecondary vocational education activities under the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C. 2301 *et seq.*); (WIA sec. 121(b)(1)(B)(vii));

(8) Trade Adjustment Assistance and NAFTA Transitional Adjustment Assistance activities authorized under chapter 2 of title II of the Trade Act of 1974, as amended (19 U.S.C. 2271 *et seq.*) and Section 123(c)(2) of the Trade Adjustment Assistance Reform Act of 2002 (Pub. L. 107–210), respectively; see (WIA sec. 121(b)(1)(B)(viii));

(9) Activities authorized under chapter 41 of title 38, U.S.C. (local veterans' employment representatives and disabled veterans outreach programs); (WIA sec. 121(b)(1)(B)(ix));

(10) Employment and training activities carried out under the Community Services Block Grant (42 U.S.C. 9901 *et seq.*); (WIA sec. 121(b)(1)(B)(x));

(11) Employment and training activities carried out by the Department of Housing and Urban Development; (WIA sec. 121(b)(1)(B)(xi)); and

(12) Programs authorized under State unemployment compensation laws (in accordance with applicable Federal law); (WIA sec. 121(b)(1)(B)(xii).)

[65 FR 49398, Aug. 11, 2000, as amended at 71 FR 35523, June 21, 2006]

§ 662.210 What other entities may serve as One-Stop partners?

(a) WIA provides that other entities that carry out a human resource program, including Federal, State, or local programs and programs in the private sector may serve as additional partners in the One-Stop system if the Local Board and chief elected official(s) approve the entity's participation.

(b) Additional partners may include:

(1) TANF programs authorized under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*);

(2) Employment and training programs authorized under section 6(d)(4) of the Food Stamp Act of 1977 (7 U.S.C. 2015(d)(4));

(3) Work programs authorized under section 6(o) of the Food Stamp Act of 1977 (7 U.S.C. 2015(o));

(4) Programs authorized under the National and Community Service Act of 1990 (42 U.S.C. 12501 *et seq.*); and

(5) Other appropriate Federal, State or local programs, including programs related to transportation and housing and programs in the private sector. (WIA sec. 121(b)(2).)

(c) The State may require that one or more of the programs identified in paragraph (b) of this section be included as a partner in all of the local One-Stop delivery systems in the State.

§ 662.220 What entity serves as the One-Stop partner for a particular program in the local area?

(a) The ''entity'' that carries out the program and activities listed in §§ 662.200 and 662.210 and, therefore, serves as the One-Stop partner is the grant recipient, administrative entity or organization responsible for administering the funds of the specified program in the local area. The term ''entity'' does not include the service providers that contract with or are subrecipients of the local administrative entity. For programs that do not include local administrative entities, the responsible State Agency should be the partner. Specific entities for particular programs are identified in paragraph (b) of this section. If a program or activity listed in § 662.200 is not carried out in a local area, the requirements relating to a required One-Stop partner are not applicable to such program or activity in that local One-Stop system.

(b)(1) For title II of WIA, the entity that carries out the program for the

purposes of paragraph (a) is the State eligible entity. The State eligible entity may designate an eligible provider, or a consortium of eligible providers, as the ''entity'' for this purpose;

(2) For title I, Part A, of the Rehabilitation Act, the entity that carries out the program for the purposes of paragraph (a) of this section is the designated State agency or designated unit specified under section 101(a)(2) that is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities; and

(3) Under WIA, the national programs, including Job Corps, the WIA Indian and Native American program, the Migrant and Seasonal Farmworkers program, and the Veterans' Workforce Investment program, are required One-Stop partners. Local Boards must include them in the One-Stop delivery system where they are present in their local area. In local areas where the national programs are not present, States and Local Boards should take steps to ensure that customer groups served by these programs have access to services through the One-Stop delivery system.

§ 662.230 What are the responsibilities of the required One-Stop partners?

All required partners must:

(a) Make available to participants through the One-Stop delivery system the core services that are applicable to the partner's programs; (WIA sec. 121(b)(1)(A).)

(b) Use a portion of funds made available to the partner's program, to the extent not inconsistent with the Federal law authorizing the partner's program, to:

(1) Create and maintain the One-Stop delivery system; and

(2) Provide core services; (WIA sec. 134(d)(1)(B).)

(c) Enter into a memorandum of understanding (MOU) with the Local Board relating to the operation of the One-Stop system that meets the requirements of § 662.300, including a description of services, how the cost of the identified services and operating costs of the system will be funded, and methods for referrals (WIA sec. 121(c));

(d) Participate in the operation of the One-Stop system consistent with the terms of the MOU and requirements of authorizing laws; (WIA sec. 121(b)(1)(B).) and

(e) Provide representation on the Local Workforce Investment Board. (WIA sec. 117(b)(2)(A)(vi).)

§ 662.240 What are a program's applicable core services?

(a) The core services applicable to any One-Stop partner program are those services described in paragraph (b) of this section, that are authorized and provided under the partner's program.

(b) The core services identified in section 134(d)(2) of the WIA are:

(1) Determinations of whether the individuals are eligible to receive assistance under subtitle B of title I of WIA;

(2) Outreach, intake (which may include worker profiling), and orientation to the information and other services available through the One-Stop delivery system;

(3) Initial assessment of skill levels, aptitudes, abilities, and supportive service needs;

(4) Job search and placement assistance, and where appropriate, career counseling;

(5) Provision of employment statistics information, including the provision of accurate information relating to local, regional, and national labor market areas, including—

(i) Job vacancy listings in such labor market areas;

(ii) Information on job skills necessary to obtain the listed jobs; and

(iii) Information relating to local occupations in demand and the earnings and skill requirements for such occupations;

(6) Provision of program performance information and program cost information on:

(i) Eligible providers of training services described in WIA section 122;

(ii) Eligible providers of youth activities described in WIA section 123;

(iii) Providers of adult education described in title II;

(iv) Providers of postsecondary vocational education activities and vocational education activities available to

school dropouts under the Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C. 2301 *et seq.*); and

(v) Providers of vocational rehabilitation program activities described in title I of the Rehabilitation Act of 1973 (29 U.S.C. 720 *et seq.*);

(7) Provision of information on how the local area is performing on the local performance measures and any additional performance information with respect to the One-Stop delivery system in the local area;

(8) Provision of accurate information relating to the availability of supportive services, including, at a minimum, child care and transportation, available in the local area, and referral to such services, as appropriate;

(9) Provision of information regarding filing claims for unemployment compensation;

(10) Assistance in establishing eligibility for programs of financial aid assistance for training and education programs that are not funded under this Act and are available in the local area; and

(11) Followup services, including counseling regarding the workplace, for participants in workforce investment activities authorized under subtitle (B) of title I of WIA who are placed in unsubsidized employment, for not less than 12 months after the first day of the employment, as appropriate.

[65 FR 49398, Aug. 11, 2000, as amended at 71 FR 35523, June 21, 2006]

§ 662.250 Where and to what extent must required One-Stop partners make core services available?

(a) At a minimum, the core services that are applicable to the program of the partner under § 662.220, and that are in addition to the basic labor exchange services traditionally provided in the local area under the Wagner-Peyser program, must be made available at the comprehensive One-Stop center. These services must be made available to individuals attributable to the partner's program who seek assistance at the center. The adult and dislocated worker program partners are required to make all of the core services listed in § 662.240 available at the center in accordance with 20 CFR 663.100(b)(1).

(b) The applicable core services may be made available by the provision of appropriate technology at the comprehensive One-Stop center, by co-locating personnel at the center, cross-training of staff, or through a cost reimbursement or other agreement between service providers at the comprehensive One-Stop center and the partner, as described in the MOU.

(c) The responsibility of the partner for the provision of core services must be proportionate to the use of the services at the comprehensive One-Stop center by the individuals attributable to the partner's program. The specific method of determining each partner's proportionate responsibility must be described in the MOU.

(d) For purposes of this part, individuals attributable to the partner's program may include individuals who are referred through the comprehensive One-Stop center and enrolled in the partner's program after the receipt of core services, who have been enrolled in the partner's program prior to receipt of the applicable core services at the center, who meet the eligibility criteria for the partner's program and who receive an applicable core service, or who meet an alternative definition described in the MOU.

(e) Under the MOU, the provision of applicable core services at the center by the One-Stop partner may be supplemented by the provision of such services through the networks of affiliated sites and networks of One-Stop partners described in WIA section 134(c)(2).

§ 662.260 What services, in addition to the applicable core services, are to be provided by One-Stop partners through the One-Stop delivery system?

In addition to the provision of core services, One-Stop partners must provide access to the other activities and programs carried out under the partner's authorizing laws. The access to these services must be described in the local MOU. 20 CFR part 663 describes the specific requirements relating to the provision of core, intensive, and training services through the One-Stop system that apply to the adult and the dislocated worker programs authorized

under title I of WIA. Additional requirements apply to the provision of all labor exchange services under the Wagner-Peyser Act. (WIA sec. 134(c)(1)(D).)

§ 662.270 How are the costs of providing services through the One-Stop delivery system and the operating costs of the system to be funded?

The MOU must describe the particular funding arrangements for services and operating costs of the One-Stop delivery system. Each partner must contribute a fair share of the operating costs of the One-Stop delivery system proportionate to the use of the system by individuals attributable to the partner's program. There are a number of methods, consistent with the equirements of the relevant OMB circulars, that may be used for allocating costs among the partners. Some of these methodologies include allocations based on direct charges, cost pooling, indirect cost rates and activity-based cost allocation plans. Additional guidance relating to cost allocation methods may be issued by the Department in consultation with the other appropriate Federal agencies.

§ 662.280 Does title I require One-Stop partners to use their funds for individuals who are not eligible for the partner's program or for services that are not authorized under the partner's program?

No, the requirements of the partner's program continue to apply. The Act intends to create a seamless service delivery system for individuals seeking workforce development services by linking the One-Stop partners in the One-Stop delivery system. While the overall effect is to provide universal access to core services, the resources of each partner may only be used to provide services that are authorized and provided under the partner's program to individuals who are eligible under such program. (WIA sec. 121(b)(1).)

Subpart C—Memorandum of Understanding for the One-Stop Delivery System

§ 662.300 What is the Memorandum of Understanding (MOU)?

(a) The Memorandum of Understanding (MOU) is an agreement developed and executed between the Local Board, with the agreement of the chief elected official, and the One-Stop partners relating to the operation of the One-Stop delivery system in the local area.

(b) The MOU must contain the provisions required by WIA section 121(c)(2). These provisions cover services to be provided through the One-Stop delivery system; the funding of the services and operating costs of the system; and methods for referring individuals between the One-Stop operators and partners. The MOU's provisions also must determine the duration and procedures for amending the MOU, and may contain any other provisions that are consistent with WIA title I and the WIA regulations agreed to by the parties. (WIA sec. 121(c).)

§ 662.310 Is there a single MOU for the local area or are there to be separate MOU's between the Local Board and each partner?

(a) A single ''umbrella'' MOU may be developed that addresses the issues relating to the local One-Stop delivery system for the Local Board, chief elected official and all partners, or the Local Board, chief elected official and the partners may decide to enter into separate agreements between the Local Board (with the agreement of the chief elected official) and one or more partners. Under either approach, the requirements described in this subpart apply. Since funds are generally appropriated annually, financial agreements may be negotiated with each partner annually to clarify funding of services and operating costs of the system under the MOU.

(b) WIA emphasizes full and effective partnerships between Local Boards, chief elected officials and One-Stop partners. Local Boards and partners

must enter into good-faith negotiations. Local Boards, chief elected officials and partners may request assistance from a State agency responsible for administering the partner program, the Governor, State Board, or other appropriate parties. The State agencies, the State Board, and the Governor may also consult with the appropriate Federal agencies to address impasse situations after exhausting other alternatives. The Local Board and partners must document the negotiations and efforts that have taken place. Any failure to execute an MOU between a Local Board and a required partner must be reported by the Local Board and the required partner to the Governor or State Board, and the State agency responsible for administering the partner's program, and by the Governor or the State Board and the responsible State agency to the Secretary of Labor and to the head of any other Federal agency with responsibility for oversight of a partner's program. (WIA sec. 121(c).)

(c) If an impasse has not been resolved through the alternatives available under this section any partner that fails to execute an MOU may not be permitted to serve on the Local Board. In addition, any local area in which a Local Board has failed to execute an MOU with all of the required partners is not eligible for State incentive grants awarded on the basis of local coordination of activities under 20 CFR 665.200(d)(2). These sanctions are in addition to, not in lieu of, any other remedies that may be applicable to the Local Board or to each partner for failure to comply with the statutory requirement.

Subpart D—One-Stop Operators

§ 662.400 Who is the One-Stop operator?

(a) The One-Stop operator is the entity that performs the role described in paragraph (c) of this section. The types of entities that may be selected to be the One-Stop operator include:

(1) A postsecondary educational institution;

(2) An Employment Service agency established under the Wagner-Peyser Act on behalf of the local office of the agency;

(3) A private, nonprofit organization (including a community-based organization);

(4) A private for-profit entity;

(5) A government agency; and

(6) Another interested organization or entity.

(b) One-Stop operators may be a single entity or a consortium of entities and may operate one or more One-Stop centers. In addition, there may be more than one One-Stop operator in a local area.

(c) The agreement between the Local Board and the One-Stop operator shall specify the operator's role. That role may range between simply coordinating service providers within the center, to being the primary provider of services within the center, to coordinating activities throughout the One-Stop system. (WIA sec. 121(d).)

§ 662.410 How is the One-Stop operator selected?

(a) The Local Board, with the agreement of the chief elected official, must designate and certify One-Stop operators in each local area.

(b) The One-Stop operator is designated or certified:

(1) Through a competitive process,

(2) Under an agreement between the Local Board and a consortium of entities that includes at least three or more of the required One-Stop partners.identified at § 662.200, or

(3) Under the conditions described in §§ 662.420 or 662.430. (WIA sec.121(d), 121(e) and 117(f)(2))

(c) The designation or certification of the One-Stop operator must be carried out in accordance with the ''sunshine provision'' at 20 CFR 661.307.

§ 662.420 Under what limited conditions may the Local Board be designated or certified as the One-Stop operator?

(a) The Local Board may be designated or certified as the One-Stop operator only with the agreement of the chief elected official and the Governor.

(b) The designation or certification must be reviewed whenever the biennial certification of the Local Board is made under 20 CFR 663.300(a). (WIA sec. 117(f)(2).)

§ 662.430 Under what conditions may One-Stop operators designated to operate in a One-Stop delivery system established prior to the enactment of WIA be designated to continue as a One-Stop operator under WIA without meeting the requirements of § 662.410(b)?

Under WIA section 121(e), the Local Board, the chief elected official and the Governor may agree to certify an entity that has been serving as a One-Stop operator in a One-Stop delivery system established prior to the enactment of WIA (August 7, 1998) to continue to serve as a One-Stop operator without meeting the requirements for designation under § 662.410(b) if the local One-Stop delivery system is modified, as necessary, to meet the other requirements of this part, including the requirements relating to the inclusion of One-Stop partners, the execution of the MOU, and the provision of services.(WIA sec. 121(e).)

PART 663—ADULT AND DISLOCATED WORKER ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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Subpart A—Delivery of Adult and Dislocated Worker Services Through the One-Stop Delivery System

§ 663.100 What is the role of the adult and dislocated worker programs in the One-Stop delivery system?

(a) The One-Stop system is the basic delivery system for adult and dislocated worker services. Through this system, adults and dislocated workers can access a continuum of services. The services are organized into three levels: core, intensive, and training.

(b) The chief elected official or his/her designee(s), as the local grant recipient(s) for the adult and dislocated worker programs, is a required One-Stop partner and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions:

(1) Core services for adults and dislocated workers must be made available in at least one comprehensive One-Stop center in each local workforce investment area. Services may also be available elsewhere, either at affiliated sites or at specialized centers. For example, specialized centers may be established to serve workers being dislocated from a particular employer or industry, or to serve residents of public housing.

(2) The One-Stop centers also make intensive services available to adults and dislocated workers, as needed, either by the One-Stop operator directly or through contracts with service providers that are approved by the Local Board.

(3) Through the One-Stop system, adults and dislocated workers needing training are provided Individual Training Accounts (ITA's) and access to lists of eligible providers and programs of training. These lists contain quality consumer information, including cost and performance information for each of the providers' programs, so that participants can make informed choices

on where to use their ITA's. (ITA's are more fully discussed in subpart D of this part.)

§ 663.105 When must adults and dislocated workers be registered?

(a) Registration is the process for collecting information to support a determination of eligibility. This information may be collected through methods that include electronic data transfer, personal interview, or an individual's application.

(b) Adults and dislocated workers who receive services funded under title I other than self-service or informational activities must be registered and determined eligible.

(c) EO data must be collected on every individual who is interested in being considered for WIA title I financially assisted aid, benefits, services, or training by a recipient, and who has signified that interest by submitting personal information in response to a request from the recipient.

§ 663.110 What are the eligibility criteria for core services for adults in the adult and dislocated worker programs?

To be eligible to receive core services as an adult in the adult and dislocated worker programs, an individual must be 18 years of age or older. To be eligible for the dislocated worker programs, an eligible adult must meet the criteria of § 663.115. Eligibility criteria for intensive and training services are found at §§ 663.220 and 663.310.

§ 663.115 What are the eligibility criteria for core services for dislocated workers in the adult and dislocated worker programs?

(a) To be eligible to receive core services as a dislocated worker in the adult and dislocated worker programs, an individual must meet the definition of ''dislocated worker'' at WIA section 101(9). Eligibility criteria for intensive and training services are found at §§ 663.220 and 663.310.

(b) Governors and Local Boards may establish policies and procedures for One-Stop operators to use in determining an individual's eligibility as a dislocated worker, consistent with the definition at WIA section 101(9). These policies and procedures may address such conditions as:

(1) What constitutes a ''general announcement'' of plant closing under WIA section 101(9)(B)(ii) or (iii); and

(2) What constitutes ''unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters'' for determining the eligibility of self-employed individuals, including family members and farm or ranch hands, under WIA section 101(9)(C).

§ 663.120 Are displaced homemakers eligible for dislocated worker activities under WIA?

(a) Yes, there are two significant differences from the eligibility requirements under the Job Training Partnership Act.

(b) Under the dislocated worker program in JTPA, displaced homemakers are defined as ''additional dislocated workers'' and are only eligible to receive services if the Governor determines that providing such services would not adversely affect the delivery of services to the other eligible dislocated workers. Under WIA section 101(9), displaced homemakers who meet the definition at WIA section 101(10) are eligible dislocated workers without any additional determination.

(c) The definition of displaced homemaker under JTPA included individuals who had been dependent upon public assistance under Aid for Families with Dependent Children (AFDC) as well as those who had been dependent on the income of another family member. The definition in WIA section 101(10) includes only those individuals who were dependent on a family member's income. Those individuals who have been dependent on public assistance may be served in the adult program.

§ 663.145 What services are WIA title I adult and dislocated workers formula funds used to provide?

(a) WIA title I formula funds allocated to local areas for adults and dislocated workers must be used to provide core, intensive and training services through the One-Stop delivery system. Local Boards determine the most appropriate mix of these services, but

all three types must be available for both adults and dislocated workers. There are different eligibility criteria for each of these types of services, which are described at §§ 663.110, 663.115, 663.220 and 663.310.

(b) WIA title I funds may also be used to provide the other services described in WIA section 134(e):

(1) Discretionary One-Stop delivery activities, including:

(i) Customized screening and referral of qualified participants in training services to employment; and

(ii) Customized employment-related services to employers on a fee-for-service basis that are in addition to labor exchange services available to employers under the Wagner-Peyser Act.

(2) Supportive services, including needs-related payments, as described in subpart H of this part.

§ 663.150 What core services must be provided to adults and dislocated workers?

(a) At a minimum, all of the core services described in WIA section 134(d)(2) and 20 CFR 662.240 must be provided in each local area through the One-Stop delivery system.

(b) Followup services must be made available, as appropriate, for a minimum of 12 months following the first day of employment, to registered participants who are placed in unsubsidized employment.

§ 663.155 How are core services delivered?

Core services must be provided through the One-Stop delivery system. Core services may be provided directly by the One-Stop operator or through contracts with service providers that are approved by the Local Board. The Local Board may only be a provider of core services when approved by the chief elected official and the Governor in accordance with the requirements of WIA section 117(f)(2) and 20 CFR 661.310.

§ 663.160 Are there particular core services an individual must receive before receiving intensive services under WIA section 134(d)(3)?

(a) Yes, at a minimum, an individual must receive at least one core service, such as an initial assessment or job search and placement assistance, before receiving intensive services. The initial assessment provides preliminary information about the individual's skill levels, aptitudes, interests, and supportive services needs. The job search and placement assistance helps the individual determine whether he or she is unable to obtain employment, and thus requires more intensive services to obtain employment. The decision on which core services to provide, and the timing of their delivery, may be made on a case-by-case basis at the local level depending upon the needs of the participant.

(b) A determination of the need for intensive services under § 663.220, as established by the initial assessment or the individual's inability to obtain employment through the core services provided, must be contained in the participant's case file.

§ 663.165 How long must an individual be in core services in order to be eligible for intensive services?

There is no Federally-required minimum time period for participation in core services before receiving intensive services. (WIA sec. 134(d)(3).)

Subpart B—Intensive Services

§ 663.200 What are intensive services for adults and dislocated workers?

(a) Intensive services are listed in WIA section 134(d)(3)(C). The list in the Act is not all-inclusive and other intensive services, such as out-of-area job search assistance, literacy activities related to basic workforce readiness, relocation assistance, internships, and work experience may be provided, based on an assessment or individual employment plan.

(b) For the purposes of paragraph (a) of this section, work experience is a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate. A work experience workplace may be in the private for profit sector, the non-profit sector, or the public sector. Labor standards apply in any work experience where an employee/employer relationship, as defined by the Fair Labor Standards Act, exists.

§ 663.210 How are intensive services delivered?

(a) Intensive services must be provided through the One-Stop delivery system, including specialized One-Stop centers. Intensive services may be provided directly by the One-Stop operator or through contracts with service providers, which may include contracts with public, private for-profit, and private non-profit service providers (including specialized service providers), that are approved by the Local Board. (WIA secs. 117(d)(2)(D) and 134(d)(3)(B).)

(b) The Local Board may only be a provider of intensive services when approved by the chief elected official and the Governor in accordance with WIA section 117(f)(2) and 20 CFR 661.310.

§ 663.220 Who may receive intensive services?

There are two categories of adults and dislocated workers who may receive intensive services:

(a) Adults and dislocated workers who are unemployed, have received at least one core service and are unable to obtain employment through core services, and are determined by a One-Stop operator to be in need of more intensive services to obtain employment; and

(b) Adults and dislocated workers who are employed, have received at least one core service, and are determined by a One-Stop operator to be in need of intensive services to obtain or retain employment that leads to self-sufficiency, as described in § 663.230.

§ 663.230 What criteria must be used to determine whether an employed worker needs intensive services to obtain or retain employment leading to "self-sufficiency"?

State Boards or Local Boards must set the criteria for determining whether employment leads to self-sufficiency. At a minimum, such criteria must provide that self-sufficiency means employment that pays at least the lower living standard income level, as defined in WIA section 101(24). Self-sufficiency for a dislocated worker may be defined in relation to a percentage of the layoff wage. The special needs of individuals with disabilities or other barriers to employment should be taken into account when setting criteria to determine self-sufficiency.

§ 663.240 Are there particular intensive services an individual must receive before receiving training services under WIA section 134(d)(4)(A)(i)?

(a) Yes, at a minimum, an individual must receive at least one intensive service, such as development of an individual employment plan with a case manager or individual counseling and career planning, before the individual may receive training services.

(b) The case file must contain a determination of need for training services under § 663.310, as identified in the individual employment plan, comprehensive assessment, or through any other intensive service received.

§ 663.245 What is the individual employment plan?

The individual employment plan is an ongoing strategy jointly developed by the participant and the case manager that identifies the participant's employment goals, the appropriate achievement objectives, and the appropriate combination of services for the participant to achieve the employment goals.

§ 663.250 How long must an individual participant be in intensive services to be eligible for training services?

There is no Federally-required minimum time period for participation in intensive services before receiving training services. The period of time an individual spends in intensive services should be sufficient to prepare the individual for training or employment. (WIA sec. 134(d)(4)(A)(i).)

Subpart C—Training Services

§ 663.300 What are training services for adults and dislocated workers?

Training services are listed in WIA section 134(d)(4)(D). The list in the Act is not all-inclusive and additional training services may be provided.

§ 663.310 Who may receive training services?

Training services may be made available to employed and unemployed adults and dislocated workers who:

(a) Have met the eligibility requirements for intensive services, have received at least one intensive service under § 663.240, and have been determined to be unable to obtain or retain employment through such services;

(b) After an interview, evaluation, or assessment, and case management, have been determined by a One-Stop operator or One-Stop partner, to be in need of training services and to have the skills and qualifications to successfully complete the selected training program;

(c) Select a program of training services that is directly linked to the employment opportunities either in the local area or in another area to which the individual is willing to relocate;

(d) Are unable to obtain grant assistance from other sources to pay the costs of such training, including such sources as Welfare-to-Work, State-funded training funds, Trade Adjustment Assistance and Federal Pell Grants established under title IV of the Higher Education Act of 1965, or require WIA assistance in addition to other sources of grant assistance, including Federal Pell Grants (provisions relating to fund coordination are found at § 663.320 and WIA section 134(d)(4)(B)); and

(e) For individuals whose services are provided through the adult funding stream, are determined eligible in accordance with the State and local priority system, if any, in effect for adults under WIA section 134(d)(4)(E) and § 663.600. (WIA sec. 134(d)(4)(A).)

§ 663.320 What are the requirements for coordination of WIA training funds and other grant assistance?

(a) WIA funding for training is limited to participants who:

(1) Are unable to obtain grant assistance from other sources to pay the costs of their training; or

(2) Require assistance beyond that available under grant assistance from other sources to pay the costs of such training. Program operators and training providers must coordinate funds available to pay for training as described in paragraphs (b) and (c) of this section.

(b) Program operators must coordinate training funds available and make funding arrangements with One-Stop partners and other entities to apply the provisions of paragraph (a) of this section. Training providers must consider the availability of other sources of grants to pay for training costs such as Welfare-to-Work, State-funded training funds, and Federal Pell Grants, so that WIA funds supplement other sources of training grants.

(c) A WIA participant may enroll in WIA-funded training while his/her application for a Pell Grant is pending as long as the One-Stop operator has made arrangements with the training provider and the WIA participant regarding allocation of the Pell Grant, if it is subsequently awarded. In that case, the training provider must reimburse the One-Stop operator the WIA funds used to underwrite the training for the amount the Pell Grant covers. Reimbursement is not required from the portion of Pell Grant assistance disbursed to the WIA participant for education-related expenses. (WIA sec. 134(d)(4)(B).)

Subpart D—Individual Training Accounts

§ 663.400 How are training services provided?

Except under the three conditions described in WIA section 134(d)(4)(G)(ii) and § 663.430(a), the Individual Training Account (ITA) is established for eligible individuals to finance training services. Local Boards may only provide training services under § 663.430 if they receive a waiver from the Governor and meet the requirements of 20 CFR 661.310 and WIA section 117(f)(1). (WIA sec. 134(d)(4)(G).)

§ 663.410 What is an Individual Training Account (ITA)?

The ITA is established on behalf of a participant. WIA title I adult and dislocated workers purchase training services from eligible providers they select in consultation with the case manager. Payments from ITA's may be made in a variety of ways, including

the electronic transfer of funds through financial institutions, vouchers, or other appropriate methods. Payments may also be made incrementally; through payment of a portion of the costs at different points in the training course. (WIA sec. 134(d)(4)(G).)

§ 663.420 Can the duration and amount of ITA's be limited?

(a) Yes, the State or Local Board may impose limits on ITA's, such as limitations on the dollar amount and/or duration.

(b) Limits to ITA's may be established in different ways:

(1) There may be a limit for an individual participant that is based on the needs identified in the individual employment plan; or

(2) There may be a policy decision by the State Board or Local Board to establish a range of amounts and/or a maximum amount applicable to all ITA's.

(c) Limitations established by State or Local Board policies must be described in the State or Local Plan, respectively, but should not be implemented in a manner that undermines the Act's requirement that training services are provided in a manner that maximizes customer choice in the selection of an eligible training provider. ITA limitations may provide for exceptions to the limitations in individual cases.

(d) An individual may select training that costs more than the maximum amount available for ITAs under a State or local policy when other sources of funds are available to supplement the ITA. These other sources may include: Pell Grants; scholarships; severance pay; and other sources.

§ 663.430 Under what circumstances may mechanisms other than ITA's be used to provide training services?

(a) Contracts for services may be used instead of ITA's only when one of the following three exceptions applies:

(1) When the services provided are on-the-job training (OJT) or customized training;

(2) When the Local Board determines that there are an insufficient number of eligible providers in the local area to accomplish the purpose of a system of ITA's. The Local Plan must describe the process to be used in selecting the providers under a contract for services. This process must include a public comment period for interested providers of at least 30 days;

(3) When the Local Board determines that there is a training services program of demonstrated effectiveness offered in the area by a community-based organization (CBO) or another private organization to serve special participant populations that face multiple barriers to employment, as described in paragraph (b) in this section. The Local Board must develop criteria to be used in determining demonstrated effectiveness, particularly as it applies to the special participant population to be served. The criteria may include:

(i) Financial stability of the organization;

(ii) Demonstrated performance in the delivery of services to hard to serve participant populations through such means as program completion rate; attainment of the skills, certificates or degrees the program is designed to provide; placement after training in unsubsidized employment; and retention in employment; and

(iii) How the specific program relates to the workforce investment needs identified in the local plan.

(b) Under paragraph (a)(3) of this section, special participant populations that face multiple barriers to employment are populations of low-income individuals that are included in one or more of the following categories:

(1) Individuals with substantial language or cultural barriers;

(2) Offenders;

(3) Homeless individuals; and

(4) Other hard-to-serve populations as defined by the Governor.

§ 663.440 What are the requirements for consumer choice?

(a) Training services, whether under ITA's or under contract, must be provided in a manner that maximizes informed consumer choice in selecting an eligible provider.

(b) Each Local Board, through the One-Stop center, must make available to customers the State list of eligible providers required in WIA section

122(e). The list includes a description of the programs through which the providers may offer the training services, the information identifying eligible providers of on-the-job training and customized training required under WIA section 122(h) (where applicable), and the performance and cost information about eligible providers of training services described in WIA sections 122 (e) and (h).

(c) An individual who has been determined eligible for training services under § 663.310 may select a provider described in paragraph (b) of this section after consultation with a case manager. Unless the program has exhausted training funds for the program year, the operator must refer the individual to the selected provider, and establish an ITA for the individual to pay for training. For purposes of this paragraph, a referral may be carried out by providing a voucher or certificate to the individual to obtain the training.

(d) The cost of referral of an individual with an ITA to a training provider is paid by the applicable adult or dislocated worker program under title I of WIA.

Subpart E—Eligible Training Providers

§ 663.500 What is the purpose of this subpart?

The workforce investment system established under WIA emphasizes informed customer choice, system performance, and continuous improvement. The eligible provider process is part of the strategy for achieving these goals. Local Boards, in partnership with the State, identify training providers and programs whose performance qualifies them to receive WIA funds to train adults and dislocated workers. In order to maximize customer choice and assure that all significant population groups are served, States and local areas should administer the eligible provider process in a manner to assure that significant numbers of competent providers, offering a wide variety of training programs and occupational choices, are available to customers. After receiving core and intensive services and in consultation with case managers, eligible participants who need training use the list of these eligible providers to make an informed choice. The ability of providers to successfully perform, the procedures State and Local Boards use to establish eligibility, and the degree to which information, including performance information, on those providers is made available to customers eligible for training services, are key factors affecting the successful implementation of the Statewide workforce investment system. This subpart describes the process for determining eligible training providers.

§ 663.505 What are eligible providers of training services?

(a) Eligible providers of training services are described in WIA section 122. They are those entities eligible to receive WIA title I-B funds to provide training services to eligible adult and dislocated worker customers.

(b) In order to provide training services under WIA title I-B, a provider must meet the requirements of this subpart and WIA section 122.

(1) These requirements apply to the use of WIA title I adult and dislocated worker funds to provide training:

(i) To individuals using ITA's to access training through the eligible provider list; and

(ii) To individuals for training provided through the exceptions to ITA's described at § 663.430 (a)(2) and (a)(3).

(2) These requirements apply to all organizations providing training to adult and dislocated workers, including:

(i) Postsecondary educational institutions providing a program described in WIA section 122(a)(2)(A)(ii);

(ii) Entities that carry out programs under the National Apprenticeship Act (29 U.S.C. 50 *et seq.*);

(iii) Other public or private providers of a program of training services described in WIA section 122(a)(2)(C);

(iv) Local Boards, if they meet the conditions of WIA section 117(f)(1); and

(v) Community-based organizations and other private organizations providing training under § 663.430.

(c) Provider eligibility procedures must be established by the Governor, as required by this subpart. Different

procedures are described in WIA for determinations of ''initial'' and ''subsequent'' eligibility. Because the processes are different, they are discussed separately.

§ 663.508 What is a "program of training services"?

A program of training services is one or more courses or classes, or a structured regimen, that upon successful completion, leads to:

(a) A certificate, an associate degree, baccalaureate degree, or

(b) The skills or competencies needed for a specific job or jobs, an occupation, occupational group, or generally, for many types of jobs or occupations, as recognized by employers and determined prior to training.

§ 663.510 Who is responsible for managing the eligible provider process?

(a) The State and the Local Boards each have responsibilities for managing the eligible provider process.

(b) The Governor must establish eligibility criteria for certain providers to become initially eligible and must set minimum levels of performance for all providers to remain subsequently eligible.

(c) The Governor must designate a State agency (called the ''designated State agency'') to assist in carrying out WIA section 122. The designated State agency is responsible for:

(1) Developing and maintaining the State list of eligible providers and programs, which is comprised of lists submitted by Local Boards;

(2) Determining if programs meet performance levels, including verifying the accuracy of the information on the State list in consultation with the Local Boards, removing programs that do not meet program performance levels, and taking appropriate enforcement actions, against providers in the case of the intentional provision of inaccurate information, as described in WIA section 122(f)(1), and in the case of a substantial violation of the requirements of WIA, as described in WIA section 122(f)(2);

(3) Disseminating the State list, accompanied by performance and cost information relating to each provider, to One-Stop operators throughout the State.

(d) The Local Board must:

(1) Accept applications for initial eligibility from certain postsecondary institutions and entities providing apprenticeship training;

(2) Carry out procedures prescribed by the Governor to assist in determining the initial eligibility of other providers;

(3) Carry out procedures prescribed by the Governor to assist in determining the subsequent eligibility of all providers;

(4) Compile a local list of eligible providers, collect the performance and cost information and any other required information relating to providers;

(5) Submit the local list and information to the designated State agency;

(6) Ensure the dissemination and appropriate use of the State list through the local One-Stop system;

(7) Consult with the designated State agency in cases where termination of an eligible provider is contemplated because inaccurate information has been provided; and

(8) Work with the designated State agency in cases where the termination of an eligible provider is contemplated because of violations of the Act.

(e) The Local Board may:

(1) Make recommendations to the Governor on the procedures to be used in determining initial eligibility of certain providers;

(2) Increase the levels of performance required by the State for local providers to maintain subsequent eligibility;

(3) Require additional verifiable program-specific information from local providers to maintain subsequent eligibility.

§ 663.515 What is the process for initial determination of provider eligibility?

(a) To be eligible to receive adult or dislocated worker training funds under title I of WIA, all providers must submit applications to the Local Boards in the areas in which they wish to provide services. The application must describe each program of training services to be offered.

(b) For programs eligible under title IV of the Higher Education Act and apprenticeship programs registered under the National Apprenticeship Act (NAA), and the providers or such programs, Local Boards determine the procedures to use in making an application. The procedures established by the Local Board must specify the timing, manner, and contents of the required application.

(c) For programs not eligible under title IV of the HEA or registered under the NAA, and for providers not eligible under title IV of the HEA or carrying out apprenticeship programs under NAA:

(1) The Governor must develop a procedure for use by Local Boards for determining the eligibility of other providers, after

(i) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State;

(ii) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on the procedure; and

(iii) Designating a specific time period for soliciting and considering the recommendations of Local Boards and provider, and for providing an opportunity for public comment.

(2) The procedure must be described in the State Plan.

(3)(i) The procedure must require that the provider must submit an application to the Local Board at such time and in such manner as may be required, which contains a description of the program of training services;

(ii) If the provider provides a program of training services on the date of application, the procedure must require that the application include an appropriate portion of the performance information and program cost information described in § 663.540, and that the program meet appropriate levels of performance;

(iii) If the provider does not provide a program of training services on that date, the procedure must require that the provider meet appropriate requirements specified in the procedure. (WIA sec. 122(b)(2)(D).)

(d) The Local Board must include providers that meet the requirements of paragraphs (b) and (c) of this section on a local list and submit the list to the designated State agency. The State agency has 30 days to determine that the provider or its programs do not meet the requirements relating to the providers under paragraph (c) of this section. After the agency determines that the provider and its programs meet(s) the criteria for initial eligibility, or 30 days have elapsed, whichever occurs first, the provider and its programs are initially eligible. The programs and providers submitted under paragraph (b) of this section are initially eligible without State agency review. (WIA sec. 122(e).)

§ 663.530 Is there a time limit on the period of initial eligibility for training providers?

Yes, under WIA section 122(c)(5), the Governor must require training providers to submit performance information and meet performance levels annually in order to remain eligible providers. States may require that these performance requirements be met one year from the date that initial eligibility was determined, or may require all eligible providers to submit performance information by the same date each year. If the latter approach is adopted, the Governor may exempt eligible providers whose determination of initial eligibility occurs within six months of the date of submissions. The effect of this requirement is that no training provider may have a period of initial eligibility that exceeds eighteen months. In the limited circumstance when insufficient data is available, initial eligibility may be extended for a period of up to six additional months, if the Governor's procedures provide for such an extension.

§ 663.535 What is the process for determining the subsequent eligibility of a provider?

(a) The Governor must develop a procedure for the Local Board to use in determining the subsequent eligibility of all eligible training providers determined initially eligible under § 663.515 (b) and (c), after:

(1) Soliciting and taking into consideration recommendations from Local Boards and providers of training services within the State;

(2) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on such procedure; and

(3) Designating a specific time period for soliciting and considering the recommendations of Local Boards and providers, and for providing an opportunity for public comment.

(b) The procedure must be described in the State Plan.

(c) The procedure must require that:

(1) Providers annually submit performance and cost information as described at WIA section 122(d)(1) and (2), for each program of training services for which the provider has been determined to be eligible, in a time and manner determined by the Local Board;

(2) Providers and programs annually meet minimum performance levels described at WIA section 122(c)(6), as demonstrated utilizing UI quarterly wage records where appropriate.

(d) The program's performance information must meet the minimum acceptable levels established under paragraph (c)(2) of this section to remain eligible;

(e) Local Boards may require higher levels of performance for local programs than the levels specified in the procedures established by the Governor. (WIA sec.122(c)(5) and (c)(6).)

(f) The State procedure must require Local Boards to take into consideration:

(1) The specific economic, geographic and demographic factors in the local areas in which providers seeking eligibility are located, and

(2) The characteristics of the populations served by programs seeking eligibility, including the demonstrated difficulties in serving these populations, where applicable.

(g) The Local Board retains those programs on the local list that meet the required performance levels and other elements of the State procedures and submits the list, accompanied by the performance and cost information, and any additional required information, to the designated State agency. If the designated State agency determines within 30 days from the receipt of the information that the program does not meet the performance levels established under paragraph (c)(2) of this section, the program may be removed from the list. A program retained on the local list and not removed by the designated State agency is considered an eligible program of training services.

§ 663.540 What kind of performance and cost information is required for determinations of subsequent eligibility?

(a) Eligible providers of training services must submit, at least annually, under procedures established by the Governor under § 663.535(c):

(1) Verifiable program-specific performance information, including:

(i) The information described in WIA section 122(d)(1)(A)(i) for all individuals participating in the programs of training services, including individuals who are not receiving assistance under WIA section 134 and individuals who are receiving such assistance; and

(ii) The information described in WIA section 122(d)(1)(A)(ii) relating only to individuals receiving assistance under the WIA adult and dislocated worker program who are participating in the applicable program of training services; and

(2) Information on program costs (such as tuition and fees) for WIA participants in the program.

(b) Governors may require any additional verifiable performance information (such as the information described at WIA section 122(d)(2)) that the Governor determines to be appropriate to obtain subsequent eligibility, including information regarding all participating individuals as well as individuals receiving assistance under the WIA adult and dislocated worker program.

(c) Governors must establish procedures by which providers can demonstrate if the additional information required under paragraph (b) of this section imposes extraordinary costs on providers, or if providers experience extraordinary costs in the collection of

information. If, through these procedures, providers demonstrate that they experience such extraordinary costs:

(1) The Governor or Local Board must provide access to cost-effective methods for the collection of the information; or

(2) The Governor must provide additional resources to assist providers in the collection of the information from funds for Statewide workforce investment activities reserved under WIA sections 128(a) and 133(a)(1).

(d) The Local Board and the designated State agency may accept program-specific performance information consistent with the requirements for eligibility under title IV of the Higher Education Act of 1965 from a provider for purposes of enabling the provider to fulfill the applicable requirements of this section, if the information is substantially similar to the information otherwise required under this section.

§ 663.550 How is eligible provider information developed and maintained?

(a) The designated State agency must maintain a list of all eligible training programs and providers in the State (the ''State list'').

(b) The State list is a compilation of the eligible programs and providers identified or retained by local areas and that have not been removed under §§ 663.535(g) and 663.565.

(c) The State list must be accompanied by the performance and cost information contained in the local lists as required by § 663.535(e). (WIA sec. 122(e)(4)(A).)

§ 663.555 How is the State list disseminated?

(a) The designated State agency must disseminate the State list and accompanying performance and cost information to the One-Stop delivery systems within the State.

(b) The State list and information must be updated at least annually.

(c) The State list and accompanying information form the primary basis of the One-Stop consumer reports system that provides for informed customer choice. The list and information must be widely available, through the One-Stop delivery system, to customers seeking information on training outcomes, as well as participants in employment and training activities funded under WIA and other programs.

(1) The State list must be made available to individuals who have been determined eligible for training services under § 663.310.

(2) The State list must also be made available to customers whose training is supported by other One-Stop partners.

§ 663.565 May an eligible training provider lose its eligibility?

(a) Yes. A training provider must deliver results and provide accurate information in order to retain its status as an eligible training provider.

(b) If the provider's programs do not meet the established performance levels, the programs will be removed from the eligible provider list.

(1) A Local Board must determine, during the subsequent eligibility determination process, whether a provider's programs meet performance levels. If the program fails to meet such levels, the program must be removed from the local list. If all of the provider's programs fail to meet such levels, the provider must be removed from the local list.

(2) The designated State agency upon receipt of the performance information accompanying the local list, may remove programs from the State list if the agency determines the program failed to meet the levels of performance prescribed under § 663.535(c). If all of the provider's programs are determined to have failed to meet the levels, the designated State agency may remove the provider from the State list.

(3) Providers determined to have intentionally supplied inaccurate information or to have subsequently violated any provision of title I of WIA or the WIA regulations, including 29 CFR part 37, may be removed from the list in accordance with the enforcement provisions of WIA section 122(f). A provider whose eligibility is terminated under these conditions is liable to repay all adult and dislocated worker training funds it received during the period of noncompliance.

(4) The Governor must establish appeal procedures for providers of training to appeal a denial of eligibility under this subpart according to the requirements of 20 CFR 667.640(b).

§ 663.570 What is the consumer reports system?

The consumer reports system, referred to in WIA as performance information, is the vehicle for informing the customers of the One-Stop delivery system about the performance of training providers and programs in the local area. It is built upon the State list of eligible providers and programs developed through the procedures described in WIA section 122 and this subpart. The consumer reports system must contain the information necessary for an adult or dislocated worker customer to fully understand the options available to him or her in choosing a program of training services. Such program-specific factors may include overall performance, performance for significant customer groups (including wage replacement rates for dislocated workers), performance of specific provider sites, current information on employment and wage trends and projections, and duration of training programs.

§ 663.575 In what ways can a Local Board supplement the information available from the State list?

(a) Local Boards may supplement the information available from the State list by providing customers with additional information to assist in supporting informed customer choice and the achievement of local performance measures (as described in WIA section 136).

(b) This additional information may include:

(1) Information on programs of training services that are linked to occupations in demand in the local area;

(2) Performance and cost information, including program-specific performance and cost information, for the local outlet(s) of multi-site eligible providers; and

(3) Other appropriate information related to the objectives of WIA, which may include the information described in § 663.570.

§ 663.585 May individuals choose training providers located outside of the local area?

Yes, individuals may choose any of the eligible providers and programs on the State list. A State may also establish a reciprocal agreement with another State(s) to permit providers of eligible training programs in each State to accept individual training accounts provided by the other State. (WIA secs. 122(e)(4) and (e)(5).)

§ 663.590 May a community-based organization (CBO) be included on an eligible provider list?

Yes, CBO's may apply and they and their programs may be determined eligible providers of training services, under WIA section 122 and this subpart. As eligible providers, CBO's provide training through ITA's and may also receive contracts for training special participant populations when the requirements of § 663.430 are met.

§ 663.595 What requirements apply to providers of OJT and customized training?

For OJT and customized training providers, One-Stop operators in a local area must collect such performance information as the Governor may require, determine whether the providers meet such performance criteria as the Governor may require, and disseminate a list of providers that have met such criteria, along with the relevant performance information about them, through the One-Stop delivery system. Providers determined to meet the criteria are considered to be identified as eligible providers of training services. These providers are not subject to the other requirements of WIA section 122 or this subpart.

Subpart F—Priority and Special Populations

§ 663.600 What priority must be given to low-income adults and public assistance recipients served with adult funds under title I?

(a) WIA states, in section 134(d)(4)(E), that in the event that funds allocated to a local area for adult employment

and training activities are limited, priority for intensive and training services funded with title I adult funds must be given to recipients of public assistance and other low-income individuals in the local area.

(b) Since funding is generally limited, States and local areas must establish criteria by which local areas can determine the availability of funds and the process by which any priority will be applied under WIA section 134(d)(2)(E). Such criteria may include the availability of other funds for providing employment and training-related services in the local area, the needs of the specific groups within the local area, and other appropriate factors.

(c) States and local areas must give priority for adult intensive and training services to recipients of public assistance and other low-income individuals, unless the local area has determined that funds are not limited under the criteria established under paragraph (b) of this section.

(d) The process for determining whether to apply the priority established under paragraph (b) of this section does not necessarily mean that only the recipients of public assistance and other low income individuals may receive WIA adult funded intensive and training services when funds are determined to be limited in a local area. The Local Board and the Governor may establish a process that gives priority for services to the recipients of public assistance and other low income individuals and that also serves other individuals meeting eligibility requirements.

§ 663.610 Does the statutory priority for use of adult funds also apply to dislocated worker funds?

No, the statutory priority applies to adult funds for intensive and training services only. Funds allocated for dislocated workers are not subject to this requirement.

§ 663.620 How do the Welfare-to-Work program and the TANF program relate to the One-Stop delivery system?

(a) The local Welfare-to-Work (WtW) program operator is a required partner in the One-Stop delivery system. 20 CFR part 662 describes the roles of such partners in the One-Stop delivery system and applies to the Welfare-to-Work program operator. WtW programs serve individuals who may also be served by the WIA programs and, through appropriate linkages and referrals, these customers will have access to a broader range of services through the cooperation of the WtW program in the One-Stop system. WtW participants, who are determined to be WIA eligible, and who need occupational skills training may be referred through the One-Stop system to receive WIA training, when WtW grant and other grant funds are not available in accordance with § 663.320(a). WIA participants who are also determined WtW eligible, may be referred to the WtW operator for job placement and other WtW assistance.

(b) The local TANF agency is specifically suggested under WIA as an additional partner in the One-Stop system. TANF recipients will have access to more information about employment opportunities and services when the TANF agency participates in the One-Stop delivery system. The Governor and Local Board should encourage the TANF agency to become a One-Stop partner to improve the quality of services to the WtW and TANF-eligible populations. In addition, becoming a One-Stop partner will ensure that the TANF agency is represented on the Local Board and participates in developing workforce investment strategies that help cash assistance recipients secure lasting employment.

§ 663.630 How does a displaced homemaker qualify for services under title I?

Displaced homemakers may be eligible to receive assistance under title I in a variety of ways, including:

(a) Core services provided by the One-Stop partners through the One-Stop delivery system;

(b) Intensive or training services for which an individual qualifies as a dislocated worker/displaced homemaker if the requirements of this part are met;

(c) Intensive or training services for which an individual is eligible if the requirements of this part are met;

(d) Statewide employment and training projects conducted with reserve

funds for innovative programs for displaced homemakers, as described in 20 CFR 665.210(f).

§ 663.640 May an individual with a disability whose family does not meet income eligibility criteria under the Act be eligible for priority as a low-income adult?

Yes, even if the family of an individual with a disability does not meet the income eligibility criteria, the individual with a disability is to be considered a low-income individual if the individual's own income:

(a) Meets the income criteria established in WIA section 101(25)(B); or

(b) Meets the income eligibility criteria for cash payments under any Federal, State or local public assistance program. (WIA sec. 101(25)(F).)

Subpart G—On-the-Job Training (OJT) and Customized Training

§ 663.700 What are the requirements for on-the-job training (OJT)?

(a) On-the-job training (OJT) is defined at WIA section 101(31). OJT is provided under a contract with an employer in the public, private non-profit, or private sector. Through the OJT contract, occupational training is provided for the WIA participant in exchange for the reimbursement of up to 50 percent of the wage rate to compensate for the employer's extraordinary costs. (WIA sec. 101(31)(B).)

(b) The local program must not contract with an employer who has previously exhibited a pattern of failing to provide OJT participants with continued long-term employment with wages, benefits, and working conditions that are equal to those provided to regular employees who have worked a similar length of time and are doing the same type of work. (WIA sec. 195(4).)

(c) An OJT contract must be limited to the period of time required for a participant to become proficient in the occupation for which the training is being provided. In determining the appropriate length of the contract, consideration should be given to the skill requirements of the occupation, the academic and occupational skill level of the participant, prior work experience, and the participant's individual employment plan. (WIA sec. 101(31)(C).)

§ 663.705 What are the requirements for OJT contracts for employed workers?

OJT contracts may be written for eligible employed workers when:

(a) The employee is not earning a self-sufficient wage as determined by Local Board policy;

(b) The requirements in § 663.700 are met; and

(c) The OJT relates to the introduction of new technologies, introduction to new production or service procedures, upgrading to new jobs that require additional skills, workplace literacy, or other appropriate purposes identified by the Local Board.

§ 663.710 What conditions govern OJT payments to employers?

(a) On-the-job training payments to employers are deemed to be compensation for the extraordinary costs associated with training participants and the costs associated with the lower productivity of the participants.

(b) Employers may be reimbursed up to 50 percent of the wage rate of an OJT participant for the extraordinary costs of providing the training and additional supervision related to the OJT. (WIA sec. 101(31)(B).)

(c) Employers are not required to document such extraordinary costs.

§ 663.715 What is customized training?

Customized training is training:

(a) That is designed to meet the special requirements of an employer (including a group of employers);

(b) That is conducted with a commitment by the employer to employ, or in the case of incumbent workers, continue to employ, an individual on successful completion of the training; and

(c) For which the employer pays for not less than 50 percent of the cost of the training. (WIA sec. 101(8).)

§ 663.720 What are the requirements for customized training for employed workers?

Customized training of an eligible employed individual may be provided for an employer or a group of employers when:

(a) The employee is not earning a self-sufficient wage as determined by Local Board policy;

(b) The requirements in § 663.715 are met; and

(c) The customized training relates to the purposes described in § 663.705(c) or other appropriate purposes identified by the Local Board.

§ 663.730 May funds provided to employers for OJT of customized training be used to assist, promote, or deter union organizing?

No, funds provided to employers for OJT or customized training must not be used to directly or indirectly assist, promote or deter union organizing.

Subpart H—Supportive Services

§ 663.800 What are supportive services for adults and dislocated workers?

Supportive services for adults and dislocated workers are defined at WIA sections 101(46) and 134(e)(2) and (3). They include services such as transportation, child care, dependent care, housing, and needs-related payments, that are necessary to enable an individual to participate in activities authorized under WIA title I. Local Boards, in consultation with the One-Stop partners and other community service providers, must develop a policy on supportive services that ensures resource and service coordination in the local area. Such policy should address procedures for referral to such services, including how such services will be funded when they are not otherwise available from other sources. The provision of accurate information about the availability of supportive services in the local area, as well as referral to such activities, is one of the core services that must be available to adults and dislocated workers through the One-Stop delivery system. (WIA sec. 134(d)(2)(H).)

§ 663.805 When may supportive services be provided to participants?

(a) Supportive services may only be provided to individuals who are:

(1) Participating in core, intensive or training services; and

(2) Unable to obtain supportive services through other programs providing such services. (WIA sec. 134(e)(2)(A) and (B).)

(b) Supportive services may only be provided when they are necessary to enable individuals to participate in title I activities. (WIA sec. 101(46).)

§ 663.810 Are there limits on the amounts or duration of funds for supportive services?

(a) Local Boards may establish limits on the provision of supportive services or provide the One-Stop operator with the authority to establish such limits, including a maximum amount of funding and maximum length of time for supportive services to be available to participants.

(b) Procedures may also be established to allow One-Stop operators to grant exceptions to the limits established under paragraph (a) of this section.

§ 663.815 What are needs-related payments?

Needs-related payments provide financial assistance to participants for the purpose of enabling individuals to participate in training and are one of the supportive services authorized by WIA section 134(e)(3).

§ 663.820 What are the eligibility requirements for adults to receive needs-related payments?

Adults must:

(a) Be unemployed,

(b) Not qualify for, or have ceased qualifying for, unemployment compensation; and

(c) Be enrolled in a program of training services under WIA section 134(d)(4).

§ 663.825 What are the eligibility requirements for dislocated workers to receive needs-related payments?

To receive needs related payments, a dislocated worker must:

(a) Be unemployed, and:

(1) Have ceased to qualify for unemployment compensation or trade readjustment allowance under TAA or NAFTA-TAA; and

(2) Be enrolled in a program of training services under WIA section 134(d)(4) by the end of the 13th week after the most recent layoff that resulted in a

determination of the worker's eligibility as a dislocated worker, or, if later, by the end of the 8th week after the worker is informed that a short-term layoff will exceed 6 months; or

(b) Be unemployed and did not qualify for unemployment compensation or trade readjustment assistance under TAA or NAFTA-TAA.

§ 663.830 May needs-related payments be paid while a participant is waiting to start training classes?

Yes, payments may be provided if the participant has been accepted in a training program that will begin within 30 calendar days. The Governor may authorize local areas to extend the 30 day period to address appropriate circumstances.

§ 663.840 How is the level of needs-related payments determined?

(a) The payment level for adults must be established by the Local Board.

(b) For dislocated workers, payments must not exceed the greater of either of the following levels:

(1) For participants who were eligible for unemployment compensation as a result of the qualifying dislocation, the payment may not exceed the applicable weekly level of the unemployment compensation benefit; or

(2) For participants who did not qualify for unemployment compensation as a result of the qualifying layoff, the weekly payment may not exceed the poverty level for an equivalent period. The weekly payment level must be adjusted to reflect changes in total family income as determined by Local Board policies. (WIA sec. 134(e)(3)(C).)

PART 664—YOUTH ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Subpart A—Youth Councils

§ 664.100 What is the youth council?

(a) The duties and membership requirements of the youth council are described in WIA section 117(h) and 20 CFR 661.335 and 661.340.

(b) The purpose of the youth council is to provide expertise in youth policy and to assist the Local Board in:

(1) Developing and recommending local youth employment and training policy and practice;

(2) Broadening the youth employment and training focus in the community to incorporate a youth development perspective;

(3) Establishing linkages with other organizations serving youth in the local area; and

(4) Taking into account a range of issues that can have an impact on the success of youth in the labor market. (WIA sec. 117(h).)

§ 664.110 Who is responsible for oversight of youth programs in the local area?

(a) The Local Board, working with the youth council, is responsible for conducting oversight of local youth programs operated under the Act, to ensure both fiscal and programmatic accountability.

(b) Local program oversight is conducted in consultation with the local area's chief elected official.

(c) The Local Board may, after consultation with the CEO, delegate its responsibility for oversight of eligible youth providers, as well as other youth program oversight responsibilities, to the youth council, recognizing the advantage of delegating such responsibilities to the youth council whose members have expertise in youth issues. (WIA sec. 117(d); 117(h)(4).)

Subpart B—Eligibility for Youth Services

§ 664.200 Who is eligible for youth services?

An eligible youth is defined, under WIA sec. 101(13), as an individual who:

(a) Is age 14 through 21;

(b) Is a low income individual, as defined in the WIA section 101(25); and

(c) Is within one or more of the following categories:

(1) Deficient in basic literacy skills;

(2) School dropout;

(3) Homeless, runaway, or foster child;

(4) Pregnant or parenting;

(5) Offender; or

(6) Is an individual (including a youth with a disability) who requires additional assistance to complete an educational program, or to secure and hold employment. (WIA sec. 101(13).)

§ 664.205 How is the "deficient in basic literacy skills" criterion in § 664.200(c)(1) defined and documented?

(a) Definitions and eligibility documentation requirements regarding the ''deficient in basic literacy skills'' criterion in § 664.200(c)(1) may be established at the State or local level. These

definitions may establish such criteria as are needed to address State or local concerns, and must include a determination that an individual:

(1) Computes or solves problems, reads, writes, or speaks English at or below the 8th grade level on a generally accepted standardized test or a comparable score on a criterion-referenced test; or

(2) Is unable to compute or solve problems, read, write, or speak English at a level necessary to function on the job, in the individual's family or in society. (WIA secs. 101(19), 203(12).)

(b) In cases where the State Board establishes State policy on this criterion, the policy must be included in the State plan. (WIA secs. 101(13)(C)(i), 101(19).)

§ 664.210 How is the "requires additional assistance to complete an educational program, or to secure and hold employment" criterion in § 664.200(c)(6) defined and documented?

Definitions and eligibility documentation requirements regarding the ''requires additional assistance to complete an educational program, or to secure and hold employment'' criterion of § 664.200(c)(6) may be established at the State or local level. In cases where the State Board establishes State policy on this criterion, the policy must be included in the State Plan. (WIA sec. 101(13)(C)(iv).)

§ 664.215 Must youth participants be registered to participate in the youth program?

(a) Yes, all youth participants must be registered.

(b) Registration is the process of collecting information to support a determination of eligibility.

(c) Equal opportunity data must be collected during the registration process on any individual who has submitted personal information in response to a request by the recipient for such information.

§ 664.220 Is there an exception to permit youth who are not low-income individuals to receive youth services?

Yes, up to five percent of youth participants served by youth programs in a local area may be individuals who do not meet the income criterion for eligible youth, provided that they are within one or more of the following categories:

(a) School dropout;

(b) Basic skills deficient, as defined in WIA section 101(4);

(c) Are one or more grade levels below the grade level appropriate to the individual's age;

(d) Pregnant or parenting;

(e) Possess one or more disabilities, including learning disabilities;

(f) Homeless or runaway;

(g) Offender; or

(h) Face serious barriers to employment as identified by the Local Board. (WIA sec. 129(c)(5).)

§ 664.230 Are the eligibility barriers for eligible youth the same as the eligibility barriers for the five percent of youth participants who do not have to meet income eligibility requirements?

No, the barriers listed in §§ 664.200 and 664.220 are not the same. Both lists of eligibility barriers include school dropout, homeless or runaway, pregnant or parenting, and offender, but each list contains barriers not included on the other list.

§ 664.240 May a local program use eligibility for free lunches under the National School Lunch Program as a substitute for the income eligibility criteria under title I of WIA?

No, the criteria for income eligibility under the National School Lunch Program are not the same as the Act's income eligibility criteria. Therefore, the school lunch list may not be used as a substitute for income eligibility to determine who is eligible for services under the Act.

§ 664.250 May a disabled youth whose family does not meet income eligibility criteria under the Act be eligible for youth services?

Yes, even if the family of a disabled youth does not meet the income eligibility criteria, the disabled youth may be considered a low-income individual if the youth's own income:

(a) Meets the income criteria established in WIA section 101(25)(B); or

(b) Meets the income eligibility criteria for cash payments under any Federal, State or local public assistance program. (WIA sec. 101(25)(F).)

Subpart C—Out-of-School Youth

§ 664.300 Who is an "out-of-school youth"?

An out-of-school youth is an individual who:

(a) Is an eligible youth who is a school dropout; or

(b) Is an eligible youth who has either graduated from high school or holds a GED, but is basic skills deficient, unemployed, or underemployed. (WIA sec. 101(33).)

§ 664.310 When is dropout status determined, particularly for youth attending alternative schools?

A school dropout is defined as an individual who is no longer attending any school and who has not received a secondary school diploma or its recognized equivalent. A youth's dropout status is determined at the time of registration. A youth attending an alternative school at the time of registration is not a dropout. An individual who is out-of school at the time of registration and subsequently placed in an alternative school, may be considered an out-of-school youth for the purposes of the 30 percent expenditure requirement for out-of-school youth. (WIA sec. 101(39).)

§ 664.320 Does the requirement that at least 30 percent of youth funds be used to provide activities to out-of-school youth apply to all youth funds?

(a) Yes, the 30 percent requirement applies to the total amount of all funds allocated to a local area under WIA section 128(b)(2)(A) or (b)(3), except for local area expenditures for administrative purposes under 20 CFR 667.210(a)(2).

(b) Although it is not necessary to ensure that 30 percent of such funds spent on summer employment opportunities (or any other particular element of the youth program) are spent on out-of-school youth, the funds spent on these activities are included in the total to which the 30 percent requirement applies.

(c) There is a limited exception, at WIA section 129(c)(4)(B), under which certain small States may apply to the Secretary to reduce the minimum amount that must be spent on out-of-school youth. (WIA sec. 129(c)(4).)

Subpart D—Youth Program Design, Elements, and Parameters

§ 664.400 What is a local youth program?

A local youth program is defined as those youth activities offered by a Local Workforce Investment Board for a designated local workforce investment area, as specified in 20 CFR part 661.

§ 664.405 How must local youth programs be designed?

(a) The design framework of local youth programs must:

(1) Provide an objective assessment of each youth participant, that meets the requirements of WIA section 129(c)(1)(A), and includes a review of the academic and occupational skill levels, as well as the service needs, of each youth;

(2) Develop an individual service strategy for each youth participant that meets the requirements of WIA section 129(c)(1)(B), including identifying an age-appropriate career goal and consideration of the assessment results for each youth; and

(3) Provide preparation for postsecondary educational opportunities, provide linkages between academic and occupational learning, provide preparation for employment, and provide effective connections to intermediary organizations that provide strong links to the job market and employers.

(4) The requirement in WIA section 123 that eligible providers of youth services be selected by awarding a grant or contract on a competitive basis does not apply to the design framework component, such as services for intake, objective assessment and the development of individual service strategy, when these services are provided by the grant recipient/fiscal agent.

(b) The local plan must describe the design framework for youth program design in the local area, and how the ten program elements required in § 664.410 are provided within that framework.

(c) Local Boards must ensure appropriate links to entities that will foster the participation of eligible local area youth. Such links may include connections to:

(1) Local area justice and law enforcement officials;

(2) Local public housing authorities;

(3) Local education agencies;

(4) Job Corps representatives; and

(5) Representatives of other area youth initiatives, including those that serve homeless youth and other public and private youth initiatives.

(d) Local Boards must ensure that the referral requirements in WIA section 129(c)(3) for youth who meet the income eligibility criteria are met, including:

(1) Providing these youth with information regarding the full array of applicable or appropriate services available through the Local Board or other eligible providers, or One-Stop partners; and

(2) Referring these youth to appropriate training and educational programs that have the capacity to serve them either on a sequential or concurrent basis.

(e) In order to meet the basic skills and training needs of eligible applicants who do not meet the enrollment requirements of a particular program or who cannot be served by the program, each eligible youth provider must ensure that these youth are referred:

(1) For further assessment, as necessary, and

(2) To appropriate programs, in accordance with paragraph (d)(2) of this section.

(f) Local Boards must ensure that parents, youth participants, and other members of the community with experience relating to youth programs are involved in both the design and implementation of its youth programs.

(g) The objective assessment required under paragraph (a)(1) of this section or the individual service strategy required under paragraph (a)(2) of this section is not required if the program provider determines that it is appropriate to use a recent objective assessment or individual service strategy that was developed under another education or training program. (WIA section 129(c)(1).)

§ 664.410 Must local programs include each of the ten program elements listed in WIA section 129(c)(2) as options available to youth participants?

(a) Yes, local programs must make the following services available to youth participants:

(1) Tutoring, study skills training, and instruction leading to secondary school completion, including dropout prevention strategies;

(2) Alternative secondary school offerings;

(3) Summer employment opportunities directly linked to academic and occupational learning;

(4) Paid and unpaid work experiences, including internships and job shadowing, as provided in §§ 664.460 and 664.470;

(5) Occupational skill training;

(6) Leadership development opportunities, which include community service and peer-centered activities encouraging responsibility and other positive social behaviors;

(7) Supportive services, which may include the services listed in § 664.440;

(8) Adult mentoring for a duration of at least twelve (12) months, that may occur both during and after program participation;

(9) Followup services, as provided in § 664.450; and

(10) Comprehensive guidance and counseling, including drug and alcohol abuse counseling, as well as referrals to counseling, as appropriate to the needs of the individual youth.

(b) Local programs have the discretion to determine what specific program services will be provided to a youth participant, based on each participant's objective assessment and individual service strategy. (WIA sec. 129(c)(2).)

§ 664.420 What are leadership development opportunities?

Leadership development opportunities are opportunities that encourage

responsibility, employability, and other positive social behaviors such as:

(a) Exposure to postsecondary educational opportunities;

(b) Community and service learning projects;

(c) Peer-centered activities, including peer mentoring and tutoring;

(d) Organizational and team work training, including team leadership training;

(e) Training in decision-making, including determining priorities; and

(f) Citizenship training, including life skills training such as parenting, work behavior training, and budgeting of resources. (WIA sec. 129(c)(2)(F).)

§ 664.430 What are positive social behaviors?

Positive social behaviors are outcomes of leadership opportunities, often referred to as soft skills, which are incorporated by many local programs as part of their menu of services. Positive social behaviors focus on areas that may include the following:

(a) Positive attitudinal development;

(b) Self esteem building;

(c) Openness to working with individuals from diverse racial and ethnic backgrounds;

(d) Maintaining healthy lifestyles, including being alcohol and drug free;

(e) Maintaining positive relationships with responsible adults and peers, and contributing to the well being of one's community, including voting;

(f) Maintaining a commitment to learning and academic success;

(g) Avoiding delinquency;

(h) Postponed and responsible parenting; and

(i) Positive job attitudes and work skills. (WIA sec. 129(c)(2)(F).)

§ 664.440 What are supportive services for youth?

Supportive services for youth, as defined in WIA section 101(46), may include the following:

(a) Linkages to community services;

(b) Assistance with transportation;

(c) Assistance with child care and dependent care;

(d) Assistance with housing;

(e) Referrals to medical services; and

(f) Assistance with uniforms or other appropriate work attire and work-related tools, including such items as eye glasses and protective eye gear. (WIA sec. 129(c)(2)(G).)

§ 664.450 What are follow-up services for youth?

(a) Follow-up services for youth may include:

(1) The leadership development and supportive service activities listed in §§ 664.420 and 664.440;

(2) Regular contact with a youth participant's employer, including assistance in addressing work-related problems that arise;

(3) Assistance in securing better paying jobs, career development and further education;

(4) Work-related peer support groups;

(5) Adult mentoring; and

(6) Tracking the progress of youth in employment after training.

(b) All youth participants must receive some form of follow-up services for a minimum duration of 12 months. Follow-up services may be provided beyond twelve (12) months at the State or Local Board's discretion. The types of services provided and the duration of services must be determined based on the needs of the individual. The scope of these follow-up services may be less intensive for youth who have only participated in summer youth employment opportunities. (WIA sec. 129(c)(2)(I).)

§ 664.460 What are work experiences for youth?

(a) Work experiences are planned, structured learning experiences that take place in a workplace for a limited period of time. As provided in WIA section 129(c)(2)(D) and § 664.470, work experiences may be paid or unpaid.

(b) Work experience workplaces may be in the private, for-profit sector; the non-profit sector; or the public sector.

(c) Work experiences are designed to enable youth to gain exposure to the working world and its requirements. Work experiences are appropriate and desirable activities for many youth throughout the year. Work experiences should help youth acquire the personal attributes, knowledge, and skills needed to obtain a job and advance in employment. The purpose is to provide

the youth participant with the opportunities for career exploration and skill development and is not to benefit the employer, although the employer may, in fact, benefit from the activities performed by the youth. Work experiences may be subsidized or unsubsidized and may include the following elements:

(1) Instruction in employability skills or generic workplace skills such as those identified by the Secretary's Commission on Achieving Necessary Skills (SCANS);

(2) Exposure to various aspects of an industry;

(3) Progressively more complex tasks;

(4) Internships and job shadowing;

(5) The integration of basic academic skills into work activities;

(6) Supported work, work adjustment, and other transition activities;

(7) Entrepreneurship;

(8) Service learning;

(9) Paid and unpaid community service; and

(10) Other elements designed to achieve the goals of work experiences.

(d) In most cases, on-the-job training is not an appropriate work experiences activity for youth participants under age 18. Local program operators may choose, however, to use this service strategy for eligible youth when it is appropriate based on the needs identified by the objective assessment of an individual youth participant. (WIA sec. 129(c)(2)(D).)

§ 664.470 Are paid work experiences allowable activities?

Funds under the Act may be used to pay wages and related benefits for work experiences in the public; private, for-profit or non-profit sectors where the objective assessment and individual service strategy indicate that work experiences are appropriate. (WIA sec. 129(c)(2)(D).)

Subpart E—Concurrent Enrollment

§ 664.500 May youth participate in both youth and adult/dislocated worker programs concurrently?

(a) Yes, under the Act, eligible youth are 14 through 21 years of age. Adults are defined in the Act as individuals age 18 and older. Thus, individuals ages 18 through 21 may be eligible for both adult and youth programs. There is no specified age for the dislocated worker program.

(b) Individuals who meet the respective eligibility requirements may participate in adult and youth programs concurrently. Concurrent enrollment is allowable for youth served in programs under WIA titles I or II. Such individuals must be eligible under the youth or adult/dislocated worker eligibility criteria applicable to the services received. Local program operators may determine, for individuals in this age group, the appropriate level and balance of services under the youth, adult, dislocated worker, or other services.

(c) Local program operators must identify and track the funding streams which pay the costs of services provided to individuals who are participating in youth and adult/dislocated worker programs concurrently, and ensure that services are not duplicated.

§ 664.510 Are Individual Training Accounts allowed for youth participants?

No, however, individuals age 18 and above, who are eligible for training services under the adult and dislocated worker programs, may receive Individual Training Accounts through those programs. Requirements for concurrent participation requirements are set forth in § 664.500. To the extent possible, in order to enhance youth participant choice, youth participants should be involved in the selection of educational and training activities.

Subpart F—Summer Employment Opportunities

§ 664.600 Are Local Boards required to offer summer employment opportunities in the local youth program?

(a) Yes, Local Boards are required to offer summer youth employment opportunities that link academic and occupational learning as part of the menu of services required in § 664.410(a).

(b) Summer youth employment must provide direct linkages to academic and occupational learning, and may provide other elements and strategies

as appropriate to serve the needs and goals of the participants.

(c) Local Boards may determine how much of available youth funds will be used for summer and for year-round youth activities.

(d) The summer youth employment opportunities element is not intended to be a stand-alone program. Local programs should integrate a youth's participation in that element into a comprehensive strategy for addressing the youth's employment and training needs. Youths who participate in summer employment opportunities must be provided with a minimum of twelve months of followup services, as required in § 664.450. (WIA sec. 129(c)(2)(C).)

§ 664.610 How is the summer employment opportunities element administered?

Chief elected officials and Local Boards are responsible for ensuring that the local youth program provides summer employment opportunities to youth. The chief elected officials (which may include local government units operating as a consortium) are the grant recipients for local youth funds, unless another entity is chosen to be grant recipient or fiscal agent under WIA section 117(d)(3)(B). If, in the administration of the summer employment opportunities element of the local youth program, providers other than the grant recipient/fiscal agent, are used to provide summer youth employment opportunities, these providers must be selected by awarding a grant or contract on a competitive basis, based on the recommendation of the youth council and on criteria contained in the State Plan. However, the selection of employers who are providing unsubsidized employment opportunities may be excluded from the competitive process. (WIA sec. 129(c)(2)(C).)

§ 664.620 Do the core indicators described in 20 CFR 666.100(a)(3) apply to participation in summer employment activities?

Yes, the summer employment opportunities element is one of a number of activities authorized by the WIA youth program. WIA section 136(b)(2) (A)(ii) and(B) provides specific core indicators of performance for youth, and requires that all participating youth be included in the determination of whether the local levels of performance are met. Program operators can help ensure positive outcomes for youth participants by providing them with continuity of services.

Subpart G—One-Stop Services to Youth

§ 664.700 What is the connection between the youth program and the One-Stop service delivery system?

(a) The chief elected official (or designee, under WIA section 117(d)(3)(B)), as the local grant recipient for the youth program is a required One-Stop partner and is subject to the requirements that apply to such partners, described in 20 CFR part 662.

(b) In addition to the provisions of 20 CFR part 662, connections between the youth program and the One-Stop system may include those that facilitate:

(1) The coordination and provision of youth activities;

(2) Linkages to the job market and employers;

(3) Access for eligible youth to the information and services required in §§ 664.400 and 664.410; and

(4) Other activities designed to achieve the purposes of the youth program and youth activities as described in WIA section 129(a). (WIA secs. 121(b)(1)(B)(i); 129.)

§ 664.710 Do Local Boards have the flexibility to offer services to area youth who are not eligible under the youth program through the One-Stop centers?

Yes, however, One-Stop services for non-eligible youth must be funded by programs that are authorized to provide services to such youth. For example, basic labor exchange services under the Wagner-Peyser Act may be provided to any youth.

Subpart H—Youth Opportunity Grants

§ 664.800 How are the recipients of Youth Opportunity Grants selected?

(a) Youth Opportunity Grants are awarded through a competitive selection process. The Secretary establishes appropriate application procedures, selection criteria, and an approval process for awarding Youth Opportunity Grants to applicants which can accomplish the purpose of the Act and use available funds in an effective manner in the Solicitation for Grant Applications announcing the competition.

(b) The Secretary distributes grants equitably among urban and rural areas by taking into consideration such factors as the following:

(1) The poverty rate in urban and rural communities;

(2) The number of people in poverty in urban and rural communities; and

(3) The quality of proposals received. (WIA sec.169(a) and (e).)

§ 664.810 How does a Local Board or other entity become eligible to receive a Youth Opportunity Grant?

(a) A Local Board is eligible to receive a Youth Opportunity Grant if it serves a community that:

(1) Has been designated as an empowerment zone (EZ) or enterprise community (EC) under section 1391 of the Internal Revenue Code of 1986;

(2) Is located in a State that does not have an EZ or an EC and that has been designated by its Governor as a high poverty area; or

(3) Is one of two areas in a State that has been designated by the Governor as an area for which a local board may apply for a Youth Opportunity Grant, and that meets the poverty rate criteria in section 1392 (a)(4), (b), and (d) of the Internal Revenue Code of 1986.

(b) An entity other than a Local Board is eligible to receive a grant if that entity:

(1) Is a WIA Indian and Native American grant recipient under WIA section 166; and

(2) Serves a community that:

(i) Meets the poverty rate criteria in section 1392(a)(4), (b), and (d) of the Internal Revenue Code of 1986; and

(ii) Is located on an Indian reservation or serves Oklahoma Indians or Alaska Native villages or Native groups, as provided in WIA section 169 (d)(2)(B). (WIA sec. 169(c) and (d).)

§ 664.820 Who is eligible to receive services under Youth Opportunity Grants?

All individuals ages 14 through 21 who reside in the community identified in the grant are eligible to receive services under the grant. (WIA sec. 169(a).)

§ 664.830 How are performance measures for Youth Opportunity Grants determined?

(a) The Secretary negotiates performance measures, including appropriate performance levels for each indicator, with each selected grantee, based on information contained in the application.

(b) Performance indicators for the measures negotiated under Youth Opportunity Grants are the indicators of performance provided in WIA sections 136(b)(2)(A) and (B). (WIA sec. 169(f).).

PART 665—STATEWIDE WORKFORCE INVESTMENT ACTIVITIES UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—General Description

Sec.
665.100 What are the Statewide workforce investment activities under title I of WIA?
665.110 How are Statewide workforce investment activities funded?

Subpart B—Required and Allowable Statewide Workforce Investment Activities

665.200 What are required Statewide workforce investment activities?
665.210 What are allowable Statewide workforce investment activities?
665.220 Who is an ''incumbent worker'' for purposes of Statewide workforce investment activities?

Subpart C—Rapid Response Activities

665.300 What are rapid response activities and who is responsible for providing them?
665.310 What rapid response activities are required?

665.320 May other activities be undertaken as part of rapid response?
665.330 Are the NAFTA-TAA program requirements for rapid response also required activities?
665.340 What is meant by ''provision of additional assistance'' in WIA section 134(a)(2)(A)(ii)?

AUTHORITY: Section 506(c), Pub. L. 105–220; 20 U.S.C. 9276(c).

SOURCE: 65 FR 49415, Aug. 11, 2000, unless otherwise noted.

Subpart A—General Description

§ 665.100 What are the Statewide workforce investment activities under title I of WIA?

Statewide workforce investment activities include Statewide employment and training activities for adults and dislocated workers, as described in WIA section 134(a), and Statewide youth activities, as described in WIA section 129(b). They include both required and allowable activities. In accordance with the requirements of this subpart, the State may develop policies and strategies for use of Statewide workforce investment funds. Descriptions of these policies and strategies must be included in the State Plan. (WIA secs. 129(b), 134(a).)

§ 665.110 How are Statewide workforce investment activities funded?

(a) Except for the Statewide rapid response activities described in paragraph (c) of this section, Statewide workforce investment activities are supported by funds reserved by the Governor under WIA section 128(a).

(b) Funds reserved by the Governor for Statewide workforce investment activities may be combined and used for any of the activities authorized in WIA sections 129(b), 134(a)(2)(B) or 134(a)(3)(A) (which are described in §§ 665.200 and 665.210), regardless of whether the funds were allotted through the youth, adult, or dislocated worker funding streams.

(c) Funds for Statewide rapid response activities are reserved under WIA section 133(a)(2) and may be used to provide the activities authorized at section 134(a)(2)(A) (which are described in §§ 665.310 through 665.330). (WIA secs. 129(b), 133(a)(2), 134(a)(2)(B), and 134(a)(3)(A).)

Subpart B—Required and Allowable Statewide Workforce Investment Activities

§ 665.200 What are required Statewide workforce investment activities?

Required Statewide workforce investment activities are:

(a) Required rapid response activities, as described in § 665.310;

(b) Disseminating:

(1) The State list of eligible providers of training services (including those providing non-traditional training services), for adults and dislocated workers;

(2) Information identifying eligible providers of on-the-job training (OJT) and customized training;

(3) Performance and program cost information about these providers, as described in 20 CFR 663.540; and

(4) A list of eligible providers of youth activities as described in WIA section 123;

(c) States must assure that the information listed in paragraphs (b)(1) through (4) of this section is widely available.

(d) Conducting evaluations, under WIA section 136(e), of workforce investment activities for adults, dislocated workers and youth, in order to establish and promote methods for continuously improving such activities to achieve high-level performance within, and high-level outcomes from, the Statewide workforce investment system. Such evaluations must be designed and conducted in conjunction with the State and Local Boards, and must include analysis of customer feedback, outcome and process measures in the workforce investment system. To the maximum extent practicable, these evaluations should be conducted in coordination with Federal evaluations carried out under WIA section 172.

(e) Providing incentive grants:

(1) To local areas for regional cooperation among Local Boards (including Local Boards for a designated region, as described in 20 CFR 661.290);

(2) For local coordination of activities carried out under WIA; and

(3) For exemplary performance by local areas on the performance measures.

(f) Providing technical assistance to local areas that fail to meet local performance measures.

(g) Assisting in the establishment and operation of One-Stop delivery systems, in accordance with the strategy described in the State workforce investment plan. (WIA sec. 112(b)(14).)

(h) Providing additional assistance to local areas that have high concentrations of eligible youth.

(i) Operating a fiscal and management accountability information system, based on guidelines established by the Secretary after consultation with the Governors, chief elected officials, and One-Stop partners, as required by WIA section 136(f). (WIA secs. 129(b)(2), 134(a)(2), and 136(e)(2).)

§ 665.210 What are allowable Statewide workforce investment activities?

Allowable Statewide workforce investment activities include:

(a) State administration of the adult, dislocated worker and youth workforce investment activities, consistent with the five percent administrative cost limitation at 20 CFR 667.210(a)(1).

(b) Providing capacity building and technical assistance to local areas, including Local Boards, One-Stop operators, One-Stop partners, and eligible providers, which may include:

(1) Staff development and training; and

(2) The development of exemplary program activities.

(c) Conducting research and demonstrations.

(d) Establishing and implementing:

(1) Innovative incumbent worker training programs, which may include an employer loan program to assist in skills upgrading; and

(2) Programs targeted to Empowerment Zones and Enterprise Communities.

(e) Providing support to local areas for the identification of eligible training providers.

(f) Implementing innovative programs for displaced homemakers, and programs to increase the number of individuals trained for and placed in nontraditional employment.

(g) Carrying out such adult and dislocated worker employment and training activities as the State determines are necessary to assist local areas in carrying out local employment and training activities.

(h) Carrying out youth activities Statewide.

(i) Preparation and submission to the Secretary of the annual performance progress report as described in 20 CFR 667.300(e). (WIA secs. 129(b)(3) and 134(a)(3).)

§ 665.220 Who is an "incumbent worker" for purposes of Statewide workforce investment activities?

States may establish policies and definitions to determine which workers, or groups of workers, are eligible for incumbent worker services under this subpart. An incumbent worker is an individual who is employed, but an incumbent worker does not necessarily have to meet the eligibility requirements for intensive and training services for employed adults and dislocated workers at 20 CFR 663.220(b) and 663.310. (WIA sec. 134(a)(3)(A)(iv)(I).)

Subpart C—Rapid Response Activities

§ 665.300 What are rapid response activities and who is responsible for providing them?

(a) Rapid response activities are described in §§ 665.310 through 665.330. They encompass the activities necessary to plan and deliver services to enable dislocated workers to transition to new employment as quickly as possible, following either a permanent closure or mass layoff, or a natural or other disaster resulting in a mass job dislocation.

(b) The State is responsible for providing rapid response activities. Rapid response is a required activity carried out in local areas by the State, or an entity designated by the State, in conjunction with the Local Board and chief elected officials. The State must establish methods by which to provide additional assistance to local areas that experience disasters, mass layoffs, plant closings, or other dislocation events when such events substantially increase the number of unemployed individuals.

(c) States must establish a rapid response dislocated worker unit to carry

out Statewide rapid response activities. (WIA secs. 101(38), 112(b)(17)(A)(ii) and 134(a)(2)(A).)

§ 665.310 What rapid response activities are required?

Rapid response activities must include:

(a) Immediate and on-site contact with the employer, representatives of the affected workers, and the local community, which may include an assessment of the:

(1) Layoff plans and schedule of the employer;

(2) Potential for averting the layoff(s) in consultation with State or local economic development agencies, including private sector economic development entities;

(3) Background and probable assistance needs of the affected workers;

(4) Reemployment prospects for workers in the local community; and

(5) Available resources to meet the short and long-term assistance needs of the affected workers.

(b) The provision of information and access to unemployment compensation benefits, comprehensive One-Stop system services, and employment and training activities, including information on the Trade Adjustment Assistance (TAA) program and the NAFTA-TAA program (19 U.S.C. 2271 *et seq.*);

(c) The provision of guidance and/or financial assistance in establishing a labor-management committee voluntarily agreed to by labor and management, or a workforce transition committee comprised of representatives of the employer, the affected workers and the local community. The committee may devise and oversee an implementation strategy that responds to the reemployment needs of the workers. The assistance to this committee may include:

(1) The provision of training and technical assistance to members of the committee;

(2) Funding the operating costs of a committee to enable it to provide advice and assistance in carrying out rapid response activities and in the design and delivery of WIA-authorized services to affected workers. Typically, such support will last no longer than six months; and

(3) Providing a list of potential candidates to serve as a neutral chairperson of the committee.

(d) The provision of emergency assistance adapted to the particular closing, layoff or disaster.

(e) The provision of assistance to the local board and chief elected official(s) to develop a coordinated response to the dislocation event and, as needed, obtain access to State economic development assistance. Such coordinated response may include the development of an application for National Emergency Grant under 20 CFR part 671. (WIA secs. 101(38) and 134(a)(2)(A).)

§ 665.320 May other activities be undertaken as part of rapid response?

Yes, a State or designated entity may provide rapid response activities in addition to the activities required to be provided under § 665.310. In order to provide effective rapid response upon notification of a permanent closure or mass layoff, or a natural or other disaster resulting in a mass job dislocation, the State or designated entity may:

(a) In conjunction, with other appropriate Federal, State and Local agencies and officials, employer associations, technical councils or other industry business councils, and labor organizations:

(1) Develop prospective strategies for addressing dislocation events, that ensure rapid access to the broad range of allowable assistance;

(2) Identify strategies for the aversion of layoffs; and

(3) Develop and maintain mechanisms for the regular exchange of information relating to potential dislocations, available adjustment assistance, and the effectiveness of rapid response strategies.

(b) In collaboration with the appropriate State agency(ies), collect and analyze information related to economic dislocations, including potential closings and layoffs, and all available resources in the State for dislocated workers in order to provide an adequate basis for effective program management, review and evaluation of rapid response and layoff aversion efforts in the State.

(c) Participate in capacity building activities, including providing information about innovative and successful strategies for serving dislocated workers, with local areas serving smaller layoffs.

(d) Assist in devising and overseeing strategies for:

(1) Layoff aversion, such as prefeasibility studies of avoiding a plant closure through an option for a company or group, including the workers, to purchase the plant or company and continue it in operation;

(2) Incumbent worker training, including employer loan programs for employee skill upgrading; and

(3) Linkages with economic development activities at the Federal, State and local levels, including Federal Department of Commerce programs and available State and local business retention and recruitment activities.

§ 665.330 Are the NAFTA-TAA program requirements for rapid response also required activities?

The Governor must ensure that rapid response activities under WIA are made available to workers who, under the NAFTA Implementation Act (Public Law 103–182), are members of a group of workers (including those in any agricultural firm or subdivision of an agricultural firm) for which the Governor has made a preliminary finding that:

(a) A significant number or proportion of the workers in such firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated; and

(b) Either:

(1) The sales or production, or both, of such firm or subdivision have decreased absolutely; and

(2) Imports from Mexico or Canada of articles like or directly competitive with those produced by such firm or subdivision have increased; or

(c) There has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles which are produced by the firm or subdivision.

§ 665.340 What is meant by "provision of additional assistance" in WIA section 134(a)(2)(A)(ii)?

Up to 25 percent of dislocated worker funds may be reserved for rapid response activities. Once the State has reserved adequate funds for rapid response activities, such as those described in §§ 665.310 and 665.320, the remainder of the funds may be used by the State to provide funds to local areas, that experience increased numbers of unemployed individuals due to natural disasters, plant closings, mass layoffs or other events, for provision of direct services to participants (such as intensive, training, and other services) if there are not adequate local funds available to assist the dislocated workers.

PART 666—PERFORMANCE ACCOUNTABILITY UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

Subpart A—State Measures of Performance

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666.100 What performance indicators must be included in a State's plan?
666.110 May a Governor require additional indicators of performance?
666.120 What are the procedures for negotiating annual levels of performance?
666.130 Under what conditions may a State or DOL request revisions to the State negotiated levels of performance?
666.140 Which individuals receiving services are included in the core indicators of performance?
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666.210 How may Incentive Grant funds be used?
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to achieve negotiated levels of performance for title I?

Subpart C—Local Measures of Performance

666.300 What performance indicators apply to local areas?
666.310 What levels of performance apply to the indicators of performance in local areas?

Subpart D—Incentives and Sanctions for Local Performance

666.400 Under what circumstances are local areas eligible for State Incentive Grants?
666.410 How may local incentive awards be used?
666.420 Under what circumstances may a sanction be applied to local areas for poor performance?

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Subpart A—State Measures of Performance

§ 666.100 What performance indicators must be included in a State's plan?

(a) All States submitting a State Plan under WIA title I, subtitle B must propose expected levels of performance for each of the core indicators of performance for the adult, dislocated worker and youth programs, respectively and the two customer satisfaction indicators.

(1) For the Adult program, these indicators are:

(i) Entry into unsubsidized employment;

(ii) Retention in unsubsidized employment six months after entry into the employment;

(iii) Earnings received in unsubsidized employment six months after entry into the employment; and

(iv) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter unsubsidized employment.

(2) For the Dislocated Worker program, these indicators are:

(i) Entry into unsubsidized employment;

(ii) Retention in unsubsidized employment six months after entry into the employment;

(iii) Earnings received in unsubsidized employment six months after entry into the employment; and

(iv) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter unsubsidized employment.

(3) For the Youth program, these indicators are:

(i) For eligible youth aged 14 through 18:

(A) Attainment of basic skills goals, and, as appropriate, work readiness or occupational skills goals, up to a maximum of three goals per year;

(B) Attainment of secondary school diplomas and their recognized equivalents; and

(C) Placement and retention in post-secondary education, advanced training, military service, employment, or qualified apprenticeships.

(ii) For eligible youth aged 19 through 21:

(A) Entry into unsubsidized employment;

(B) Retention in unsubsidized employment six months after entry into the employment;

(C) Earnings received in unsubsidized employment six months after entry into the employment; and

(D) Attainment of a recognized credential related to achievement of educational skills (such as a secondary school diploma or its recognized equivalent), or occupational skills, by participants who enter post-secondary education, advanced training, or unsubsidized employment.

(4) A single customer satisfaction measure for employers and a single customer satisfaction indicator for participants must be used for the WIA title I, subtitle B programs for adults, dislocated workers and youth. (WIA sec. 136(b)(2).)

(b) After consultation with the representatives identified in WIA sections 136(i) and 502(b), the Departments of

Labor and Education will issue definitions for the performance indicators established under title I and title II of WIA. (WIA sec. 136 (b), (f) and (i).)

§ 666.110 May a Governor require additional indicators of performance?

Yes, Governors may develop additional indicators of performance for adults, youth and dislocated worker activities. These indicators must be included in the State Plan. (WIA sec. 136(b)(2)(C).)

§ 666.120 What are the procedures for negotiating annual levels of performance?

(a) We issue instructions on the specific information that must accompany the State Plan and that is used to review the State's expected levels of performance. The instructions may require that levels of performance for years two and three be expressed as a percentage improvement over the immediately preceding year's performance, consistent with the objective of continuous improvement.

(b) States must submit expected levels of performance for the required indicators for each of the first three program years covered by the Plan.

(c) The Secretary and the Governor must reach agreement on levels of performance for each core indicator and the customer satisfaction indicators. In negotiating these levels, the following must be taken into account:

(1) The expected levels of performance identified in the State Plan;

(2) The extent to which the levels of performance for each core indicator assist in achieving high customer satisfaction;

(3) The extent to which the levels of performance promote continuous improvement and ensure optimal return on the investment of Federal funds; and

(4) How the levels compare with those of other States, taking into account factors including differences in economic conditions, participant characteristics, and the proposed service mix and strategies.

(d) The levels of performance agreed to under paragraph (c) of this section will be the State's negotiated levels of performance for the first three years of the State Plan. These levels will be used to determine whether sanctions will be applied or incentive grant funds will be awarded.

(e) Before the fourth year of the State Plan, the Secretary and the Governor must reach agreement on levels of performance for each core indicator and the customer satisfaction indicators for the fourth and fifth years covered by the plan. In negotiating these levels, the factors listed in paragraph (c) of this section must be taken into account.

(f) The levels of performance agreed to under paragraph (e) of this section will be the State negotiated levels of performance for the fourth and fifth years of the plan and must be incorporated into the State Plan.

(g) Levels of performance for the additional indicators developed by the Governor, including additional indicators to demonstrate and measure continuous improvement toward goals identified by the State, are not part of the negotiations described in paragraphs (c) and (e) of this section. (WIA sec. 136(b)(3).)

(h) State negotiated levels of performance may be revised in accordance with § 666.130.

§ 666.130 Under what conditions may a State or DOL request revisions to the State negotiated levels of performance?

(a) The DOL guidelines describe when and under what circumstances a Governor may request revisions to negotiated levels. These circumstances include significant changes in economic conditions, in the characteristics of participants entering the program, or in the services to be provided from when the initial plan was submitted and approved. (WIA sec. 136(b)(3)(A)(vi).)

(b) The guidelines will establish the circumstances under which a State will be required to submit revisions under specified circumstances.

§ 666.140 Which individuals receiving services are included in the core indicators of performance?

(a)(1) The core indicators of performance apply to all individuals who are registered under 20 CFR 663.105 and 664.215 for the adult, dislocated worker

and youth programs, except for those adults and dislocated workers who participate exclusively in self-service or informational activities. (WIA sec. 136(b)(2)(A).)

(2) Self-service and informational activities are those core services that are made available and accessible to the general public, that are designed to inform and educate individuals about the labor market and their employment strengths, weaknesses, and the range of services appropriate to their situation, and that do not require significant staff involvement with the individual in terms of resources or time.

(b) For registered participants, a standardized record that includes appropriate performance information must be maintained in accordance with WIA section 185(a)(3).

(c) Performance will be measured on the basis of results achieved by registered participants, and will reflect services provided under WIA title I, subtitle B programs for adults, dislocated workers and youth. Performance may also take into account services provided to participants by other One-Stop partner programs and activities, to the extent that the local MOU provides for the sharing of participant information.

§ 666.150 What responsibility do States have to use quarterly wage record information for performance accountability?

(a) States must, consistent with State laws, use quarterly wage record information in measuring the progress on State and local performance measures. In order to meet this requirement the use of social security numbers from registered participants and such other information as is necessary to measure the progress of those participants through quarterly wage record information is authorized.

(b) The State must include in the State Plan a description of the State's performance accountability system, and a description of the State's strategy for using quarterly wage record information to measure the progress on State and local performance measures. The description must identify the entities that may have access to quarterly wage record information for this purpose.

(c) ''Quarterly wage record information'' means information regarding wages paid to an individual, the social security account number (or numbers, if more than one) of the individual and the name, address, State, and (when known) the Federal employer identification number of the employer paying the wages to the individual. (WIA sec. 136(f)(2).)

Subpart B—Incentives and Sanctions for State Performance

§ 666.200 Under what circumstances is a State eligible for an Incentive Grant?

A State is eligible to apply for an Incentive Grant if its performance for the immediately preceding year exceeds:

(a) The State's negotiated levels of performance for the required core indicators for the adult, dislocated worker and youth programs under title I of WIA as well as the customer satisfaction indicators for WIA title I programs;

(b) The adjusted levels of performance for title II Adult Education and Family Literacy programs; and

(c) The adjusted levels of performance under section 113 of the Carl D. Perkins Vocational and Technical Education Act (20 U.S.C. 2301 *et seq.*). (WIA sec. 503.)

§ 666.205 What are the time frames under which States submit performance progress reports and apply for incentive grants?

(a) State performance progress reports must be filed by the due date established in reporting instructions issued by the Department.

(b) Based upon the reports filed under paragraph (a) of this section, we will determine the amount of funds available, under WIA title I, to each eligible State for incentive grants, in accordance with the criteria of § 666.230. We will publish the award amounts for each eligible State, after consultation with the Secretary of Education, within ninety (90) days after the due date for performance progress reports established under paragraph (a) of this section.

(c) Within forty-five (45) days of the publication of award amounts under paragraph (b) of this section, States may apply for incentive grants in accordance with the requirements of § 666.220.

§ 666.210 How may Incentive Grant funds be used?

Incentive grant funds are awarded to States to carry out any one or more innovative programs under titles I or II of WIA or the Carl D. Perkins Vocational and Technical Education Act, regardless of which Act is the source of the incentive funds. (WIA sec. 503(a).)

§ 666.220 What information must be included in a State Board's application for an Incentive Grant?

(a) After consultation with the Secretary of Education, we will issue instructions annually which will include the amount of funds available to be awarded for each State and provide instructions for submitting applications for an Incentive Grant.

(b) Each State desiring an incentive grant must submit to the Secretary an application, developed by the State Board, containing the following assurances:

(1) The State legislature was consulted regarding the development of the application.

(2) The application was approved by the Governor, the eligible agency (as defined in WIA section 203), and the State agency responsible for vocational and technical programs under the Carl D. Perkins Vocational and Technical Education Act.

(3) The State exceeded the State negotiated levels of performance for title I, the levels of performance under title II and the levels for vocational and technical programs under the Carl D. Perkins Vocational and Technical Education Act. (WIA sec. 503(b).)

§ 666.230 How does the Department determine the amounts for Incentive Grant awards?

(a) We determine the total amount to be allocated from funds available under WIA section 174(b) for Incentive Grants taking into consideration such factors as:

(1) The availability of funds under section 174(b) for technical assistance, demonstration and pilot projects, evaluations, and Incentive Grants and the needs for these activities;

(2) The number of States that are eligible for Incentive Grants and their relative program formula allocations under title I;

(3) The availability of funds under WIA section 136(g)(2) resulting from funds withheld for poor performance by States; and

(4) The range of awards established in WIA section 503(c).

(b) We will publish the award amount for eligible States, after consultation with the Secretary of Education, within 90 days after the due date, established under § 666.205(a), for the latest State performance progress report providing the annual information needed to determine State eligibility.

(c) In determining the amount available to an eligible State, the Secretary, with the Secretary of Education, may consider such factors as:

(1) The relative allocations of the eligible State compared to other States;

(2) The extent to which the negotiated levels of performance were exceeded;

(3) Performance improvement relative to previous years;

(4) Changes in economic conditions, participant characteristics and proposed service design since the negotiated levels of performance were agreed to;

(5) The eligible State's relative performance for each of the indicators compared to other States; and

(6) The performance on those indicators considered most important in terms of accomplishing national goals established by each of the respective Secretaries.

§ 666.240 Under what circumstances may a sanction be applied to a State that fails to achieve negotiated levels of performance for title I?

(a) If a State fails to meet the negotiated levels of performance agreed to under § 666.120 for core indicators of performance or customer satisfaction indicators for the adult, dislocated worker or youth programs under title I

of WIA, the Secretary must, upon request, provide technical assistance, as authorized under WIA sections 136(g) and 170.

(b) If a State fails to meet the negotiated levels of performance for core indicators of performance or customer satisfaction indicators for the same program in two successive years, the amount of the succeeding year's allocation for the applicable program may be reduced by up to five percent.

(c) The exact amount of any allocation reduction will be based upon the degree of failure to meet the negotiated levels of performance for core indicators. In making a determination of the amount, if any, of such a sanction, we may consider factors such as:

(1) The State's performance relative to other States;

(2) Improvement efforts underway;

(3) Incremental improvement on the performance measures;

(4) Technical assistance previously provided;

(5) Changes in economic conditions and program design;

(6) The characteristics of participants served compared to the participant characteristics described in the State Plan; and

(7) Performance on other core indicators of performance and customer satisfaction indicators for that program. (WIA sec. 136(g).)

(d) Only performance that is less than 80 percent of the negotiated levels will be deemed to be a failure to achieve negotiated levels of performance.

(e) In accordance with 20 CFR 667.300(e), a State grant may be reduced for failure to submit an annual performance progress report.

(f) A State may request review of a sanction we impose in accordance with the provisions of 20 CFR 667.800.

Subpart C—Local Measures of Performance

§ 666.300 What performance indicators apply to local areas?

(a) Each local workforce investment area in a State is subject to the same core indicators of performance and the customer satisfaction indicators that apply to the State under § 666.100(a).

(b) In addition to the indicators described in paragraph (a) of this section, under § 666.110, the Governor may apply additional indicators of performance to local areas in the State. (WIA sec. 136(c)(1).)

§ 666.310 What levels of performance apply to the indicators of performance in local areas?

(a) The Local Board and the chief elected official must negotiate with the Governor and reach agreement on the local levels of performance for each indicator identified under § 666.300. The levels must be based on the State negotiated levels of performance established under § 666.120 and take into account the factors described in paragraph (b) of this section.

(b) In determining the appropriate local levels of performance, the Governor, Local Board and chief elected official must take into account specific economic, demographic and other characteristics of the populations to be served in the local area.

(c) The performance levels agreed to under paragraph (a) of this section must be incorporated in the local plan. (WIA secs. 118(b)(3) and 136(c).)

Subpart D—Incentives and Sanctions for Local Performance

§ 666.400 Under what circumstances are local areas eligible for State Incentive Grants?

(a) States must use a portion of the funds reserved for Statewide workforce investment activities under WIA sections 128(a) and 133(a)(1) to provide Incentive Grants to local areas for regional cooperation among local boards (including local boards for a designated region, as described in WIA section 116(c)), for local coordination of activities carried out under this Act, and for exemplary performance on the local performance measures established under subpart C of this part.

(b) The amount of funds used for Incentive Grants under paragraph (a) of this section and the criteria used for determining exemplary local performance levels to qualify for the incentive grants are determined by the Governor. (WIA sec. 134(a)(2)(B)(iii).)

§ 666.410 How may local incentive awards be used?

The local incentive grant funds may be used for any activities allowed under WIA title I-B.

§ 666.420 Under what circumstances may a sanction be applied to local areas for poor performance?

(a) If a local area fails to meet the levels of performance agreed to under § 666.310 for the core indicators of performance or customer satisfaction indicators for a program in any program year, technical assistance must be provided. The technical assistance must be provided by the Governor with funds reserved for Statewide workforce investment activities under WIA sections 128(a) and 133(a)(1), or, upon the Governor's request, by the Secretary. The technical assistance may include the development of a performance improvement plan, a modified local plan, or other actions designed to assist the local area in improving performance.

(b) If a local area fails to meet the levels of performance agreed to under § 666.310 for the core indicators of performance or customer satisfaction indicators for a program for two consecutive program years, the Governor must take corrective actions. The corrective actions may include the development of a reorganization plan under which the Governor:

(1) Requires the appointment and certification of a new Local Board;

(2) Prohibits the use of particular service providers or One-Stop partners that have been identified as achieving poor levels of performance; or

(3) Requires other appropriate measures designed to improve the performance of the local area.

(c) A local area may appeal to the Governor to rescind or revise a reorganization plan imposed under paragraph (b) of this section not later than thirty (30) days after receiving notice of the plan. The Governor must make a final decision within 30 days after receipt of the appeal. The Governor's final decision may be appealed by the Local Board to the Secretary under 20 CFR 667.650(b) not later than thirty (30) days after the local area receives the decision. The decision by the Governor to impose a reorganization plan becomes effective at the time it is issued, and remains effective unless the Secretary rescinds or revises the reorganization plan. Upon receipt of the appeal from the local area, the Secretary must make a final decision within thirty (30) days. (WIA sec. 136(h).)

PART 667—ADMINISTRATIVE PROVISIONS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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SOURCE: 65 FR 49421, Aug. 11, 2000, unless otherwise noted.

Subpart A—Funding

§ 667.100 When do Workforce Investment Act grant funds become available?

(a) *Program year*. Except as provided in paragraph (b) of this section, fiscal year appropriations for programs and activities carried out under title I of WIA are available for obligation on the basis of a program year. A program year begins on July 1 in the fiscal year for which the appropriation is made and ends on June 30 of the following year.

(b) *Youth fund availability*. Fiscal year appropriations for a program year's youth activities, authorized under chapter 4, subtitle B, title I of WIA, may be made available for obligation beginning on April 1 of the fiscal year for which the appropriation is made.

§ 667.105 What award document authorizes the expenditure of Workforce Investment Act funds under title I of the Act?

(a) *Agreement*. All WIA title I funds that are awarded by grant, contract or cooperative agreement are issued under an agreement between the Grant Officer/Contracting Officer and the recipient. The agreement describes the terms and conditions applicable to the award of WIA title I funds.

(b) *Grant funds awarded to States*. Under the Governor/Secretary Agreement described in § 667.110, each program year, the grant agreement described in paragraph (a) of this section will be executed and signed by the Governor or the Governor's designated representative and Secretary or the Grant Officer. The grant agreement and associated Notices of Obligation are the basis for Federal obligation of funds allotted to the States in accordance with WIA sections 127(b) and 132(b) for each program year.

(c) *Indian and Native American Programs*. (1) Awards of grants, contracts or cooperative agreements for the WIA Indian and Native American program will be made to eligible entities on a competitive basis every two program years for a two-year period, in accordance with the provisions of 20 CFR part 668. An award for the succeeding two-year period may be made to the same recipient on a non-competitive basis if the recipient:

(i) Has performed satisfactorily; and

(ii) Submits a satisfactory two-year program plan for the succeeding two-year grant, contract or agreement period.

(2) A grant, contract or cooperative agreement may be renewed under the authority of paragraph (c)(1) of this section no more than once during any four-year period for any single recipient.

(d) *National Farmworker Jobs programs*. (1) Awards of grants or contracts for the National Farmworker Jobs program will be made to eligible entities on a competitive basis every two program years for a two-year period, in accordance with the provisions of 20 CFR part 669. An award for the succeeding two-year period may be made to the same recipient if the recipient:

(i) Has performed satisfactorily; and

(ii) Submits a satisfactory two-year program plan for the succeeding two-year period.

(2) A grant or contract may be renewed under the authority of paragraph (d)(1) of this section no more than once during any four-year period for any single recipient.

(e) *Job Corps*. (1) Awards of contracts will be made on a competitive basis between the Contracting Officer and eligible entities to operate contract centers and provide operational support services.

(2) The Secretary may enter into interagency agreements with Federal agencies for funding, establishment, and operation of Civilian Conservation Centers for Job Corps programs.

(f) [Reserved]

(g) *Awards under WIA sections 171 and 172*. (1) Awards of grants, contracts or cooperative agreements will be made to eligible entities for programs or activities authorized under WIA sections 171 or 172. These funds are for:

(i) Demonstration;

(ii) Pilot;

(iii) Multi-service;

(iv) Research;

(v) Multi-State projects; and

(vi) Evaluations

(2) Grants and contracts under paragraphs (g)(1)(i) and (ii) of this section

will be awarded on a competitive basis, except that a noncompetitive award may be made in the case of a project that is funded jointly with other public or private entities that provide a portion of the funding.

(3) Contracts and grants under paragraphs (g)(1)(iii), (iv), and (v) of this section in amounts that exceed $100,000 will be awarded on a competitive basis, except that a noncompetitive award may be made in the case of a project that is funded jointly with other public or private sector entities that provide a substantial portion of the assistance under the grant or contract for the project.

(4) Grants or contracts for carrying out projects in paragraphs (g)(1)(iii), (iv), and (v) of this section may not be awarded to the same organization for more than three consecutive years, unless the project is competitively reevaluated within that period.

(5) Entities with nationally recognized expertise in the methods, techniques and knowledge of workforce investment activities will be provided priority in awarding contracts or grants for the projects under paragraphs (g)(1)(iii), (iv), and (v) of this section.

(6) A peer review process will be used for projects under paragraphs (g)(1)(iii), (iv), and (v) of this section for grants that exceed $500,000, and to designate exemplary and promising programs.

(h) *Termination*. Each grant terminates when the period of fund availability has expired. The grant must be closed in accordance with the closeout provisions at 29 CFR 95.71 or 97.50, as appropriate.

[65 FR 49421, Aug. 11, 2000, as amended at 71 FR 35525, June 21, 2006]

§ 667.107 What is the period of availability for expenditure of WIA funds?

(a) *Grant funds expended by States*. Funds allotted to States under WIA sections 127(b) and 132(b) for any program year are available for expenditure by the State receiving the funds only during that program year and the two succeeding program years.

(b) *Grant funds expended by local areas*. (1) Funds allocated by a State to a local area under WIA sections 128(b) and 133(b), for any program year are available for expenditure only during that program year and the succeeding program year.

(2) Funds which are not expended by a local area in the two-year period described in paragraph (b)(1) of this section, must be returned to the State. Funds so returned are available for expenditure by State and local recipients and subrecipients only during the third program year of availability. These funds may:

(i) Be used for Statewide projects, or

(ii) Be distributed to other local areas which had fully expended their allocation of funds for the same program year within the two-year period.

(c) *Job Corps*. Funds obligated for any program year for any Job Corps activity carried out under title I, subtitle C, of WIA may be expended during that program year and the two succeeding program years.

(d) *Funds awarded under WIA sections 171 and 172*. Funds obligated for any program year for a program or activity authorized under sections 171 or 172 of WIA remain available until expended.

(e) *Other programs under title I of WIA*. For all other grants, contracts and cooperative agreements issued under title I of WIA the period of availability for expenditure is set in the terms and conditions of the award document.

§ 667.110 What is the Governor/Secretary Agreement?

(a) To establish a continuing relationship under the Act, the Governor and the Secretary will enter into a Governor/Secretary Agreement. The Agreement will consist of a statement assuring that the State will comply with:

(1) The Workforce Investment Act and all applicable rules and regulations, and

(2) The Wagner-Peyser Act and all applicable rules and regulations.

(b) The Governor/Secretary Agreement may be modified, revised or terminated at any time, upon the agreement of both parties.

§ 667.120 What planning information must a State submit in order to receive a formula grant?

Each State seeking financial assistance under WIA sections 127 (youth) or 132 (adults and dislocated workers) or under the Wagner-Peyser Act must submit a single State Plan. The requirements for the plan content and the plan review process are described in WIA section 112, Wagner-Peyser Act section 8, and 20 CFR 661.220, 661.240 and 652.211 through 652.214.

§ 667.130 How are WIA title I formula funds allocated to local workforce investment areas?

(a) *General.* The Governor must allocate WIA formula funds allotted for services to youth, adults and dislocated workers in accordance with WIA sections 128 and 133, and this section.

(1) State Boards must assist Governors in the development of any discretionary within-State allocation formulas. (WIA sec. 111(d)(5).)

(2) Within-State allocations must be made:

(i) In accordance with the allocation formulas contained in WIA sections 128(b) and 133(b) and in the State workforce investment plan, and

(ii) After consultation with chief elected officials in each of the workforce investment areas.

(b) *State reserve.* (1) Of the WIA formula funds allotted for services to youth, adults and dislocated workers, the Governor must reserve funds from each of these sources for Statewide workforce investment activities. In making these reservations, the Governor may reserve up to fifteen (15) percent from each of these sources. Funds reserved under this paragraph may be combined and spent on Statewide employment and training activities, for adults and dislocated workers, and Statewide youth activities, as described in 20 CFR 665.200 and 665.210, without regard to the funding source of the reserved funds.

(2) The Governor must reserve a portion of the dislocated worker funds for Statewide rapid response activities, as described in WIA section 134(a)(2)(A) and 20 CFR 665.310 through 665.330. In making this reservation, the Governor may reserve up to twenty-five (25) percent of the dislocated worker funds.

(c) *Youth allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary allocation formula described in paragraph (c)(2) of this section, the remainder of youth funds not reserved under paragraph (b)(1) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce investment area, compared to the total number of unemployed individuals in all areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each workforce investment area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged youth in each workforce investment area, compared to the total number of disadvantaged youth in the State. (WIA sec. 128(b)(2)(A)(i))

(2) *Discretionary youth allocation formula.* In lieu of making the formula allocation described in paragraph (c)(1) of this section, the State may allocate youth funds under a discretionary formula. Under that formula, the State must allocate a minimum of 70 percent of youth funds not reserved under paragraph (b)(1) of this section on the basis of the formula in paragraph (c)(1) of this section, and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in paragraph (c)(1) of this section) relating to:

(A) Excess youth poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State Board and approved by the Secretary of Labor as part of the State workforce investment plan. (WIA sec. 128(b)(3).)

(d) *Adult allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary

allocation formula described in paragraph (d)(2) of this section, the remainder of adult funds not reserved under paragraph (b)(1) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each workforce investment area, compared to the total number of unemployed individuals in areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each workforce investment area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged adults in each workforce investment area, compared to the total number of disadvantaged adults in the State. (WIA sec. 133(b)(2)(A)(i))

(2) *Discretionary adult allocation formula.* In lieu of making the formula allocation described in paragraph (d)(1) of this section, the State may allocate adult funds under a discretionary formula. Under that formula, the State must allocate a minimum of 70 percent of adult funds on the basis of the formula in paragraph (d)(1) of this section, and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in paragraph (d)(1) of this section) relating to:

(A) Excess poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State Board and approved by the Secretary of Labor as part of the State workforce investment plan. (WIA sec. 133(b)(3).)

(e) *Dislocated worker allocation formula.* (1) The remainder of dislocated worker funds not reserved under paragraph (b)(1) or (b)(2) of this section must be allocated on the basis of a formula prescribed by the Governor that distributes funds in a manner that addresses the State's worker readjustment assistance needs. Funds so distributed must not be less than 60 percent of the State's formula allotment.

(2)(i) The Governor's dislocated worker formula must use the most appropriate information available to the Governor, including information on:

(A) Insured unemployment data,

(B) Unemployment concentrations,

(C) Plant closings and mass layoff data,

(D) Declining industries data,

(E) Farmer-rancher economic hardship data, and

(F) Long-term unemployment data.

(ii) The State Plan must describe the data used for the formula and the weights assigned, and explain the State's decision to use other information or to omit any of the information sources set forth in paragraph (e)(2)(i) of this section.

(3) The Governor may not amend the dislocated worker formula more than once for any program year.

(4)(i) Dislocated worker funds initially reserved by the Governor for Statewide rapid response activities in accordance with paragraph (b)(2) of this section may be:

(A) Distributed to local areas, and

(B) Used to operate projects in local areas in accordance with the requirements of WIA section 134(a)(2)(A) and 20 CFR 665.310 through 665.330.

(ii) The State Plan must describe the procedures for any distribution to local areas, including the timing and process for determining whether a distribution will take place.

§ 667.135 What "hold harmless" provisions apply to WIA adult and youth allocations?

(a)(1) For the first two fiscal years after the date on which a local area is designated under section 116 of WIA, the State may elect to apply the ''hold harmless'' provisions specified in paragraph (b) of this section to local area allocations of WIA youth funds under § 667.130(c) and to allocations of WIA adult funds under § 667.130(d).

(2) Effective at the end of the second full fiscal year after the date on which a local area is designated under section 116 of WIA the State must apply the ''hold harmless'' specified in paragraph (b) of this section to local area allocations of WIA youth funds under § 667.130(c) and to allocations of WIA adult funds under § 667.130(d).

(3) There are no ''hold harmless'' provisions that apply to local area allocations of WIA dislocated worker funds.

(b)(1) If a State elects to apply a ''hold-harmless'' under paragraph (a)(1) of this section, a local area must not receive an allocation amount for a fiscal year that is less than 90 percent of the average allocation of the local area for the two preceding fiscal years.

(2) In applying the ''hold harmless'' under paragraph (a)(2) of this section, a local area must not receive an allocation amount for a fiscal year that is less than 90 percent of the average allocation of the local area for the two preceding fiscal years.

(3) Amounts necessary to increase allocations to local areas must be obtained by ratably reducing the allocations to be made to other local areas.

(4) If the amounts of WIA funds appropriated in a fiscal year are not sufficient to provide the amount specified in paragraph (b)(1) of this section to all local areas, the amounts allocated to each local area mustbe ratably reduced. (WIA secs. 128(b)(2)(A)(ii), 133(b)(2)(A)(ii), 506.)

§ 667.140 Does a Local Board have the authority to transfer funds between programs?

(a) A Local Board may transfer up to 20 percent of a program year allocation for adult employment and training activities, and up to 20 percent of a program year allocation for dislocated worker employment and training activities between the two programs.

(b) Before making any such transfer, a Local Board must obtain the Governor's approval.

(c) Local Boards may not transfer funds to or from the youth program.

§ 667.150 What reallotment procedures does the Secretary use?

(a) The first reallotment of funds among States will occur during PY 2001 based on obligations in PY 2000.

(b) The Secretary determines, during the first quarter of the program year, whether a State has obligated its required level of at least 80 percent of the funds allotted under WIA sections 127 and 132 for programs serving youth, adults, and dislocated workers for the prior year, as separately determined for each of the three funding streams. Unobligated balances are determined based on allotments adjusted for any allowable transfer between the adult and dislocated worker funding streams. The amount to be recaptured from each State for reallotment, if any, is based on State obligations of the funds allotted to each State under WIA sections 127 and 132 for programs serving youth, adults, or dislocated workers, less any amount reserved (up to 5 percent at the State level and up to 10 percent at the local level) for the costs of administration. This amount, if any, is separately determined for each funding stream.

(c) The Secretary reallots youth, adult and dislocated worker funds among eligible States in accordance with the provisions of WIA sections 127(c) and 132(c), respectively. To be eligible to receive a reallotment of youth, adult, or dislocated worker funds under the reallotment procedures, a State must have obligated at least 80 percent of the prior program year's allotment, less any amount reserved for the costs of administration of youth, adult, or dislocated worker funds. A State's eligibility to receive a reallotment is separately determined for each funding stream.

(d) The term ''obligation'' is defined at 20 CFR 660.300. For purposes of this section, the Secretary will also treat as State obligations:

(1) Amounts allocated by the State, under WIA sections 128(b) and 133(b), to the single State local area if the State has been designated as a single local area under WIA section 116(b) or to a balance of State local area administered by a unit of the State government, and

(2) Inter-agency transfers and other actions treated by the State as encumbrances against amounts reserved by the State under WIA sections 128(a) and 133(a) for Statewide workforce investment activities.

§ 667.160 What reallocation procedures must the Governors use?

(a) The Governor may reallocate youth, adult, and dislocated worker funds among local areas within the State in accordance with the provisions of sections 128(c) and 133(c) of the

Act. If the Governor chooses to reallocate funds, the provisions in paragraphs (b) and (c) of this section apply.

(b) For the youth, adult and dislocated worker programs, the amount to be recaptured from each local area for purposes of reallocation, if any, must be based on the amount by which the prior year's unobligated balance of allocated funds exceeds 20 percent of that year's allocation for the program, less any amount reserved (up to 10 percent) for the costs of administration. Unobligated balances must be determined based on allocations adjusted for any allowable transfer between funding streams. This amount, if any, must be separately determined for each funding stream.

(c) To be eligible to receive youth, adult or dislocated worker funds under the reallocation procedures, a local area must have obligated at least 80 percent of the prior program year's allocation, less any amount reserved (up to 10 percent) for the costs of administration, for youth, adult, or dislocated worker activities, as separately determined. A local area's eligibility to receive a reallocation must be separately determined for each funding stream.

§ 667.170 What responsibility review does the Department conduct for awards made under WIA title I, subtitle D?

(a) Before final selection as a potential grantee, we conduct a review of the available records to assess the organization's overall responsibility to administer Federal funds. As part of this review, we may consider any information that has come to our attention and will consider the organization's history with regard to the management of other grants, including DOL grants. The failure to meet any one responsibility test, except for those listed in paragraphs (a)(1) and (a)(2) of this section, does not establish that the organization is not responsible unless the failure is substantial or persistent (for two or more consecutive years). The responsibility tests include:

(1) The organization's efforts to recover debts (for which three demand letters have been sent) established by final agency action have been unsuccessful, or that there has been failure to comply with an approved repayment plan;

(2) Established fraud or criminal activity of a significant nature within the organization.

(3) Serious administrative deficiencies that we identify, such as failure to maintain a financial management system as required by Federal regulations;

(4) Willful obstruction of the audit process;

(5) Failure to provide services to applicants as agreed to in a current or recent grant or to meet applicable performance standards;

(6) Failure to correct deficiencies brought to the grantee's attention in writing as a result of monitoring activities, reviews, assessments, or other activities;

(7) Failure to return a grant closeout package or outstanding advances within 90 days of the grant expiration date or receipt of closeout package, whichever is later, unless an extension has been requested and granted; final billings reflecting serious cost category or total budget cost overrun;

(8) Failure to submit required reports;

(9) Failure to properly report and dispose of government property as instructed by DOL;

(10) Failure to have maintained effective cash management or cost controls resulting in excess cash on hand;

(11) Failure to ensure that a subrecipient complies with its OMB Circular A–133 audit requirements specified at § 667.200(b);

(12) Failure to audit a subrecipient within the required period;

(13) Final disallowed costs in excess of five percent of the grant or contract award if, in the judgement of the grant officer, the disallowances are egregious findings and;

(14) Failure to establish a mechanism to resolve a subrecipient's audit in a timely fashion.

(b) This responsibility review is independent of the competitive process. Applicants which are determined to be not responsible will not be selected as potential grantees irrespective of their standing in the competition.

Subpart B—Administrative Rules, Costs and Limitations

§ 667.200 What general fiscal and administrative rules apply to the use of WIA title I funds?

(a) *Uniform fiscal and administrative requirements.* (1) Except as provided in paragraphs (a)(3) through (6) of this section, State, local, and Indian tribal government organizations that receive grants or cooperative agreements under WIA title I must follow the common rule ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments'' which is codified at 29 CFR part 97.

(2) Except as provided in paragraphs (a)(3) through (7) of this section, institutions of higher education, hospitals, other non-profit organizations, and commercial organizations must the follow the common rule implementing OMB Circular A–110 which is codified at 2 CFR part 215 and 29 CFR part 95.

(3) In addition to the requirements at 29 CFR 95.48 or 29 CFR 97.36(i) (as appropriate), all procurement contracts and other transactions between Local Boards and units of State or local governments must be conducted only on a cost reimbursement basis. No provision for profit is allowed. (WIA sec. 184(a)(3)(B).)

(4) In addition to the requirements at 29 CFR 95.42 or 29 CFR 97.36(b)(3) (as appropriate), which address codes of conduct and conflict of interest issues related to employees:

(i) A State Board member or a Local Board member or a Youth Council member must neither cast a vote on, nor participate in any decision-making capacity, on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or a member of his immediate family.

(ii) Neither membership on the State Board, the Local Board, the Youth Council nor the receipt of WIA funds to provide training and related services, by itself, violates these conflict of interest provisions.

(5) The addition method, described at 29 CFR 95.24 or 29 CFR 97.25(g)(2) (as appropriate), must be used for the all program income earned under WIA title I grants. When the cost of generating program income has been charged to the program, the gross amount earned must be added to the WIA program. However, the cost of generating program income must be subtracted from the amount earned to establish the net amount of program income available for use under the grants when these costs have not been charged to the WIA program.

(6) Any excess of revenue over costs incurred for services provided by a governmental or non-profit entity must be included in program income. (WIA sec. 195(7)(A) and (B).)

(7) Interest income earned on funds received under WIA title I must be included in program income. (WIA sec. 195(7)(B)(iii).)

(8) On a fee-for-service basis, employers may use local area services, facilities, or equipment funded under title I of WIA to provide employment and training activities to incumbent workers:

(i) When the services, facilities, or equipment are not being used by eligible participants;

(ii) If their use does not affect the ability of eligible participants to use the services, facilities, or equipment; and

(iii) If the income generated from such fees is used to carry out programs authorized under this title.

(b) *Audit requirements.* (1) All governmental and non-profit organizations must follow the audit requirements of OMB Circular A–133. These requirements are found at 29 CFR 97.26 for governmental organizations and at 29 CFR 95.26 for institutions of higher education, hospitals, and other non-profit organizations.

(2)(i) We are responsible for audits of commercial organizations which are direct recipients of Federal financial assistance under WIA title I.

(ii) Commercial organizations which are subrecipients under WIA title I and which expend more than the minimum level specified in OMB Circular A–133 ($300,000 ($500,000 for years ending after December 21, 2003)) must have either an organization-wide audit conducted in accordance with A–133 or a program

specific financial and compliance audit.

(c) *Allowable costs/cost principles.* All recipients and subrecipients must follow the Federal allowable cost principles that apply to their kind of organizations. The DOL regulations at 29 CFR 95.27 and 29 CFR 97.22 identify the Federal principles for determining allowable costs which each kind of recipient and subrecipient must follow. The applicable Federal principles for each kind of recipient are described in paragraphs (c)(1) through (5) of this section; all recipients must comply with paragraphs (c)(6) and (c)(7) of this section. For those selected items of cost requiring prior approval, the authority to grant or deny approval is delegated to the Governor for programs funded under sections 127 or 132 of the Act.

(1) Allowable costs for State, local, and Indian tribal government organizations must be determined under OMB Circular A–87, ''Cost Principles for State, Local and Indian Tribal Governments.''

(2) Allowable costs for non-profit organizations must be determined under OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(3) Allowable costs for institutions of higher education must be determined under OMB Circular A–21, ''Cost Principles for Educational Institutions.''

(4) Allowable costs for hospitals must be determined in accordance under appendix E of 45 CFR part 74, ''Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.''

(5) Allowable costs for commercial organizations and those non-profit organizations listed in Attachment C to OMB Circular A–122 must be determined under the provisions of the Federal Acquisition Regulation (FAR), at 48 CFR part 31.

(6) For all types of entities, legal expenses for the prosecution of claims against the Federal Government, including appeals to an Administrative Law Judge, are unallowable.

(d) *Government-wide debarment and suspension, and government-wide drug-free workplace requirements.* All WIA title I grant recipients and subrecipients must comply with the government-wide requirements for debarment and suspension, and the government-wide requirements for a drug-free workplace, codified at 29 CFR part 98.

(e) *Restrictions on lobbying.* All WIA title I grant recipients and subrecipients must comply with the restrictions on lobbying which are codified in the DOL regulations at 29 CFR part 93.

(f) *Nondiscrimination.* All WIA title I recipients, as the term is defined in 29 CFR 37.4, must comply with the nondiscrimination and equal opportunity provisions of WIA section 188 and its implementing regulations found at 29 CFR part 37. Information on the handling of discrimination complaints by participants and other interested parties may be found in 29 CFR 37.70 through 37.80, and in § 667.600(g).

(g) *Nepotism.* (1) No individual may be placed in a WIA employment activity if a member of that person's immediate family is directly supervised by or directly supervises that individual.

(2) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, such State or local requirement must be followed.

[65 FR 49421, Aug. 11, 2000, as amended at 71 FR 35523, June 21, 2006]

§ 667.210 What administrative cost limits apply to Workforce Investment Act title I grants?

(a) Formula grants to States:

(1) As part of the 15 percent that a State may reserve for Statewide activities, the State may spend up to five percent (5%) of the amount allotted under sections 127(b)(1), 132(b)(1) and 132(b)(2) of the Act for the administrative costs of Statewide workforce investment activities.

(2) Local area expenditures for administrative purposes under WIA formula grants are limited to no more than ten percent (10%) of the amount allocated to the local area under sections 128(b) and 133(b) of the Act.

(3) Neither the five percent (5%) of the amount allotted that may be reserved for Statewide administrative costs nor the ten percent (10%) of the amount allotted that may be reserved for local administrative costs needs to be allocated back to the individual funding streams.

(b) Limits on administrative costs for programs operated under subtitle D of title I will be identified in the grant or contract award document.

(c) In a One-Stop environment, administrative costs borne by other sources of funds, such as the Wagner-Peyser Act, are not included in the administrative cost limit calculation. Each program's administrative activities area chargeable to its own grant and subject to its own administrative cost limitations.

§ 667.220 What Workforce Investment Act title I functions and activities constitute the costs of administration subject to the administrative cost limit?

(a) The costs of administration are that allocable portion of necessary and reasonable allowable costs of State and local workforce investment boards, direct recipients, including State grant recipients under subtitle B of title I and recipients of awards under subtitle D of title I, as well as local grant recipients, local grant subrecipients, local fiscal agents and one-stop operators that are associated with those specific functions identified in paragraph (b) of this section and which are not related to the direct provision of workforce investment services, including services to participants and employers. These costs can be both personnel and non-personnel and both direct and indirect.

(b) The costs of administration are the costs associated with performing the following functions:

(1) Performing the following overall general administrative functions and coordination of those functions under WIA title I:

(i) Accounting, budgeting, financial and cash management functions;

(ii) Procurement and purchasing functions;

(iii) Property management functions;

(iv) Personnel management functions;

(v) Payroll functions;

(vi) Coordinating the resolution of findings arising from audits, reviews, investigations and incident reports;

(vii) Audit functions;

(viii) General legal services functions; and

(ix) Developing systems and procedures, including information systems, required for these administrative functions;

(2) Performing oversight and monitoring responsibilities related to WIA administrative functions;

(3) Costs of goods and services required for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) Travel costs incurred for official business in carrying out administrative activities or the overall management of the WIA system; and

(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting and payroll systems) including the purchase, systems development and operating costs of such systems.

(c)(1) Awards to subrecipients or vendors that are solely for the performance of administrative functions are classified as administrative costs.

(2) Personnel and related non-personnel costs of staff who perform both administrative functions specified in paragraph (b) of this section and programmatic services or activities must be allocated as administrative or program costs to the benefitting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods.

(3) Specific costs charged to an overhead or indirect cost pool that can be identified directly as a program cost are to be charged as a program cost. Documentation of such charges must be maintained.

(4) Except as provided at paragraph (c)(1), all costs incurred for functions and activities of subrecipients and vendors are program costs.

(5) Costs of the following information systems including the purchase, systems development and operating (e.g., data entry) costs are charged to the program category:

(i) Tracking or monitoring of participant and performance information;

(ii) Employment statistics information, including job listing information,

job skills information, and demand occupation information;

(iii) Performance and program cost information on eligible providers of training services, youth activities, and appropriate education activities;

(iv) Local area performance information; and

(v) Information relating to supportive services and unemployment insurance claims for program participants;

(6) Continuous improvement activities are charged to administration or program category based on the purpose or nature of the activity to be improved. Documentation of such charges must be maintained.

§ 667.250 What requirements relate to the enforcement of the Military Selective Service Act?

The requirements relating to the enforcement of the Military Selective Service Act are found at WIA section 189(h).

§ 667.255 Are there special rules that apply to veterans when income is a factor in eligibility determinations?

Yes, under 38 U.S.C. 4213, when past income is an eligibility determinant for Federal employment or training programs, any amounts received as military pay or allowances by any person who served on active duty, and certain other specified benefits must be disregarded. This applies when determining if a person is a ''low-income individual'' for eligibility purposes, (for example, in the WIA youth, Job Corps, or NFJP programs) and applies if income is used as a factor in applying the priority provision, under 20 CFR 663.600, when WIA adult funds are limited. Questions regarding the application of 38 U.S.C. 4213 should be directed to the Veterans Employment and Training Service.

§ 667.260 May WIA title I funds be spent for construction?

WIA title I funds must not be spent on construction or purchase of facilities or buildings except:

(a) To meet a recipient's, as the term is defined in 29 CFR 37.4, obligation to provide physical and programmatic accessibility and reasonable accommodation, as required by section 504 of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended;

(b) To fund repairs, renovations, alterations and capital improvements of property, including:

(1) SESA real property, identified at WIA section 193, using a formula that assesses costs proportionate to space utilized;

(2) JTPA owned property which is transferred to WIA title I programs;

(c) Job Corps facilities, as authorized by WIA section 160(3)(B); and

(d) To fund disaster relief employment on projects for demolition, cleaning, repair, renovation, and reconstruction of damaged and destroyed structures, facilities, and lands located within a disaster area. (WIA sec. 173(d).)

§ 667.262 Are employment generating activities, or similar activities, allowable under WIA title I?

(a) Under WIA section 181(e), WIA title I funds may not be spent on employment generating activities, economic development, and other similar activities, unless they are directly related to training for eligible individuals. For purposes of this section, employer outreach and job development activities are directly related to training for eligible individuals.

(b) These employer outreach and job development activities include:

(1) Contacts with potential employers for the purpose of placement of WIA participants;

(2) Participation in business associations (such as chambers of commerce); joint labor management committees, labor associations, and resource centers;

(3) WIA staff participation on economic development boards and commissions, and work with economic development agencies, to:

(i) Provide information about WIA programs,

(ii) Assist in making informed decisions about community job training needs, and

(iii) Promote the use of first source hiring agreements and enterprise zone vouchering services,

(4) Active participation in local business resource centers (incubators) to provide technical assistance to small and new business to reduce the rate of business failure;

(5) Subscriptions to relevant publications;

(6) General dissemination of information on WIA programs and activities;

(7) The conduct of labor market surveys;

(8) The development of on-the-job training opportunities; and

(9) Other allowable WIA activities in the private sector. (WIA sec. 181(e).)

§ 667.264 What other activities are prohibited under title I of WIA?

(a) WIA title I funds must not be spent on:

(1) The wages of incumbent employees during their participation in economic development activities provided through a Statewide workforce investment system, (WIA sec. 181(b)(1).);

(2) Public service employment, except to provide disaster relief employment, as specifically authorized in section 173(d) of WIA, (WIA sec. 195(10));

(3) Expenses prohibited under any other Federal, State or local law or regulation.

(b) WIA formula funds available to States and local areas under subtitle B, title I of WIA must not be used for foreign travel. (WIA sec. 181(e).)

§ 667.266 What are the limitations related to religious activities?

(a) Limitations related to sectarian activities are set forth at WIA section 188(a)(3) and 29 CFR 37.6(f).

(b)(1) 29 CFR part 2, subpart D governs the circumstances under which DOL support, including WIA Title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* 20 CFR 667.275 and 29 CFR 37.6(f)(1). 29 CFR part 2, subpart D also contains requirements related to equal treatment in Department of Labor programs for religious organizations, and to protecting the religious liberty of Department of Labor social service providers and beneficiaries.

(2) Limitations on the employment of participants under WIA Title I to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place for religious worship are described at 29 CFR 37.6(f)(2).

[65 FR 49421, Aug. 11, 2000, as amended at 69 FR 41891, July 12, 2004]

§ 667.268 What prohibitions apply to the use of WIA title I funds to encourage business relocation?

(a) WIA funds may not be used or proposed to be used for:

(1) The encouragement or inducement of a business, or part of a business, to relocate from any location in the United States, if the relocation results in any employee losing his or her job at the original location;

(2) Customized training, skill training, or on-the-job training or company specific assessments of job applicants or employees of a business or a part of a business that has relocated from any location in the United States, until the company has operated at that location for 120 days, if the relocation has resulted in any employee losing his or her jobs at the original location.

(b) *Pre-award review*. To verify that an establishment which is new or expanding is not, in fact, relocating employment from another area, standardized pre-award review criteria developed by the State must be completed and documented jointly by the local area with the establishment as a prerequisite to WIA assistance.

(1) The review must include names under which the establishment does business, including predecessors and successors in interest; the name, title, and address of the company official certifying the information, and whether WIA assistance is sought in connection with past or impending job losses at other facilities, including a review of whether WARN notices relating to the employer have been filed.

(2) The review may include consultations with labor organizations and others in the affected local area(s). (WIA sec. 181(d).)

§ 667.269 What procedures and sanctions apply to violations of §§ 667.260 through 667.268?

(a) We will promptly review and take appropriate action on alleged violations of the provisions relating to:

(1) Employment generating activities (§ 667.262);

(2) Other prohibited activities (§ 667.264);

(3) The limitation related to sectarian activities (§ 667.266);

(4) The use of WIA title I funds to encourage business relocation (§ 667.268).

(b) Procedures for the investigation and resolution of the violations are provided for under the Grant Officer's resolution process at § 667.510. Sanctions and remedies are provided for under WIA section 184(c) for violations of the provisions relating to:

(1) Construction (§ 667.260);

(2) Employment generating activities (§ 667.262);

(3) Other prohibited activities (§ 667.264); and

(4) The limitation related to sectarian activities (§ 667.266(b)(1)).

(c) Sanctions and remedies are provided for in WIA section 181(d)(3) for violations of § 667.268, which addresses business relocation.

(d) Violations of § 667.266(b)(2) will be handled in accordance with the DOL nondiscrimination regulations implementing WIA section 188, codified at 29 CFR part 37.

§ 667.270 What safeguards are there to ensure that participants in Workforce Investment Act employment and training activities do not displace other employees?

(a) A participant in a program or activity authorized under title I of WIA must not displace (including a partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits) any currently employed employee (as of the date of the participation).

(b) A program or activity authorized under title I of WIA must not impair existing contracts for services or collective bargaining agreements. When a program or activity authorized under title I of WIA would be inconsistent with a collective bargaining agreement, the appropriate labor organization and employer must provide written concurrence before the program or activity begins.

(c) A participant in a program or activity under title I of WIA may not be employed in or assigned to a job if:

(1) Any other individual is on layoff from the same or any substantially equivalent job;

(2) The employer has terminated the employment of any regular, unsubsidized employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the WIA participant; or

(3) The job is created in a promotional line that infringes in any way on the promotional opportunities of currently employed workers.

(d) Regular employees and program participants alleging displacement may file a complaint under the applicable grievance procedures found at § 667.600. (WIA sec. 181.)

§ 667.272 What wage and labor standards apply to participants in activities under title I of WIA?

(a) Individuals in on-the-job training or individuals employed in activities under title I of WIA must be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience and skills. Such rates must be in accordance with applicable law, but may not be less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the applicable State or local minimum wage law.

(b) Individuals in on-the-job training or individuals employed in programs and activities under Title I of WIA must be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work.

(c) Allowances, earnings, and payments to individuals participating in programs under Title I of WIA are not

considered as income for purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or Federally assisted program based on need other than as provided under the Social Security Act (42 U.S.C. 301 *et seq.*). (WIA sec. 181(a)(2).)

§ 667.274 What health and safety standards apply to the working conditions of participants in activities under title I of WIA?

(a) Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees are equally applicable to working conditions of participants engaged in programs and activities under Title I of WIA.

(b)(1) To the extent that a State workers' compensation law applies, workers' compensation must be provided to participants in programs and activities under Title I of WIA on the same basis as the compensation is provided to other individuals in the State in similar employment.

(2) If a State workers' compensation law applies to a participant in work experience, workers' compensation benefits must be available for injuries suffered by the participant in such work experience. If a State workers' compensation law does not apply to a participant in work experience, insurance coverage must be secured for injuries suffered by the participant in the course of such work experience.

§ 667.275 What are a recipient's obligations to ensure nondiscrimination and equal opportunity, and what are a recipient's obligations with respect to religious activities?

(a)(1) Recipients, as defined in 29 CFR 37.4, must comply with the nondiscrimination and equal opportunity provisions of WIA section 188 and its implementing regulations, codified at 29 CFR part 37. Under that definition, the term ''recipients'' includes State and Local Workforce Investment Boards, One-Stop operators, service providers, vendors, and subrecipients, as well as other types of individuals and entitites.

(2) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, are governed by the regulations implementing WIA section 188, codified at 29 CFR part 37, and are administered and enforced by the DOL Civil Rights Center.

(3) As described in § 667.260(a), financial assistance provided under WIA title I may be used to meet a recipient's obligation to provide physical and programmatic accessibility and reasonable accommodation/modification in regard to the WIA program, as required by section 504 of the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act of 1990, as amended, section 188 of WIA, and the regulations implementing these statutory provisions.

(b) 29 CFR part 2, subpart D governs the circumstances under which recipients may use DOL support, including WIA Title I financial assistance, to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms may also be considered indirect. *See also* 20 CFR 667.266 and 29 CFR 37.6(f)(1). 29 CFR part 2, subpart D also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries. Limitations on the employment of participants under WIA Title I to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place of religious worship are described at 29 CFR 37.6(f)(2). *See* section 188(a)(3) of the Workforce Investment Act of 1998, 29 U.S.C. 2938(a)(3).

[65 FR 49421, Aug. 11, 2000, as amended at 69 FR 41891, July 12, 2004]

Subpart C—Reporting Requirements

§ 667.300 What are the reporting requirements for Workforce Investment Act programs?

(a) *General.* All States and other direct grant recipients must report financial, participant, and performance data in accordance with instructions issued by DOL. Required reports must be submitted no more frequently than quarterly within a time period specified in the reporting instructions.

(b) *Subrecipient reporting.* (1) A State or other direct grant recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients. However, the recipient is required to meet the reporting requirements imposed by DOL.

(2) If a State intends to impose different reporting requirements, it must describe those reporting requirements in its State WIA plan.

(c) *Financial reports.* (1) Each grant recipient must submit financial reports.

(2) Reports must include any income or profits earned, including such income or profits earned by subrecipients, and any costs incurred (such as stand-in costs) that are otherwise allowable except for funding limitations. (WIA sec. 185(f)(2))

(3) Reported expenditures and program income, including any profits earned, must be on the accrual basis of accounting and cumulative by fiscal year of appropriation. If the recipient's accounting records are not normally kept on the accrual basis of accounting, the recipient must develop accrual information through an analysis of the documentation on hand.

(d) *Due date.* Financial reports and participant data reports are due no later than 45 days after the end of each quarter unless otherwise specified in reporting instructions. A final financial report is required 90 days after the expiration of a funding period or the termination of grant support.

(e) *Annual performance progress report.* An annual performance progress report for each of the three programs under title I, subpart B is required by WIA section 136(d).

(1) A State failing to submit any of these annual performance progress reports within 45 days of the due date may have its grant (for that program or all title I, subpart B programs) for the succeeding year reduced by as much as five percent, as provided by WIA section 136(g)(1)(B).

(2) States submitting annual performance progress reports that cannot be validated or verified as accurately counting and reporting activities in accordance with the reporting instructions, may be treated as failing to submit annual reports, and be subject to sanction. Sanctions related to State performance or failure to submit these reports timely cannot result in a total grant reduction of more than five percent. Any sanction would be in addition to having to repay the amount of any incentive funds granted based on the invalid report.

Subpart D—Oversight and Monitoring

§ 667.400 Who is responsible for oversight and monitoring of WIA title I grants?

(a) The Secretary is authorized to monitor all recipients and subrecipients of all grants awarded and funds expended under WIA title I to determine compliance with the Act and the WIA regulations, and may investigate any matter deemed necessary to determine such compliance. Federal oversight will be conducted primarily at the recipient level.

(b) In each fiscal year, we will also conduct in-depth reviews in several States, including financial and performance audits, to assure that funds are spent in accordance with the Act. Priority for such in-depth reviews will be given to States not meeting annual adjusted levels of performance.

(c)(1) Each recipient and subrecipient must continuously monitor grant-supported activities in accordance with the uniform administrative requirements at 29 CFR parts 95 and 97, as applicable, including the applicable cost principles indicated at 29 CFR 97.22(b) or 29 CFR 95.27, for all entities receiving WIA title I funds. For governmental units, the applicable requirements are at 29 CFR part 97. For non-

profit organizations, the applicable requirements are at 29 CFR part 95.

(2) In the case of grants under WIA sections 127 and 132, the Governor must develop a State monitoring system that meets the requirements of § 667.410(b). The Governor must monitor Local Boards annually for compliance with applicable laws and regulations in accordance with the State monitoring system. Monitoring must include an annual review of each local area's compliance with the uniform administrative requirements.

§ 667.410 What are the oversight roles and responsibilities of recipients and subrecipients?

(a) *Roles and responsibilities for all recipients and subrecipients of funds under WIA title I in general.* Each recipient and subrecipient must conduct regular oversight and monitoring of its WIA activities and those of its subrecipients and contractors in order to:

(1) Determine that expenditures have been made against the cost categories and within the cost limitations specified in the Act and the regulations in this part;

(2) Determine whether or not there is compliance with other provisions of the Act and the WIA regulations and other applicable laws and regulations; and

(3) Provide technical assistance as necessary and appropriate.

(b) *State roles and responsibilities for grants under WIA sections 127 and 132.* (1) The Governor is responsible for the development of the State monitoring system. The Governor must be able to demonstrate, through a monitoring plan or otherwise, that the State monitoring system meets the requirements of paragraph (b)(2) of this section.

(2) The State monitoring system must:

(i) Provide for annual on-site monitoring reviews of local areas' compliance with DOL uniform administrative requirements, as required by WIA section 184(a)(4);

(ii) Ensure that established policies to achieve program quality and outcomes meet the objectives of the Act and the WIA regulations, including policies relating to: the provision of services by One-Stop Centers; eligible providers of training services; and eligible providers of youth activities;

(iii) Enable the Governor to determine if subrecipients and contractors have demonstrated substantial compliance with WIA requirements; and

(iv) Enable the Governor to determine whether a local plan will be disapproved for failure to make acceptable progress in addressing deficiencies, as required in WIA section 118(d)(1).

(v) Enable the Governor to ensure compliance with the nondiscrimination and equal opportunity requirements of WIA section 188 and 29 CFR part 37. Requirements for these aspects of the monitoring system are set forth in 29 CFR 37.54(d)(2)(ii).

(3) The State must conduct an annual on-site monitoring review of each local area's compliance with DOL uniform administrative requirements, including the appropriate administrative requirements for subrecipients and the applicable cost principles indicated at § 667.200 for all entities receiving WIA title I funds.

(4) The Governor must require that prompt corrective action be taken if any substantial violation of standards identified in paragraphs (b) (2) or (3) of this section is found. (WIA sec. 184(a)(5).)

(5) The Governor must impose the sanctions provided in WIA section 184 (b) and (c) in the event of a subrecipient's failure to take required corrective action required under paragraph (b)(4) of this section.

(6) The Governor may issue additional requirements and instructions to subrecipients on monitoring activities.

(7) The Governor must certify to the Secretary every two years that:

(i) The State has implemented uniform administrative requirements;

(ii) The State has monitored local areas to ensure compliance with uniform administrative requirements; and

(iii) The State has taken appropriate corrective action to secure such compliance. (WIA sec. 184(a)(6)(A), (B), and (C).)

Subpart E—Resolution of Findings From Monitoring and Oversight Reviews

§ 667.500 What procedures apply to the resolution of findings arising from audits, investigations, monitoring and oversight reviews?

(a) *Resolution of subrecipient-level findings.* (1) The Governor is responsible for resolving findings that arise from the State's monitoring reviews, investigations and audits (including OMB Circular A–133 audits) of subrecipients.

(2) A State must utilize the audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.

(3) If a State does not have such procedures, it must prescribe standards and procedures to be used for this grant program.

(b) *Resolution of State and other direct recipient level findings.* (1) The Secretary is responsible for resolving findings that arise from Federal audits, monitoring reviews, investigations, incident reports, and recipient level OMB Circular A–133 audits.

(2) The Secretary uses the DOL audit resolution process, consistent with the Single Audit Act of 1996 and OMB Circular A–133, and Grant Officer Resolution provisions of § 667.510, as appropriate.

(3) A final determination issued by a Grant Officer under this process may be appealed to the DOL Office of Administrative Law Judges under the procedures at § 667.800.

(c) *Resolution of nondiscrimination findings.* Findings arising from investigations or reviews conducted under nondiscrimination laws will be resolved in accordance with WIA section 188 and the Department of Labor nondiscrimination regulations implementing WIA section 188, codified at 29 CFR part 37.

§ 667.505 How do we resolve investigative and monitoring findings?

(a) As a result of an investigation, on-site visit or other monitoring, we notify the recipient of the findings of the investigation and gives the recipient a period of time (not more than 60 days) to comment and to take appropriate corrective actions.

(b) The Grant Officer reviews the complete file of the investigation or monitoring report and the recipient's actions under paragraph (a) of this section. The Grant Officer's review takes into account the sanction provisions of WIA section 184(b) and (c). If the Grant Officer agrees with the recipient's handling of the situation, the Grant Officer so notifies the recipient. This notification constitutes final agency action.

(c) If the Grant Officer disagrees with the recipient's handling of the matter, the Grant Officer proceeds under § 667.510.

§ 667.510 What is the Grant Officer resolution process?

(a) *General.* When the Grant Officer is dissatisfied with the State's disposition of an audit or other resolution of violations (including those arising out of incident reports or compliance reviews), or with the recipient's response to findings resulting from investigations or monitoring report, the initial and final determination process, set forth in this section, is used to resolve the matter.

(b) *Initial determination.* The Grant Officer makes an initial determination on the findings for both those matters where there is agreement and those where there is disagreement with the recipient's resolution, including the allowability of questioned costs or activities. This initial determination is based upon the requirements of the Act and regulations, and the terms and conditions of the grants, contracts, or other agreements under the Act.

(c) *Informal resolution.* Except in an emergency situation, when the Secretary invokes the authority described in WIA section 184(e), the Grant Officer may not revoke a recipient's grant in whole or in part, nor institute corrective actions or sanctions, without first providing the recipient with an opportunity to present documentation or arguments to resolve informally those matters in controversy contained in the initial determination. The initial determination must provide for an informal resolution period of at least 60 days from issuance of the initial determination. If the matters are resolved informally, the Grant Officer must

issue a final determination under paragraph (d) of this section which notifies the parties in writing of the nature of the resolution and may close the file.

(d) *Grant Officer's final determination.* (1) If the matter is not fully resolved informally, the Grant Officer provides each party with a written final determination by certified mail, return receipt requested. For audits of recipient-level entities and other recipients which receive WIA funds directly from DOL, ordinarily, the final determination is issued not later than 180 days from the date that the Office of Inspector General (OIG) issues the final approved audit report to the Employment and Training Administration. For audits of subrecipients conducted by the OIG, ordinarily the final determination is issued not later than 360 days from the date the OIG issues the final approved audit report to ETA.

(2) A final determination under this paragraph (d) must:

(i) Indicate whether efforts to informally resolve matters contained in the initial determination have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set forth in the initial determination and the rationale for such modifications;

(iv) Establish a debt, if appropriate;

(v) Require corrective action, when needed;

(vi) Determine liability, method of restitution of funds and sanctions; and

(vii) Offer an opportunity for a hearing in accordance with § 667.800 of this part.

(3) Unless a hearing is requested, a final determination under this paragraph (d) is final agency action and is not subject to further review.

(e) Nothing in this subpart precludes the Grant Officer from issuing an initial determination and/or final determination directly to a subrecipient, in accordance with section 184(d)(3) of the Act. In such a case, the Grant Officer will inform the recipient of this action.

Subpart F—Grievance Procedures, Complaints, and State Appeals Processes

§ 667.600 What local area, State and direct recipient grievance procedures must be established?

(a) Each local area, State and direct recipient of funds under title I of WIA, except for Job Corps, must establish and maintain a procedure for grievances and complaints according to the requirements of this section. The grievance procedure requirements applicable to Job Corps are set forth at 20 CFR 670.990.

(b) Each local area, State, and direct recipient must:

(1) Provide information about the content of the grievance and complaint procedures required by this section to participants and other interested parties affected by the local Workforce Investment System, including One-Stop partners and service providers;

(2) Require that every entity to which it awards Title I funds must provide the information referred to in paragraph (b)(1) of this section to participants receiving Title I-funded services from such entities; and

(3) Must make reasonable efforts to assure that the information referred to in paragraph (b)(1) of this section will be understood by affected participants and other individuals, including youth and those who are limited-English speaking individuals. Such efforts must comply with the language requirements of 29 CFR 37.35 regarding the provision of services and information in languages other than English.

(c) Local area procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the local Workforce Investment System, including One-Stop partners and service providers;

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint;

(3) A process which allows an individual alleging a labor standards violation to submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the

parties to the grievance so provides; and

(4) An opportunity for a local level appeal to a State entity when:

(i) No decision is reached within 60 days; or

(ii) Either party is dissatisfied with the local hearing decision.

(d) State procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the Statewide Workforce Investment programs;

(2) A process for resolving appeals made under paragraph (c)(4) of this section;

(3) A process for remanding grievances and complaints related to the local Workforce Investment Act programs to the local area grievance process; and

(4) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint.

(e) Procedures of direct recipients must provide:

(1) A process for dealing with grievance and complaints from participants and other interested parties affected by the recipient's Workforce Investment Act programs; and

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint.

(f) The remedies that may be imposed under local, State and direct recipient grievance procedures are enumerated at WIA section 181(c)(3).

(g)(1) The provisions of this section on grievance procedures do not apply to discrimination complaints brought under WIA section 188 and/or 29 CFR part 37. Such complaints must be handled in accordance with the procedures set forth in that regulatory part.

(2) Questions about or complaints alleging a violation of the nondiscrimination provisions of WIA section 188 may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N4123, 200 Constitution Avenue, NW, Washington, D.C. 20210, for processing.

(h) Nothing in this subpart precludes a grievant or complainant from pursuing a remedy authorized under another Federal, State or local law.

§ 667.610 What processes do we use to review State and local grievances and complaints?

(a) We investigate allegations arising through the grievance procedures described in § 667.600 when:

(1) A decision on a grievance or complaint under § 667.600(d) has not been reached within 60 days of receipt of the grievance or complaint or within 60 days of receipt of the request for appeal of a local level grievance and either party appeals to the Secretary; or

(2) A decision on a grievance or complaint under § 667.600(d) has been reached and the party to which such decision is adverse appeals to the Secretary.

(b) We must make a final decision on an appeal under paragraph (a) of this section no later than 120 days after receiving the appeal.

(c) Appeals made under paragraph (a)(2) of this section must be filed within 60 days of the receipt of the decision being appealed. Appeals made under paragraph (a)(1) of this section must be filed within 120 days of the filing of the grievance with the State, or the filing of the appeal of a local grievance with the State. All appeals must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the appropriate ETA Regional Administrator and the opposing party.

(d) Except for complaints arising under WIA section 184(f) or section 188, grievances or complaints made directly to the Secretary will be referred to the appropriate State or local area for resolution in accordance with this section, unless we notify the parties that the Department of Labor will investigate the grievance under the procedures at § 667.505. Discrimination complaints brought under WIA section 188 or 29 CFR part 37 will be referred to the Director of the Civil Rights Center.

§ 667.630 How are complaints and reports of criminal fraud and abuse addressed under WIA?

Information and complaints involving criminal fraud, waste, abuse or other criminal activity must be reported immediately through the Department's Incident Reporting System to the DOL Office of Inspector General, Office of Investigations, Room S5514, 200 Constitution Avenue NW., Washington, D.C. 20210, or to the corresponding Regional Inspector General for Investigations, with a copy simultaneously provided to the Employment and Training Administration. The Hotline number is 1–800–347–3756. Complaints of a non-criminal nature are handled under the procedures set forth in § 667.505 or through the Department's Incident Reporting System.

§ 667.640 What additional appeal processes or systems must a State have for the WIA program?

(a) *Non-designation of local areas:* (1) The State must establish, and include in its State Plan, due process procedures which provide expeditious appeal to the State Board for a unit or combination of units of general local government or a rural concentrated employment program grant recipient (as described at WIA section 116(a)(2)(B)) that requests, but is not granted, automatic or temporary and subsequent designation as a local workforce investment area under WIA section 116(a)(2) or 116(a)(3).

(2) These procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) If the appeal to the State Board does not result in designation, the appellant may request review by the Secretary under § 667.645.

(4) If the Secretary determines that the appellant was not accorded procedural rights under the appeal process established in paragraph (a)(1) of this section, or that the area meets the requirements for designation at WIA section 116(a)(2) or 116(a)(3), the Secretary may require that the area be designated as a workforce investment area.

(b) *Denial or termination of eligibility as a training provider*. (1) A State must establish procedures which allow providers of training services the opportunity to appeal:

(i) Denial of eligibility by a Local Board or the designated State agency under WIA section 122 (b), (c) or (e);

(ii) Termination of eligibility or other action by a Local Board or State agency under WIA section 122(f); or

(iii) Denial of eligibility as a provider of on-the-job training (OJT) or customized training by a One-Stop operator under WIA section 122(h).

(2) Such procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) A decision under this State appeal process may not be appealed to the Secretary.

(c) *Testing and sanctioning for use of controlled substances*. (1) A State must establish due process procedures which provide expeditious appeal for:

(i) WIA participants subject to testing for use of controlled substances, imposed under a State policy established under WIA section 181(f); and

(ii) WIA participants who are sanctioned after testing positive for the use of controlled substances, under the policy described in paragraph (c)(1)(i) of this section.

(2) A decision under this State appeal process may not be appealed to the Secretary.

§ 667.645 What procedures apply to the appeals of non-designation of local areas?

(a) A unit or combination of units of general local government or rural concentrated employment program grant recipient (as described in WIA section 116(a)(2)(B)) whose appeal of the denial of a request for automatic or temporary and subsequent designation as a local workforce investment area to the State Board has not resulted in designation may appeal the denial of local area designation to the Secretary.

(b) Appeals made under paragraph (a) of this section must be filed no later than 30 days after receipt of written notification of the denial from the State Board, and must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210,

Attention: ASET. A copy of the appeal must be simultaneously provided to the State Board.

(c) The appellant must establish that it was not accorded procedural rights under the appeal process set forth in the State Plan, or establish that it meets the requirements for designation in WIA section 116(a)(2) or (a)(3). The Secretary may consider any comments submitted in response by the State Board.

(d) If the Secretary determines that the appellant has met its burden of establishing that it was not accorded procedural rights under the appeal process set forth in the State Plan, or that it meets the requirements for designation in WIA section 116(a)(2) or (a)(3), the Secretary may require that the area be designated as a local workforce investment area.

(e) The Secretary must issue a written decision to the Governor and the appellant.

§ 667.650 What procedures apply to the appeals of the Governor's imposition of sanctions for substantial violations or performance failures by a local area?

(a) A local area which has been found in substantial violation of WIA title I, and has received notice from the Governor that either all or part of the local plan will be revoked or that a reorganization will occur, may appeal such sanctions to the Secretary under WIA section 184(b). The sanctions do not become effective until:

(1) The time for appeal has expired; or

(2) The Secretary has issued a decision.

(b) A local area which has failed to meet local performance measures for two consecutive years, and has received the Governor's notice of intent to impose a reorganization plan, may appeal such sanctions to the Secretary under WIA section 136(h)(1)(B).

(c) Appeals made under paragraph (a) or (b) of this section must be filed no later than 30 days after receipt of written notification of the revoked plan or imposed reorganization, and must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the Governor.

(d) The Secretary may consider any comments submitted in response by the Governor.

(e) The Secretary will notify the Governor and the appellant in writing of the Secretary's decision under paragraph (a) of this section within 45 days after receipt of the appeal. The Secretary will notify the Governor and the appellant in writing of the Secretary's decision under paragraph (b) of this section within 30 days after receipt of the appeal.

Subpart G—Sanctions, Corrective Actions, and Waiver of Liability

§ 667.700 What procedure do we use to impose sanctions and corrective actions on recipients and subrecipients of WIA grant funds?

(a)(1) Except for actions under WIA section 188(a) or 29 CFR part 37 (relating to nondiscrimination requirements), the Grant Officer uses the initial and final determination procedures outlined in § 667.510 to impose a sanction or corrective action.

(2) To impose a sanction or corrective action for a violation of WIA section 188(a) or 29 CFR part 37, the Department will use the procedures set forth in that regulatory part.

(b) To impose a sanction or corrective action for noncompliance with the uniform administrative requirements set forth at section 184(a)(3) of WIA, and § 667.200(a), when the Grant Officer determines that the Governor has not taken corrective action to remedy the violation as required by WIA section 184(a)(5), the Grant Officer, under the authority of WIA section 184(a)(7) and § 667.710(c), must require the Governor to impose any of the corrective actions set forth at WIA section 184(b)(1). If the Governor fails to impose the corrective actions required by the Grant Officer, the Secretary may immediately suspend or terminate financial assistance in accordance with WIA section 184(e).

(c) For substantial violations of WIA statutory and regulatory requirements, if the Governor fails to promptly take the actions specified in WIA section 184(b)(1), the Grant Officer may impose

such actions directly against the local area.

(d) The Grant Officer may also impose a sanction directly against a subrecipient, as authorized in section 184(d)(3) of the Act. In such a case, the Grant Officer will inform the recipient of the action.

§ 667.705 Who is responsible for funds provided under title I of WIA?

(a) The recipient is responsible for all funds under its grant(s).

(b) The political jurisdiction(s) of the chief elected official(s) in a local workforce investment area is liable for any misuse of the WIA grant funds allocated to the local area under WIA sections 128 and 133, unless the chief elected official(s) reaches an agreement with the Governor to bear such liability.

(c) When a local workforce area is composed of more than one unit of general local government, the liability of the individual jurisdictions must be specified in a written agreement between the chief elected officials.

§ 667.710 What actions are required to address the failure of a local area to comply with the applicable uniform administrative provisions?

(a) If, as part of the annual on-site monitoring of local areas, the Governor determines that a local area is not in compliance with the uniform administrative requirements found at 29 CFR part 95 or part 97, as appropriate, the Governor must:

(1) Require corrective action to secure prompt compliance; and

(2) Impose the sanctions provided for at section 184(b) if the Governor finds that the local area has failed to take timely corrective action.

(b) An action by the recipient to impose a sanction against a local area, in accordance with this section, may be appealed to the Secretary in accordance with § 667.650, and will not become effective until:

(1) The time for appeal has expired; or

(2) The Secretary has issued a decision.

(c)(1) If the Secretary finds that the Governor has failed to monitor and certify compliance of local areas with the administrative requirements, under WIA section 184(a), or that the Governor has failed to promptly take the actions required upon a determination under paragraph (a) of this section that a local area is not in compliance with the uniform administrative requirements, the Secretary will require the Governor to take corrective actions against the State recipient or the local area, as appropriate to ensure prompt compliance.

(2) If the Governor fails to take the corrective actions required by the Secretary under paragraph (c)(1) of this section, the Secretary may immediately suspend or terminate financial assistance under WIA section 184(e).

§ 667.720 How do we handle a recipient's request for waiver of liability under WIA section 184(d)(2)?

(a) A recipient may request a waiver of liability, as described in WIA section 184(d)(2), and a Grant Officer may approve such a waiver under WIA section 184(d)(3).

(b)(1) When the debt for which a waiver of liability is desired was established in a non-Federal resolution proceeding, the resolution report must accompany the waiver request.

(2) When the waiver request is made during the ETA Grant Officer resolution process, the request must be made during the informal resolution period described in § 667.510(c).

(c) A waiver of the recipient's liability shall be considered by the Grant Officer only when:

(1) The misexpenditure of WIA funds occurred at a subrecipient's level;

(2) The misexpenditure was not due to willful disregard of the requirements of title I of the Act, gross negligence, failure to observe accepted standards of administration, or did not constitute fraud;

(3) If fraud did exist, it was perpetrated against the recipient/subrecipients; and

(i) The recipient/subrecipients discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(ii) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(4) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(5) The recipient requests such a waiver and provides documentation to demonstrate that it has substantially complied with the requirements of section 184(d)(2) of the Act, and this section.

(d) The recipient will not be released from liability for misspent funds under the determination required by section 184(d) of the Act unless the Grant Officer determines that further collection action, either by the recipient or subrecipients, would be inappropriate or would prove futile.

§ 667.730 What is the procedure to handle a recipient's request for advance approval of contemplated corrective actions?

(a) The recipient may request advance approval from the Grant Officer for contemplated corrective actions, including debt collection actions, which the recipient plans to initiate or to forego. The recipient's request must include a description and an assessment of all actions taken by the subrecipients to collect the misspent funds.

(b) Based on the recipient's request, the Grant Officer may determine that the recipient may forego certain collection actions against a subrecipient when:

(1) The subrecipient meets the criteria set forth in section 184(d)(2) of the Act;

(2) The misexpenditure of funds:

(i) Was not made by that subrecipient but by an entity that received WIA funds from that subrecipient;

(ii) Was not a violation of section 184(d)(1) of the Act, and did not constitute fraud; or

(iii) If fraud did exist,

(A) It was perpetrated against the subrecipient; and:

(B) The subrecipient discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(C) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(3) A final determination which disallows the misexpenditure and establishes a debt has been issued at the appropriate level;

(4) Final action within the recipient's appeal system has been completed; and

(5) Further debt collection action by that subrecipient or the recipient would be either inappropriate or futile.

§ 667.740 What procedure must be used for administering the offset/deduction provisions at section 184(c) of the Act?

(a)(1) For recipient level misexpenditures, we may determine that a debt, or a portion thereof, may be offset against amounts that are allotted to the recipient. Recipients must submit a written request for an offset to the Grant Officer. Generally, we will apply the offset against amounts that are available at the recipient level for administrative costs.

(2) The Grant Officer may approve an offset request, under paragraph (a)(1) of this section, if the misexpenditures were not due to willful disregard of the requirements of the Act and regulations, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure.

(b) For subrecipient level misexpenditures that were not due to willful disregard of the requirements of the Act and regulations, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure, if we have required the State to repay such amount the State may deduct an amount equal to the misexpenditure from its subsequent year's allocations to the local area from funds available for the administrative costs of the local programs involved.

(c) If offset is granted, the debt will not be fully satisfied until the Grant Officer reduces amounts allotted to the State by the amount of the misexpenditure.

(d) A State may not make a deduction under paragraph (b) of this section until the State has taken appropriate corrective action to ensure full compliance within the local area with regard

to appropriate expenditure of WIA funds.

Subpart H—Administrative Adjudication and Judicial Review

§ 667.800 What actions of the Department may be appealed to the Office of Administrative Law Judges?

(a) An applicant for financial assistance under title I of WIA which is dissatisfied because we have issued a determination not to award financial assistance, in whole or in part, to such applicant; or a recipient, subrecipient, or a vendor against which the Grant Officer has directly imposed a sanction or corrective action, including a sanction against a State under 20 CFR part 666, may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ) within 21 days of receipt of the final determination.

(b) Failure to request a hearing within 21 days of receipt of the final determination constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this subpart must state specifically those issues in the final determination upon which review is requested. Those provisions of the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review. Only alleged violations of the Act, its regulations, grant or other agreement under the Act fairly raised in the determination, and the request for hearing are subject to review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400, 800 K Street, NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The procedures in this subpart apply in the case of a complainant who has not had a dispute adjudicated under the alternative dispute resolution process set forth in § 667.840 within the 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period provided in § 667.840. In addition to including the final determination upon which review is requested, the complainant must include a copy of any Stipulation of Facts and a brief summary of proceedings.

§ 667.810 What rules of procedure apply to hearings conducted under this subpart?

(a) *Rules of practice and procedure.* The rules of practice and procedure promulgated by the OALJ at subpart A of 29 CFR part 18, govern the conduct of hearings under this subpart. However, a request for hearing under this subpart is not considered a complaint to which the filing of an answer by DOL or a DOL agency or official is required. Technical rules of evidence will not apply to hearings conducted pursuant to this part. However, rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination will apply.

(b) *Prehearing procedures.* In all cases, the Administrative Law Judge (ALJ) should encourage the use of prehearing procedures to simplify and clarify facts and issues.

(c) *Subpoenas.* Subpoenas necessary to secure the attendance of witnesses and the production of documents or other items at hearings must be obtained from the ALJ and must be issued under the authority contained in section 183(c) of the Act, incorporating 15 U.S.C. 49.

(d) *Timely submission of evidence.* The ALJ must not permit the introduction at the hearing of any documentation if it has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least 3 weeks prior to the hearing date.

(e) *Burden of production.* The Grant Officer has the burden of production to support her or his decision. To this end, the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.

§ 667.820 What authority does the Administrative Law Judge have in ordering relief as an outcome of an administrative hearing?

In ordering relief, the ALJ has the full authority of the Secretary under the Act.

§ 667.825 What special rules apply to reviews of NFJP and WIA INA grant selections?

(a) An applicant whose application for funding as a WIA INA grantee under 20 CFR part 668 or as an NFJP grantee under 20 CFR part 669 is denied in whole or in part may request an administrative review under § 667.800(a) with to determine whether there is a basis in the record to support the decision. This appeal will not in any way interfere with the designation and funding of another organization to serve the area in question during the appeal period. The available remedy in such an appeal is the right to be designated in the future as the WIA INA or NFJP grantee for the remainder of the current grant cycle. Neither retroactive nor immediately effective selection status may be awarded as relief in a non-selection appeal under this section.

(b) If the ALJ rules that the organization should have been selected and the organization continues to meet the requirements of 20 CFR part 668 or part 669, we will select and fund the organization within 90 days of the ALJ's decision unless the end of the 90-day period is within six (6) months of the end of the funding period. An applicant so selected is not entitled to the full grant amount, but will only receive the funds remaining in the grant that have not been expended by the current grantee through its operation of the grant and its subsequent closeout.

(c) Any organization selected and/or funded as a WIA INA or NFJP grantee is subject to being removed as grantee in the event an ALJ decision so orders. The Grant Officer provides instructions on transition and close-out to a grantee which is removed. All parties must agree to the provisions of this paragraph as a condition for WIA INA or NFJP funding.

(d) A successful appellant which has not been awarded relief because of the application of paragraph (b) of this section is eligible to compete for funds in the immediately subsequent two-year grant cycle. In such a situation, we will not issue a waiver of competition and for the area and will select a grantee through the normal competitive process.

§ 667.830 When will the Administrative Law Judge issue a decision?

(a) The ALJ should render a written decision not later than 90 days after the closing of the record.

(b) The decision of the ALJ constitutes final agency action unless, within 20 days of the decision, a party dissatisfied with the ALJ's decision has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 2–96), specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged is deemed to have been waived. A copy of the petition for review must be sent to the opposing party at that time. Thereafter, the decision of the ALJ constitutes final agency action unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

§ 667.840 Is there an alternative dispute resolution process that may be used in place of an OALJ hearing?

(a) Parties to a complaint which has been filed according to the requirements of § 667.800 may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) The waiver of the right to request a hearing before the OALJ will automatically be revoked if a settlement has not been reached or a decision has

not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as a final decision of an Administrative Law Judge under section 186(b) of the Act.

§ 667.850 Is there judicial review of a final order of the Secretary issued under section 186 of the Act?

(a) Any party to a proceeding which resulted in a Secretary's final order under section 186 of the Act may obtain a review in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days of the issuance of the Secretary's final order.

(b) The court has jurisdiction to make and enter a decree affirming, modifying, or setting aside the order of the Secretary, in whole or in part.

(c) No objection to the Secretary's order may be considered by the court unless the objection was specifically urged, in a timely manner, before the Secretary. The review is limited to questions of law, and the findings of fact of the Secretary are conclusive if supported by substantial evidence.

(d) The judgment of the court is final, subject to certiorari review by the United States Supreme Court.

§ 667.860 Are there other remedies available outside of the Act?

Nothing contained in this subpart prejudices the separate exercise of other legal rights in pursuit of remedies and sanctions available outside the Act.

PART 668—INDIAN AND NATIVE AMERICAN PROGRAMS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.
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AUTHORITY: Secs. 506(c) and 166(h)(2), Pub. L. 105–220; 20 U.S.C. 9276(c); 29 U.S.C. 2911(h)(2).

SOURCE: 65 FR 49435, Aug. 11, 2000, unless otherwise noted.

Subpart A—Purposes and Policies

§ 668.100 What is the purpose of the programs established to serve Native American peoples (INA programs) under section 166 of the Workforce Investment Act?

(a) The purpose of WIA INA programs is to support comprehensive employment and training activities for Indian, Alaska Native and Native Hawaiian individuals in order to:

(1) Develop more fully their academic, occupational, and literacy skills;

(2) Make them more competitive in the workforce;

(3) Promote the economic and social development of Indian, Alaska Native, and Native Hawaiian communities according to the goals and values of such communities; and

(4) Help them achieve personal and economic self-sufficiency.

(b) The principal means of accomplishing these purposes is to enable

tribes and Native American organizations to provide employment and training services to Native American peoples and their communities. Services should be provided in a culturally appropriate manner, consistent with the principles of Indian self-determination. (WIA sec. 166(a)(1).)

§ 668.120 How must INA programs be administered?

(a) We will administer INA programs to maximize the Federal commitment to support the growth and development of Native American people and communities as determined by representatives of such communities.

(b) In administering these programs, we will observe the Congressional declaration of policy set forth in the Indian Self-Determination and Education Assistance Act, at 25 U.S.C. section 450a, as well as the Department of Labor's ''American Indian and Alaska Native Policy,'' dated July 29, 1998.

(c) The regulations in this part are not intended to abrogate the trust responsibilities of the Federal Government to Native American bands, tribes, or groups in any way.

(d) We will administer INA programs through a single organizational unit and consistent with the requirements in section 166(h) of the Act. We have designated the Division of Indian and Native American Programs (DINAP) within the Employment and Training Administration (ETA) as this single organizational unit required by WIA section 166(h)(1).

(e) We will establish and maintain administrative procedures for the selection, administration, monitoring, and evaluation of Native American employment and training programs authorized under this Act. We will utilize staff who have a particular competence in this field to administer these programs. (WIA sec. 166(h).)

§ 668.130 What obligation do we have to consult with the INA grantee community in developing rules, regulations, and standards of accountability for INA programs?

We will consult with the Native American grantee community as a full partner in developing policies for the INA programs. We will actively seek and consider the views of all INA grantees, and will discuss options with the grantee community prior to establishing policies and program regulations. The primary consultation vehicle is the Native American Employment and Training Council. (WIA sec. 166(h)(2).)

§ 668.140 What WIA regulations apply to the INA program?

(a) The regulations found in this subpart.

(b) The general administrative requirements found in 20 CFR part 667, including the regulations concerning Complaints, Investigations and Hearings found at 20 CFR part 667, subpart E through subpart H.

(c) The Department's regulations codifying the common rules implementing Office of Management and Budget (OMB) Circulars which generally apply to Federal programs carried out by Indian tribal governments and nonprofit organizations, at 29 CFR parts 95, 96, 97, and 99 as applicable.

(d) The Department's regulations at 29 CFR part 37, which implement the nondiscrimination provisions of WIA section 188, apply to recipients of financial assistance under WIA section 166.

§ 668.150 What definitions apply to terms used in the regulations in this part?

In addition to the definitions found in WIA sections 101 and 166 and 20 CFR 660.300, the following definitions apply:

DINAP means the Division of Indian and Native American Programs within the Employment and Training Administration of the Department.

Governing body means a body of representatives who are duly elected, appointed by duly elected officials, or selected according to traditional tribal means. A governing body must have the authority to provide services to and to enter into grants on behalf of the organization that selected or designated it.

Grant Officer means a Department of Labor official authorized to obligate Federal funds. Indian or Native American (INA) *Grantee* means an entity which is formally designated under subpart B of this part to operate an

INA program and which has a grant agreement under § 668.292.

NEW means the Native Employment Works Program, the tribal work program authorized under section 412(a)(2) of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act (Public Law 104–193).

Underemployed means an individual who is working part time but desires full time employment, or who is working in employment not commensurate with the individual's demonstrated level of educational and/or skill achievement.

Subpart B—Service Delivery Systems Applicable to Section 166 Programs

§ 668.200 What are the requirements for designation as an "Indian or Native American (INA) grantee"?

(a) To be designated as an INA grantee, an entity must have:

(1) A legal status as a government or as an agency of a government, private non-profit corporation, or a consortium which contains at least one of these entities;

(2) The ability to administer INA program funds, as defined at § 668.220; and

(3) A new (non-incumbent) entity must have a population within the designated geographic service area which would provide funding under the funding formula found at § 668.296(b) in the amount of at least $100,000, including any amounts received for supplemental youth services under the funding formula at § 668.440(a). Incumbent grantees which do not meet this dollar threshold for Program Year (PY) 2000 and beyond will be grandfathered in. We will make an exception for grantees wishing to participate in the demonstration program under Public Law 102–477 if all resources to be consolidated under the Public Law 102–477 plan total at least $100,000, with at least $20,000 derived from section 166 funds as determined by the most recent Census data. Exceptions to this $20,000 limit may be made for those entities which are close to the limit and which have demonstrated the capacity to administer Federal funds and operate a successful employment and training program.

(b) To be designated as a Native American grantee, a consortium or its members must meet the requirements of paragraph (a) of this section and must:

(1) Be in close proximity to one another, but they may operate in more than one State;

(2) Have an administrative unit legally authorized to run the program and to commit the other members to contracts, grants, and other legally-binding agreements; and

(3) Be jointly and individually responsible for the actions and obligations of the consortium, including debts.

(c) Entities potentially eligible for designation under paragraph (a)(1) or (b)(1) of this section are:

(1) Federally-recognized Indian tribes;

(2) Tribal organizations, as defined in 25 U.S.C. 450b;

(3) Alaska Native-controlled organizations representing regional or village areas, as defined in the Alaska Native Claims Settlement Act;

(4) Native Hawaiian-controlled entities;

(5) Native American-controlled organizations serving Indians; and

(6) Consortia of eligible entities which individually meets the legal requirements for a consortium described in paragraph (c) of this section.

(d) Under WIA section 166(d)(2)(B), individuals who were eligible to participate under section 401 of JTPA on August 6, 1998, remain eligible to participate under section 166 of WIA. State-recognized tribal organizations serving such individuals are considered to be ''Native American controlled'' for WIA section 166 purposes.

§ 668.210 What priority for designation is given to eligible organizations?

(a) Federally-recognized Indian tribes, Alaska Native entities, or consortia that include a tribe or entity will have the highest priority for designation. To be designated, the organizations must meet the requirements in this subpart. These organizations will be designated for those geographic areas and/or populations over which

they have legal jurisdiction. (WIA sec. 166(c)(1).)

(b) If we decide not to designate Indian tribes or Alaska Native entities to serve their service areas, we will enter into arrangements to provide services with entities which the tribes or Alaska Native entities involved approve.

(c) In geographic areas not served by Indian tribes or Alaska Native entities, entities with a Native American-controlled governing body and which are representative of the Native American community or communities involved will have priority for designation.

§ 668.220 What is meant by the "ability to administer funds" for designation purposes?

An organization has the ''ability to administer funds'' if it:

(a) Is in compliance with Departmental debt management procedures, if applicable;

(b) Has not been found guilty of fraud or criminal activity which would affect the entity's ability to safeguard Federal funds or deliver program services;

(c) Can demonstrate that it has or can acquire the necessary program and financial management personnel to safeguard Federal funds and effectively deliver program services; and

(d) Can demonstrate that it has successfully carried out, or has the capacity to successfully carry out activities that will strengthen the ability of the individuals served to obtain or retain unsubsidized employment.

§ 668.230 How will we determine an entity's "ability to administer funds"?

(a) Before determining which entity to designate for a particular service area, we will conduct a review of the entity's ability to administer funds.

(b) The review for an entity that has served as a grantee in either of the two designation periods before the one under consideration, also will consider the extent of compliance with the WIA regulations. Evidence of the ability to administer funds may be established by a satisfactory Federal audit record. It may also be established by a recent record showing substantial compliance with Federal record keeping, reporting, program performance standards, or similar standards imposed on grantees by this or other public sector supported programs.

(c) For other entities, the review includes the experience of the entity's management in administering funds for services to Native American people. This review also includes an assessment of the relationship between the entity and the Native American community or communities to be served.

[65 FR 49435, Aug. 11, 2000, as amended at 71 FR 35524, June 21, 2006]

§ 668.240 What is the process for applying for designation as an INA grantee?

(a) Every entity seeking designation must submit a Notice of Intent (NOI) which complies with the requirements of the Solicitation for Grant Application (SGA). An SGA will be issued every two years, covering all areas except for those for which competition is waived for the incumbent grantee under WIA section 166(c)(2).

(b) NOI's must be submitted to the Chief of DINAP, bearing a U.S. Postal Service postmark indicating its submission no later than October 1st of the year which precedes the first year of a new designation cycle (unless the SGA provides a later date). For NOI's received after October 1, only a timely official U.S. Postal Service postmark is acceptable as proof of timely submission. Dates indicating submission by private express delivery services or metered mail are unacceptable as proof of the timely submission of designation documents.

(c) NOI's must include the following:

(1) Documentation of the legal status of the entity, as described in § 668.200(a)(1);

(2) A Standard Form (SF) 424b;

(3) The assurances required by 29 CFR 37.20;

(4) A specific description, by State, county, reservation or similar area, or service population, of the geographic area for which the entity requests designation;

(5) A brief summary of the employment and training or human resource development programs serving Native Americans that the entity currently operates or has operated within the previous two-year period;

(6) A description of the planning process used by the entity, including the involvement of the governing body and local employers;

(7) Evidence to establish an entity's ability to administer funds under §§ 668.220 through 668.230.

§ 668.250 What happens if two or more entities apply for the same area?

(a) Every two years, unless there has been a waiver of competition for the area, we issue a Solicitation for Grant Application (SGA) seeking applicants for INA program grants.

(b) If two or more entities apply for grants for the same service area, or for overlapping service areas, and a waiver of competition under WIA section 166(c)(2) is not granted to the incumbent grantee, the following additional procedures apply:

(1) The Grant Officer will follow the regulations for priority designation at § 668.210.

(2) If no applicant is entitled to priority designation, DINAP will inform each entity which submitted a NOI, including the incumbent grantee, in writing, of all the competing Notices of Intent no later than November 15 of the year the NOI's are received.

(3) Each entity will have an opportunity to describe its service plan, and may submit additional information addressing the requirements of § 668.240(c) or such other information as the applicant determines is appropriate. Revised Notices must be received or contain an official U.S. Postal Service postmark, no later than January 5th (unless a later date is provided in DINAP's information notice).

(4) The Grant Officer selects the entity that demonstrates the ability to produce the best outcomes for its customers.

§ 668.260 How are INA grantees designated?

(a) On March 1 of each designation year, we designate or conditionally designate Native American grantees for the coming two program years. The Grant Officer informs, in writing, each entity which submitted a Notice of Intent that the entity has been:

(1) Designated;

(2) Conditionally designated;

(3) Designated for only a portion of its requested area or population; or

(4) Denied designation.

(b) Designated Native American entities must ensure and provide evidence to DOL that a system is in place to afford all members of the eligible population within their service area an equitable opportunity to receive employment and training activities and services.

§ 668.270 What appeal rights are available to entities that are denied designation?

Any entity that is denied designation in whole or in part for the area or population that it requested may appeal the denial to the Office of the Administrative Law Judges using the procedures at 20 CFR 667.800 or the alternative dispute resolution procedures at 20 CFR 667.840. The Grant Officer will provide an entity whose request for designation was denied, in whole or in part, with a copy of the appeal procedures.

§ 668.280 Are there any other ways in which an entity may be designated as an INA grantee?

Yes, for an area which would otherwise go unserved. The Grant Officer may designate an entity, which has not submitted an NOI, but which meets the qualifications for designation, to serve the particular geographic area. Under such circumstances, DINAP will seek the views of Native American leaders in the area involved about the decision to designate the entity to serve that community. DINAP will inform the Grant Officer of their views. The Grant Officer will accommodate their views to the extent possible.

§ 668.290 Can an INA grantee's designation be terminated?

(a) Yes, the Grant Officer can terminate a grantee's designation for cause, or the Secretary or another DOL official confirmed by the Senate can terminate a grantee's designation in emergency circumstances where termination is necessary to protect the integrity of Federal funds or ensure the proper operation of the program. (WIA sec. 184(e).)

(b) The Grant Officer may terminate a grantee's designation for cause only if there is a substantial or persistent violation of the requirements in the Act or the WIA regulations. The grantee must be provided with written notice 60 days before termination, stating the specific reasons why termination is proposed. The appeal procedures at 20 CFR 667.800 apply.

(c) The Secretary must give a grantee terminated in emergency circumstances prompt notice of the termination and an opportunity for a hearing within 30 days of the termination.

§ 668.292 How does a designated entity become an INA grantee?

A designated entity becomes a grantee on the effective date of an executed grant agreement, signed by the authorized official of the grantee organization and the Grant Officer. The grant agreement includes a set of certifications and assurances that the grantee will comply with the terms of the Act, the WIA regulations, and other appropriate requirements. Funds are released to the grantee upon approval of the required planning documents, as described in §§ 668.710 through 668.740.

§ 668.294 Do we have to designate an INA grantee for every part of the country?

No, beginning with the PY 2000 grant awards, if there are no entities meeting the requirements for designation in a particular area, or willing to serve that area, we will not allocate funds for that service area. The funds allocated to that area will be distributed to the remaining INA grantees, or used for other program purposes such as technical assistance and training (TAT). Unawarded funds used for technical assistance and training are in addition to, and not subject to the limitations on, amounts reserved under § 668.296(e). Areas which are unserved by the INA program may be restored during a subsequent designation cycle, when and if a current grantee or other eligible entity applies for and is designated to serve that area.

§ 668.296 How are WIA funds allocated to INA grantees?

(a) Except for reserved funds described in paragraph (e) of this section and funds used for program purposes under § 668.294, all funds available for WIA section 166(d)(2)(A)(i) comprehensive workforce investment services program at the beginning of a Program Year will be allocated to Native American grantees for their designated geographic service areas.

(b) Each INA grantee will receive the sum of the funds calculated under the following formula:

(1) One-quarter of the funds available will be allocated on the basis of the number of unemployed Native American persons in the grantee's designated INA service area(s) compared to all such persons in all such areas in the United States.

(2) Three-quarters of the funds available will be allocated on the basis of the number of Native American persons in poverty in the grantee's designated INA service area(s) as compared to all such persons in all such areas in the United States.

(3) The data and definitions used to implement these formulas is provided by the U.S. Bureau of the Census.

(c) In years immediately following the use of new data in the formula described in paragraph (b) of this section, based upon criteria to be described in the SGA, we may utilize a hold harmless factor to reduce the disruption in grantee services which would otherwise result from changes in funding levels. This factor will be determined in consultation with the grantee community and the Native American Employment and Training Council.

(d) We may reallocate funds from one INA grantee to another if a grantee is unable to serve its area for any reason, such as audit or debt problems, criminal activity, internal (political) strife, or lack of ability or interest. Funds may also be reallocated if a grantee has carry-in excess of 20 percent of the total funds available to it. Carry-in amounts greater than 20 percent but less than 25 percent of total funds available may be allowed under an approved waiver issued by DINAP.

(e) We may reserve up to one percent (1 percent) of the funds appropriated

under WIA section 166(d)(2)(A)(i) for any Program Year for TAT purposes. Technical assistance will be provided in consultation with the Native American Employment and Training Council.

Subpart C—Services to Customers

§ 668.300 Who is eligible to receive services under the INA program?

(a) A person is eligible to receive services under the INA program if that person is:

(1) An Indian, as determined by a policy of the Native American grantee. The grantee's definition must at least include anyone who is a member of a Federally-recognized tribe; or

(2) An Alaska Native, as defined in section 3(b) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1602(b); or

(3) A Native Hawaiian, as defined in WIA section 166(b)(3).

(b) The person must also be any one of the following:

(1) Unemployed; or

(2) Underemployed, as defined in § 668.150; or

(3) A low-income individual, as defined in WIA section 101(25); or

(4) The recipient of a bona fide lay-off notice which has taken effect in the last six months or will take effect in the following six month period, who is unlikely to return to a previous industry or occupation, and who is in need of retraining for either employment with another employer or for job retention with the current employer; or

(5) An individual who is employed, but is determined by the grantee to be in need of employment and training services to obtain or retain employment that allows for self-sufficiency.

(c) If applicable, male applicants must also register or be registered for the Selective Service.

(d) For purposes of determining whether a person is a low-income individual under paragraph (b)(3) of this section, we will issue guidance for the determination of family income. (WIA sec. 189(h).)

§ 668.340 What are INA grantee allowable activities?

(a) The INA grantee may provide any services consistent with the purposes of this section that are necessary to meet the needs of Native Americans preparing to enter, reenter, or retain unsubsidized employment. (WIA sec. 166(d)(1)(B).) Comprehensive workforce investment activities authorized under WIA section 166(d)(2) include:

(b) Core services, which must be delivered in partnership with the One-Stop delivery system, include:

(1) Outreach;

(2) Intake;

(3) Orientation to services available;

(4) Initial assessment of skill levels, aptitudes, abilities and supportive service needs;

(5) Eligibility certification;

(6) Job Search and placement assistance;

(7) Career counseling;

(8) Provision of employment statistics information and local, regional, and national Labor Market Information;

(9) Provision of information about filing of Unemployment Insurance claims;

(10) Assistance in establishing eligibility for Welfare-to-Work programs;

(11) Assistance in establishing eligibility for financial assistance for training;

(12) Provision of information about supportive services;

(13) Provision of performance and cost information relating to training providers and training services; and

(14) Follow-up services.

(c) Allowable intensive services which include:

(1) Comprehensive and specialized testing and assessment;

(2) Development of an individual employment plan;

(3) Group counseling;

(4) Individual counseling and career planning;

(5) Case Management for seeking training services;

(6) Short term pre-vocational services;

(7) Work experience in the public or private sector;

(8) Tryout employment;

(9) Dropout prevention activities;

(10) Supportive services; and

(11) Other services identified in the approved Two Year Plan.

(d) Allowable training services which include:

(1) Occupational skill training;

(2) On-the-job training;

(3) Programs that combine workplace training with related instruction, which may include cooperative education programs;

(4) Training programs operated by the private sector;

(5) Skill upgrading and retraining;

(6) Entrepreneurial and small business development technical assistance and training;

(7) Job readiness training;

(8) Adult basic education, GED attainment, literacy training, and English language training, provided alone or in combination with training or intensive services described paragraphs (c)(1) through (11) and (d)(1) through (10) of this section;

(9) Customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of training; and

(10) Educational and tuition assistance.

(e) Allowable activities specifically designed for youth are identified in section 129 of the Act and include:

(1) Improving educational and skill competencies;

(2) Adult mentoring;

(3) Training opportunities;

(4) Supportive services, as defined in WIA section 101(46);

(5) Incentive programs for recognition and achievement;

(6) Opportunities for leadership development, decision-making, citizenship and community service;

(7) Preparation for postsecondary education, academic and occupational learning, unsubsidized employment opportunities, and other effective connections to intermediaries with strong links to the job market and local and regional employers;

(8) Tutoring, study skills training, and other drop-out prevention strategies;

(9) Alternative secondary school services;

(10) Summer employment opportunities that are directly linked to academic and occupational learning;

(11) Paid and unpaid work experiences, including internships and job shadowing;

(12) Occupational skill training;

(13) Leadership development opportunities, as defined in 20 CFR 664.420;

(14) Follow-up services, as defined in 20 CFR 664.450;

(15) Comprehensive guidance and counseling, which may include drug and alcohol abuse counseling and referral; and

(16) Information and referral.

(f) In addition, allowable activities include job development and employment outreach, including:

(1) Support of the Tribal Employment Rights Office (TERO) program;

(2) Negotiation with employers to encourage them to train and hire participants;

(3) Establishment of linkages with other service providers to aid program participants;

(4) Establishment of management training programs to support tribal administration or enterprises; and

(5) Establishment of linkages with remedial education, such as Adult Basic Education (ABE), basic literacy training, and English-as-a-second-language (ESL) training programs, as necessary.

(g) Participants may be enrolled in more than one activity at a time and may be sequentially enrolled in multiple activities.

(h) INA grantees may provide any services which may be carried out by fund recipients under any provisions of the Act. (WIA sec. 166(d).)

(i) In addition, INA grantees must develop programs which contribute to occupational development, upward mobility, development of new careers, and opportunities for nontraditional employment. (WIA sec. 195(1).)

§ 668.350 Are there any restrictions on allowable activities?

(a) All occupational training must be for occupations for which there are employment opportunities in the local area or another area to which the participant is willing to relocate. (WIA sec. 134(d)(4)(A)(iii).)

(b) INA grantees must provide OJT services consistent with the definition provided in WIA section 101(31) and other limitations in the Act. Individuals in OJT must:

(1) Be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills (WIA sec. 181(a)(1)); and

(2) Be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work. (WIA sec. 181(b)(5).)

(c) In addition, OJT contracts under this title must not be entered into with employers who have:

(1) Received payments under previous contracts and have exhibited a pattern of failing to provide OJT participants with continued, long-term employment as regular employees with wages and employment benefits and working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same work; or

(2) Who have violated paragraphs (b)(1) and/or (2) of this section. (WIA sec. 195(4).)

(d) INA grantees are prohibited from using funds to encourage the relocation of a business, as described in WIA section 181(d) and 20 CFR 667.268.

(e) INA grantees must only use WIA funds for activities which are in addition to those that would otherwise be available to the Native American population in the area in the absence of such funds. (WIA sec. 195(2).)

(f) INA grantees must not spend funds on activities that displace currently employed individuals, impair existing contracts for services, or in any way affect union organizing.

(g) Under 20 CFR 667.266, sectarian activities involving WIA financial assistance or participants are limited in accordance with the provisions of 29 CFR 37.6(f). (WIA sec. 181(b).)

§ 668.360 What is the role of INA grantees in the One-Stop system?

(a) In those local workforce investment areas where an INA grantee conducts field operations or provides substantial services, the INA grantee is a required partner in the local One-Stop delivery system and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions, a Memorandum of Understanding (MOU) between the INA grantee and the Local Board over the operation of the One-Stop Center(s) in the Local Board's workforce investment area also must be executed. Where the Local Board is an alternative entity under 20 CFR 661.330, the INA grantee must negotiate with the alternative entity on the terms of its MOU and the scope of its on-going role in the local workforce investment system, as specified in 20 CFR 661.310(b)(2). In local areas with a large concentration of potentially eligible INA participants, which are in an INA grantee's service area but in which the grantee does not conduct operations or provide substantial services, the INA grantee should encourage such individuals to participate in the One-Stop system in that area in order to receive WIA services.

(b) At a minimum, the MOU must contain provisions related to:

(1) The services to be provided through the One-Stop Service System;

(2) The methods for referral of individuals between the One-Stop operator and the INA grantee which take into account the services provided by the INA grantee and the other One-Stop partners;

(3) The exchange of information on the services available and accessible through the One-Stop system and the INA program;

(4) As necessary to provide referrals and case management services, the exchange of information on Native American participants in the One-Stop system and the INA program;

(5) Arrangements for the funding of services provided by the One-Stop(s), consistent with the requirements at 20 CFR 662.280 that no expenditures may be made with INA program funds for individuals who are not eligible or for services not authorized under this part.

(c) The INA grantee's Two Year Plan must describe the efforts the grantee

has made to negotiate MOU's consistent with paragraph (b) of this section, for each planning cycle during which Local Boards are operating under the terms of WIA.

§ 668.370 What policies govern payments to participants, including wages, training allowances or stipends, or direct payments for supportive services?

(a) INA grantees may pay training allowances or stipends to participants for their successful participation in and completion of education or training services (except such allowance may not be provided to participants in OJT). Allowances or stipends may not exceed the Federal or State minimum wage, whichever is higher.

(b) INA grantees may not pay a participant in a training activity when the person fails to participate without good cause.

(c) If a participant in a WIA-funded activity, including participants in OJT, is involved in an employer-employee relationship, that participant must be paid wages and fringe benefits at the same rates as trainees or employees who have similar training, experience and skills and which are not less than the higher of the applicable Federal, State or local minimum wage. (WIA sec. 181(a)(1).)

(d) In accordance with the policy described in the two-year plan, INA grantees may pay incentive bonuses to participants who meet or exceed individual employability or training goals established in writing in the individual employment plan.

(e) INA grantees must comply with other restrictions listed in WIA sections 181 through 199, which apply to all programs funded under title I of WIA.

(f) INA grantees must comply with the provisions on labor standards in WIA section 181(b).

§ 668.380 What will we do to strengthen the capacity of INA grantees to deliver effective services?

We will provide appropriate TAT, as necessary, to INA grantees. This TAT will assist INA grantees to improve program performance and enhance services to the target population(s), as resources permit. (WIA sec. 166(h)(5).)

Subpart D—Supplemental Youth Services

§ 668.400 What is the purpose of the supplemental youth services program?

The purpose of this program is to provide supplemental employment and training and related services to Native American youth on or near Indian reservations, or in Oklahoma, Alaska, and Hawaii. (WIA sec. 166(d)(2)(A)(ii).)

§ 668.410 What entities are eligible to receive supplemental youth services funding?

Eligible recipients for supplemental youth services funding are limited to those tribal, Alaska Native, Native Hawaiian and Oklahoma tribal grantees funded under WIA section 166(d)(2)(A)(i), or other grantees serving those areas and/or populations specified in § 668.400, that received funding under title II-B of the Job Training Partnership Act, or that are designated to serve an eligible area as specified in WIA section 166(d)(2)(A)(ii).

§ 668.420 What are the planning requirements for receiving supplemental youth services funding?

Beginning with PY 2000, eligible INA grantees must describe the supplemental youth services which they intend to provide in their Two Year Plan (described more fully in §§ 668.710 and 668.720). This Plan includes the target population the grantee intends to serve, for example, drop-outs, juvenile offenders, and/or college students. It also includes the performance measures/standards to be utilized to measure program progress.

§ 668.430 What individuals are eligible to receive supplemental youth services?

(a) Participants in supplemental youth services activities must be Native Americans, as determined by the INA grantee according to § 668.300(a), and must meet the definition of Eligible Youth, as defined in WIA section 101(13).

(b)Youth participants must be low-income individuals, except that not more than five percent (5%) who do not meet the minimum income criteria,

may be considered eligible youth if they meet one or more of the following categories:

(1) School dropouts;

(2) Basic skills deficient as defined in WIA section 101(4);

(3) Have educational attainment that is one or more grade levels below the grade level appropriate to their age group;

(4) Pregnant or parenting;

(5) Have disabilities, including learning disabilities;

(6) Homeless or runaway youth;

(7) Offenders; or

(8) Other eligible youth who face serious barriers to employment as identified by the grantee in its Plan. (WIA sec. 129(c)(5).)

§ 668.440 How is funding for supplemental youth services determined?

(a) Beginning with PY 2000, supplemental youth funding will be allocated to eligible INA grantees on the basis of the relative number of Native American youth between the ages of 14 and 21, inclusive, in the grantee's designated INA service area as compared to the number of Native American youth in other eligible INA service areas. We reserve the right to redetermine this youth funding stream in future program years, in consultation with the Native American Employment and Training Council, as program experience warrants and as appropriate data become available.

(b) The data used to implement this formula is provided by the U.S. Bureau of the Census.

(c) The hold harmless factor described in § 668.296(c) also applies to supplemental youth services funding. This factor also will be determined in consultation with the grantee community and the Native American Employment and Training Council.

(d) The reallocation provisions of § 668.296(d) also apply to supplemental youth services funding.

(e) Any supplemental youth services funds not allotted to a grantee or refused by a grantee may be used for the purposes outlined in § 668.296(e), as described in § 668.294. Any such funds are in addition to, and not subject to the limitations on, amounts reserved under § 668.296(e).

§ 668.450 How will supplemental youth services be provided?

(a) INA grantees may offer supplemental services to youth throughout the school year, during the summer vacation, and/or during other breaks during the school year at their discretion;

(b) We encourage INA grantees to work with Local Educational Agencies to provide academic credit for youth activities whenever possible;

(c) INA grantees may provide participating youth with the activities listed in 20 CFR 668.340(e).

§ 668.460 Are there performance measures and standards applicable to the supplemental youth services program?

Yes, WIA section 166(e)(5) requires that the program plan contain a description of the performance measures to be used to assess the performance of grantees in carrying out the activities assisted under this section. We will develop specific indicators of performance and levels of performance for supplemental youth services activities in partnership with the Native American Employment and Training Council, and will transmit them to INA grantees as an administrative issuance.

Subpart E—Services to Communities

§ 668.500 What services may INA grantees provide to or for employers under section 166?

(a) INA grantees may provide a variety of services to employers in their areas. These services may include:

(1) Workforce planning which involves the recruitment of current or potential program participants, including job restructuring services;

(2) Recruitment and assessment of potential employees, with priority given to potential employees who are or who might become eligible for program services;

(3) Pre-employment training;

(4) Customized training;

(5) On-the-Job training (OJT);

(6) Post-employment services, including training and support services to encourage job retention and upgrading;

(7) Work experience for public or private sector work sites;

(8) Other innovative forms of worksite training.

(b) In addition to the services listed in paragraph (a) of this section, other grantee-determined services (as described in the grantee's Two Year Plan) which are intended to assist eligible participants to obtain or retain employment may also be provided to or for employers.

§ 668.510 What services may INA grantees provide to the community at large under section 166?

(a) INA grantees may provide services to the Native American communities in their designated service areas by engaging in program development and service delivery activities which:

(1) Strengthen the capacity of Native American-controlled institutions to provide education and work-based learning services to Native American youth and adults, whether directly or through other Native American institutions such as tribal colleges;

(2) Increase the community's capacity to deliver supportive services, such as child care, transportation, housing, health, and similar services needed by clients to obtain and retain employment;

(3) Use program participants engaged in education, training, work experience, or similar activities to further the economic and social development of Native American communities in accordance with the goals and values of those communities; and

(4) Engage in other community-building activities described in the INA grantee's Two Year Plan.

(b) INA grantees should develop their Two Year Plan in conjunction with, and in support of, strategic tribal planning and community development goals.

§ 668.520 Must INA grantees give preference to Indian/Native American entities in the selection of contractors or service providers?

Yes, INA grantees must give as much preference as possible to Indian organizations and to Indian-owned economic enterprises, as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452), when awarding any contract or subgrant.

§ 668.530 What rules govern the issuance of contracts and/or subgrants?

In general, INA grantees must follow the rules of OMB Circulars A–102 (for tribes) or A–110 (for private non-profits) when awarding contracts and/or subgrants under WIA section 166. The common rules implementing those circulars are codified for DOL-funded programs at 29 CFR part 97 (A–102) or 29 CFR part 95 (A–110), and covered in the WIA regulations at 20 CFR 667.200. These rules do not apply to OJT contract awards.

Subpart F—Accountability for Services and Expenditures

§ 668.600 To whom is the INA grantee accountable for the provision of services and the expenditure of INA funds?

(a) The INA grantee is responsible to the Native American community to be served by INA funds.

(b) The INA grantee is also responsible to the Department of Labor, which is charged by law with ensuring that all WIA funds are expended:

(1) According to applicable laws and regulations;

(2) For the benefit of the identified Native American client group; and

(3) For the purposes approved in the grantee's plan and signed grant document.

§ 668.610 How is this accountability documented and fulfilled?

(a) Each INA grantee must establish its own internal policies and procedures to ensure accountability to the INA grantee's governing body, as the representative of the Native American community(ies) served by the INA program. At a minimum, these policies and procedures must provide a system for governing body review and oversight of program plans and measures and standards for program performance.

(b) Accountability to the Department is accomplished in part through on-site program reviews (monitoring), which strengthen the INA grantee's capability to deliver effective services and protect the integrity of Federal funds.

(c) In addition to audit information, as described at § 668.850 and program reviews, accountability to the Department is documented and fulfilled by the submission of reports. For the purposes of report submission, a postmark or date indicating receipt by a private express delivery service is acceptable proof of timely submission. These report requirements are as follows:

(1) Each INA grantee must submit an annual report on program participants and activities. This report must be received no later than 90 days after the end of the Program Year, and may be combined with the report on program expenditures. The reporting format is developed by DINAP, in consultation with the Native American Advisory Council, and published in the FEDERAL REGISTER.

(2) Each INA grantee must submit an annual report on program expenditures. This report must be received no later than 90 days after the end of the Program Year, and may be combined with the report on program participants and activities.

(3) INA grantees are encouraged, but not required, to submit a descriptive narrative with their annual reports describing the barriers to successful plan implementation they have encountered. This narrative should also discuss program successes and other notable occurrences that effected the INA grantee's overall performance that year.

(4) Each INA grantee may be required to submit interim reports on program participants and activities and/or program expenditures during the Program Year. Interim reports must be received no later than 45 days after the end of the reporting period.

§ 668.620 What performance measures are in place for the INA program?

Indicators of performance measures and levels of performance in use for INA program will be those indicators and standards proposed in individual grantee plans and approved by us, in accordance with guidelines we will develop in consultation with INA grantees under WIA section 166(h)(2)(A).

§ 668.630 What are the requirements for preventing fraud and abuse under section 166?

(a) Each INA grantee must implement program and financial management procedures to prevent fraud and abuse. Such procedures must include a process which enables the grantee to take action against contractors or subgrantees to prevent any misuse of funds. (WIA sec. 184.)

(b) Each INA grantee must have rules to prevent conflict of interest by its governing body. These conflict of interest rules must include a rule prohibiting any member of any governing body or council associated with the INA grantee from voting on any matter which would provide a direct financial benefit to that member, or to a member of his or her immediate family, in accordance with 20 CFR 667.200(a)(4) and 29 CFR 97.36(b) or 29 CFR 95.42.

(c) Officers or agents of the INA grantee must not solicit or personally accept gratuities, favors, or anything of monetary value from any actual or potential contractor, subgrantee, vendor or participant. This rule must also apply to officers or agents of the grantee's contractors and/or subgrantees. This prohibition does not apply to:

(1) Any rebate, discount or similar incentive provided by a vendor to its customers as a regular feature of its business;

(2) Items of nominal monetary value distributed consistent with the cultural practices of the Native American community served by the grantee.

(d) No person who selects program participants or authorizes the services provided to them may select or authorize services to any participant who is such a person's husband, wife, father, mother, brother, sister, son, or daughter unless:

(1)(i) The participant involved is a low income individual; or

(ii) The community in which the participant resides has a population of less than 1,000 Native American people; and

(2) The INA grantee has adopted and implemented the policy described in the Two Year Plan to prevent favoritism on behalf of such relatives.

(e) INA grantees are subject to the provisions of 41 U.S.C. 53 relating to kickbacks.

(f) No assistance provided under this Act may involve political activities. (WIA sec. 195(6).)

(g) INA grantees may not use funds under this Act for lobbying, as provided in 29 CFR part 93.

(h) The provisions of 18 U.S.C. 665 and 666 prohibiting embezzlement apply to programs under WIA.

(i) Recipients of financial assistance under WIA section 168 are prohibited from discriminatory practices as outlined at WIA section 188, and the regulations implementing WIA section 188, at 29 CFR part 37. However, this does not affect the legal requirement that all INA participants be Native American. Also, INA grantees are not obligated to serve populations other than those for which they were designated.

§ 668.640 What grievance systems must a section 166 program provide?

INA grantees must establish grievance procedures consistent with the requirements of WIA section 181(c) and 20 CFR 667.600.

§ 668.650 Can INA grantees exclude segments of the eligible population?

(a) No, INA grantees cannot exclude segments of the eligible population. INA grantees must document in their Two Year Plan that a system is in place to afford all members of the eligible population within the service area for which the grantee was designated an equitable opportunity to receive WIA services and activities.

(b) Nothing in this section restricts the ability of INA grantees to target subgroups of the eligible population (for example, the disabled, substance abusers, TANF recipients, or similar categories), as outlined in an approved Two Year Plan. However, it is unlawful to target services to subgroups on grounds prohibited by WIA section 188 and 29 CFR part 37, including tribal affilitation (which is considered national origin). Outreach efforts, on the other hand, may be targeted to any subgroups.

Subpart G—Section 166 Planning/Funding Process

§ 668.700 What process must an INA grantee use to plan its employment and training services?

(a) An INA grantee may utilize the planning procedures it uses to plan other activities and services.

(b) However, in the process of preparing its Two Year Plan for Native American WIA services, the INA grantee must consult with:

(1) Customers or prospective customers of such services;

(2) Prospective employers of program participants or their representatives;

(3) Service providers, including local educational agencies, which can provide services which support or are complementary to the grantee's own services; and

(4) Tribal or other community officials responsible for the development and administration of strategic community development efforts.

§ 668.710 What planning documents must an INA grantee submit?

Each grantee receiving funds under WIA section 166 must submit to DINAP a comprehensive services plan and a projection of participant services and expenditures covering the two-year planning cycle. We will, in consultation with the Native American Advisory Council, issue budget and planning instructions which grantees must use when preparing their plan.

§ 668.720 What information must these planning documents contain?

(a) The comprehensive services plan must cover the two Program Years included within a designation cycle. According to planning instructions issued by the Department, the comprehensive services plan must describe in narrative form:

(1) The specific goals of the INA grantee's program for the two Program Years involved;

(2) The method the INA grantee will use to target its services to specific segments of its service population;

(3) The array of services which the INA grantee intends to make available;

(4) The system the INA grantee will use to be accountable for the results of

its program services. Such results must be judged in terms of the outcomes for individual participants and/or the benefits the program provides to the Native American community(ies) which the INA grantee serves. Plans must include the performance information required by § 668.620;

(5) The ways in which the INA grantee will seek to integrate or coordinate and ensure nonduplication of its employment and training services with:

(i) The One-Stop delivery system in its local workforce investment area, including a description of any MOU's which affect the grantee's participation;

(ii) Other services provided by Local Workforce Investment Boards;

(iii) Other program operators;

(iv) Other services available within the grantee organization; and

(v) Other services which are available to Native Americans in the community, including planned participation in the One-Stop system.

(b) Eligible INA grantees must include in their plan narratives a description of activities planned under the supplemental youth program, including items described in paragraphs (a)(1) through (5) of this section.

(c) INA grantees must be prepared to justify the amount of proposed Administrative Costs, utilizing the definition at 20 CFR 667.220.

(d) INA grantees' plans must contain a projection of participant services and expenditures for each Program Year, consistent with guidance issued by the Department.

§ 668.730 When must these plans be submitted?

(a) The two-year plans are due at a date specified by DINAP in the year in which the two-year designation cycle begins. We will announce exact submission dates in the biennial planning instructions.

(b) Plans from INA grantees who are eligible for supplemental youth services funds must include their supplemental youth plans as part of their regular Two Year Plan.

(c) INA grantees must submit modifications for the second year reflecting exact funding amounts, after the individual allotments have been determined. We will announce the time for their submission, which will be no later than June 1 prior to the beginning of the second year of the designation cycle.

§ 668.740 How will we review and approve such plans?

(a) We will approve a grantee's planning documents before the date on which funds for the program become available unless:

(1) The planning documents do not contain the information specified in the regulations in this part and Departmental planning guidance; or

(2) The services which the INA grantee proposes are not permitted under WIA or applicable regulations.

(b) We may approve a portion of the plan, and disapprove other portions. The grantee also has the right to appeal the decision to the Office of the Administrative Law Judges under the procedures at 20 CFR 667.800 or 667.840. While the INA grantee exercises its right to appeal, the grantee must implement the approved portions of the plan.

(c) If we disapprove all or part of an INA grantee's plan, and that disapproval is sustained in the appeal process, the INA grantee will be given the opportunity to amend its plan so that it can be approved.

(d) If an INA grantee's plan is amended but is still disapproved, the grantee will have the right to appeal the decision to the Offices of the Administrative Law Judges under the procedures at 20 CFR 667.800 or 667.840.

§ 668.750 Under what circumstances can we or the INA grantee modify the terms of the grantee's plan(s)?

(a) We may unilaterally modify the INA grantee's plan to add funds or, if required by Congressional action, to reduce the amount of funds available for expenditure.

(b) The INA grantee may request approval to modify its plan to add, expand, delete, or diminish any service allowable under the regulations in this part. The INA grantee may modify its plan without our approval, unless the modification reduces the total number of participants to be served annually

under the grantee's program by a number which exceeds 25 percent of the participants previously proposed to be served, or by 25 participants, whichever is larger.

(c) We will act upon any modification within thirty (30) calendar days of receipt of the proposed modification. In the event that further clarification or modification is required, we may extend the thirty (30) day time frame to conclude appropriate negotiations.

Subpart H—Administrative Requirements

§ 668.800 What systems must an INA grantee have in place to administer an INA program?

(a) Each INA grantee must have a written system describing the procedures the grantee uses for:

(1) The hiring and management of personnel paid with program funds;

(2) The acquisition and management of property purchased with program funds;

(3) Financial management practices;

(4) A participant grievance system which meets the requirements in section 181(c) of WIA and 20 CFR 667.600; and

(5) A participant records system.

(b) Participant records systems must include:

(1) A written or computerized record containing all the information used to determine the person's eligibility to receive program services;

(2) The participant's signature certifying that all the eligibility information he or she provided is true to the best of his/her knowledge; and

(3) The information necessary to comply with all program reporting requirements.

§ 668.810 What types of costs are allowable expenditures under the INA program?

Rules relating to allowable costs under WIA are covered in 20 CFR 667.200 through 667.220.

§ 668.820 What rules apply to administrative costs under the INA program?

The definition and treatment of administrative costs are covered in 20 CFR 667.210(b) and 667.220.

§ 668.825 Does the WIA administrative cost limit for States and local areas apply to section 166 grants?

No, under 20 CFR 667.210(b), limits on administrative costs for section 166 grants will be negotiated with the grantee and identified in the grant award document.

§ 668.830 How should INA program grantees classify costs?

Cost classification is covered in the WIA regulations at 20 CFR 667.200 through 667.220. For purposes of the INA program, program costs also include costs associated with other activities such as Tribal Employment Rights Office (TERO), and supportive services, as defined in WIA section 101(46).

§ 668.840 What cost principles apply to INA funds?

The cost principles described in OMB Circulars A–87 (for tribal governments), A–122 (for private non-profits), and A–21 (for educational institutions), and the regulations at 20 CFR 667.200(c), apply to INA grantees, depending on the nature of the grantee organization.

§ 668.850 What audit requirements apply to INA grants?

The audit requirements established under the Department's regulations at 29 CFR part 99, which implement OMB Circular A–133, apply to all Native American WIA grants. These regulations, for all of WIA title I, are cited at 20 CFR 667.200(b). Audit resolution procedures are covered at 20 CFR 667.500 and 667.510.

§ 668.860 What cash management procedures apply to INA grant funds?

INA grantees must draw down funds only as they actually need them. The U.S. Department of Treasury regulations which implement the Cash Management Improvement Act, found at 31 CFR part 205, apply by law to most recipients of Federal funds. Special rules

may apply to those grantees required to keep their funds in interest-bearing accounts, and to grantees participating in the demonstration under Public Law 102–477.

§ 668.870 What is "program income" and how is it regulated in the INA program?

(a) Program income is defined and regulated by WIA section 195(7), 20 CFR 667.200(a)(5) and the applicable rules in 29 CFR parts 95 and 97.

(b) For grants made under this part, program income does not include income generated by the work of a work experience participant in an enterprise, including an enterprise owned by an Indian tribe or Alaska Native entity, whether in the public or private sector.

(c) Program income does not include income generated by the work of an OJT participant in an establishment under paragraph (b) of this section.

Subpart I—Miscellaneous Program Provisions

§ 668.900 Does WIA provide regulatory and/or statutory waiver authority?

Yes, WIA section 166(h)(3) permits waivers of any statutory or regulatory requirement imposed upon INA grantees (except for the areas cited in § 668.920). Such waivers may include those necessary to facilitate WIA support of long term community development goals.

§ 668.910 What information is required to document a requested waiver?

To request a waiver, an INA grantee must submit a plan indicating how the waiver will improve the grantee's WIA program activities. We will provide further guidance on the waiver process, consistent with the provisions of WIA section 166(h)(3).

§ 668.920 What provisions of law or regulations may not be waived?

Requirements relating to:

(a) Wage and labor standards;

(b) Worker rights;

(c) Participation and protection of workers and participants;

(d) Grievance procedures;

(e) Judicial review; and

(f) Non-discrimination may not be waived. (WIA sec. 166(h)(3)(A).)

§ 668.930 May INA grantees combine or consolidate their employment and training funds?

Yes, INA grantees may consolidate their employment and training funds under WIA with assistance received from related programs in accordance with the provisions of the Indian Employment, Training and Related Services Demonstration Act of 1992 (Public Law 102–477) (25 U.S.C. 3401 *et seq.*). Also, Federally-recognized tribes that administer INA funds and funds provided by more than one State under other sections of WIA title I may enter into an agreement with the Governors to transfer the State funds to the INA program. (WIA sec. 166(f) and (h)(6).)

§ 668.940 What is the role of the Native American Employment and Training Council?

The Native American Employment and Training Council is a body composed of representatives of the grantee community which advises the Secretary on all aspects of Native American employment and training program implementation. WIA section 166(h)(4) continues the Council essentially as it is currently constituted, with the exception that all the Council members no longer have to be Native American. However, the nature of the consultative process remains essentially unchanged. We continue to support the Council.

PART 669—NATIONAL FARMWORKER JOBS PROGRAM UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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Sec.

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Subpart A—Purpose and Definitions

§ 669.100 What is the purpose of the National Farmworker Jobs Program (NFJP) and the other services and activities established under WIA section 167?

The purpose of the NFJP, and the other services and activities established under WIA section 167, is to

strengthen the ability of eligible migrant and seasonal farmworkers and their families to achieve economic self-sufficiency. This part provides the regulatory requirements applicable to the expenditure of WIA section 167 funds for such programs, services and activities.

§ 669.110 What definitions apply to this program?

In addition to the definitions found in WIA sections 101 and 167 and in 20 CFR 660.300, the following definitions apply to programs under this part:

Allowances means direct payments, which must not exceed the higher of the State or Federal minimum wage, made to NFJP participants during their enrollment to enable them to participate in intensive or training services.

Capacity enhancement means the technical assistance we provide to grantees and grantee staff by the Department to improve the quality of the program and the delivery of program services to NFJP participants.

Dependent means an individual who:

(1) Was claimed as a dependent on the qualifying farmworker's federal income tax return for the previous year; or

(2) Is the spouse of the qualifying farmworker; or

(3) If not claimed as a dependent for federal income tax purposes, is able to establish:

(i) A relationship as the farmworker's

(A) Child, grandchild, great grandchild, including legally adopted children;

(B) Stepchild;

(C) Brother, sister, half brother, half sister, stepbrother, or stepsister;

(D) Parent, grandparent, or other direct ancestor but not foster parent;

(E) Foster child;

(F) Stepfather or stepmother;

(G) Uncle or aunt;

(H) Niece or nephew;

(I) Father-in-law, mother-in-law, son-in-law; or

(J) Daughter-in-law, brother-in-law, or sister-in-law; and

(ii) The receipt of over half of his/her total support from the eligible farmworker's family during the eligibility determination period.

Disadvantaged means a farmworker whose income, for any 12 consecutive months out of the 24 months immediately before the farmworker applies for the program, does not exceed the higher of either the poverty line or 70 percent of the lower living standard income level, adjusted for the farmworker's family size and including the income of all wage earners, except when its inclusion would be unjust due to unstable conditions of the family unit.

DSFP means the Division of Seasonal Farmworker Programs within the Employment and Training Administration of the Department, or a successor organizational unit.

Eligibility determination period means any consecutive 12-month period within the 24-month period immediately preceding the date of application for the NFJP by the applicant farmworker.

Emergency assistance means assistance that addresses immediate needs of farmworkers and their families, provided by NFJP grantees. Except for evidence to support legal working status in the United States and Selective Service registration, where applicable, the applicant's self-attestation is accepted as eligibility for emergency assistance.

Farmwork means those occupations and industries within agricultural production and agricultural services that we identify for the National Farmworker Jobs Program.

Housing development assistance within the NFJP, is a type of related assistance consisting of an organized program of education and on-site demonstrations about the basic elements of family housing and may include financing, site selection, permits and construction skills, leading towards home ownership.

MOU means Memorandum of Understanding.

MSFW means a Migrant or Seasonal Farmworker under WIA section 167.

MSFW program grantee means an entity to which we directly award a WIA grant to carry out the MSFW program in one or more designated States or substate areas.

National Farmworker Jobs Program (NFJP) is the nationally administered

workforce investment program for farmworkers established by WIA section 167 as a required partner of the One-Stop system.

Related assistance means short-term forms of direct assistance designed to assist farmworkers and their families to retain or stabilize their agricultural employment or enrollment in the NFJP.

Self-certification means a farmworker's signed attestation that the information he/she submits to demonstrate eligibility for the NFJP is true and accurate.

Service area means the geographical jurisdiction in which a WIA section 167 grantee is designated to operate.

Work experience means a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate.

§ 669.120 How do we administer the NFJP program?

This program is centrally administered by the Department of Labor in a manner consistent with the requirements of WIA section 167. As described in § 669.210, we designate grantees using procedures consistent with standard Federal government competitive procedures. We award other grants and contracts using similar competitive procedures.

§ 669.130 What unit within the Department administers the National Farmworker Jobs Program funded under WIA section 167?

We have designated the Division of Seasonal Farmworker Programs (DSFP), or its successor organization, within the Employment and Training Administration, as the organizational unit that administers the NFJP and other MSFW programs at the Federal level.

§ 669.140 How does the Division of Seasonal Farmworker Programs (DSFP) assist the MSFW grantee organizations to serve farmworker customers?

We provide technical assistance and training to MSFW grantees for the purposes of program implementation and program performance management leading to enhancement of services to and continuous improvement in the employment outcomes of farmworkers.

§ 669.150 How are regulations established for this program?

In developing regulations for WIA section 167, we consult with the Migrant and Seasonal Farmworker Employment and Training Advisory Committee. The regulations and program guidance consider the economic circumstances and demographics of eligible migrant and seasonal farmworkers.

§ 669.160 How do we consult with NFJP organizations in developing rules, regulations and standards of accountability, and other policy guidance for the NFJP?

(a) We consider the NFJP grantee community as a full partner in the development of policies for the NFJPs under the Act.

(b) We have established and continue to support the Federal MSFW Employment and Training Advisory Committee. Through the Advisory Committee, we actively seek and consider the views of the grantee community before establishing policies and/or program regulations, according to the requirements of WIA section 167.

§ 669.170 What WIA regulations apply to the programs funded under WIA section 167?

(a) The regulations found in this part;

(b) The general administrative requirements found in 20 CFR part 667, including the regulations concerning Complaints, Investigations and Hearings found at 20 CFR part 667, subpart E through subpart H, which cover programs under WIA section 167;

(c) The Department's regulations codifying the common rules implementing Office of Management and Budget (OMB) Circulars, which generally apply to Federal programs carried out by State and local governments and nonprofit organizations at 29 CFR parts 95, 96, 97, and 99, as applicable.

(d) The regulations on partnership responsibilities contained in 20 CFR parts 661 (Statewide and Local Governance) and 662 (the One-Stop System).

(e) The Department's regulations at 29 CFR part 37, which implement the

nondiscrimination provisions of WIA section 188, apply to recipients of financial assistance under WIA section 167.

Subpart B—The Service Delivery System for the National Farmworker Jobs Program

§ 669.200 Who is eligible to receive a NFJP grant?

(a) To be eligible to receive a grant under this section, an entity must have:

(1) An understanding of the problems of eligible migrant and seasonal farmworkers and their dependents;

(2) A familiarity with the agricultural industry and the labor market needs of the geographic area to be served;

(3) The capacity to effectively administer a diversified program of workforce investment activities and related assistance for eligible migrant and seasonal farmworkers (including farmworker youth) as described in paragraph (b) of this section;

(4) The capacity to work effectively as a One-Stop partner.

(b) For purposes of paragraph (a)(3) of this section, an entity's ''capacity to effectively administer'' a program may be demonstrated by:

(1) Organizational experience; or

(2) Significant experience of its key staff in administering similar programs.

(c) For purposes of paragraph (a)(4) of this section, an applicant may demonstrate its capacity to work effectively as a One-Stop partner through its existing relationships with Local Workforce Investment Boards and other One-Stop partners, as evidenced through One-Stop system participation and successful MOU negotiations.

(d) As part of the evaluation of the applicant's capacity to work effectively as a One-Stop partner under paragraph (a)(4) of this section:

(1) The Grant Officer must determine whether the policies or actions of any Local Board established under the authorty of the alternative entity provision of WIA section 117(i) and 20 CFR 661.330:

(i) Preclude One-Stop system participation by the applicant or existing NFJP grantee; or

(ii) For the prior program year, contributed to a failure to reach agreement on the terms of the MOU required under § 669.220; and

(2) If the Grant Officer's determinations under paragraph (d)(1) of this section are affirmative, then the Grant Officer may consider this fact when weighing the capacity of the competitors.

§ 669.210 How does an eligible entity become an NFJP grantee?

To become an NFJP grantee and receive a grant under this subpart, an applicant must respond to a Solicitation for Grant Applications (SGA). The SGA may contain additional requirements for the grant application or the grantee's two-year plan. Under the SGA, grantees will be selected using standard Federal Government competitive procedures. The entity's proposal must describe a two-year strategy for meeting the needs of eligible migrant and seasonal farmworkers in the geographic area the entity seeks to serve.

§ 669.220 What is the role of the NFJP grantee in the One-Stop delivery system?

(a) In those local workforce investment areas where the grantee operates its NFJP, the grantee is a required partner of the local One-Stop delivery system and is subject to the provisions relating to such partners described in 20 CFR part 662. Consistent with those provisions, the grantee and the Local Board must negotiate an MOU which meets the requirements of 20 CFR 662.300 and sets forth their respective responsibilities for making the full range of services available through the One-Stop system available to farmworkers. Where the Local Board is an alternative entity under 20 CFR 661.330, the NFJP grantee must negotiate with the Board on the terms of its MOU and the scope of its on-going role in the local workforce investment system, as specified in 20 CFR 661.310(b)(2). In local areas where the grantee does not operate its NFJP and there is a large concentration of MSFW's, the grantee

may consider the availability of electronic connections and other means to participate in the One-stop system in that area, in order to serve those individuals.

(b) The MOU must provide for appropriate and equitable services to MSFW's, and may include costs of services to MSFW's incurred by the One-Stop that extend beyond Wagner-Peyser funded services and activities.

§ 669.230 Can an NFJP grantee's designation be terminated?

Yes, a grantee's designation may be terminated for cause:

(a) By the Secretary, in emergency circumstances when such action is necessary to protect the integrity of Federal funds or ensure the proper operation of the program. Any grantee so terminated will be provided with written notice and an opportunity for a hearing within 30 days after the termination (WIA sec. 184(e)); or

(b) By the Grant Officer, if there is a substantial or persistent violation of the requirements in the Act or the WIA regulations. In such a case, the Grant Officer must provide the grantee with 60 days prior written notice, stating the reasons why termination is proposed, and the applicable appeal procedures.

§ 669.240 How do we use funds appropriated under WIA section 167 for the NFJP?

(a) At least 94 percent of the funds appropriated each year for WIA section 167 activities must be allocated to State service areas, based on the distribution of the eligible MSFW population determined under a formula which has been published in the FEDERAL REGISTER. Grants are awarded under a competitive process for the provision of services to eligible farmworkers within each service area.

(b) The balance, up to 6 percent of the appropriated funds, will be used for discretionary purposes, for such activities as grantee technical assistance and support of farmworker housing activities.

Subpart C—The National Farmworker Jobs Program Customers and Available Program Services

§ 669.300 What are the general responsibilities of the NFJP grantees?

Each grantee is responsible for providing needed services in accordance with a service delivery strategy described in its approved grant plan. These services must reflect the needs of the MSFW population in the service area and include the services and training activities that are necessary to achieve each participant's employment goals.

§ 669.310 What are the basic components of an NFJP service delivery strategy?

The NFJP service delivery strategy must include:

(a) A customer-centered case management approach;

(b) The provision of workforce investment activities, which include core services, intensive services, and training services, as described in WIA section 134, as appropriate;

(c) The arrangements under the MOU's with the applicable Local Workforce Investment Boards for the delivery of the services available through the One-Stop system to MSFW's; and

(d) Related assistance services.

§ 669.320 Who is eligible to receive services under the NFJP?

Disadvantaged migrant and seasonal farmworkers, as defined in § 669.110, and their dependents are eligible for services funded by the NFJP.

§ 669.330 How are services delivered to the customer?

To ensure that all services are focused on the customer's needs, services are provided through a case-management approach and may include: Core, intensive and training services; and related assistance, which includes emergency assistance and supportive services. The basic services and delivery of case-management activities are further described at §§ 669.340 through 669.410. Consistent with 20 CFR part 663, before receiving intensive services, a participant must receive at least one core

service, and, prior to receiving training services, a participant must receive at least one intensive service.

§ 669.340 What core services are available to eligible MSFW's?

The core services identified in WIA section 134(d)(2) are available to eligible MSFW's.

§ 669.350 How are core services delivered to MSFW's?

(a) The full range of core services are available to MSFW's, as well as other individuals, at One-Stop Centers, as described in 20 CFR part 662.

(b) Core services must be made available through the One-Stop delivery system. The delivery of core services to MSFW's, by the NFJP grantee and through the One-Stop system, must be discussed in the required MOU between the Local Board and the NFJP grantee.

§ 669.360 May grantees provide emergency assistance to MSFW's?

(a) Yes, Emergency Assistance (as defined in § 669.110) is a form of the related assistance that is authorized under WIA section 167(d) and may be provided by a grantee as described in the grant plan.

(b) In providing emergency assistance, the NFJP grantee may use an abbreviated eligibility determination process that accepts the applicant's self-attestation as final evidence of eligibility, except that self-attestation may not be used to establish the requirements of legal working status in the United States, and Selective Service registration, where applicable.

§ 669.370 What intensive services may be provided to eligible MSFW's?

(a) Intensive services available to farmworkers include those described in WIA section 134(d)(3)(C).

(b) Intensive services may also include:

(1) Dropout prevention activities;

(2) Allowance payments;

(3) Work experience, which:

(i) Is designed to promote the development of good work habits and basic work skills at the work-site (work experience may be conducted with the public and private non-profit sectors and with the private for-profit sector when the design for this service is described in the approved grant plan); and which:

(ii)(A) May be paid. Paid work experience must compensate participants at no less than the higher of the applicable State or Federal minimum wage; or

(B) May be unpaid. Unpaid work experience must provide tangible benefits, in lieu of wages, to those who participate in unpaid work experience and the strategy for ensuring that tangible benefits are received must be described in the approved grant plan. The benefits to the participant must be commensurate with the participant's contribution to the hosting organization;

(4) Literacy and English-as-a-Second language; and

(5) Other services identified in the approved grant plan.

§ 669.380 What is the objective assessment that is authorized as an intensive service?

(a) An objective assessment is a procedure designed to comprehensively assess the skills, abilities, and interests of each employment and training participant through the use of diagnostic testing and other assessment tools. The methods used by the grantee in conducting the objective assessment may include:

(1) Structured in-depth interviews;

(2) Skills and aptitude assessments;

(3) Performance assessments (for example, skills or work samples, including those that measure interest and capability to train in nontraditional employment);

(4) Interest or attitude inventories;

(5) Career guidance instruments;

(6) Aptitude tests; and

(7) Basic skills tests.

(b) The objective assessment is an ongoing process that requires the grantee staff to remain in close consultation with each participant to continuously obtain current information about the participant's progress that may be relevant to his/her Individual Employment Plan (IEP).

§ 669.400 What are the elements of the Individual Employment Plan that is authorized as an intensive service?

The elements of the Individual Employment Plan (IEP) are:

(a) *Joint development:* The grantee develops the IEP in partnership with the participant;

(b) *Customer focus:* The combination of services chosen with the participant must be consistent with the results of any objective assessment, responsive to the expressed goals of the participant, and must include periodic evaluation of planned goals and a record of accomplishments in consultation with the participant;

(c) *Length/type of service:* The type and duration of intensive or training services must be based upon:

(1) The employment/career goal;

(2) Referrals to other programs for specified activities; and

(3) The delivery agents and schedules for intensive services, training and training-related supportive services; and

(d) *Privacy:* As a customer-centered case management tool, an IEP is a personal record and must receive confidential treatment.

§ 669.410 What training services may be provided to eligible MSFW's?

(a) Training services include those described in WIA sections 134(d)(4)(D) and 167(d), and may be described in the IEP and may include:

(1) On-the-job training activities under a contract between the participating employer and the grantee;

(2) Training-related supportive services; and

(b) Other training activities identified in the approved grant plan such as training in self-employment skills and micro-enterprise development.

§ 669.420 What must be included in an on-the-job training contract?

At a minimum, an on-the-job training contract must comply with the requirements of WIA sections 195(4) and 101(31) and must include:

(a) The occupation(s) for which training is to be provided;

(b) The duration of training;

(c) The wage rate to be paid to the trainee;

(d) The rate of reimbursement;

(e) The maximum amount of reimbursement;

(f) A training outline that reflects the work skills required for the position;

(g) An outline of any other separate classroom training that may be provided by the employer; and

(h) The employer's agreement to maintain and make available time and attendance, payroll and other records to support amounts claimed by the employer for reimbursement under the OJT contract.

§ 669.430 What Related Assistance services may be provided to eligible farmworkers?

Related Assistance may include such services and activities as:

(a) Emergency Assistance;

(b) Workplace safety and farmworker pesticide safety instruction;

(c) Housing development assistance;

(d) Other supportive services described in the grant plan; and

(e) English language classes and basic education classes for participants not enrolled in intensive or training services.

§ 669.440 When may farmworkers receive related assistance?

Farmworkers may receive related assistance services when the need for the related assistance is documented for any eligible farmworker or dependent in a determination made by the grantee or in a statement by the farmworker.

Subpart D—Performance Accountability, Planning and Waiver Provision

§ 669.500 What performance measures and standards apply to the NFJP?

(a) The NFJP will use the core indicators of performance common to the adult and youth programs, described in 20 CFR part 666. The levels of performance for the farmworker indicators will be established in a negotiation between the Department and the grantee. The levels must take into account the characteristics of the population to be served and the economic conditions in the service area. Proposed levels of performance must be included in the grantee plan submission, and the

agreed-upon levels must be included in the approved plan.

(b) We may develop additional performance indicators with appropriate levels of performance for evaluating programs that serve farmworkers and which reflect the State service area economy and local demographics of eligible MSFW's. The levels of performance for these additional indicators must be negotiated with the grantee and included in the approved plan.

§ 669.510 What planning documents must an NFJP grantee submit?

Each grantee receiving WIA section 167 program funds must submit to DSFP a comprehensive service delivery plan and a projection of participant services and expenditures covering the two-year designation cycle.

§ 669.520 What information is required in the NFJP grant plans?

An NFJP grantee's biennial plan must describe:

(a) The employment and education needs of the farmworker population to be served;

(b) The manner in which proposed services to farmworkers and their families will strengthen their ability to obtain or retain employment or stabilize their agricultural employment;

(c) The related assistance and supportive services to be provided and the manner in which such assistance and services are to be coordinated with other available services;

(d) The performance indicators and proposed levels of performance used to assess the performance of such entity, including the specific goals of the grantee's program for the two Program Years involved;

(e) The method the grantee will use to target its services on specific segments of the eligible population, as appropriate;

(f) The array of services which the grantee intends to make available, with costs specified on forms we prescribe. These forms will indicate how many participants the grantee expects to serve, by activity, the results expected under the grantee's plan, and the anticipated expenditures by cost category; and

(g) Its response to any other requirements set forth in the SGA issued under § 669.210.

§ 669.530 What are the submission dates for these plans?

We will announce plan submission dates in the SGA issued under § 669.220.

§ 669.540 Under what circumstances are the terms of the grantee's plan modified by the grantee or the Department?

(a) Plans must be modified to reflect the funding level for the second year of the designation cycle. We will provide instructions for when to submit modifications for second year funding, which will generally be no later than June 1 prior to the beginning of the second year of the designation cycle.

(b) We may unilaterally modify the grantee's plan to add funds or, if the total amount of funds available for allotment is reduced by Congress, to reduce each grantee's grant amount.

(c) The grantee may modify its plan to add, delete, expand, or reduce any part of the program plan or allowable activities. Such modifications may be made by the grantee without our approval except where the modification reduces the total number of participants to be served annually under intensive and/or training services by 15 percent or more, in which case the plan may only be modified with Grant Officer approval.

(d) If the grantee is approved for a regulatory waiver under §§ 669.560 and 669.570, the grantee must submit a modification of its service delivery plan to reflect the effect of the waiver.

§ 669.550 How are costs classified under the NFJP?

(a) Costs are classified as follows:

(1) Administrative costs, as defined in 20 CFR 667.220; and

(2) Program costs, which are all other costs not defined as administrative.

(b) Program costs must be classified and reported in the following categories:

(1) Related assistance, including emergency assistance and supportive services, including allocated staff costs; and

(2) All other program services, including allocated staff costs.

§ 669.555 Do the WIA administrative cost limits for States and local areas apply to NFJP grants?

No, under 20 CFR 667.210(b), limits on administrative costs for NFJP grants will be negotiated with the grantee and identified in the grant award document.

§ 669.560 Are there regulatory and/or statutory waiver provisions that apply to WIA section 167?

(a) The statutory waiver provision at WIA section 189(i) does not apply to WIA section 167.

(b) NFJP grantees may request waiver of any regulatory provisions only when such regulatory provisions are:

(1) Not required by WIA;

(2) Not related to wage and labor standards, nondisplacement protection, worker rights, participation and protection of workers and participants, and eligibility of participants, grievance procedures, judicial review, nondiscrimination, allocation of funds, procedures for review and approval of plans; and

(3) Not related to the key reform principles embodied in WIA, described in 20 CFR 661.400.

§ 669.570 What information is required to document a requested waiver?

To request a waiver, a grantee must submit a waiver plan that:

(a) Describes the goals of the waiver, the expected programmatic outcomes, and how the waiver will improve the provision of WIA activities;

(b) Is consistent with guidelines we establish and the waiver provisions at 20 CFR 661.400 through 661.420; and

(c) Includes a modified service delivery plan reflecting the effect of requested waiver.

Subpart E—The MSFW Youth Program

§ 669.600 What is the purpose of the WIA section 167 MSFW Youth Program?

The purpose of the MSFW youth program is to provide an effective and comprehensive array of educational opportunities, employment skills, and life enhancement activities to at-risk and out-of-school MSFW youth that lead to success in school, economic stability and development into productive members of society.

§ 669.610 What is the relationship between the MSFW youth program and the NFJP authorized at WIA section 167?

The MSFW youth program is funded under WIA section 127(b)(1)(A)(iii) to provide farmworker youth activities under the auspices of WIA section 167. These funds are specifically earmarked for MSFW youth. Funds provided for the section 167 program may also be used for youth, but are not limited to this age group.

§ 669.620 How do the MSFW youth program regulations apply to the NFJP program authorized under WIA section 167?

(a) This subpart applies only to the administration of grants for MSFW youth programs funded under WIA section 127(b)(1)(A)(iii).

(b) The regulations for the NFJP in this part apply to the administration of the MSFW youth program, except as modified in this subpart.

§ 669.630 What are the requirements for designation as an "MSFW youth program grantee"?

Any entity that meets the requirements described in the SGA may apply for designation as an ''MSFW youth program grantee'' consistent with requirements described in the SGA. The Department gives special consideration to an entity in any service area for which the entity has been designated as a WIA section 167 NFJP program grantee.

§ 669.640 What is the process for applying for designation as an MSFW youth program grantee?

(a) To apply for designation as an MSFW youth program grantee, entities must respond to an SGA by submitting a plan that meets the requirements of WIA section 167(c)(2) and describes a two-year strategy for meeting the needs of eligible MSFW youth in the service area the entity seeks to serve.

(b) The designation process is conducted competitively (subject to § 669.210) through a selection process

distinct from the one used to select WIA section 167 NFJP grantees.

§ 669.650 How are MSFW youth funds allocated to section 167 youth grantees?

The allocation of funds among entities designated as WIA section 167 MSFW Youth Program grantees is based on the comparative merits of the applications, in accordance with criteria set forth in the SGA. However, we may include criteria in the SGA that promote a geographical distribution of funds and that encourages both large- and small-scale programs.

§ 669.660 What planning documents and information are required in the application for MSFW youth grants and when must they be filed?

The required planning documents and other required information and the submission dates for filing are described in the SGA.

§ 669.670 Who is eligible to receive services under the section 167 MSFW youth program?

Disadvantaged youth, ages 14 through 21, who are individually eligible or are members of eligible families under the WIA section 167 NFJP may receive these services.

§ 669.680 What activities and services may be provided under the MSFW youth program?

(a) Based on an evaluation and assessment of the needs of MSFW youth participants, grantees may provide activities and services to MSFW youth that include:

(1) Intensive services and training services, as described in §§ 669.400 and 669.410;

(2) Life skills activities which may include self and interpersonal skills development;

(3) Community service projects;

(4) Small business development technical assistance and training in conjunction with entrepreneurial training;

(5) Supportive services including the related assistance services, described in § 669.430; and

(b) Other activities and services that conform to the use of funds for youth activities described in 20 CFR part 664.

PART 670—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INVESTMENT ACT

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SOURCE: 65 FR 49450, Aug. 11, 2000, unless otherwise noted.

Subpart A—Scope and Purpose

§ 670.100 What is the scope of this part?

The regulations in this part are an outline of the requirements that apply to the Job Corps program. More detailed policies and procedures are contained in a Policy and Requirements Handbook issued by the Secretary. Throughout this part, phrases like ''according to instructions (procedures) issued by the Secretary'' refer to the Policy and Requirements Handbook and other Job Corps directives.

§ 670.110 What is the Job Corps program?

Job Corps is a national program that operates in partnership with States and communities, local Workforce Investment Boards, youth councils, One-Stop Centers and partners, and other youth programs to provide education and training, primarily in a residential setting, for low income young people. The objective of Job Corps is to provide young people with the skills they need to obtain and hold a job, enter the Armed Forces, or enroll in advanced training or further education.

§ 670.120 What definitions apply to this part?

The following definitions apply to this part:

Absent Without Official Leave (AWOL) means an adverse enrollment status to which a student is assigned based on extended, unapproved absence from his/her assigned center or off-center place of duty. Students do not earn Job Corps allowances while in AWOL status.

Applicable local board means a local Workforce Investment Board that:

(1) Works with a Job Corps center and provides information on local demand occupations, employment opportunities, and the job skills needed to obtain the opportunities, and

(2) Serves communities in which the graduates of the Job Corps seek employment when they leave the program.

Capital improvement means any modification, addition, restoration or other improvement:

(1) Which increases the usefulness, productivity, or serviceable life of an existing site, facility, building, structure, or major item of equipment;

(2) Which is classified for accounting purposes as a ''fixed asset;'' and

(3) The cost of which increases the recorded value of the existing building, site, facility, structure, or major item of equipment and is subject to depreciation.

Center means a facility and an organizational entity, including all of its parts, providing Job Corps training and designated as a Job Corps center.

Center operator means a Federal, State or local agency, or a contractor that runs a center under an agreement or contract with DOL.

Civilian conservation center (CCC) means a center operated on public land under an agreement between DOL and another Federal agency, which provides, in addition to other training and assistance, programs of work-based learning to conserve, develop, or manage public natural resources or public recreational areas or to develop community projects in the public interest.

Contract center means a Job Corps center operated under a contract with DOL.

Contracting officer means the Regional Director or other official authorized to enter into contracts or agreements on behalf of DOL.

Enrollee means an individual who has voluntarily applied for, been selected for, and enrolled in the Job Corps program, and remains with the program, but has not yet become a graduate. Enrollees are also referred to as ''students'' in this part.

Enrollment means the process by which individual formally becomes a student in the Job Corps program.

Graduate means an enrollee who has:

(1) Completed the requirements of a vocational training program, or received a secondary school diploma or its equivalent as a result of participating in the Job Corps program; and

(2) Achieved job readiness and employment skills as a result of participating in the Job Corps program.

Individual with a disability means an individual with a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

Interagency agreement means a formal agreement between DOL and another Federal agency administering and operating centers. The agreement establishes procedures for the funding, administration, operation, and review of those centers as well as the resolution of any disputes.

Job Corps means the agency of the Department established by section 143 of the Workforce Investment Act of 1998 (WIA) (20 U.S.C. 9201 *et seq.*) to perform those functions of the Secretary of Labor set forth in subtitle C of WIA Title I.

Job Corps Director means the chief official of the Job Corps or a person authorized to act for the Job Corps Director.

Low income individual means an individual who meets the definition in WIA section 101(25).

National Office means the national office of Job Corps.

National training contractor means a labor union, union-affiliated organization, business organization, association or a combination of such organizations, which has a contract with the national office to provide vocational training, placement, or other services.

Operational support services means activities or services required to support the operation of Job Corps, including:

(1) Outreach and admissions services;

(2) Contracted vocational training and off-center training;

(3) Placement services;

(4) Continued services for graduates;

(5) Certain health services; and

(6) Miscellaneous logistical and technical support.

Outreach and admissions agency means an organization that performs outreach, and screens and enrolls youth under a contract or other agreement with Job Corps.

Placement means student employment, entry into the Armed Forces, or enrollment in other training or education programs following separation from Job Corps.

Placement agency means an organization acting under a contract or other agreement with Job Corps to provide placement services for graduates and, to the extent possible, for former students.

Regional appeal board means the board designated by the Regional Director to consider student appeals of disciplinary discharges.

Regional Director means the chief Job Corps official of a regional office or a person authorized to act for the Regional Director.

Regional Office means a regional office of Job Corps.

Regional Solicitor means the chief official of a regional office of the DOL Office of the Solicitor, or a person authorized to act for the Regional Solicitor.

Separation means the action by which an individual ceases to be a student in the Job Corps program, either voluntarily or involuntarily.

Student means an individual enrolled in the Job Corps.

Unauthorized goods means:

(1) Firearms and ammunition;

(2) Explosives and incendiaries;

(3) Knives with blades longer than 2 inches;

(4) Homemade weapons;

(5) All other weapons and instruments used primarily to inflict personal injury;

(6) Stolen property;

(7) Drugs, including alcohol, marijuana, depressants, stimulants, hallucinogens, tranquilizers, and drug paraphernalia except for drugs and/or paraphernalia that are prescribed for medical reasons; and

(8) Any other goods prohibited by the center operator in a student handbook.

§ 670.130 What is the role of the Job Corps Director?

The Job Corps Director has been delegated the authority to carry out the responsibilities of the Secretary under Subtitle I-C of the Act. Where the term ''Secretary'' is used in this part 670 to refer to establishment or issuance of

guidelines and standards directly relating to the operation of the Job Corps program, the Job Corps Director has that responsibility.

Subpart B—Site Selection and Protection and Maintenance of Facilities

§ 670.200 Who decides where Job Corps centers will be located?

(a) The Secretary must approve the location and size of all Job Corps centers.

(b) The Secretary establishes procedures for making decisions concerning the establishment, relocation, expansion, or closing of contract centers.

§ 670.210 How are center facility improvements and new construction handled?

The Secretary issues procedures for requesting, approving, and initiating capital improvements and new construction on Job Corps centers.

§ 670.220 Are we responsible for the protection and maintenance of center facilities?

(a) Yes, the Secretary establishes procedures for the protection and maintenance of contract center facilities owned or leased by the Department of Labor, that are consistent with Federal Property Management Regulations at 41 CFR Chapter 101.

(b) Federal agencies operating civilian conservation centers (CCC's) on public land are responsible for protection and maintenance of CCC facilities.

(c) The Secretary issues procedures for conducting periodic facility surveys of centers to determine their condition and to identify needs such as correction of safety and health deficiencies, rehabilitation, and/or new construction.

Subpart C—Funding and Selection of Service Providers

§ 670.300 What entities are eligible to receive funds to operate centers and provide training and operational support services?

(a) Entities eligible to receive funds under this subpart to operate centers include:

(1) Federal, State, and local agencies;

(2) Private for-profit and non-profit corporations;

(3) Indian tribes and organizations; and

(4) Area vocational education or residential vocational schools. (WIA sec. 147(a)(1)(A) and (d)).

(b) Entities eligible to receive funds to provide outreach and admissions, placement and other operational support services include:

(1) One-Stop Centers and partners;

(2) Community action agencies;

(3) Business organizations;

(4) Labor organizations;

(5) Private for-profit and non-profit corporations; and

(6) Other agencies, and individuals that have experience and contact with youth. (WIA sec. 145(a)(3)).

§ 670.310 How are entities selected to receive funding?

(a) The Secretary selects eligible entities to operate contract centers and operational support service providers on a competitive basis in accordance with the Federal Property and Administrative Services Act of 1949 unless section 303 (c) and (d) of that Act apply. In selecting an entity, Job Corps issues requests for proposals (RFP) for the operation of all contract centers and for provision of operational support services according to Federal Acquisition Regulation (48 CFR Chapter 1) and DOL Acquisition Regulation (48 CFR Chapter 29). Job Corps develops RFP's for center operators in consultation with the Governor, the center industry council (if established), and the Local Board for the workforce investment area in which the center is located.

(b) The RFP for each contract center and each operational support service contract describes uniform specifications and standards, as well as specifications and requirements that are unique to the operation of the specific center or to the specific required operational support services.

(c) The Contracting Officer selects and funds Job Corps contract center operators on the basis of an evaluation of the proposals received using criteria established by the Secretary, and set

forth in the RFP. The criteria include the following:

(1) The offeror's ability to coordinate the activities carried out through the Job Corps center with activities carried out under the appropriate State and local workforce investment plans;

(2) The degree to which the offeror proposes vocational training that reflects employment opportunities in the local areas in which most of the students intend to seek employment;

(3) The degree to which the offeror is familiar with the surrounding community, including the applicable One-Stop Centers, and the State and region in which the center is located; and

(4) The offeror's past performance.

(d) The Contracting Officer selects and funds operational support service contractors on the basis of an evaluation of the proposals received using criteria established by the Secretary and set forth in the RFP.

(e) The Secretary enters into interagency agreements with Federal agencies for the funding, establishment, and operation of CCC's which include provisions to ensure that the Federal agencies comply with the regulations under this part.

§ 670.320 What are the requirements for award of contracts and payments to Federal agencies?

(a) The requirements of the Federal Property and Administrative Services Act of 1949, as amended; the Federal Grant and Cooperative Agreement Act of 1977; the Federal Acquisition Regulation (48 CFR Chapter 1); and the DOL Acquisition Regulation (48 CFR Chapter 29) apply to the award of contracts and to payments to Federal agencies.

(b) Job Corps funding of Federal agencies that operate CCC's are made by a transfer of obligational authority from DOL to the respective operating agency.

Subpart D—Recruitment, Eligibility, Screening, Selection and Assignment, and Enrollment

§ 670.400 Who is eligible to participate in the Job Corps program?

To be eligible to participate in the Job Corps, an individual must be:

(a) At least 16 and not more than 24 years of age at the time of enrollment, except

(1) There is no upper age limit for an otherwise eligible individual with a disability; and

(2) Not more than 20% of individuals enrolled nationwide may be individuals who are aged 22 to 24 years old;

(b) A low-income individual;

(c) An individual who is facing one or more of the following barriers to education and employment:

(1) Is basic skills deficient, as defined in WIA sec. 101(4); or

(2) Is a school dropout; or

(3) Is homeless, or a runaway, or a foster child; or

(4) Is a parent; or

(5) Requires additional education, vocational training, or intensive counseling and related assistance in order to participate successfully in regular schoolwork or to secure and hold meaningful employment; and

(d) Meets the requirements of § 670.420, if applicable.

§ 670.410 Are there additional factors which are considered in selecting an eligible applicant for enrollment?

Yes, in accordance with procedures issued by the Secretary, an eligible applicant may be selected for enrollment, only if:

(a) A determination is made, based on information relating to the background, needs and interests of the applicant, that the applicant's educational and vocational needs can best be met through the Job Corps program;

(b) A determination is made that there is a reasonable expectation the applicant can participate successfully in group situations and activities, and is not likely to engage in actions that would potentially:

(1) Prevent other students from receiving the benefit of the program;

(2) Be incompatible with the maintenance of sound discipline; or

(3) Impede satisfactory relationships between the center to which the student is assigned and surrounding local communities;

(c) The applicant is made aware of the center's rules and what the consequences are for failure to observe the

rules, as described in procedures issued by the Secretary;

(d) The applicant passes a background check conducted according to procedures established by the Secretary. The background check must find that the applicant is not on probation, parole, under a suspended sentence or under the supervision of any agency as a result of court action or institutionalization, unless the court or appropriate agency certifies in writing that it will approve of the applicant's release from its supervision and that the applicant's release does not violate applicable laws and regulations. No one will be denied enrollment in Job Corps solely on the basis of contact with the criminal justice system. (WIA secs. 145(b)(1)(C) and 145(b)(2));

(e) Suitable arrangements are made for the care of any dependent children for the proposed period of enrollment.

§ 670.420 Are there any special requirements for enrollment related to the Military Selective Service Act?

(a) Yes, each male applicant 18 years of age or older must present evidence that he has complied with section 3 of the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*) if required; and

(b) When a male student turns 18 years of age, he must submit evidence to the center that he has complied with the requirements of the Military Selective Service Act (50 U.S.C. App. 451 *et seq*).

§ 670.430 What entities conduct outreach and admissions activities for the Job Corps program?

The Regional Director makes arrangements with outreach and admissions agencies to perform Job Corps recruitment, screening and admissions functions according to standards and procedures issued by the Secretary. One-Stop Centers or partners, community action organizations, private for-profit and non-profit businesses, labor organizations, or other entities that have contact with youth over substantial periods of time and are able to offer reliable information about the needs of youth, conduct outreach and admissions activities. The Regional Director awards contracts for provision of outreach and screening services on a competitive basis in accordance with the requirements in § 670.310.

§ 670.440 What are the responsibilities of outreach and admissions agencies?

(a) Outreach and admissions agencies are responsible for:

(1) Developing outreach and referral sources;

(2) Actively seeking out potential applicants;

(3) Conducting personal interviews with all applicants to identify their needs and eligibility status; and

(4) Identifying youth who are interested and likely Job Corps participants.

(b) Outreach and admissions agencies are responsible for completing all Job Corps application forms and determining whether applicants meet the eligibility and selection criteria for participation in Job Corps as provided in §§ 670.400 and 670.410.

(c) The Secretary may decide that determinations with regard to one or more of the eligibility criteria will be made by the Regional Director.

§ 670.450 How are applicants who meet eligibility and selection criteria assigned to centers?

(a) Each applicant who meets the application and selection requirements of §§ 670.400 and 670.410 is assigned to a center based on an assignment plan developed by the Secretary. The assignment plan identifies a target for the maximum percentage of students at each center who come from the State or region nearest the center, and the regions surrounding the center. The assignment plan is based on an analysis of:

(1) The number of eligible individuals in the State and region where the center is located and the regions surrounding where the center is located;

(2) The demand for enrollment in Job Corps in the State and region where the center is located and in surrounding regions; and

(3) The size and enrollment level of the center.

(b) Eligible applicants are assigned to centers closest to their homes, unless it is determined, based on the special needs of applicants, including vocational interests and English literacy

needs, the unavailability of openings in the closest center, or parent or guardian concerns, that another center is more appropriate.

(c) A student who is under the age of 18 must not be assigned to a center other than the center closest to home if a parent or guardian objects to the assignment.

§ 670.460 What restrictions are there on the assignment of eligible applicants for nonresidential enrollment in Job Corps?

(a) No more than 20 percent of students enrolled in Job Corps nationwide may be nonresidential students.

(b) In enrolling individuals who are to be nonresidential students, priority is given to those eligible individuals who are single parents with dependent children. (WIA sec 147(b).)

§ 670.470 May a person who is determined to be ineligible or an individual who is denied enrollment appeal that decision?

(a) A person who is determined to be ineligible to participate in Job Corps under § 670.400 or a person who is not selected for enrollment under § 670.410 may appeal the determination to the outreach and admissions agency or to the center within 60 days of the determination. The appeal will be resolved according to the procedures in §§ 670.990 and 670.991. If the appeal is denied by the outreach/admissions contractor or the center, the person may appeal the decision in writing to the Regional Director within 60 days the date of the denial. The Regional Director will decide within 60 days whether to reverse or approve the appealed decision. The decision by the Regional Director is the Department's final decision.

(b) If an applicant believes that he or she has been determined ineligible or not selected for enrollment based upon a factor prohibited by WIA section 188, the individual may proceed under the applicable DOL nondiscrimination regulations implementing WIA section 188. These regulations may be found at 29 CFR part 37.

(c) An applicant who is determined to be ineligible or a person who is denied enrollment must be referred to the appropriate One-Stop Center or other local service provider.

§ 670.480 At what point is an applicant considered to be enrolled in Job Corps?

(a) To become enrolled as a Job Corps student, an applicant selected for enrollment must physically arrive at the assigned Job Corps center on the appointed date. However, applicants selected for enrollment who arrive at their assigned centers by government furnished transportation are considered to be enrolled on their dates of departure by such transportation.

(b) Center operators must document the enrollment of new students according to procedures issued by the Secretary.

§ 670.490 How long may a student be enrolled in Job Corps?

(a) Except as provided in paragraph (b) of this section, a student may remain enrolled in Job Corps for no more than two years.

(b)(1) An extension of a student's enrollment may be authorized in special cases according to procedures issued by the Secretary; and

(2) A student's enrollment in an advanced career training program may be extended in order to complete the program for a period not to exceed one year.

Subpart E—Program Activities and Center Operations

§ 670.500 What services must Job Corps centers provide?

(a) Job Corps centers must provide:

(1) Academic, vocational, employability and social skills training;

(2) Work-based learning; and

(3) Recreation, counseling and other residential support services.

(b) In addition, centers must provide students with access to the core services described in WIA section 134(d)(2) and the intensive services described in WIA section 134(d)(3).

§ 670.505 What types of training must Job Corps centers provide?

(a) Job Corps centers must provide basic education, vocational and social skills training. The Secretary provides curriculum standards and guidelines.

(b) Each center must provide students with competency-based or individualized training in an occupational area that will best contribute to the students' opportunities for permanent long-term employment.

(1) Specific vocational training programs offered by individual centers must be approved by the Regional Director according to policies issued by the Secretary.

(2) Center industry councils described in § 670.800 must review appropriate labor market information, identify employment opportunities in local areas where students will look for employment, determine the skills and education necessary for those jobs, and as appropriate, recommend changes in the center's vocational training program to the Secretary.

(c) Each center must implement a system to evaluate and track the progress and achievements of each student at regular intervals.

(d) Each center must develop a training plan that must be available for review and approval by the appropriate Regional Director.

§ 670.510 Are Job Corps center operators responsible for providing all vocational training?

No, in order to facilitate students' entry into the workforce, the Secretary may contract with national business, union, or union-affiliated organizations for vocational training programs at specific centers. Contractors providing such vocational training will be selected in accordance with the requirements of § 670.310.

§ 670.515 What responsibilities do the center operators have in managing work-based learning?

(a) The center operator must emphasize and implement work-based learning programs for students through center program activities, including vocational skills training, and through arrangements with employers. Work-based learning must be under actual working conditions and must be designed to enhance the employability, responsibility, and confidence of the students. Work-based learning usually occurs in tandem with students' vocational training.

(b) The center operator must ensure that students are assigned only to workplaces that meet the safety standards described in § 670.935.

§ 670.520 Are students permitted to hold jobs other than work-based learning opportunities?

Yes, a center operator may authorize a student to participate in gainful leisure time employment, as long as the employment does not interfere with required scheduled activities.

§ 670.525 What residential support services must Job Corps center operators provide?

Job Corps center operators must provide the following services according to procedures issued by the Secretary:

(a) A quality living and learning environment that supports the overall training program and includes a safe, secure, clean and attractive physical and social environment, seven days a week, 24 hours a day;

(b) An ongoing, structured counseling program for students;

(c) Food service, which includes provision of nutritious meals for students;

(d) Medical services, through provision or coordination of a wellness program which includes access to basic medical, dental and mental health services, as described in the Policy and Requirements Handbook, for all students from the date of enrollment until separation from the Job Corps program;

(e) A recreation/avocational program;

(f) A student leadership program and an elected student government; and

(g) A student welfare association for the benefit of all students that is funded by non-appropriated funds which come from sources such as snack bars, vending machines, disciplinary fines, and donations, and is run by an elected student government, with the help of a staff advisor.

§ 670.530 Are Job Corps centers required to maintain a student accountability system?

Yes, each Job Corps center must establish and operate an effective system to account for and document the whereabouts, participation, and status

of students during their Job Corps enrollment. The system must enable center staff to detect and respond to instances of unauthorized or unexplained student absence. Each center must operate its student accountability system according to requirements and procedures issued by the Secretary.

§ 670.535 Are Job Corps centers required to establish behavior management systems?

(a) Yes, each Job Corps center must establish and maintain its own student incentives system to encourage and reward students' accomplishments.

(b) The Job Corps center must establish and maintain a behavior management system, according to procedures established by the Secretary. The behavior management system must include a zero tolerance policy for violence and drugs policy as described in § 670.540.

§ 670.540 What is Job Corps' zero tolerance policy?

(a) Each Job Corps center must have a zero tolerance policy for:

(1) An act of violence, as defined in procedures issued by the Secretary;

(2) Use, sale, or possession of a controlled substance, as defined at 21 U.S.C. 802;

(3) Abuse of alcohol;

(4) Possession of unauthorized goods; or

(5) Other illegal or disruptive activity.

(b) As part of this policy, all students must be tested for drugs as a condition of enrollment. (WIA sec. 145(a)(1) and 152(b)(2).)

(c) According to procedures issued by the Secretary, the policy must specify the offenses that result in the automatic separation of a student from the Job Corps. The center director is responsible for determining when there is a violation of a specified offense.

§ 670.545 How does Job Corps ensure that students receive due process in disciplinary actions?

The center operator must ensure that all students receive due process in disciplinary proceedings according to procedures developed by the Secretary. These procedures must include, at a minimum, center fact-finding and behavior review boards, a code of sanctions under which the penalty of separation from Job Corps might be imposed, and procedures for students to appeal a center's decision to discharge them involuntarily from Job Corps to a regional appeal board.

§ 670.550 What responsibilities do Job Corps centers have in assisting students with child care needs?

(a) Job Corps centers are responsible for coordinating with outreach and admissions agencies to assist students with making arrangements for child care for their dependent children.

(b) Job Corps centers may operate on center child development programs with the approval of the Secretary.

§ 670.555 What are the center's responsibilities in ensuring that students' religious rights are respected?

(a) Centers must ensure that a student has the right to worship or not worship as he or she chooses.

(b) Students who believe their religious rights have been violated may file complaints under the procedures set forth in 29 CFR part 37.

(c) Requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries, are found at subpart D of 29 CFR part 2. *See also* §§ 667.266 and 667.275 of 20 CFR; 29 CFR part 37.

[65 FR 49450, Aug. 11, 2000, as amended at 69 FR 41891, July 12, 2004]

§ 670.560 Is Job Corps authorized to conduct pilot and demonstration projects?

(a) Yes, the Secretary may undertake experimental, research and demonstration projects related to the Job Corps program according to WIA section 156.

(b) The Secretary establishes policies and procedures for conducting such projects.

(c) All studies and evaluations produced or developed with Federal funds become the property of the United States.

Subpart F—Student Support

§ 670.600 Is government-paid transportation provided to Job Corps students?

Yes, Job Corps provides for the transportation of students between their homes and centers as described in policies and procedures issued by the Secretary.

§ 670.610 When are students authorized to take leaves of absence from their Job Corps centers?

Job Corps students are eligible for annual leaves, emergency leaves and other types of leaves of absence from their assigned centers according to criteria and requirements issued by the Secretary. Center operators and other service providers must account for student leave according to procedures issued by the Secretary.

§ 670.620 Are Job Corps students eligible to receive cash allowances and performance bonuses?

(a) Yes, according to criteria and rates established by the Secretary, Job Corps students receive cash living allowances, performance bonuses, and allotments for care of dependents, and graduates receive post-separation readjustment allowances and placement bonuses. The Secretary may provide former students with post-separation allowances.

(b) In the event of a student's death, any amount due under this section is paid according to the provisions of 5 U.S.C. 5582 governing issues such as designation of beneficiary, order of precedence and related matters.

§ 670.630 Are student allowances subject to Federal Payroll Taxes?

Yes, Job Corps student allowances are subject to Federal payroll tax withholding and social security taxes. Job Corps students are considered to be Federal employees for purposes of Federal payroll taxes. (WIA sec. 157(a)(2).)

§ 670.640 Are students provided with clothing?

Yes, Job Corps students are provided cash clothing allowances and/or articles of clothing, including safety clothing, when needed for their participation in Job Corps and their successful entry into the work force. Center operators and other service providers must issue clothing and clothing assistance to students according to rates, criteria, and procedures issued by the Secretary.

Subpart G—Placement and Continued Services

§ 670.700 What are Job Corps centers' responsibilities in preparing students for placement services?

Job Corps centers must test and counsel students to assess their competencies and capabilities and determine their readiness for placement.

§ 670.710 What placement services are provided for Job Corps students?

(a) Job Corps placement services focus on placing program graduates in:

(1) Full-time jobs that are related to their vocational training and that pay wages that allow for self-sufficiency;

(2) Higher education; or

(3) Advanced training programs, including apprenticeship programs.

(b) Placement service levels for students may vary, depending on whether the student is a graduate or a former student.

(c) Procedures relating to placement service levels are issued by the Secretary.

§ 670.720 Who provides placement services?

The One-Stop system must be used to the fullest extent possible in placing graduates and former students in jobs. Job Corps placement agencies provide placement services under a contract or other agreement with the Department of Labor.

§ 670.730 What are the responsibilities of placement agencies?

(a) Placement agencies are responsible for:

(1) Contacting graduates;

(2) Assisting them in improving skills in resume preparation, interviewing techniques and job search strategies;

(3) Identifying job leads or educational and training opportunities

through coordination with local Workforce Investment Boards, One-Stop operators and partners, employers, unions and industry organizations; and

(4) Placing graduates in jobs, apprenticeship, the Armed Forces, or higher education or training, or referring former students for additional services in their local communities as appropriate. Placement services may be provided for former students according to procedures issued by the Secretary.

(b) Placement agencies must record and submit all Job Corps placement information according to procedures established by the Secretary.

§ 670.740 Must continued services be provided for graduates?

Yes, according to procedures issued by the Secretary, continued services, including transition support and workplace counseling, must be provided to program graduates for 12 months after graduation.

§ 670.750 Who may provide continued services for graduates?

Placement agencies, centers or other agencies, including One-Stop partners, may provide post-program services under a contract or other agreement with the Regional Director. In selecting a provider for continued services, priority is given to One-Stop partners. (WIA sec. 148(d)).

§ 670.760 How will Job Corps coordinate with other agencies?

(a) The Secretary issues guidelines for the National Office, Regional Offices, Job Corps centers and operational support providers to use in developing and maintaining cooperative relationships with other agencies and institutions, including law enforcement, educational institutions, communities, and other employment and training programs and agencies.

(b) The Secretary develops polices and requirements to ensure linkages with the One-Stop delivery system to the greatest extent practicable, as well as with other Federal, State, and local programs, and youth programs funded under this title. These linkages enhance services to youth who face multiple barriers to employment and must include, where appropriate:

(1) Referrals of applicants and students;

(2) Participant assessment;

(3) Pre-employment and work maturity skills training;

(4) Work-based learning;

(5) Job search, occupational, and basic skills training; and

(6) Provision of continued services for graduates.

Subpart H—Community Connections

§ 670.800 How do Job Corps centers and service providers become involved in their local communities?

(a) Job Corps representatives serve on Youth Councils operating under applicable Local Boards wherever geographically feasible.

(b) Each Job Corps center must have a Business and Community Liaison designated by the director of the center to establish relationships with local and distant employers, applicable One-Stop centers and local boards, and members of the community according to procedures established by the Secretary. (WIA sec. 153(a).)

(c) Each Job Corps center must implement an active community relations program.

(d) Each Job Corps center must establish an industry advisory council, according to procedures established by the Secretary. The industry advisory council must include:

(1) Distant and local employers;

(2) Representatives of labor organizations (where present) and employees; and

(3) Job Corps students and graduates.

(e) A majority of the council members must be local and distant business owners, chief executives or chief operating officers of nongovernmental employers or other private sector employers, who have substantial management, hiring or policy responsibility and who represent businesses with employment opportunities in the local area and the areas to which students will return.

(f) The council must work with Local Boards and must review labor market information to provide recommendations to the Secretary regarding the center's vocational training offerings, including identification of emerging

occupations suitable for training. (WIA sec.154(b)(1).)

(g) Job Corps is identified as a required One-Stop partner. Wherever practicable, Job Corps centers and operational support contractors must establish cooperative relationships and partnerships with One-Stop centers and other One-Stop partners, Local Boards, and other programs for youth.

Subpart I—Administrative and Management Provisions

§ 670.900 Are damages caused by the acts or omissions of students eligible for payment under the Federal Tort Claims Act?

Yes, students are considered Federal employees for purposes of the FTCA (28 U.S.C. 2671 *et seq.*). Claims for such damage should be filed pursuant to the procedures found in 29 CFR part 15, subpart D.

[77 FR 22207, Apr. 13, 2012]

§ 670.905 Are loss and damages that occur to persons or personal property of students at Job Corps centers eligible for reimbursement?

Yes, the Job Corps may pay students for valid claims under the procedures found in 29 CFR part 15, subpart D.

[77 FR 22207, Apr. 13, 2012]

§ 670.910 If a student is injured in the performance of duty as a Job Corps Student, what benefits may they receive?

(a) Job Corps students are considered Federal employees for purposes of the Federal Employees' Compensation Act (FECA) as specified in 29 U.S.C. 2897.

(b) Job Corps students may be entitled to benefits under FECA as provided by 5 U.S.C. 8143 for injuries occurring in the performance of duty.

(c) Job Corps students must meet the same eligibility tests for FECA benefits that apply to all other Federal employees. The requirements for FECA benefits may be found at 5 U.S.C. 8101, *et seq.* and part 10 of this title. The Department of Labor's Office of Workers' Compensation Programs (OWCP) administers the FECA program; all FECA determinations are within the exclusive authority of the OWCP, subject to appeal to the Employees' Compensation Appeals Board.

(d) Whenever a student is injured, develops an occupationally related illness, or dies while in the performance of duty, the procedures of the OWCP, at part 10 of this title, must be followed. To assist OWCP in determining FECA eligibility, a thorough investigation of the circumstances and a medical evaluation must be completed and required forms must be timely filed by the center operator with the DOL's OWCP. Additional information regarding Job Corps FECA claims may be found in OWCP's regulations and procedures available on DOL's Web site located at *www.dol.gov*.

[77 FR 22207, Apr. 13, 2012]

§ 670.915 When is a Job Corps student considered to be in the performance of duty?

(a) Performance of duty is a determination that must be made by the OWCP under FECA, and is based on the individual circumstances in each claim.

(b) In general, residential students may be considered to be in the ''performance of duty'' when:

(1) They are on center under the supervision and control of Job Corps officials;

(2) They are engaged in any authorized Job Corps activity;

(3) They are in authorized travel status; or

(4) They are engaged in any authorized offsite activity.

(c) Non-resident students are generally considered to be ''in performance of duty'' as Federal employees when they are engaged in any authorized Job Corps activity, from the time they arrive at any scheduled center activity until they leave the activity. The standard rules governing coverage of Federal employees during travel to and from work apply. These rules are described in guidance issued by the Secretary.

(d) Students are generally considered to be not in the performance of duty when:

(1) They are Absent Without Leave (AWOL);

(2) They are at home, whether on pass or on leave;

(3) They are engaged in an unauthorized offsite activity; or

(4) They are injured or ill due to their own willful misconduct, intent to cause injury or death to oneself or another or through intoxication or illegal use of drugs.

[77 FR 22207, Apr. 13, 2012]

§ 670.935 How are students protected from unsafe or unhealthy situations?

(a) The Secretary establishes procedures to ensure that students are not required or permitted to work, be trained, reside in, or receive services in buildings or surroundings or under conditions that are unsanitary or hazardous. Whenever students are employed or in training for jobs, they must be assigned only to jobs or training which observe applicable Federal, State and local health and safety standards.

(b) The Secretary develops procedures to ensure compliance with applicable DOL Occupational Safety and Health Administration regulations.

§ 670.940 What are the requirements for criminal law enforcement jurisdiction on center property?

(a) All Job Corps property which would otherwise be under exclusive Federal legislative jurisdiction is considered under concurrent jurisdiction with the appropriate State and locality with respect to criminal law enforcement. Concurrent jurisdiction extends to all portions of the property, including housing and recreational facilities, in addition to the portions of the property used for education and training activities.

(b) Centers located on property under concurrent Federal-State jurisdiction must establish agreements with Federal, State and local law enforcement agencies to enforce criminal laws.

(c) The Secretary develops procedures to ensure that any searches of a student's person, personal area or belongings for unauthorized goods follow applicable right-to-privacy laws.

§ 670.945 Are Job Corps operators and service providers authorized to pay State or local taxes on gross receipts?

(a) A private for-profit or a nonprofit Job Corps service provider is not liable, directly or indirectly, to any State or subdivision for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes in connection with any payments made to or by such service provider for operating a center or other Job Corps program or activity. The service provider is not liable to any State or subdivision to collect or pay any sales, excise, use, or similar tax imposed upon the sale to or use by such deliverer of any property, service, or other item in connection with the operation of a center or other Job Corps program or activity. (WIA sec. 158(d).)

(b) If a State or local authority compels a center operator or other service provider to pay such taxes, the center operator or service provider may pay the taxes with Federal funds, but must document and report the State or local requirement according to procedures issued by the Secretary.

§ 670.950 What are the financial management responsibilities of Job Corps center operators and other service providers?

(a) Center operators and other service providers must manage Job Corps funds using financial management information systems that meet the specifications and requirements of the Secretary.

(b) These financial management systems must:

(1) Provide accurate, complete, and current disclosures of the costs of their Job Corps activities;

(2) Ensure that expenditures of funds are necessary, reasonable, allocable and allowable in accordance with applicable cost principles;

(3) Use account structures specified by the Secretary;

(4) Ensure the ability to comply with cost reporting requirements and procedures issued by the Secretary; and

(5) Maintain sufficient cost data for effective planning, monitoring, and evaluation of program activities and

for determining the allowability of reported costs.

§ 670.955 Are center operators and service providers subject to Federal audits?

(a) Yes, Center operators and service providers are subject to Federal audits.

(b) The Secretary arranges for the survey, audit, or evaluation of each Job Corps center and service provider at least once every three years, by Federal auditors or independent public accountants. The Secretary may arrange for more frequent audits. (WIA sec. 159(b)(2).)

(c) Center operators and other service providers are responsible for giving full cooperation and access to books, documents, papers and records to duly appointed Federal auditors and evaluators. (WIA sec. 159(b)(1).)

§ 670.960 What are the procedures for management of student records?

The Secretary issues guidelines for a system for maintaining records for each student during enrollment and for disposition of such records after separation.

§ 670.965 What procedures apply to disclosure of information about Job Corps students and program activities?

(a) The Secretary develops procedures to respond to requests for information or records or other necessary disclosures pertaining to students.

(b) DOL disclosure of Job Corps information must be handled according to the Freedom of Information Act and according to DOL regulations at 29 CFR part 70.

(c) Job Corps contractors are not ''agencies'' for Freedom of Information Act purposes. Therefore, their records are not subject to disclosure under the Freedom of Information Act or 29 CFR part 70.

(d) The regulations at 29 CFR part 71 apply to a system of records covered by the Privacy Act of 1974 maintained by DOL or to a similar system maintained by a contractor, such as a screening agency, contract center operator, or placement agency on behalf of the Job Corps.

§ 670.970 What are the reporting requirements for center operators and operational support service providers?

The Secretary establishes procedures to ensure the timely and complete reporting of necessary financial and program information to maintain accountability. Center operators and operational support service providers are responsible for the accuracy and integrity of all reports and data they provide.

§ 670.975 How is the performance of the Job Corps program assessed?

The performance of the Job Corps program as a whole, and the performance of individual program components, is assessed on an ongoing basis, in accordance with the regulations in this part and procedures and standards, including a national performance measurement system, issued by the Secretary. Annual performance assessments are done for each center operator and other service providers, including screening and admissions and placement agencies.

§ 670.980 What are the indicators of performance for Job Corps?

(a) At a minimum, the performance assessment system established under § 670.975 will include expected levels of performance established for each of the indicators of performance contained in WIA section 159(c). These are:

(1) The number of graduates and rate of graduation, analyzed by the type of vocational training received and the training provider;

(2) The job placement rate of graduates into unsubsidized employment, analyzed by the vocational training received, whether or not the job placement is related to the training received, the vocational training provider, and whether the placement is made by a local or national service provider;

(3) The average placement wage of graduates in training-related and non-training related unsubsidized jobs;

(4) The average wage of graduates on the first day of employment and at 6 and 12 months following placement, analyzed by the type of vocational training received;

(5) The number of and retention rate of graduates in unsubsidized employment after 6 and 12 months;

(6) The number of graduates who entered unsubsidized employment for 32 hours per week or more, for 20 to 32 hours per week, and for less than 20 hours per week.

(7) The number of graduates placed in higher education or advanced training; and

(8) The number of graduates who attained job readiness and employment skills.

(b) The Secretary issues the expected levels of performance for each indicator. To the extent practicable, the levels of performance will be continuous and consistent from year to year.

§ 670.985 What happens if a center operator, screening and admissions contractor or other service provider fails to meet the expected levels of performance?

(a) The Secretary takes appropriate action to address performance issues through a specific performance plan.

(b) The plan may include the following actions:

(1) Providing technical assistance to a Job Corps center operator or support service provider, including a screening and admissions contractor;

(2) Changing the management staff of a center;

(3) Changing the vocational training offered at a center;

(4) Contracting out or recompeting the contract for a center or operational support service provider;

(5) Reducing the capacity of a Job Corps center;

(6) Relocating a Job Corps center; or

(7) Closing a Job Corps center. (WIA sec. 159 (f).)

§ 670.990 What procedures are available to resolve complaints and disputes?

(a) Each Job Corps center operator and service provider must establish and maintain a grievance procedure for filing complaints and resolving disputes from applicants, students and/or other interested parties about its programs and activities. A hearing on each complaint or dispute must be conducted within 30 days of the filing of the complaint or dispute. A decision on the complaint must be made by the center operator or service provider, as appropriate, within 60 days after the filing of the complaint, and a copy of the decision must be immediately served, by first-class mail, on the complainant and any other party to the complaint. Except for complaints under § 670.470 or complaints alleging fraud or other criminal activity, complaints may be filed within one year of the occurrence that led to the complaint.

(b) The procedure established under paragraph (a) of this section must include procedures to process complaints alleging violations of WIA section 188, consistent with DOL nondiscrimination regulations implementing WIA section 188 at 29 CFR part 37 and § 670.995.

§ 670.991 How does Job Corps ensure that complaints or disputes are resolved in a timely fashion?

(a) If a complaint is not resolved by the center operator or service provider in the time frames described in § 670.990, the person making the complaint may request that the Regional Director determine whether reasonable cause exists to believe that the Act or regulations for this part of the Act have been violated. The request must be filed with the Regional Director within 60 days from the date that the center operator or service provider should have issued the decision.

(b) Following the receipt of a request for review under paragraph (a) of this section, the Regional Director must determine within 60 days whether there has been a violation of the Act or the WIA regulations. If the Regional Director determines that there has been a violation of the Act or Regulations, (s)he may direct the operator or service provider to remedy the violation or direct the service provider to issue a decision to resolve the dispute according to the service provider's grievance procedures. If the service provider does not comply with the Regional Director's decision within 30 days, the Regional Director may impose a sanction on the center operator or service provider for violating the Act or regulations, and/or for failing to issue a decision. Decisions imposing sanctions

upon a center operator or service provider may be appealed to the DOL Office of Administrative Law Judges under 20 CFR 667.800 or 667.840.

§ 670.992 How does Job Corps ensure that centers or other service providers comply with the Act and the WIA regulations?

(a) If DOL receives a complaint or has reason to believe that a center or other service provider is failing to comply with the requirements of the Act or regulations, the Regional Director must investigate the allegation and determine within 90 days after receiving the complaint or otherwise learning of the alleged violation, whether such allegation or complaint is true.

(b) As a result of such a determination, the Regional Director may:

(1) Direct the center operator or service provider to handle a complaint through the grievance procedures established under § 670.990; or

(2) Investigate and determine whether the center operator or service provider is in compliance with the Act and regulations. If the Regional Director determines that the center or service provider is not in compliance with the Act or regulations, the Regional Director may take action to resolve the complaint under § 670.991(b), or will report the incident to the DOL Office of the Inspector General, as described in 20 CFR 667.630.

§ 670.993 How does Job Corps ensure that contract disputes will be resolved?

A dispute between DOL and a Job Corps contractor will be handled according to the Contract Disputes Act and applicable regulations.

§ 670.994 How does Job Corps resolve disputes between DOL and other Federal Agencies?

Disputes between DOL and a Federal Agency operating a center will be handled according to the interagency agreement with the agency which is operating the center.

§ 670.995 What DOL equal opportunity and nondiscrimination regulations apply to Job Corps?

Nondiscrimination requirements, procedures, complaint processing, and compliance reviews are governed by, as applicable, provisions of the following Department of Labor regulations:

(a) Regulations implementing WIA section 188 for programs receiving Federal financial assistance under WIA found at 29 CFR part 37.

(b) 29 CFR part 33 for programs conducted by the Department of Labor; and

(c) 41 CFR Chapter 60 for entities that have a Federal government contract.

PART 671—NATIONAL EMERGENCY GRANTS FOR DISLOCATED WORKERS

Sec.

671.100 What is the purpose of national emergency grants under WIA section 173?
671.105 What funds are available for national emergency grants?
671.110 What are major economic dislocations or other events which may qualify for a national emergency grant?
671.120 Who is eligible to apply for national emergency grants?
671.125 What are the requirements for submitting applications for national emergency grants?
671.130 When should applications for national emergency grants be submitted to the Department?
671.140 What are the allowable activities and what dislocated workers may be served under national emergency grants?
671.150 How do statutory and workflex waivers apply to national emergency grants?
671.160 What rapid response activities are required before a national emergency grant application is submitted?
671.170 What are the program and administrative requirements that apply to national emergency grants?

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SOURCE: 65 FR 49460, Aug. 11, 2000, unless otherwise noted.

§ 671.100 What is the purpose of national emergency grants under WIA section 173?

The purpose of national emergency grants is to provide supplemental dislocated worker funds to States, Local Boards and other eligible entities in order to respond to the needs of dislocated workers and communities affected by major economic dislocations and other worker dislocation events

which cannot be met with formula allotments.

§ 671.105 What funds are available for national emergency grants?

We use funds reserved under WIA section 132(a)(2)(A) to provide financial assistance to eligible applicant for grants under WIA section 173.

§ 671.110 What are major economic dislocations or other events which may qualify for a national emergency grant?

These include:

(a) Plant closures;

(b) Mass layoffs affecting 50 or more workers at a single site of employment;

(c) Closures and realignments of military installations;

(d) Multiple layoffs in a single local community that have significantly increased the total number of unemployed individuals in a community;

(e) Emergencies or natural disasters, as defined in paragraphs (1) and (2) respectively, of section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(1) and (2)) which have been declared eligible for public assistance by the Federal Emergency Management Agency (FEMA); and

(f) Other events, as determined by the Secretary.

§ 671.120 Who is eligible to apply for national emergency grants?

(a) *For projects within a State.* A State, a Local Board or another entity determined to be appropriate by the Governor of the State in which the project is located may apply for a national emergency grant. Also, Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations which are recipients of funds under section 166 of the Act (Indian and Native American Programs) may apply for a national emergency grant.

(b) *For inter-State projects.* Consortia of States and/or Local Boards may apply. Other private entities which can demonstrate, in the application for assistance, that they possess unique capabilities to effectively respond to the circumstances of the major economic dislocation(s) covered in the application may apply.

(c) *Other entities.* The Secretary may consider applications from other entities, to ensure that appropriate assistance is provided in response to major economic dislocations.

§ 671.125 What are the requirements for submitting applications for national emergency grants?

We publish instructions for submitting applications for National Emergency Grants in the FEDERAL REGISTER. The instructions specify application procedures, selection criteria and the approval process.

§ 671.130 When should applications for national emergency grants be submitted to the Department?

(a) Applications for national emergency grants to respond to mass layoffs and plant closures may be submitted to the Department as soon as:

(1) The State receives a notification of a mass layoff or a closure as a result of a WARN notice, a general announcement or some other means determined by the Governor to be sufficient to respond;

(2) Rapid response assistance has been initiated; and

(3) A determination has been made, in collaboration with the applicable Local Board(s) and chief elected official(s), that State and local formula dislocated worker funds are inadequate to provide the level of services needed by the workers being laid off.

(b) An eligible entity may apply for a national emergency grant at any time during the year.

(c) Applications for national emergency grants to respond to a declared emergency or natural disaster as described in § 671.110(e), cannot be considered until FEMA has declared that the affected area is eligible for disaster-related public assistance.

§ 671.140 What are the allowable activities and what dislocated workers may be served under national emergency grants?

(a) National emergency grants may provide adjustment assistance for eligible dislocated workers, described at WIA section 173(c)(2) or (d)(2).

(b) Adjustment assistance includes the core, intensive, and training services authorized at WIA sections 134(d) and 173. The scope of services to be provided in a particular project are negotiated between the Department and the grantee, taking into account the needs of the target population covered by the grant. The scope of services may be changed through grant modifications, if necessary.

(c) National emergency grants may provide for supportive services to help workers who require such assistance to participate in activities provided for in the grant. Needs-related payments, in support of other employment and training assistance, may be available for the purpose of enabling dislocated workers who are eligible for such payments to participate in programs of training services. Generally, the terms of a grant must be consistent with Local Board policies governing such financial assistance with formula funds (including the payment levels and duration of payments). However, the terms of the grant agreement may diverge from established Local Board policies, in the following instances:

(1) If unemployed dislocated workers served by the project are not able to meet the 13 or 8 weeks enrollment in training requirement at WIA section 134(e)(3)(B) because of the lack of formula or emergency grant funds in the State or local area at the time of dislocation, such individuals may be eligible for needs-related payments if they are enrolled in training by the end of the 6th week following the date of the emergency grant award;

(2) Trade-impacted workers who are not eligible for trade readjustment assistance under NAFTA-TAA may be eligible for needs-related payments under a national emergency grant if the worker is enrolled in training by the end of the 16th week following layoff; and

(3) Under other circumstances as specified in the national emergency grant application guidelines.

(d) A national emergency grant to respond to a declared emergency or natural disaster, as defined at § 671.110(e), may provide short-term disaster relief employment for:

(1) Individuals who are temporarily or permanently laid off as a consequence of the disaster;

(2) Dislocated workers; and

(3) Long-term unemployed individuals.

(e) Temporary employment assistance is authorized on disaster projects that provide food, clothing, shelter and other humanitarian assistance for disaster victims; and on projects that perform demolition, cleaning, repair, renovation and reconstruction of damaged and destroyed structures, facilities and lands located within the disaster area. For such temporary jobs, each eligible worker is limited to no more than six months of employment for each single disaster. The amounts, duration and other limitations on wages will be negotiated for each grant.

(f) Additional requirements that apply to national emergency grants, including natural disaster grants, are contained in the application instructions.

§ 671.150 How do statutory and workflex waivers apply to national emergency grants?

(a) State and Local Board grantees may request and we may approve the application of existing general statutory or regulatory waivers and workflex waivers to a National Emergency Grant award. The application for grant funds must describe any statutory waivers which the applicant wishes to apply to the project that the State and/or Local Board, as applicable, have been granted under its waiver plan, or that the State has approved for implementation in the applicable local area under workflex waivers. We will consider such requests as part of the overall application review and decision process.

(b) If, during the operation of the project, the grantee wishes to apply a waiver not identified in the application, the grantee must request a modification which includes the provision to be waived, the operational barrier to be removed and the effect upon the outcome of the project.

§ 671.160 What rapid response activities are required before a national emergency grant application is submitted?

(a) Rapid response is a required Statewide activity under WIA section 134(a)(2)(A), to be carried out by the State or its designee in collaboration with the Local Board(s) and chief elected official(s). Under 20 CFR 665.310, rapid response encompasses, among other activities, an assessment of the general needs of the affected workers and the resources available to them.

(b) In accordance with national emergency grant application guidelines published by the Department, each applicant must demonstrate that:

(1) The rapid response activities described in 20 CFR 665.310 have been initiated and carried out, or are in the process of being carried out;

(2) State and local funds, including those made available under section 132(b)(2)(B) of the Act, have been used to initiate appropriate services to the eligible workers;

(3) There is a need for additional funds to effectively respond to the assistance needs of the workers and, in the case of declared emergencies and natural disasters, the community; and

(4) The application has been developed by or in conjunction with the Local Board(s) and chief elected official(s) of the local area(s) in which the proposed project is to operate.

§ 671.170 What are the program and administrative requirements that apply to national emergency grants?

(a) In general, the program requirements and administrative standards set forth at 20 CFR parts 663 and 667 will apply.

(b) Exceptions include:

(1) Funds provided in response to a natural disaster may be used for temporary job creation in areas declared eligible for public assistance by FEMA, subject to the limitations of WIA section 173(d), this part and the application guidelines issued by the Department;

(2) National emergency grant funds may be used to pay an appropriate level of administrative costs based on the design and complexity of the project. We will negotiate administration costs with the applicant as part of the application review and grant award and modification processes;

(3) The period of availability for expenditure of funds under a national emergency grant is specified in the grant agreement.

(4) We may establish supplemental reporting, monitoring and oversight requirements for national emergency grants. The requirements will be identified in the grant application instructions or the grant document.

(5) We may negotiate and fund projects under terms other than those specified in this part where it can be clearly demonstrated that such adjustments will achieve a greater positive benefit for the workers and/or communities being assisted.

PART 672—PROVISIONS GOVERNING THE YOUTHBUILD PROGRAM

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672.615 What requirements apply to YouthBuild housing?

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Subpart A—Purpose and Definitions

§ 672.100 What is YouthBuild?

(a) YouthBuild is a workforce development program that provides employment, education, leadership development, and training opportunities to disadvantaged and low-income youth between the ages of 16 and 24, most of whom are secondary school drop outs and are either a member of a low-income family, a foster care youth, a youth offender, a youth with a disability, a child of an incarcerated parent, or a migrant youth.

(b) Program participants receive education services that may lead to either a high school diploma or General Educational Development (GED). Further, they receive occupational skills training and are encouraged to pursue a post- secondary education or additional training, including registered apprenticeship programs. The program is designed to create a skilled workforce either in the construction industry, through the rehabilitation and construction of housing for homeless individuals and families and low- income families, as well as public facilities, or in other high wage, high-demand jobs. The program also benefits the larger community because it provides more new and rehabilitated affordable housing.

§ 672.105 What are the purposes of the YouthBuild program?

(a) The overarching goal of the YouthBuild program is to provide disadvantaged and low-income youth the opportunity to obtain education and employment skills in local in-demand and high-demand jobs to achieve economic self-sufficiency. Additionally, the YouthBuild program has as goals:

(1) To promote leadership skills development and community service activities. YouthBuild programs will foster the development of leadership skills and a commitment to community improvement among youth in low-income communities.

(2) To enable youth to further their education and training. YouthBuild programs will provide counseling and assistance in obtaining post-secondary education and/or employment and training placements that allow youth to further their education and training.

(3) To expand the supply of permanent affordable housing and reduce the rate of homelessness in communities with YouthBuild programs. The program seeks to increase the number of affordable housing units available and

to decrease the number of homeless individuals and families in their communities.

(b) Through these educational and occupational opportunities, to enable youth participants to provide a valuable contribution to their communities. The YouthBuild program will add skilled workers to the workforce by educating and training youth who might have otherwise succumbed to the negative influences within their environments.

§ 672.110 What definitions apply to this part?

Alternative school. The term ''alternative school'' means a school or program that is set up by a State, school district, or other community-based entity to serve young people who are not succeeding in a traditional public school environment. In order for an ''alternative school'' to qualify as of part of a ''sequential service strategy'' it must be recognized by the authorizing entity designated by the State, award a high school diploma or both a high school diploma and a GED and, must be affiliated with a YouthBuild program.

Community or other public facility. The term ''community or other public facility'' means those facilities which are either privately owned by non-profit organizations, including faith-based and community-based organizations, and publicly used for the benefit of the community, or publicly owned and publicly used for the benefit of the community.

Core construction. The term ''core construction'' means activities that are directly related to the construction or rehabilitation of residential, community, or other public facilities. These activities include, but are not limited to, job skills that can be found under the Standard Occupational Classification System (SOC) major group 47, Construction and Extraction Occupations, in codes 47–1011 through 47–4099. These activities may also include, but are not limited to, construction skills that may be required by green building and weatherization industries but are not yet standardized. A full list of the SOC's can be found at the Bureau of Labor Statistics (BLS) Web site, *http://www.bls.gov/soc.*

Eligible entity. The term ''eligible entity'' means a public or private nonprofit agency or organization (including a consortium of such agencies or organizations), including—

(1) A community-based organization;

(2) A faith-based organization;

(3) An entity carrying out activities under this Title, such as a local school board;

(4) A community action agency;

(5) A State or local housing development agency;

(6) An Indian tribe or other agency primarily serving Indians;

(7) A community development corporation;

(8) A State or local youth service or conservation corps; and

(9) Any other entity eligible to provide education or employment training under a Federal program (other than the program carried out under this part).

Homeless individual. For purposes of YouthBuild, the definition of ''homeless individual'' at Section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302) applies.

Housing development agency. The term ''housing development agency'' means any agency of a Federal, State or local government, or any private nonprofit organization, that is engaged in providing housing for homeless individuals or low-income families.

Income. As defined in 42 U.S.C. 1437a(b), ''income'' is: Income from all sources of each member of the household, as determined in accordance with the criteria prescribed by the Secretary of Labor, in consultation with the Secretary of Agriculture, except that any amounts not actually received by the family and any amounts which would be eligible for exclusion under sec. 1382b(a)(7) of the United States Housing Act of 1937, may not be considered as income under this paragraph.

Indian; Indian tribe. As defined in 25 U.S.C. 450b of sec. 4 of the Indian Self-Determination and Education Assistance Act, the term ''Indian'' is a person who is a member of an Indian tribe;

and the term ''Indian tribe'' is any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) (43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Individual of limited English proficiency. As defined in 20 U.S.C. 9202(10), an ''individual of limited English proficiency'' is: An adult or out- of-school youth who has limited ability in speaking, reading, writing, or understanding the English language, and:

(1) Whose native language is a language other than English; or

(2) Who lives in a family or community environment where a language other than English is the dominant language.

Low-income family. As defined in 42 U.S.C. 1437a(b)(2), a ''low-income family'' is: A family whose income does not exceed 80 percent of the median income for the area, as determined by the Secretary of Labor with adjustments for smaller and larger families, except that the Secretary of Labor may establish income ceilings higher or lower than 80 percent of the median for the area if the Secretary finds that such variations are necessary because of prevailing levels of construction costs or unusually high or low family incomes. Further, as defined by 42 U.S.C. 1437a(b)(2)(3), the term families includes families consisting of one person.

Migrant youth. The term ''migrant youth'' means a youth, or a youth who is the dependent of someone who, during the previous 12 months has:

(1) Worked at least 25 days in agricultural labor that is characterized by chronic unemployment or underemployment;

(2) Made at least $800 from agricultural labor that is characterized by chronic unemployment or underemployment, if at least 50 percent of his or her income came from such agricultural labor;

(3) Was employed at least 50 percent of his or her total employment in agricultural labor that is characterized by chronic unemployment or underemployment; or

(4) Was employed in agricultural labor that requires travel to a jobsite such that the farmworker is unable to return to a permanent place of residence within the same day.

Needs-based stipend. The term ''Needs-based stipends'' means additional payments (beyond regular stipends for program participation) that are based on defined needs that enable youth to participate in the program. To provide needs-based stipends the grantee must have a written policy in place, which defines: Eligibility; the amounts; and the required documentation and criteria for payments. This policy must be applied consistently to all program participants.

Occupational skills training. The term ''Occupational skills training'' means an organized program of study that provides specific vocational skills that lead to proficiency in performing the actual tasks and technical functions required by certain occupational fields at entry, intermediate, or advanced levels. The occupational skills training offered in YouthBuild programs must begin upon program enrollment and be tied to the award of an industry-recognized credential.

Partnership. The term ''partnership'' means an agreement that involves a Memorandum of Understanding (MOU) or letter of commitment submitted by each organization and applicant, as defined in the YouthBuild Transfer Act, that plan on working together as partners in a YouthBuild program. Each partner must have a clearly defined role. These roles must be verified through a letter of commitment, not just a letter of support, or an MOU submitted by each partner. The letter of commitment or MOU must detail the role the partner will play in the YouthBuild Program, including the partner's specific responsibilities and resources committed, if appropriate. These letters or MOUs must clearly indicate the partnering organization's unique contribution and commitment to the YouthBuild Program.

Public housing agency. As defined in 42 U.S.C. 1437a(b), a ''public housing

agency'' is: Any State, county, municipality or other government entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low- income housing.

Registered apprenticeship program. The term ''registered apprenticeship program'' means:

(1) Registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 20 U.S.C. 50 *et seq.*); and

(2) A program with a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, as required under 29 CFR parts 29 and 30, including such matters as the requirement for a written apprenticeship agreement.

Sequential service strategy. The term ''sequential service strategy'' means the educational and occupational skills training plan developed for individuals who have dropped out of high school and want to enroll in a YouthBuild program. The plan is designed so that the individual sequentially enrolls in an alternative school, and after receiving a year or more of educational services, enrolls in the YouthBuild program.

Transitional housing. The term ''transitional housing'' means housing provided for the purpose of facilitating the movement of homeless individuals to independent living within a reasonable amount of time. The term includes housing primarily designed to serve deinstitutionalized homeless individuals and other homeless individuals who are individuals with disabilities or are members of families with children.

Youth in foster care. The term ''youth in foster care'' means youth currently in foster care or youth who have ever been in foster care.

Youth who is an individual with a disability. The term youth who is an individual with a disability means a youth with any disability (as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)) or a student receiving special education and related services under the Individuals with Disabilities Education Act (IDEA).

Subpart B—Funding and Grant Applications

§672.200 How are YouthBuild grants funded and administered?

The Secretary uses funds authorized for appropriation under sec. 173A of the Workforce Investment Act (WIA) to administer YouthBuild as a national program under Title I, Subtitle D of the Act. YouthBuild grants are awarded to eligible entities, as defined in §672.110, through a competitive selection process described in §672.205.

§672.205 How does an eligible entity apply for grant funds to operate a YouthBuild program?

The Secretary announces the availability of grant funds through a Solicitation for Grant Applications (SGA). The SGA contains instructions for what is required in the grant application, describes eligibility requirements, the rating criteria that will be used in reviewing grant applications, and special reporting requirements to operate a YouthBuild project.

§672.210 How are eligible entities selected to receive grant funds?

In order to receive funds under the YouthBuild program, an eligible entity applying for funds (applicant) must meet selection criteria established by the Secretary which include:

(a) The qualifications or potential capabilities of an applicant;

(b) An applicant's potential to develop a successful YouthBuild program;

(c) The need for an applicant's proposed program, as determined by the degree of economic distress of the community from which participants would be recruited (measured by indicators such as poverty, youth unemployment, and the number of individuals who have dropped out of secondary school) and of the community in which the housing and public facilities proposed to be rehabilitated or constructed are located (measured by indicators such as incidence of homelessness, shortage of affordable housing, and poverty);

(d) The commitment of an applicant to provide skills training, leadership

development, counseling and case management, and education to participants;

(e) The focus of a proposed program on preparing youth for postsecondary education and training opportunities or local in-demand occupations;

(f) The extent of an applicant's coordination of activities to be carried out through the proposed program with:

(1) Local boards, One-Stop Career Center operators, and One-Stop partners participating in the operation of the One-Stop delivery system involved, or the extent of the applicant's good faith efforts, as determined by the Secretary, in achieving such coordination;

(2) Public education, criminal justice, housing and community development, national service, or postsecondary education or other systems that relate to the goals of the proposed program; and

(3) Employers in the local area.

(g) The extent to which a proposed program provides for inclusion of tenants who were previously homeless individuals or families in the rental of housing provided through the program;

(h) The commitment of additional resources to the proposed program (in addition to the funds made available through the grant) by:

(1) An applicant;

(2) Recipients of other Federal, State, or local housing and community development assistance who will sponsor any part of the rehabilitation, construction, operation and maintenance, or other housing and community development activities undertaken as part of the proposed program; or

(3) Entities carrying out other Federal, State, or local activities or activities conducted by Indian tribes, including vocational education programs, adult and language instruction educational programs, and job training using funds provided under WIA,

(i) An applicant's ability to enter partnerships with:

(1) Education and training providers including:

(i) The kindergarten through twelfth grade educational system;

(ii) Adult education programs;

(iii) Community and technical colleges;

(iv) Four-year colleges and universities;

(v) Registered apprenticeship programs; and

(vi) Other training entities.

(2) Employers, including professional organizations and associations. An applicant will be evaluated on the extent to which employers participate in:

(i) Defining the program strategy and goals;

(ii) Identifying needed skills and competencies;

(iii) Designing training approaches and curricula;

(iv) Contributing financial support; and

(v) Hiring qualified YouthBuild graduates.

(3) The workforce investment system which may include:

(i) State and local workforce investment boards;

(ii) State workforce agencies; and

(iii) One-Stop Career Centers and their cooperating partners.

(4) The juvenile and adult justice systems, and the extent to which they provide:

(i) Support and guidance for YouthBuild participants with court involvement;

(ii) Assistance in the reporting of recidivism rates among YouthBuild participants; and

(iii) Referrals of eligible participants through diversion or re-entry from incarceration.

(5) Faith-based and community organizations, and the extent to which they provide a variety of grant services such as:

(i) Case management;

(ii) Mentoring;

(iii) English as a Second Language courses; and

(iv) Other comprehensive supportive services, when appropriate.

(j) The applicant's potential to serve different regions, including rural areas and States that may not have previously received grants for YouthBuild programs; and

(k) Such other factors as the Secretary determines to be appropriate for purposes of evaluating an applicant's potential to carry out the proposed program in an effective and efficient manner.

(l) The weight to be given to these factors will be described in the SGA issued under § 672.205.

§ 672.215 How are eligible entities notified of approval for grant funds?

The Secretary will, to the extent practicable, notify each eligible entity applying for funds no later than 5 months from the date the application is received, whether the application is approved or disapproved. In the event additional funds become available, ETA reserves the right to use such funds to select additional grantees from applications submitted in response to an SGA.

Subpart C—Program Requirements

§ 672.300 Who is an eligible participant?

(a) *Eligibility criteria.* Except as provided in paragraph (b) of this section, an individual is eligible to participate in a YouthBuild program if the individual is:

(1) Not less than age 16 and not more than age 24 on the date of enrollment; and

(2) A school dropout or an individual who has dropped out of school and reenrolled in an alternative school, if that reenrollment is part of a sequential service strategy; and

(3) Is one or more of the following:

(i) A member of a low-income family as defined in § 672.110;

(ii) A youth in foster care;

(iii) A youth offender;

(iv) A youth who is an individual with a disability;

(v) The child of a current or formerly incarcerated parent; or

(vi) A migrant youth as defined in § 672.110.

(b) *Exceptions.* Not more than 25 percent of the participants in a program, under this section, may be individuals who do not meet the requirements of paragraph (a)(2) or (3) of this section, if such individuals:

(1) Are basic skills deficient as defined in section 101(4) of WIA, even if they have their high school diploma, GED credential, or other State-recognized equivalent; or

(2) Have been referred by a local secondary school for participation in a YouthBuild program leading to the attainment of a secondary school diploma.

§ 672.305 Are there special rules that apply to veterans?

Special rules for determining income for veterans are found in 20 CFR 667.255 and for the priority of service provisions for qualified persons are found in 20 CFR part 1010. Those special rules apply to covered persons who are eligible to participate in the YouthBuild program.

§ 672.310 What eligible activities may be funded under the YouthBuild program?

Grantees may provide one or more of the following education and workforce investment and other activities to YouthBuild participants—

(a) Eligible education activities include:

(1) Services and activities designed to meet the educational needs of participants, including:

(i) Basic skills instruction and remedial education;

(ii) Language instruction educational programs for individuals with limited English proficiency;

(iii) Secondary education services and activities, including tutoring, study skills training, and dropout prevention activities, designed to lead to the attainment of a secondary school diploma, GED credential, or other State- recognized equivalent (including recognized alternative standards for individuals with disabilities);

(iv) Counseling and assistance in obtaining post-secondary education and required financial aid; and

(v) Alternative secondary school services;

(2) Counseling services and related activities, such as comprehensive guidance and counseling on drug and alcohol abuse and referral to appropriate treatment;

(3) Activities designed to develop employment and leadership skills, which may include community service and peer-centered activities encouraging responsibility and other positive social behaviors, and activities related to

youth policy committees that participate in decisionmaking related to the program; and

(4) Supportive services, as defined under Title I of WIA Section 101(46), and provision of need-based stipends, as defined in § 672.110.

(b) Eligible workforce investment activities include:

(1) Work experience and skills training (coordinated, to the maximum extent feasible, with registered apprenticeship programs) in housing rehabilitation and construction activities described in paragraphs (c)(1) and (2) of this section;

(2) Occupational skills training;

(3) Other paid and unpaid work experiences, including internships and job shadowing; and

(4) Job search assistance.

(c) Other eligible activities include:

(1) Supervision and training for participants in the rehabilitation or construction of housing, including residential housing for homeless individuals and families or low-income families, or transitional housing for homeless individuals and families;

(2) Supervision and training for participants in the rehabilitation or construction of community or other public facilities, except that, as provided in § 672.505(b), not more than 10 percent of the funds awarded for each grant may be used for such supervision and training;

(3) Ongoing training and technical assistance for staff of grant recipients that is related to developing and carrying out the YouthBuild program;

(4) Payment of a portion of the administrative costs of the program as provided in § 672.505(a);

(5) Adult mentoring;

(6) Provision of wages, stipends, or additional benefits to participants in the program as provided in § 672.530; and

(7) Follow-up services as provided in § 672.325.

§ 672.315 What timeframes apply to participation?

An eligible individual selected for participation in the program must be offered full-time participation in the program for not less than 6 months and not more than 24 months.

§ 672.320 What timeframes must be devoted to education and workforce investment or other activities?

YouthBuild grantees must structure programs so that participants in the program are offered:

(a) Eligible education activities, as specified in § 672.310(a), during at least 50 percent of the time during which they participate in the program; and

(b) Eligible workforce investment activities, as specified in § 672.310(b), during at least 40 percent of the time during which they participate in the program. Grantees must provide the eligible workforce investment activities described in § 672.310(b)(1) as part of their program of eligible workforce investment activities.

(c) The remaining 10 percent of the time of participation can be used for the activities described in paragraphs (a) and (b) of this section and/or for leadership development and community service activities.

§ 672.325 What timeframes apply for follow-up services?

Follow-up services must be provided to all YouthBuild participants for a period of not less than 9 months but no more than 12 months after participants exit a YouthBuild program. These are services that assist participants in obtaining or retaining employment, or applying for and transitioning to postsecondary education or training.

Subpart D—Performance Indicators

§ 672.400 What are the performance indicators for YouthBuild grants?

(a) The performance indicators for YouthBuild grants are:

(1) Placement in employment or education;

(2) Attainment of a degree or certificate;

(3) Literacy and numeracy gains; and

(4) Such other indicators of performance as may be required by the Secretary.

(b) We will provide the details of the performance indicators in administrative guidance.

§ 672.405 What are the required levels of performance for the performance indicators?

(a) Expected levels of performance for each of the common performance indicators are national standards that are provided in separately issued guidance. Short-term or other performance indicators will be provided in separately issued guidance or as part of the SGA or grant agreement. Performance level expectations are based on available YouthBuild data and data from similar WIA Youth programs and may change between grant competitions. The expected national levels of performance will take into account the extent to which the levels promote continuous improvement in performance.

(b) The levels of performance established will, at a minimum:

(1) Be expressed in an objective, quantifiable, and measurable form; and

(2) Indicate continuous improvement in performance.

§ 672.410 What are the reporting requirements for YouthBuild grantees?

Each grantee must provide such reports as are required by the Secretary in separately issued guidance, including:

(a) The Quarterly Performance Report;

(b) The quarterly narrative progress report;

(c) The financial report; and

(d) Such other reports as may be required by the grant agreement.

§ 672.415 What are the due dates for quarterly reporting?

(a) Quarterly reports are due no later than 45 days after the end of the reporting quarter, unless otherwise specified in the reporting guidance issued under § 672.410; and

(b) A final financial report is required 90 days after the expiration of a funding period or the termination of grant support.

Subpart E—Administrative Rules, Costs, and Limitations

§ 672.500 What administrative regulations apply to the YouthBuild program?

Each YouthBuild grantee must comply with the following:

(a) The regulations found in this part.

(b) The general administrative requirements found in 20 CFR part 667, except those that apply only to the WIA Title I–B program and those that have been modified by this section.

(c) The Department's regulations on government-wide requirements, which include:

(1) The regulations codifying the Office of Management and Budget's government-wide grants requirements: Circular A–110 (codified at 2 CFR part 215), and Circular A–102 at 29 CFR parts 95 and 97, as applicable;

(2) The Department's regulations at 29 CFR part 37, which implement the nondiscrimination provisions of WIA section 188;

(3) The Department's regulations at 29 CFR parts 93, 94, and 98 relating to restrictions on lobbying, drug free workplace, and debarment and suspension; and

(4) The audit requirements of OMB Circular A–133 stated at 29 CFR part 99, as required by 29 CFR 96.11, 95.26, and 97.26, as applicable.

§ 672.505 How may grantees provide services under the YouthBuild program?

Each recipient of a grant under the YouthBuild program may provide the services and activities described in these regulations either directly or through subgrants, contracts, or other arrangements with local educational agencies, postsecondary educational institutions, State or local housing development agencies, other public agencies, including agencies of Indian tribes, or private organizations.

§ 672.510 What cost limits apply to the use of YouthBuild program funds?

(a) Administrative costs for programs operated under YouthBuild are limited to no more than 15 percent of the grant

award. The definition of administrative costs can be found in 20 CFR 667.220.

(b) The cost of supervision and training for participants involved in the rehabilitation or construction of community and other public facilities is limited to no more than 10 percent of the grant award.

§ 672.515 What are the cost-sharing or matching requirements of the YouthBuild program?

(a) The cost-sharing or matching requirements applicable to a YouthBuild grant will be addressed in the grant agreement.

(b) The value of construction materials used in the YouthBuild program is an allowable cost for the purposes of the required non-Federal share or match.

(c) The value of land acquired for the YouthBuild program is not an allowable cost-sharing or match.

(d) Federal funds may not be used as cost-sharing or match resources except as provided by Federal law.

(e) The value of buildings acquired for the YouthBuild program is an allowable match, provided that the following conditions apply:

(1) The purchase cost of buildings used solely for training purposes is allowable; and

(2) For buildings used for training and other purposes, the allowable amount is determined based on the proportionate share of the purchase price related to direct training activities.

(f) Grantees must follow the requirements of 29 CFR 95.23 or 29 CFR 97.24 in the accounting, valuation, and reporting of the required non-Federal share.

§ 672.520 What are considered to be leveraged funds?

(a) Leveraged funds may be used to support allowable YouthBuild program activities and consist of payments made for allowable costs funded by both non-YouthBuild Federal, and non-Federal, resources which include:

(1) Costs which meet the criteria for cost-sharing or match in § 672.515 and are in excess of the amount of cost-sharing or match resources required;

(2) Costs which would meet the criteria in § 672.515 except that they are paid for with other Federal resources; and

(3) Costs which benefit the grant program and are otherwise allowable under the cost principles but are not allowable under the grant because of some statutory, regulatory, or grant provision, whether paid for with Federal or non-Federal resources.

(b) The use of leveraged funds must be reported in accordance with Departmental instructions.

§ 672.525 How are the costs associated with real property treated in the YouthBuild program?

(a) As provided in paragraphs (b) and (c) of this section, the costs of the following activities associated with real property are allowable solely for the purpose of training YouthBuild participants:

(1) Rehabilitation of existing structures for use by homeless individuals and families or low-income families or for use as transitional housing.

(2) Construction of buildings for use by homeless individuals and families or low-income families or for use as transitional housing.

(3) Construction or rehabilitation of community or other public facilities, except, as provided in § 672.510(b), only 10 percent of the grant award is allowable for such construction and rehabilitation.

(b) The costs for acquisition of buildings that are used for activities described in paragraph (a) of this section are allowable with prior grant officer approval and only under the following conditions:

(1) The purchase cost of buildings used solely for training purposes is allowable; and

(2) For buildings used for training and other purposes, the allowable amount is determined based on the proportionate share of the purchase cost related to direct training.

(c) The following costs are allowable to the extent allocable to training YouthBuild participants in the construction and rehabilitation activities specified in paragraph (a) of this section:

(1) Trainees' tools and clothing including personal protective equipment (PPE);

(2) On-site trainee supervisors;
(3) Construction management;
(4) Relocation of buildings; and
(5) Clearance and demolition.

(d) Architectural fees, or a proportionate share thereof, are allowable when such fees can be related to items such as architectural plans or blueprints on which participants will be trained.

(e) The following costs are unallowable:
(1) The costs of acquisition of land.
(2) Brokerage fees.

§ 672.530 What participant costs are allowable under the YouthBuild program?

Allowable participant costs include:

(a) The costs of payments to participants engaged in eligible work-related YouthBuild activities.

(b) The costs of payments provided to participants engaged in non-work- related YouthBuild activities.

(c) The costs of needs-based stipends.

(d) The costs of supportive services.

(e) The costs of providing additional benefits to participants or individuals who have exited the program and are receiving follow-up services, which may include:
(1) Tuition assistance for obtaining college education credits;
(2) Scholarships to an Apprenticeship, Technical, or Secondary Education program; and
(3) Sponsored health programs.

§ 672.535 What effect do payments to YouthBuild participants have on eligibility for other Federal need-based benefits?

Under 20 CFR 667.272(c), allowances, earnings, and payments to individuals participating in programs under Title I of WIA are not considered as income for purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or Federally-assisted program based on need other than as provided under the Social Security Act (42 U.S.C. 301).

§ 672.540 What program income requirements apply under the YouthBuild program?

(a) Except as provided in paragraph (b) of this section, program income requirements, as specified in the applicable Uniform Administrative Requirements at 29 CFR 95.24 and 97.25, apply to YouthBuild grants.

(b) Revenue from the sale of buildings rehabilitated or constructed under the YouthBuild program to homeless individuals and families and low-income families is not considered program income. Grantees are encouraged to use that revenue for the long-term sustainability of the YouthBuild program.

§ 672.545 Are YouthBuild programs subject to the Davis-Bacon Act labor standards?

(a) YouthBuild programs and grantees are subject to Davis-Bacon labor standards requirements under the circumstances set forth in paragraph (b) of this section. In those instances where a grantee is subject to Davis-Bacon requirements, the grantee must follow applicable requirements in the Department's regulations at 29 CFR parts 1, 3, and 5, including the requirements contained in the Davis-Bacon contract provisions set forth in 29 CFR 5.5.

(b) YouthBuild participants are subject to Davis-Bacon Act labor standards when they perform Davis-Bacon-covered laborer or mechanic work, defined at 29 CFR 5.2, on Federal or Federally-assisted projects that are subject to the Davis-Bacon Act labor standards. The Davis-Bacon prevailing wage requirements apply to hours worked on the site of the work.

(c) YouthBuild participants who are not registered and participating in a training program approved by the Employment and Training Administration must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.

§ 672.550 What are the recordkeeping requirements for YouthBuild programs?

(a) Grantees must follow the recordkeeping requirements specified in the Uniform Administrative Requirements, at 29 CFR 95.53 and 29 CFR 97.42, as appropriate.

(b) Grantees must maintain such additional records related to the use of

buildings constructed or rehabilitated with YouthBuild funds as specified in the grant agreement or in the Department's guidance.

Subpart F—Additional Requirements

§ 672.600 What are the safety requirements for the YouthBuild program?

(a) YouthBuild Grantees must comply with 20 CFR 667.274, which applies Federal and State health and safety standards to the working conditions under WIA-funded projects and programs. These health and safety standards include ''hazardous orders'' governing child labor under 29 CFR part 570 prohibiting youth ages 16 and 17 from working in identified hazardous occupations.

(b) YouthBuild grantees are required to:

(1) Provide comprehensive safety training for youth working on YouthBuild construction projects;

(2) Have written, jobsite-specific, safety plans overseen by an on-site supervisor with authority to enforce safety procedures;

(3) Provide necessary personal protective equipment to youth working on YouthBuild projects; and

(4) Submit required injury incident reports.

§ 672.605 What are the reporting requirements for youth safety?

YouthBuild grantees must ensure that YouthBuild program sites comply with the Occupational Safety and Health Administration's (OSHA) reporting requirements in 29 CFR part 1904. A YouthBuild grantee is responsible for sending a copy of OSHA's injury incident report form, to U.S. Department of Labor, Employment and Training Administration within 7 days of any reportable injury suffered by a YouthBuild participant. The injury incident report form is available from OSHA and can be downloaded at *http://www.osha.gov/recordkeeping/RKforms.html*. Reportable injuries include those that result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness.

§ 672.610 What environmental protection laws apply to the YouthBuild program?

YouthBuild Program grantees are required, where applicable, to comply with all environmental protection statutes and regulations.

§ 672.615 What requirements apply to YouthBuild housing?

(a) YouthBuild grantees must ensure that all residential housing units which are constructed or rehabilitated using YouthBuild funds must be available solely for:

(1) Sale to homeless individuals and families or low-income families;

(2) Rental by homeless individuals and families or low-income families;

(3) Use as transitional or permanent housing for the purpose of assisting in the movement of homeless individuals and families to independent living; or

(4) Rehabilitation of homes for low-income homeowners.

(b) For rentals of residential units located on the property which are constructed or rehabilitated using YouthBuild funds:

(1) The property must maintain at least a 90 percent level of occupancy for low-income families. The income test will be conducted only at the time of entry for each available unit or rehabilitation of occupant-owned home. If the grantee cannot find a qualifying tenant to lease the unit, the unit may be leased to a family whose income is above the income threshold to qualify as a low-income family but below the median income for the area. Leases for tenants with higher incomes will be limited to not more than two years. The leases provided to tenants with higher incomes are not subject to the termination clause that is described in paragraph (b)(2) of this section.

(2) The property owner must not terminate the tenancy or refuse to renew the lease of a tenant occupying a residential rental housing unit constructed or rehabilitated using YouthBuild funds except for serious or repeated violations of the terms and conditions of the lease, for violation of applicable Federal, State or local laws, or for good cause. Any termination or refusal to renew the lease must be preceded by not less than a 30-day written notice to

the tenant specifying the grounds for the action. The property owner may waive the written notice requirement for termination in dangerous or egregious situations involving the tenant.

(c) All transitional or permanent housing for homeless individuals or families or low-income families must be safe and sanitary. The housing must meet all applicable State and local housing codes and licensing requirements in the jurisdiction in which the housing is located.

(d) For sales or rentals of residential housing units constructed or rehabilitated using YouthBuild funds, YouthBuild grantees must ensure that owners of the property record a restrictive covenant at the time that an occupancy permit is issued against such property which includes the use restrictions set forth in paragraphs (a), (b), and (c) of this section and incorporates the following definitions at § 672.110: Homeless Individual; Low- Income Housing; and Transitional Housing. The term of the restrictive covenant must be at least 10 years from the time of the issuance of the occupancy permit, unless a time period of more than 10 years has been established by the grantee. Any additional stipulations imposed by a grantee or property owner should be clearly stated in the covenant.

(e) Any conveyance document prepared in the 10-year period of the restrictive covenant must inform the buyer of the property that all residential housing units constructed or rehabilitated using YouthBuild funds are subject to the restrictions set forth in paragraphs (a), (b), (c), and (d) of this section.

PARTS 673–674 [RESERVED]

PART 675—INTRODUCTION TO THE REGULATIONS FOR THE WORKFORCE DEVELOPMENT SYSTEMS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Sec.

675.100 What are the purposes of title I of the Workforce Innovation and Opportunity Act?
675.200 What do the regulations for workforce development systems under title I of the Workforce Innovation and Opportunity Act cover?
675.300 What definitions apply to these regulations?

AUTHORITY: Secs. 2, 3, 189, 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

SOURCE: 81 FR 56368, Aug. 19, 2016, unless otherwise noted.

§ 675.100 What are the purposes of title I of the Workforce Innovation and Opportunity Act?

The purposes of title I of the Workforce Innovation and Opportunity Act (WIOA) include:

(a) Increasing access to, and opportunities for individuals to receive, the employment, education, training, and support services necessary to succeed in the labor market, with a particular focus on those individuals with disabilities or other barriers to employment including out of school youth with the goal of improving their outcomes;

(b) Enhancing the strategic role for States and elected officials, and Local Workforce Development Boards (WDBs) in the public workforce system by increasing flexibility to tailor services to meet employer and worker needs at State, regional, and local levels;

(c) Streamlining service delivery across multiple programs by requiring colocation, coordination, and integration of activities and information to make the system understandable and accessible for individuals, including individuals with disabilities and those with other barriers to employment, and businesses.

(d) Supporting the alignment of the workforce investment, education, and economic development systems in support of a comprehensive, accessible, and high-quality workforce development system at the Federal, State, and local and regional levels;

(e) Improving the quality and labor market relevance of workforce investment, education, and economic development efforts by promoting the use of industry and sector partnerships, career pathways, and regional service delivery strategies in order to both provide America's workers with the skills and credentials that will enable them to secure and advance in employment with family-sustaining wages, and to

provide America's employers with the skilled workers the employers need to succeed in a global economy;

(f) Promoting accountability using core indicators of performance measured across all WIOA authorized programs, sanctions, and high quality evaluations to improve the structure and delivery of services through the workforce development system to address and improve the employment and skill needs of workers, job seekers, and employers;

(g) Increasing the prosperity and economic growth of workers, employers, communities, regions, and States; and

(h) Providing workforce development activities through statewide and local workforce development systems to increase employment, retention and earnings of participants and to increase industry-recognized postsecondary credential attainment to improve the quality of the workforce, reduce welfare dependency, increase economic self-sufficiency, meet skill requirements of employers, and enhance productivity and competitiveness of the nation.

§ 675.200 What do the regulations for workforce development systems under title I of the Workforce Innovation and Opportunity Act cover?

(a) The regulations found in parts 675 through 688 of this chapter set forth the regulatory requirements that are applicable to programs operated with funds provided under title I of WIOA. This part describes the purpose of that Act, explains the format of these regulations, and sets forth definitions for terms that apply to each part. Parts 676, 677 and 678 of this chapter contain regulations relating to Unified and Combined State Plans, performance accountability, and the one-stop delivery system and the roles of one-stop partners, respectively. Part 679 of this chapter contains regulations relating to statewide and local governance of the workforce development system. Part 680 of this chapter sets forth requirements applicable to WIOA title I programs serving adults and dislocated workers. Part 681 of this chapter sets forth requirements applicable to WIOA title I programs serving youth. Part 682 of this chapter contains regulations relating to statewide activities. Part 683 of this chapter sets forth the administrative requirements applicable to programs funded under WIOA title I. Parts 684 and 685 of this chapter contain the particular requirements applicable to programs serving Indians and Native Americans and Migrant and Seasonal Farmworkers, respectively. Parts 686 and 687 of this chapter describe the particular requirements applicable to the Job Corps and the national dislocated worker grant programs, respectively. Part 688 of this chapter contains the regulations governing the YouthBuild program. In addition, part 603 of this chapter provides the requirements regarding confidentiality and disclosure of State Unemployment Compensation program data under WIOA.

(b) Finally, parts 651 through 658 of this chapter address provisions for the Wagner-Peyser Act Employment Service, as amended by WIOA title III. Specifically, part 651 of this chapter contains general provisions and definitions of terms used in parts 651 through 658 of this chapter; part 652 of this chapter establishes the State Employment Service and describes its operation and services; part 653 of this chapter describes employment services to migrant and seasonal farmworkers and the role of the State Monitor Advocate; part 654 of this chapter addresses the special responsibilities of the Employment Service regarding housing for farmworkers; and part 658 of this chapter contains the administrative provisions that apply to the Wagner-Peyser Act Employment Service.

(c) Title 29 CFR part 38 contains the Department's nondiscrimination regulations implementing WIOA sec. 188.

§ 675.300 What definitions apply to these regulations?

In addition to the definitions set forth in WIOA and those set forth in specific parts of this chapter, the following definitions apply to the regulations in parts 675 through 688 of this chapter:

Consultation means the process by which State and/or local stakeholders convene to discuss changes to the public workforce system and constitutes a

robust conversation in which all parties are given an opportunity to share their thoughts and opinions.

Contract means a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award. The term as used in this part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward as defined in this section.

Contractor means an entity that receives a contract as defined in this section.

Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the non-Federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal government or pass-through entity's direct benefit or use;

(2) Is distinguished from a grant in that it provides for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

Department means the U.S. Department of Labor, including its agencies and organizational units.

Employment and training activity means a workforce investment activity that is carried out for an adult or dislocated worker under part 678 of this chapter.

Equal opportunity data or *EO data* means data on race and ethnicity, age, sex, and disability required by 29 CFR part 38 of the Department of Labor regulations implementing sec. 188 of WIOA, governing nondiscrimination.

Employment and Training Administration or *ETA* means the Employment and Training Administration of the U.S. Department of Labor.

Family means two or more persons related by blood, marriage, or decree of court, who are living in a single residence, and are included in one or more of the following categories:

(1) A married couple and dependent children;

(2) A parent or guardian and dependent children; or

(3) A married couple.

Federal award means:

(1) The Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in 2 CFR 200.101 (Applicability);

(2) The cost-reimbursement contract under the Federal Acquisition Regulations that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity, as described in 2 CFR 200.101 (Applicability); and

(3) The instrument setting forth the terms and conditions. The instrument is the grant agreement, cooperative agreement, other agreement for assistance covered in paragraph (b) of 2 CFR 200.40 (Federal financial assistance), or the cost-reimbursement contract awarded under the Federal Acquisition Regulations.

(4) Federal award does not include other contracts that a Federal agency uses to buy goods or services from a contractor or a contract to operate Federal government owned, contractor operated facilities (GOCOs).

Federal financial assistance means:

(1) For grants and cooperative agreements, assistance in the form of:

(i) Grants;

(ii) Cooperative agreements;

(iii) Non-cash contributions or donations of property (including donated surplus property);

(iv) Direct appropriations;

(v) Food commodities; and

(vi) Other financial assistance, except assistance listed in paragraph (2) of this definition.

(2) For purposes of the audit requirements at 2 CFR part 200, subpart F, Federal financial assistance includes assistance that non-Federal entities receive or administer in the form of:

(i) Loans;

(ii) Loan Guarantees;

(iii) Interest subsidies; and

(iv) Insurance.

(3) Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in 2 CFR 200.502, which outlines the basis for determining Federal awards expended.

Grant or *grant agreement* means a legal instrument of financial assistance between a Federal awarding agency and a non-Federal entity that, consistent with 31 U.S.C. 6302, 6304:

(1) Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal awarding agency's direct benefit or use;

(2) Is distinguished from a cooperative agreement in that it does not provide for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award.

(3) Grant agreement does not include an agreement that provides only:

(i) Direct United States Government cash assistance to an individual;

(ii) A subsidy;

(iii) A loan;

(iv) A loan guarantee; or

(v) Insurance.

Grantee means the direct recipient of grant funds from the Department of Labor under a grant or grant agreement. A grantee also may be referred to as a recipient.

Individual with a disability means an individual with any disability as defined in sec. 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102). For purposes of WIOA sec. 188, this term is defined at 29 CFR 38.4.

Labor Federation means an alliance of two or more organized labor unions for the purpose of mutual support and action.

Literacy means an individual's ability to read, write, and speak in English, and to compute, and solve problems, at levels of proficiency necessary to function on the job, in the family of the individual, and in society.

Local WDB means a Local Workforce Development Board (WDB) established under WIOA sec. 107, to set policy for the local workforce development system.

Non-Federal entity, as defined in 2 CFR 2900.2, means a State, local government, Indian tribe, institution of higher education (IHE), for-profit entity, foreign public entity, foreign organization or nonprofit organization that carries out a Federal award as a recipient or subrecipient.

Obligations when used in connection with a non-Federal entity's utilization of funds under a Federal award, means orders placed for property and services, contracts and subawards made, and similar transactions during a given period that require payment by the non-Federal entity during the same or a future period.

Outlying area means:

(1) The United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands; and

(2) The Republic of Palau, except during a period that the Secretaries determine both that a Compact of Free Association is in effect and that the Compact contains provisions for training and education assistance prohibiting the assistance provided under WIOA.

Pass-through entity means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.

Recipient means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients.

Register means the process for collecting information, including identifying information, to determine an individual's eligibility for services under WIOA title I. Individuals may be registered in a variety ways, as described in §680.110 of this chapter.

Secretary means the Secretary of the U.S. Department of Labor, or their designee.

Secretaries means the Secretaries of the U.S. Department Labor and the U.S. Department of Education, or their designees.

Self-certification means an individual's signed attestation that the information they submit to demonstrate eligibility for a program under title I of WIOA is true and accurate.

State means each of the several States of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. The term ''State'' does not include outlying areas.

State WDB means a State Workforce Development Board (WDB) established under WIOA sec. 101.

Subgrant or *subaward* means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

Subrecipient means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program, but does not include an individual that is a beneficiary of such program. A subrecipient also may be a recipient of other Federal awards directly from a Federal awarding agency.

Unliquidated obligations means, for financial reports prepared on a cash basis, obligations incurred by the non-Federal entity that have not been paid (liquidated). For reports prepared on an accrual expenditure basis, these are obligations incurred by the non-Federal entity for which an expenditure has not been recorded.

Unobligated balance means the amount of funds under a Federal award that the non-Federal entity has not obligated. The amount is computed by subtracting the cumulative amount of the non-Federal entity's unliquidated obligations and expenditures of funds under the Federal award from the cumulative amount of the funds that the Federal awarding agency or pass-through entity authorized the non-Federal entity to obligate.

Wagner-Peyser Act means the Act of June 6, 1933, as amended, codified at 29 U.S.C. 49 *et seq*.

WIA regulations mean the regulations in parts 660 through 672 of this chapter, the Wagner-Peyser Act regulations in part 652, subpart C, of this chapter, and the regulations implementing WIA sec. 188 in 29 CFR part 37.

WIOA regulations mean the regulations in parts 675 through 687 of this chapter, the Wagner-Peyser Act regulations in part 652, subpart C, of this chapter, and the regulations implementing WIA sec. 188 in 29 CFR part 38.

Workforce investment activities mean the array of activities permitted under title I of WIOA, which include employment and training activities for adults and dislocated workers, as described in WIOA sec. 134, and youth activities, as described in WIOA sec. 129.

Youth workforce investment activity means a workforce investment activity that is carried out for eligible youth under part 679 of this chapter.

PART 676—UNIFIED AND COMBINED STATE PLANS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Sec.

676.100 What are the purposes of the Unified and Combined State Plans?
676.105 What are the general requirements for the Unified State Plan?
676.110 What are the program-specific requirements in the Unified State Plan for the adult, dislocated worker, and youth programs authorized under Workforce Innovation and Opportunity Act title I?
676.115 What are the program-specific requirements in the Unified State Plan for the Adult Education and Family Literacy Act program authorized under Workforce Innovation and Opportunity Act title II?

676.120 What are the program-specific requirements in the Unified State Plan for the Employment Service program authorized under the Wagner-Peyser Act, as amended by Workforce Innovation and Opportunity Act title III?
676.125 What are the program-specific requirements in the Unified State Plan for the State Vocational Rehabilitation program authorized under title I of the Rehabilitation Act of 1973, as amended by Workforce Innovation and Opportunity Act title IV?
676.130 What is the development, submission, and approval process of the Unified State Plan?
676.135 What are the requirements for modification of the Unified State Plan?
676.140 What are the general requirements for submitting a Combined State Plan?
676.143 What is the development, submission, and approval process of the Combined State Plan?
676.145 What are the requirements for modifications of the Combined State Plan?

AUTHORITY: Secs. 102, 103, and 503, Pub. L. 113–128, 128 Stat. 1425 (Jul. 22, 2014).

SOURCE: 81 FR 55597, Aug. 19, 2016, unless otherwise noted.

§ 676.100 What are the purposes of the Unified and Combined State Plans?

(a) The Unified and Combined State Plans provide the framework for States to outline a strategic vision of, and goals for, how their workforce development systems will achieve the purposes of the Workforce Innovation and Opportunity Act (WIOA).

(b) The Unified and Combined State Plans serve as 4-year action plans to develop, align, and integrate the State's systems and provide a platform to achieve the State's vision and strategic and operational goals. A Unified or Combined State Plan is intended to:

(1) Align, in strategic coordination, the six core programs required in the Unified State Plan pursuant to § 676.105(b), and additional Combined State Plan partner programs that may be part of the Combined State Plan pursuant to § 676.140;

(2) Direct investments in economic, education, and workforce training programs to focus on providing relevant education and training to ensure that individuals, including youth and individuals with barriers to employment, have the skills to compete in the job market and that employers have a ready supply of skilled workers;

(3) Apply strategies for job-driven training consistently across Federal programs; and

(4) Enable economic, education, and workforce partners to build a skilled workforce through innovation in, and alignment of, employment, training, and education programs.

§ 676.105 What are the general requirements for the Unified State Plan?

(a) The Unified State Plan must be submitted in accordance with § 676.130 and WIOA sec. 102(c), as explained in joint planning guidelines issued by the Secretaries of Labor and Education.

(b) The Governor of each State must submit, at a minimum, in accordance with § 676.130, a Unified State Plan to the Secretary of Labor to be eligible to receive funding for the workforce development system's six core programs:

(1) The adult, dislocated worker, and youth programs authorized under subtitle B of title I of WIOA and administered by the U.S. Department of Labor (DOL);

(2) The Adult Education and Family Literacy Act (AEFLA) program authorized under title II of WIOA and administered by the U.S. Department of Education (ED);

(3) The Employment Service program authorized under the Wagner-Peyser Act of 1933, as amended by WIOA title III and administered by DOL; and

(4) The Vocational Rehabilitation program authorized under title I of the Rehabilitation Act of 1973, as amended by title IV of WIOA and administered by ED.

(c) The Unified State Plan must outline the State's 4-year strategy for the core programs described in paragraph (b) of this section and meet the requirements of sec. 102(b) of WIOA, as explained in the joint planning guidelines issued by the Secretaries of Labor and Education.

(d) The Unified State Plan must include strategic and operational planning elements to facilitate the development of an aligned, coordinated, and comprehensive workforce development system. The Unified State Plan must include:

(1) Strategic planning elements that describe the State's strategic vision and goals for preparing an educated

and skilled workforce under sec. 102(b)(1) of WIOA. The strategic planning elements must be informed by and include an analysis of the State's economic conditions and employer and workforce needs, including education and skill needs.

(2) Strategies for aligning the core programs and Combined State Plan partner programs as described in § 676.140(d), as well as other resources available to the State, to achieve the strategic vision and goals in accordance with sec. 102(b)(1)(E) of WIOA.

(3) Operational planning elements in accordance with sec. 102(b)(2) of WIOA that support the strategies for aligning the core programs and other resources available to the State to achieve the State's vision and goals and a description of how the State Workforce Development Board (WDB) will implement its functions, in accordance with sec. 101(d) of WIOA. Operational planning elements must include:

(i) A description of how the State strategy will be implemented by each core program's lead State agency;

(ii) State operating systems, including data systems, and policies that will support the implementation of the State's strategy identified in paragraph (d)(1) of this section;

(iii) Program-specific requirements for the core programs required by WIOA sec. 102(b)(2)(D);

(iv) Assurances required by sec. 102(b)(2)(E) of WIOA, including an assurance that the lead State agencies responsible for the administration of the core programs reviewed and commented on the appropriate operational planning of the Unified State Plan and approved the elements as serving the needs of the population served by such programs, and other assurances deemed necessary by the Secretaries of Labor and Education under sec. 102(b)(2)(E)(x) of WIOA;

(v) A description of joint planning and coordination across core programs, required one-stop partner programs, and other programs and activities in the Unified State Plan; and

(vi) Any additional operational planning requirements imposed by the Secretary of Labor or the Secretary of Education under sec. 102(b)(2)(C)(viii) of WIOA.

(e) All of the requirements in this part that apply to States also apply to outlying areas.

§ 676.110 What are the program-specific requirements in the Unified State Plan for the adult, dislocated worker, and youth programs authorized under Workforce Innovation and Opportunity Act title I?

The program-specific requirements for the adult, dislocated worker, and youth programs that must be included in the Unified State Plan are described in sec. 102(b)(2)(D) of WIOA. Additional planning requirements may be explained in joint planning guidelines issued by the Secretaries of Labor and Education.

§ 676.115 What are the program-specific requirements in the Unified State Plan for the Adult Education and Family Literacy Act program authorized under Workforce Innovation and Opportunity Act title II?

The program-specific requirements for the AEFLA program in title II that must be included in the Unified State Plan are described in secs. 102(b)(2)(C) and 102(b)(2)(D)(ii) of WIOA.

(a) With regard to the description required in sec. 102(b)(2)(D)(ii)(I) of WIOA pertaining to content standards, the Unified State Plan must describe how the eligible agency will, by July 1, 2016, align its content standards for adult education with State-adopted challenging academic content standards under the Elementary and Secondary Education Act of 1965, as amended.

(b) With regard to the description required in sec. 102(b)(2)(C)(iv) of WIOA pertaining to the methods and factors the State will use to distribute funds under the core programs, for title II of WIOA, the Unified State Plan must include—

(1) How the eligible agency will award multi-year grants on a competitive basis to eligible providers in the State; and

(2) How the eligible agency will provide direct and equitable access to funds using the same grant or contract announcement and application procedure.

§ 676.120 What are the program-specific requirements in the Unified State Plan for the Employment Service program authorized under the Wagner-Peyser Act, as amended by Workforce Innovation and Opportunity Act title III?

The Employment Service program authorized under the Wagner-Peyser Act of 1933, as amended by WIOA title III, is subject to requirements in sec. 102(b) of WIOA, including any additional requirements imposed by the Secretary of Labor under secs. 102(b)(2)(C)(viii) and 102(b)(2)(D)(iv) of WIOA, as explained in joint planning guidelines issued by the Secretaries of Labor and Education.

§ 676.125 What are the program-specific requirements in the Unified State Plan for the State Vocational Rehabilitation program authorized under title I of the Rehabilitation Act of 1973, as amended by Workforce Innovation and Opportunity Act title IV?

The program specific-requirements for the vocational rehabilitation services portion of the Unified or Combined State Plan are set forth in sec. 101(a) of the Rehabilitation Act of 1973, as amended. All submission requirements for the vocational rehabilitation services portion of the Unified or Combined State Plan are in addition to the jointly developed strategic and operational content requirements prescribed by sec. 102(b) of WIOA.

§ 676.130 What is the development, submission, and approval process of the Unified State Plan?

(a) The Unified State Plan described in § 676.105 must be submitted in accordance with WIOA sec. 102(c), as explained in joint planning guidelines issued jointly by the Secretaries of Labor and Education.

(b) A State must submit its Unified State Plan to the Secretary of Labor pursuant to a process identified by the Secretary.

(1) The initial Unified State Plan must be submitted no later than 120 days prior to the commencement of the second full program year of WIOA.

(2) Subsequent Unified State Plans must be submitted no later than 120 days prior to the end of the 4-year period covered by a preceding Unified State Plan.

(3) For purposes of paragraph (b) of this section, ''program year'' means July 1 through June 30 of any year.

(c) The Unified State Plan must be developed with the assistance of the State WDB, as required by § 679.130(a) of this chapter and WIOA sec. 101(d), and must be developed in coordination with administrators with optimum policy-making authority for the core programs and required one-stop partners.

(d) The State must provide an opportunity for public comment on and input into the development of the Unified State Plan prior to its submission.

(1) The opportunity for public comment must include an opportunity for comment by representatives of Local WDBs and chief elected officials, businesses, representatives of labor organizations, community-based organizations, adult education providers, institutions of higher education, other stakeholders with an interest in the services provided by the six core programs, and the general public, including individuals with disabilities.

(2) Consistent with the ''Sunshine Provision'' of WIOA in sec. 101(g), the State WDB must make information regarding the Unified State Plan available to the public through electronic means and regularly occurring open meetings in accordance with State law. The Unified State Plan must describe the State's process and timeline for ensuring a meaningful opportunity for public comment.

(e) Upon receipt of the Unified State Plan from the State, the Secretary of Labor will ensure that the entire Unified State Plan is submitted to the Secretary of Education pursuant to a process developed by the Secretaries.

(f) The Unified State Plan is subject to the approval of both the Secretary of Labor and the Secretary of Education.

(g) Before the Secretaries of Labor and Education approve the Unified State Plan, the vocational rehabilitation services portion of the Unified State Plan described in WIOA sec. 102(b)(2)(D)(iii) must be approved by the Commissioner of the Rehabilitation Services Administration.

(h) The Secretaries of Labor and Education will review and approve the Unified State Plan within 90 days of receipt by the Secretary of Labor, unless the Secretary of Labor or the Secretary of Education determines in writing within that period that:

(1) The plan is inconsistent with a core program's requirements;

(2) The Unified State Plan is inconsistent with any requirement of sec. 102 of WIOA; or

(3) The plan is incomplete or otherwise insufficient to determine whether it is consistent with a core program's requirements or other requirements of WIOA.

(i) If neither the Secretary of Labor nor the Secretary of Education makes the written determination described in paragraph (h) of this section within 90 days of the receipt by the Secretaries, the Unified State Plan will be considered approved.

§ 676.135 What are the requirements for modification of the Unified State Plan?

(a) In addition to the required modification review set forth in paragraph (b) of this section, a Governor may submit a modification of its Unified State Plan at any time during the 4-year period of the plan.

(b) Modifications are required, at a minimum:

(1) At the end of the first 2-year period of any 4-year State Plan, wherein the State WDB must review the Unified State Plan, and the Governor must submit modifications to the plan to reflect changes in labor market and economic conditions or other factors affecting the implementation of the Unified State Plan;

(2) When changes in Federal or State law or policy substantially affect the strategies, goals, and priorities upon which the Unified State Plan is based;

(3) When there are changes in the statewide vision, strategies, policies, State negotiated levels of performance as described in § 677.170(b) of this chapter, the methodology used to determine local allocation of funds, reorganizations that change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State WDB or alternative entity, and similar substantial changes to the State's workforce development system.

(c) Modifications to the Unified State Plan are subject to the same public review and comment requirements in § 676.130(d) that apply to the development of the original Unified State Plan.

(d) Unified State Plan modifications must be approved by the Secretaries of Labor and Education, based on the approval standards applicable to the original Unified State Plan under § 676.130. This approval must come after the approval of the Commissioner of the Rehabilitation Services Administration for modification of any portion of the plan described in sec. 102(b)(2)(D)(iii) of WIOA.

§ 676.140 What are the general requirements for submitting a Combined State Plan?

(a) A State may choose to develop and submit a 4-year Combined State Plan in lieu of the Unified State Plan described in §§ 676.105 through 676.125.

(b) A State that submits a Combined State Plan covering an activity or program described in paragraph (d) of this section that is, in accordance with WIOA sec. 103(c), approved or deemed complete under the law relating to the program will not be required to submit any other plan or application in order to receive Federal funds to carry out the core programs or the program or activities described under paragraph (d) of this section that are covered by the Combined State Plan.

(c) If a State develops a Combined State Plan, it must be submitted in accordance with the process described in § 676.143.

(d) If a State chooses to submit a Combined State Plan, the plan must include the six core programs and one or more of the Combined State Plan partner programs and activities described in sec. 103(a)(2) of WIOA. The Combined State Plan partner programs and activities that may be included in the Combined State Plan are:

(1) Career and technical education programs authorized under the Carl D.

Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*);

(2) Temporary Assistance for Needy Families or TANF, authorized under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*);

(3) Employment and training programs authorized under sec. 6(d)(4) of the Food and Nutrition Act of 2008 (7 U.S.C. 2015(d)(4));

(4) Work programs authorized under sec. 6(o) of the Food and Nutrition Act of 2008 (7 U.S.C. 2015(o));

(5) Trade adjustment assistance activities under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*);

(6) Services for veterans authorized under chapter 41 of title 38 United States Code;

(7) Programs authorized under State unemployment compensation laws (in accordance with applicable Federal law);

(8) Senior Community Service Employment Programs under title V of the Older Americans Act of 1965 (42 U.S.C. 3056 *et seq.*);

(9) Employment and training activities carried out by the Department of Housing and Urban Development (HUD);

(10) Employment and training activities carried out under the Community Services Block Grant Act (42 U.S.C. 9901 *et seq.*); and

(11) Reintegration of offenders programs authorized under sec. 212 of the Second Chance Act of 2007 (42 U.S.C. 17532).

(e) A Combined State Plan must contain:

(1) For the core programs, the information required by sec. 102(b) of WIOA and §§ 676.105 through 676.125, as explained in the joint planning guidelines issued by the Secretaries;

(2) For the Combined State Plan partner programs and activities, except as described in paragraph (h) of this section, the information required by the law authorizing and governing that program to be submitted to the appropriate Secretary, any other applicable legal requirements, and any common planning requirements described in sec. 102(b) of WIOA, as explained in the joint planning guidelines issued by the Secretaries;

(3) A description of the methods used for joint planning and coordination among the core programs, and with the required one-stop partner programs and other programs and activities included in the State Plan; and

(4) An assurance that all of the entities responsible for planning or administering the programs described in the Combined State Plan have had a meaningful opportunity to review and comment on all portions of the plan.

(f) Each Combined State Plan partner program included in the Combined State Plan remains subject to the applicable program-specific requirements of the Federal law and regulations, and any other applicable legal or program requirements, governing the implementation and operation of that program.

(g) For purposes of §§ 676.140 through 676.145 the term ''appropriate Secretary'' means the head of the Federal agency who exercises either plan or application approval authority for the program or activity under the Federal law authorizing the program or activity or, if there are no planning or application requirements, who exercises administrative authority over the program or activity under that Federal law.

(h) States that include employment and training activities carried out under the Community Services Block Grant (CSBG) Act (42 U.S.C. 9901 *et seq.*) under a Combined State Plan would submit all other required elements of a complete CSBG State Plan directly to the Federal agency that administers the program, according to the requirements of Federal law and regulations.

(i) States that submit employment and training activities carried out by HUD under a Combined State Plan would submit any other required planning documents for HUD programs directly to HUD, according to the requirements of Federal law and regulations.

§ 676.143 What is the development, submission, and approval process of the Combined State Plan?

(a) For purposes of § 676.140(a), if a State chooses to develop a Combined

State Plan it must submit the Combined State Plan in accordance with the requirements described below and sec. 103 of WIOA, as explained in the joint planning guidelines issued by the Secretaries of Labor and Education.

(b) The Combined State Plan must be developed with the assistance of the State WDB, as required by §679.130(a) of this chapter and WIOA sec. 101(d), and must be developed in coordination with administrators with optimum policy-making authority for the core programs and required one-stop partners.

(c) The State must provide an opportunity for public comment on and input into the development of the Combined State Plan prior to its submission.

(1) The opportunity for public comment for the portions of the Combined State Plan that cover the core programs must include an opportunity for comment by representatives of Local WDBs and chief elected officials, businesses, representatives of labor organizations, community-based organizations, adult education providers, institutions of higher education, other stakeholders with an interest in the services provided by the six core programs, and the general public, including individuals with disabilities.

(2) Consistent with the ''Sunshine Provision'' of WIOA in sec. 101(g), the State WDB must make information regarding the Combined State Plan available to the public through electronic means and regularly occurring open meetings in accordance with State law. The Combined State Plan must describe the State's process and timeline for ensuring a meaningful opportunity for public comment on the portions of the plan covering core programs.

(3) The portions of the plan that cover the Combined State Plan partner programs are subject to any public comment requirements applicable to those programs.

(d) The State must submit to the Secretaries of Labor and Education and to the Secretary of the agency with responsibility for approving the program's plan or deeming it complete under the law governing the program, as part of its Combined State Plan, any plan, application, form, or any other similar document that is required as a condition for the approval of Federal funding under the applicable program or activity. Such submission must occur in accordance with a process identified by the relevant Secretaries in paragraph (a) of this section.

(e) The Combined State Plan will be approved or disapproved in accordance with the requirements of sec. 103(c) of WIOA.

(1) The portion of the Combined State Plan covering programs administered by the Departments of Labor and Education must be reviewed, and approved or disapproved, by the appropriate Secretary within 90 days beginning on the day the Combined State Plan is received by the appropriate Secretary from the State, consistent with paragraph (f) of this section. Before the Secretaries of Labor and Education approve the Combined State Plan, the vocational rehabilitation services portion of the Combined State Plan described in WIOA sec. 102(b)(2)(D)(iii) must be approved by the Commissioner of the Rehabilitation Services Administration.

(2) If an appropriate Secretary other than the Secretary of Labor or the Secretary of Education has authority to approve or deem complete a portion of the Combined State Plan for a program or activity described in §676.140(d), that portion of the Combined State Plan must be reviewed, and approved, disapproved, or deemed complete, by the appropriate Secretary within 120 days beginning on the day the Combined State Plan is received by the appropriate Secretary from the State consistent with paragraph (f) of this section.

(f) The appropriate Secretaries will review and approve or deem complete the Combined State Plan within 90 or 120 days, as appropriate, as described in paragraph (e) of this section, unless the Secretaries of Labor and Education or appropriate Secretary have determined in writing within that period that:

(1) The Combined State Plan is inconsistent with the requirements of the six core programs or the Federal laws authorizing or applicable to the program or activity involved, including the criteria for approval of a plan or

application, or deeming the plan complete, if any, under such law;

(2) The portion of the Combined State Plan describing the six core programs or the program or activity described in paragraph (a) of this section involved does not satisfy the criteria as provided in sec. 102 or 103 of WIOA, as applicable; or

(3) The Combined State Plan is incomplete, or otherwise insufficient to determine whether it is consistent with a core program's requirements, other requirements of WIOA, or the Federal laws authorizing, or applicable to, the program or activity described in § 676.140(d), including the criteria for approval of a plan or application, if any, under such law.

(g) If the Secretary of Labor, the Secretary of Education, or the appropriate Secretary does not make the written determination described in paragraph (f) of this section within the relevant period of time after submission of the Combined State Plan, that portion of the Combined State Plan over which the Secretary has jurisdiction will be considered approved.

(h) The Secretaries of Labor and Education's written determination of approval or disapproval regarding the portion of the plan for the six core programs may be separate from the written determination of approval, disapproval, or completeness of the program-specific requirements of Combined State Plan partner programs and activities described in § 676.140(d) and included in the Combined State Plan.

(i) *Special rule*. In paragraphs (f)(1) and (3) of this section, the term ''criteria for approval of a plan or application,'' with respect to a State or a core program or a program under the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*), includes a requirement for agreement between the State and the appropriate Secretaries regarding State performance measures or State performance accountability measures, as the case may be, including levels of performance.

§ 676.145 What are the requirements for modifications of the Combined State Plan?

(a) For the core program portions of the Combined State Plan, modifications are required, at a minimum:

(1) By the end of the first 2-year period of any 4-year State Plan. The State WDB must review the Combined State Plan, and the Governor must submit modifications to the Combined State Plan to reflect changes in labor market and economic conditions or other factors affecting the implementation of the Combined State Plan;

(2) When changes in Federal or State law or policy substantially affect the strategies, goals, and priorities upon which the Combined State Plan is based;

(3) When there are changes in the statewide vision, strategies, policies, State negotiated levels of performance as described in § 677.170(b) of this chapter, the methodology used to determine local allocation of funds, reorganizations that change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State WDB or alternative entity, and similar substantial changes to the State's workforce development system.

(b) In addition to the required modification review described in paragraph (a)(1) of this section, a State may submit a modification of its Combined State Plan at any time during the 4-year period of the plan.

(c) For any Combined State Plan partner programs and activities described in § 676.140(d) that are included in a State's Combined State Plan, the State—

(1) May decide if the modification requirements under WIOA sec. 102(c)(3) that apply to the core programs will apply to the Combined State Plan partner programs, as long as consistent with any other modification requirements for the programs, or may comply with the requirements applicable to only the particular program or activity; and

(2) Must submit, in accordance with the procedure described in § 676.143, any modification, amendment, or revision

required by the Federal law authorizing, or applicable to, the Combined State Plan partner program or activity.

(i) If the underlying programmatic requirements change (*e.g.*, the authorizing statute is reauthorized) for Federal laws authorizing such programs, a State must either modify its Combined State Plan or submit a separate plan to the appropriate Federal agency in accordance with the new Federal law authorizing the Combined State Plan partner program or activity and other legal requirements applicable to such program or activity.

(ii) If the modification, amendment, or revision affects the administration of only that particular Combined State Plan partner program and has no impact on the Combined State Plan as a whole or the integration and administration of the core and other Combined State Plan partner programs at the State level, modifications must be submitted for approval to only the appropriate Secretary, based on the approval standards applicable to the original Combined State Plan under §676.143, if the State elects, or in accordance with the procedures and requirements applicable to the particular Combined State Plan partner program.

(3) A State also may amend its Combined State Plan to add a Combined State Plan partner program or activity described in §676.140(d).

(d) Modifications of the Combined State Plan are subject to the same public review and comment requirements that apply to the development of the original Combined State Plan as described in §676.143(c) except that, if the modification, amendment, or revision affects the administration of a particular Combined State Plan partner program and has no impact on the Combined State Plan as a whole or the integration and administration of the core and other Combined State Plan partner programs at the State level, a State may comply instead with the procedures and requirements applicable to the particular Combined State Plan partner program.

(e) Modifications for the core program portions of the Combined State Plan must be approved by the Secretaries of Labor and Education, based on the approval standards applicable to the original Combined State Plan under §676.143. This approval must come after the approval of the Commissioner of the Rehabilitation Services Administration for modification of any portion of the Combined State Plan described in sec. 102(b)(2)(D)(iii) of WIOA.

PART 677—PERFORMANCE ACCOUNTABILITY UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Sec.

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§ 677.150 What definitions apply to Workforce Innovation and Opportunity Act performance accountability provisions?

(a) *Participant.* A reportable individual who has received services other than the services described in paragraph (a)(3) of this section, after satisfying all applicable programmatic requirements for the provision of services, such as eligibility determination.

(1) For the Vocational Rehabilitation (VR) program, a participant is a reportable individual who has an approved and signed Individualized Plan for Employment (IPE) and has begun to receive services.

(2) For the Workforce Innovation and Opportunity Act (WIOA) title I youth program, a participant is a reportable individual who has satisfied all applicable program requirements for the provision of services, including eligibility determination, an objective assessment, and development of an individual service strategy, and received 1 of the 14 WIOA youth program elements identified in sec. 129(c)(2) of WIOA.

(3) The following individuals are not participants:

(i) Individuals in an Adult Education and Family Literacy Act (AEFLA) program who have not completed at least 12 contact hours;

(ii) Individuals who only use the self-service system.

(A) Subject to paragraph (a)(3)(ii)(B) of this section, self-service occurs when individuals independently access any workforce development system program's information and activities in either a physical location, such as a one-stop center resource room or partner agency, or remotely via the use of electronic technologies.

(B) Self-service does not uniformly apply to all virtually accessed services. For example, virtually accessed services that provide a level of support beyond independent job or information seeking on the part of an individual would not qualify as self-service.

(iii) Individuals who receive information-only services or activities, which provide readily available information that does not require an assessment by a staff member of the individual's skills, education, or career objectives.

(4) Programs must include participants in their performance calculations.

(b) *Reportable individual.* An individual who has taken action that demonstrates an intent to use program services and who meets specific reporting criteria of the program, including:

(1) Individuals who provide identifying information;

(2) Individuals who only use the self-service system; or

(3) Individuals who only receive information-only services or activities.

(c) *Exit.* As defined for the purpose of performance calculations, exit is the point after which a participant who has received services through any program meets the following criteria:

(1) For the adult, dislocated worker, and youth programs authorized under WIOA title I, the AEFLA program authorized under WIOA title II, and the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III, exit date is the last date of service.

(i) The last day of service cannot be determined until at least 90 days have elapsed since the participant last received services; services do not include self-service, information-only services or activities, or follow-up services. This also requires that there are no plans to provide the participant with future services.

(ii) [Reserved].

(2)(i) For the VR program authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV (VR program):

(A) The participant's record of service is closed in accordance with 34 CFR 361.56 because the participant has achieved an employment outcome; or

(B) The participant's service record is closed because the individual has not achieved an employment outcome or the individual has been determined ineligible after receiving services in accordance with 34 CFR 361.43.

(ii) Notwithstanding any other provision of this section, a participant will not be considered as meeting the definition of exit from the VR program if the participant's service record is closed because the participant has achieved a supported employment outcome in an integrated setting but not in competitive integrated employment.

(3)(i) A State may implement a common exit policy for all or some of the core programs in WIOA title I and the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III, and any additional required partner program(s) listed in sec. 121(b)(1)(B) of WIOA that is under the authority of the U.S. Department of Labor (DOL).

(ii) If a State chooses to implement a common exit policy, the policy must require that a participant is exited only when all of the criteria in paragraph (c)(1) of this section are met for the WIOA title I core programs and the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III, as well as any additional required partner programs listed in sec. 121(b)(1)(B) of WIOA under the authority of DOL to which the common exit policy applies in which the participant is enrolled.

(d) *State*. For purposes of this part, other than in regard to sanctions or the statistical adjustment model, all references to ''State'' include the outlying areas of American Samoa, Guam, Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and, as applicable, the Republic of Palau.

Subpart A—State Indicators of Performance for Core Programs

§ 677.155 What are the primary indicators of performance under the Workforce Innovation and Opportunity Act?

(a) All States submitting either a Unified or Combined State Plan under §§ 676.130 and 676.143 of this chapter, must propose expected levels of performance for each of the primary indicators of performance for the adult, dislocated worker, and youth programs authorized under WIOA title I; the AEFLA program authorized under WIOA title II; the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III; and the VR program authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV.

(1) *Primary indicators of performance*. The six primary indicators of performance for the adult and dislocated worker programs, the AEFLA program, and the VR program are:

(i) The percentage of participants who are in unsubsidized employment during the second quarter after exit from the program;

(ii) The percentage of participants who are in unsubsidized employment during the fourth quarter after exit from the program;

(iii) Median earnings of participants who are in unsubsidized employment during the second quarter after exit from the program;

(iv)(A) The percentage of those participants enrolled in an education or training program (excluding those in

on-the-job training [OJT] and customized training) who attained a recognized postsecondary credential or a secondary school diploma, or its recognized equivalent, during participation in or within 1 year after exit from the program.

(B) A participant who has attained a secondary school diploma or its recognized equivalent is included in the percentage of participants who have attained a secondary school diploma or recognized equivalent only if the participant also is employed or is enrolled in an education or training program leading to a recognized postsecondary credential within 1 year after exit from the program;

(v) The percentage of participants who, during a program year, are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains, defined as documented academic, technical, occupational, or other forms of progress, towards such a credential or employment. Depending upon the type of education or training program, documented progress is defined as one of the following:

(A) Documented achievement of at least one educational functioning level of a participant who is receiving instruction below the postsecondary education level;

(B) Documented attainment of a secondary school diploma or its recognized equivalent;

(C) Secondary or postsecondary transcript or report card for a sufficient number of credit hours that shows a participant is meeting the State unit's academic standards;

(D) Satisfactory or better progress report, towards established milestones, such as completion of OJT or completion of 1 year of an apprenticeship program or similar milestones, from an employer or training provider who is providing training; or

(E) Successful passage of an exam that is required for a particular occupation or progress in attaining technical or occupational skills as evidenced by trade-related benchmarks such as knowledge-based exams.

(vi) Effectiveness in serving employers.

(2) *Participants*. For purposes of the primary indicators of performance in paragraph (a)(1) of this section, ''participant'' will have the meaning given to it in § 677.150(a), except that—

(i) For purposes of determining program performance levels under indicators set forth in paragraphs (a)(1)(i) through (iv) and (vi) of this section, a ''participant'' does not include a participant who received services under sec. 225 of WIOA and exits such program while still in a correctional institution as defined in sec. 225(e)(1) of WIOA; and

(ii) The Secretaries of Labor and Education may, as needed and consistent with the Paperwork Reduction Act (PRA), make further determinations as to the participants to be included in calculating program performance levels for purposes of any of the performance indicators set forth in paragraph (a)(1) of this section.

(b) The primary indicators in paragraphs (a)(1)(i) through (iii) and (vi) of this section apply to the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III.

(c) For the youth program authorized under WIOA title I, the primary indicators are:

(1) Percentage of participants who are in education or training activities, or in unsubsidized employment, during the second quarter after exit from the program;

(2) Percentage of participants in education or training activities, or in unsubsidized employment, during the fourth quarter after exit from the program;

(3) Median earnings of participants who are in unsubsidized employment during the second quarter after exit from the program;

(4) The percentage of those participants enrolled in an education or training program (excluding those in OJT and customized training) who obtained a recognized postsecondary credential or a secondary school diploma, or its recognized equivalent, during participation in or within 1 year after exit from the program, except that a participant who has attained a secondary school diploma or its recognized equivalent is included as having attained a

secondary school diploma or recognized equivalent only if the participant is also employed or is enrolled in an education or training program leading to a recognized postsecondary credential within 1 year from program exit;

(5) The percentage of participants who during a program year, are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains, defined as documented academic, technical, occupational or other forms of progress towards such a credential or employment. Depending upon the type of education or training program, documented progress is defined as one of the following:

(i) Documented achievement of at least one educational functioning level of a participant who is receiving instruction below the postsecondary education level;

(ii) Documented attainment of a secondary school diploma or its recognized equivalent;

(iii) Secondary or postsecondary transcript or report card for a sufficient number of credit hours that shows a participant is achieving the State unit's academic standards;

(iv) Satisfactory or better progress report, towards established milestones, such as completion of OJT or completion of 1 year of an apprenticeship program or similar milestones, from an employer or training provider who is providing training; or

(v) Successful passage of an exam that is required for a particular occupation or progress in attaining technical or occupational skills as evidenced by trade-related benchmarks such as knowledge-based exams.

(6) Effectiveness in serving employers.

§ 677.160 What information is required for State performance reports?

(a) The State performance report required by sec. 116(d)(2) of WIOA must be submitted annually using a template the Departments of Labor and Education will disseminate, and must provide, at a minimum, information on the actual performance levels achieved consistent with § 677.175 with respect to:

(1) The total number of participants served, and the total number of participants who exited each of the core programs identified in sec. 116(b)(3)(A)(ii) of WIOA, including disaggregated counts of those who participated in and exited a core program, by:

(i) Individuals with barriers to employment as defined in WIOA sec. 3(24); and

(ii) Co-enrollment in any of the programs in WIOA sec. 116(b)(3)(A)(ii).

(2) Information on the performance levels achieved for the primary indicators of performance for all of the core programs identified in § 677.155 including disaggregated levels for:

(i) Individuals with barriers to employment as defined in WIOA sec. 3(24);

(ii) Age;

(iii) Sex; and

(iv) Race and ethnicity.

(3) The total number of participants who received career services and the total number of participants who exited from career services for the most recent program year and the 3 preceding program years, and the total number of participants who received training services and the total number of participants who exited from training services for the most recent program year and the 3 preceding program years, as applicable to the program;

(4) Information on the performance levels achieved for the primary indicators of performance consistent with § 677.155 for career services and training services for the most recent program year and the 3 preceding program years, as applicable to the program;

(5) The percentage of participants in a program who attained unsubsidized employment related to the training received (often referred to as training-related employment) through WIOA title I, subtitle B programs;

(6) The amount of funds spent on career services and the amount of funds spent on training services for the most recent program year and the 3 preceding program years, as applicable to the program;

(7) The average cost per participant for those participants who received career services and training services, respectively, during the most recent program year and the 3 preceding program years, as applicable to the program;

(8) The percentage of a State's annual allotment under WIOA sec. 132(b) that the State spent on administrative costs; and

(9) Information that facilitates comparisons of programs with programs in other States.

(10) For WIOA title I programs, a State performance narrative, which, for States in which a local area is implementing a pay-for-performance contracting strategy, at a minimum provides:

(i) A description of pay-for-performance contract strategies being used for programs;

(ii) The performance of service providers entering into contracts for such strategies, measured against the levels of performance specified in the contracts for such strategies; and

(iii) An evaluation of the design of the programs and performance strategies and, when available, the satisfaction of employers and participants who received services under such strategies.

(b) The disaggregation of data for the State performance report must be done in compliance with WIOA sec. 116(d)(6)(C).

(c) The State performance reports must include a mechanism of electronic access to the State's local area and eligible training provider (ETP) performance reports.

(d) States must comply with these requirements from sec. 116 of WIOA as explained in joint guidance issued by the Departments of Labor and Education, which may include information on reportable individuals as determined by the Secretaries of Labor and Education.

§ 677.165 May a State establish additional indicators of performance?

States may identify additional indicators of performance for the six core programs. If a State does so, these indicators must be included in the Unified or Combined State Plan.

§ 677.170 How are State levels of performance for primary indicators established?

(a) A State must submit in the State Plan expected levels of performance on the primary indicators of performance for each core program as required by sec. 116(b)(3)(A)(iii) of WIOA as explained in joint guidance issued by the Secretaries of Labor and Education.

(1) The initial State Plan submitted under WIOA must contain expected levels of performance for the first 2 years of the State Plan.

(2) States must submit expected levels of performance for the third and fourth year of the State Plan before the third program year consistent with §§ 676.135 and 676.145 of this chapter.

(b) States must reach agreement on levels of performance with the Secretaries of Labor and Education for each indicator for each core program. These are the negotiated levels of performance. The negotiated levels must be based on the following factors:

(1) How the negotiated levels of performance compare with State levels of performance established for other States;

(2) The application of an objective statistical model established by the Secretaries of Labor and Education, subject to paragraph (d) of this section;

(3) How the negotiated levels promote continuous improvement in performance based on the primary indicators and ensure optimal return on investment of Federal funds; and

(4) The extent to which the negotiated levels assist the State in meeting the performance goals established by the Secretaries of Labor and Education for the core programs in accordance with the Government Performance and Results Act of 1993, as amended.

(c) An objective statistical adjustment model will be developed and disseminated by the Secretaries of Labor and Education. The model will be based on:

(1) Differences among States in actual economic conditions, including but not limited to unemployment rates and job losses or gains in particular industries; and

(2) The characteristics of participants, including but not limited to:

(i) Indicators of poor work history;

(ii) Lack of work experience;

(iii) Lack of educational or occupational skills attainment;

(iv) Dislocation from high-wage and high-benefit employment;

(v) Low levels of literacy;

(vi) Low levels of English proficiency;

(vii) Disability status;

(viii) Homelessness;

(ix) Ex-offender status; and

(x) Welfare dependency.

(d) The objective statistical adjustment model developed under paragraph (c) of this section will be:

(1) Applied to the core programs' primary indicators upon availability of data which are necessary to populate the model and apply the model to the local core programs;

(2) Subject to paragraph (d)(1) of this section, used before the beginning of a program year in order to reach agreement on State negotiated levels for the upcoming program year; and

(3) Subject to paragraph (d)(1) of this section, used to revise negotiated levels at the end of a program year based on actual economic conditions and characteristics of participants served, consistent with sec. 116(b)(3)(A)(vii) of WIOA.

(e) The negotiated levels revised at the end of the program year, based on the statistical adjustment model, are the adjusted levels of performance.

(f) States must comply with these requirements from sec. 116 of WIOA as explained in joint guidance issued by the Departments of Labor and Education.

§ 677.175 What responsibility do States have to use quarterly wage record information for performance accountability?

(a)(1) States must, consistent with State laws, use quarterly wage record information in measuring a State's performance on the primary indicators of performance outlined in § 677.155 and a local area's performance on the primary indicators of performance identified in § 677.205.

(2) The use of social security numbers from participants and such other information as is necessary to measure the progress of those participants through quarterly wage record information is authorized.

(3) To the extent that quarterly wage records are not available for a participant, States may use other information as is necessary to measure the progress of those participants through methods other than quarterly wage record information.

(b) ''Quarterly wage record information'' means intrastate and interstate wages paid to an individual, the social security number (or numbers, if more than one) of the individual, and the name, address, State, and the Federal employer identification number of the employer paying the wages to the individual.

(c) The Governor may designate a State agency (or appropriate State entity) to assist in carrying out the performance reporting requirements for WIOA core programs and ETPs. The Governor or such agency (or appropriate State entity) is responsible for:

(1) Facilitating data matches;

(2) Data quality reliability; and

(3) Protection against disaggregation that would violate applicable privacy standards.

Subpart B—Sanctions for State Performance and the Provision of Technical Assistance

§ 677.180 When is a State subject to a financial sanction under the Workforce Innovation and Opportunity Act?

A State will be subject to financial sanction under WIOA sec. 116(f) if it fails to:

(a) Submit the State annual performance report required under WIOA sec. 116(d)(2); or

(b) Meet adjusted levels of performance for the primary indicators of performance in accordance with sec. 116(f) of WIOA.

§ 677.185 When are sanctions applied for a State's failure to submit an annual performance report?

(a) Sanctions will be applied when a State fails to submit the State annual performance report required under sec. 116(d)(2) of WIOA. A State fails to report if the State either:

(1) Does not submit a State annual performance report by the date for timely submission set in performance reporting guidance; or

(2) Submits a State annual performance report by the date for timely submission, but the report is incomplete.

(b) Sanctions will not be applied if the reporting failure is due to exceptional circumstances outside of the State's control. Exceptional circumstances may include, but are not limited to:

(1) Natural disasters;

(2) Unexpected personnel transitions; and

(3) Unexpected technology related issues.

(c) In the event that a State may not be able to submit a complete and accurate performance report by the deadline for timely reporting:

(1) The State must notify the Secretary of Labor or Secretary of Education as soon as possible, but no later than 30 days prior to the established deadline for submission, of a potential impact on the State's ability to submit its State annual performance report in order to not be considered failing to report.

(2) In circumstances where unexpected events occur less than 30 days before the established deadline for submission of the State annual performance reports, the Secretaries of Labor and Education will review requests for extending the reporting deadline in accordance with the Departments of Labor and Education's procedures that will be established in guidance.

§ 677.190 When are sanctions applied for failure to achieve adjusted levels of performance?

(a) States' negotiated levels of performance will be adjusted through the application of the statistical adjustment model established under § 677.170 to account for actual economic conditions experienced during a program year and characteristics of participants, annually at the close of each program year.

(b) Any State that fails to meet adjusted levels of performance for the primary indicators of performance outlined in § 677.155 for any year will receive technical assistance, including assistance in the development of a performance improvement plan provided by the Secretary of Labor or Secretary of Education.

(c) Whether a State has failed to meet adjusted levels of performance will be determined using the following three criteria:

(1) The overall State program score, which is expressed as the percent achieved, compares the actual results achieved by a core program on the primary indicators of performance to the adjusted levels of performance for that core program. The average of the percentages achieved of the adjusted level of performance for each of the primary indicators by a core program will constitute the overall State program score.

(2) However, until all indicators for the core program have at least 2 years of complete data, the overall State program score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data for that program;

(3) The overall State indicator score, which is expressed as the percent achieved, compares the actual results achieved on a primary indicator of performance by all core programs in a State to the adjusted levels of performance for that primary indicator. The average of the percentages achieved of the adjusted level of performance by all of the core programs on that indicator will constitute the overall State indicator score.

(4) However, until all indicators for the State have at least 2 years of complete data, the overall State indicator score will be based on a comparison of the actual results achieved to the adjusted level of performance for each of the primary indicators that have at least 2 years of complete data in a State.

(5) The individual indicator score, which is expressed as the percent achieved, compares the actual results achieved by each core program on each of the individual primary indicators to the adjusted levels of performance for each of the program's primary indicators of performance.

(d) A performance failure occurs when:

(1) Any overall State program score or overall State indicator score falls below 90 percent for the program year; or

(2) Any of the States' individual indicator scores fall below 50 percent for the program year.

(e) Sanctions based on performance failure will be applied to States if, for 2 consecutive years, the State fails to meet:

(1) 90 percent of the overall State program score for the same core program;

(2) 90 percent of the overall State indicator score for the same primary indicator; or

(3) 50 percent of the same indicator score for the same program.

§ 677.195 What should States expect when a sanction is applied to the Governor's Reserve Allotment?

(a) The Secretaries of Labor and Education will reduce the Governor's Reserve Allotment by five percent of the maximum available amount for the immediately succeeding program year if:

(1) The State fails to submit the State annual performance reports as required under WIOA sec. 116(d)(2), as defined in § 677.185;

(2) The State fails to meet State adjusted levels of performance for the same primary performance indicator(s) under either § 677.190(d)(1) for the second consecutive year as defined in § 677.190; or

(3) The State's score on the same indicator for the same program falls below 50 percent under § 677.190(d)(2) for the second consecutive year as defined in § 677.190.

(b) If the State fails under paragraphs (a)(1) and either (a)(2) or (3) of this section in the same program year, the Secretaries of Labor and Education will reduce the Governor's Reserve Allotment by 10 percent of the maximum available amount for the immediately succeeding program year.

(c) If a State's Governor's Reserve Allotment is reduced:

(1) The reduced amount will not be returned to the State in the event that the State later improves performance or submits its annual performance report; and

(2) The Governor's Reserve will continue to be set at the reduced level in each subsequent year until the Secretary of Labor or the Secretary of Education, depending on which program is impacted, determines that the State met the State adjusted levels of performance for the applicable primary performance indicators and has submitted all of the required performance reports.

(d) A State may request review of a sanction the Secretary of Labor imposes in accordance with the provisions of § 683.800 of this chapter.

§ 677.200 What other administrative actions will be applied to States' performance requirements?

(a) In addition to sanctions for failure to report or failure to meet adjusted levels of performance, States will be subject to administrative actions in the case of poor performance.

(b) States' performance achievement on the individual primary indicators will be assessed in addition to the overall State program score and overall State indicator score. Based on this assessment, as clarified and explained in guidance, for performance on any individual primary indicator, the Secretary of Labor or the Secretary of Education will require the State to establish a performance risk plan to address continuous improvement on the individual primary indicator.

Subpart C—Local Performance Accountability for Workforce Innovation and Opportunity Act Title I Programs

§ 677.205 What performance indicators apply to local areas and what information must be included in local area performance reports?

(a) Each local area in a State under WIOA title I is subject to the same primary indicators of performance for the core programs for WIOA title I under § 677.155(a)(1) and (c) that apply to the State.

(b) In addition to the indicators described in paragraph (a) of this section, under § 677.165, the Governor may apply additional indicators of performance to local areas in the State.

(c) States must annually make local area performance reports available to the public using a template that the Departments of Labor and Education will disseminate in guidance, including by electronic means. The State must

provide electronic access to the public local area performance report in its annual State performance report.

(d) The local area performance report must include:

(1) The actual results achieved under § 677.155 and the information required under § 677.160(a);

(2) The percentage of a local area's allotment under WIOA secs. 128(b) and 133(b) that the local area spent on administrative costs; and

(3) Other information that facilitates comparisons of programs with programs in other local areas (or planning regions if the local area is part of a planning region).

(e) The disaggregation of data for the local area performance report must be done in compliance with WIOA sec. 116(d)(6)(C).

(f) States must comply with any requirements from sec. 116(d)(3) of WIOA as explained in guidance, including the use of the performance reporting template, issued by DOL.

§ 677.210 How are local performance levels established?

(a) The objective statistical adjustment model required under sec. 116(b)(3)(A)(viii) of WIOA and described in § 677.170(c) must be:

(1) Applied to the core programs' primary indicators upon availability of data which are necessary to populate the model and apply the model to the local core programs;

(2) Used in order to reach agreement on local negotiated levels of performance for the upcoming program year; and

(3) Used to establish adjusted levels of performance at the end of a program year based on actual conditions, consistent with WIOA sec. 116(c)(3).

(b) Until all indicators for the core program in a local area have at least 2 years of complete data, the comparison of the actual results achieved to the adjusted levels of performance for each of the primary indicators only will be applied where there are at least 2 years of complete data for that program.

(c) The Governor, Local Workforce Development Board (WDB), and chief elected official must reach agreement on local negotiated levels of performance based on a negotiations process before the start of a program year with the use of the objective statistical model described in paragraph (a) of this section. The negotiations will include a discussion of circumstances not accounted for in the model and will take into account the extent to which the levels promote continuous improvement. The objective statistical model will be applied at the end of the program year based on actual economic conditions and characteristics of the participants served.

(d) The negotiations process described in paragraph (c) of this section must be developed by the Governor and disseminated to all Local WDBs and chief elected officials.

(e) The Local WDBs may apply performance measures to service providers that differ from the performance indicators that apply to the local area. These performance measures must be established after considering:

(1) The established local negotiated levels;

(2) The services provided by each provider; and

(3) The populations the service providers are intended to serve.

Subpart D—Incentives and Sanctions for Local Performance for Workforce Innovation and Opportunity Act Title I Programs

§ 677.215 Under what circumstances are local areas eligible for State Incentive Grants?

(a) The Governor is not required to award local incentive funds, but is authorized to provide incentive grants to local areas for performance on the primary indicators of performance consistent with WIOA sec. 134(a)(3)(A)(xi).

(b) The Governor may use non-Federal funds to create incentives for the Local WDBs to implement pay-for-performance contract strategies for the delivery of training services described in WIOA sec. 134(c)(3) or activities described in WIOA sec. 129(c)(2) in the local areas served by the Local WDBs. Pay-for-performance contract strategies must be implemented in accordance with part 683, subpart E of this chapter and § 677.160.

§ 677.220 Under what circumstances may a corrective action or sanction be applied to local areas for poor performance?

(a) If a local area fails to meet the adjusted levels of performance agreed to under § 677.210 for the primary indicators of performance in the adult, dislocated worker, and youth programs authorized under WIOA title I in any program year, technical assistance must be provided by the Governor or, upon the Governor's request, by the Secretary of Labor.

(1) A State must establish the threshold for failure to meet adjusted levels of performance for a local area before coming to agreement on the negotiated levels of performance for the local area.

(i) A State must establish the adjusted level of performance for a local area, using the statistical adjustment model described in § 677.170(c).

(ii) At least 2 years of complete data on any indicator for any local core program are required in order to establish adjusted levels of performance for a local area.

(2) The technical assistance may include:

(i) Assistance in the development of a performance improvement plan;

(ii) The development of a modified local or regional plan; or

(iii) Other actions designed to assist the local area in improving performance.

(b) If a local area fails to meet the adjusted levels of performance agreed to under § 677.210 for the same primary indicators of performance for the same core program authorized under WIOA title I for a third consecutive program year, the Governor must take corrective actions. The corrective actions must include the development of a reorganization plan under which the Governor:

(1) Requires the appointment and certification of a new Local WDB, consistent with the criteria established under § 679.350 of this chapter;

(2) Prohibits the use of eligible providers and one-stop partners that have been identified as achieving poor levels of performance; or

(3) Takes such other significant actions as the Governor determines are appropriate.

§ 677.225 Under what circumstances may local areas appeal a reorganization plan?

(a) The Local WDB and chief elected official for a local area that is subject to a reorganization plan under WIOA sec. 116(g)(2)(A) may appeal to the Governor to rescind or revise the reorganization plan not later than 30 days after receiving notice of the reorganization plan. The Governor must make a final decision within 30 days after receipt of the appeal.

(b) The Local WDB and chief elected official may appeal the final decision of the Governor to the Secretary of Labor not later than 30 days after receiving the decision from the Governor. Any appeal of the Governor's final decision must be:

(1) Appealed jointly by the Local WDB and chief elected official to the Secretary of Labor under § 683.650 of this chapter; and

(2) Must be submitted by certified mail, return receipt requested, to the Secretary of Labor, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the Governor.

(c) Upon receipt of the joint appeal from the Local WDB and chief elected official, the Secretary of Labor must make a final decision within 30 days. In making this determination the Secretary of Labor may consider any comments submitted by the Governor in response to the appeals.

(d) The decision by the Governor on the appeal becomes effective at the time it is issued and remains effective unless the Secretary of Labor rescinds or revises the reorganization plan under WIOA sec. 116(g)(2)(C).

Subpart E—Eligible Training Provider Performance for Workforce Innovation and Opportunity Act Title I Programs

§ 677.230 What information is required for the eligible training provider performance reports?

(a) States are required to make available and publish annually using a template the Departments of Labor and Education will disseminate including through electronic means, the ETP performance reports for ETPs who provide services under sec. 122 of WIOA that are described in §§ 680.400 through 680.530 of this chapter. These reports at a minimum must include, consistent with § 677.175 and with respect to each program of study that is eligible to receive funds under WIOA:

(1) The total number of participants as defined by § 677.150(a) who received training services under the adult and dislocated worker programs authorized under WIOA title I for the most recent year and the 3 preceding program years, including:

(i) The number of participants under the adult and dislocated worker programs disaggregated by barriers to employment;

(ii) The number of participants under the adult and dislocated worker programs disaggregated by race, ethnicity, sex, and age;

(iii) The number of participants under the adult and dislocated worker programs disaggregated by the type of training entity for the most recent program year and the 3 preceding program years;

(2) The total number of participants who exit a program of study or its equivalent, including disaggregate counts by the type of training entity during the most recent program year and the 3 preceding program years;

(3) The average cost-per-participant for participants who received training services for the most recent program year and the 3 preceding program years disaggregated by type of training entity;

(4) The total number of individuals exiting from the program of study (or the equivalent) with respect to all individuals engaging in the program of study (or the equivalent); and

(5) The levels of performance achieved for the primary indicators of performance identified in § 677.155(a)(1)(i) through (iv) with respect to all individuals engaging in a program of study (or the equivalent).

(b) Apprenticeship programs registered under the National Apprenticeship Act are not required to submit ETP performance information. If a registered apprenticeship program voluntarily submits performance information to a State, the State must include this information in the report.

(c) The State must provide a mechanism of electronic access to the public ETP performance report in its annual State performance report.

(d) States must comply with any requirements from sec. 116(d)(4) of WIOA as explained in guidance issued by DOL.

(e) The Governor may designate one or more State agencies such as a State Education Agency or other State Educational Authority to assist in overseeing ETP performance and facilitating the production and dissemination of ETP performance reports. These agencies may be the same agencies that are designated as responsible for administering the ETP list as provided under § 680.500 of this chapter. The Governor or such agencies, or authorities, is responsible for:

(1) Facilitating data matches between ETP records and unemployment insurance (UI) wage data in order to produce the report;

(2) The creation and dissemination of the reports as described in paragraphs (a) through (d) of this section;

(3) Coordinating the dissemination of the performance reports with the ETP list and the information required to accompany the list, as provided in § 680.500 of this chapter.

Subpart F—Performance Reporting Administrative Requirements

§ 677.235 What are the reporting requirements for individual records for core Workforce Innovation and Opportunity Act (WIOA) title I programs; the Wagner-Peyser Act Employment Service program, as amended by WIOA title III; and the Vocational Rehabilitation program authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV?

(a) On a quarterly basis, each State must submit to the Secretary of Labor or the Secretary of Education, as appropriate, individual records that include demographic information, information on services received, and information on resulting outcomes, as appropriate, for each reportable individual in either of the following programs administered by the Secretary of Labor or Secretary of Education: A WIOA title I core program; the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III; or the VR program authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV.

(b) For individual records submitted to the Secretary of Labor, those records may be required to be integrated across all programs administered by the Secretary of Labor in one single file.

(c) States must comply with the requirements of sec. 116(d)(2) of WIOA as explained in guidance issued by the Departments of Labor and Education.

§ 677.240 What are the requirements for data validation of State annual performance reports?

(a) States must establish procedures, consistent with guidelines issued by the Secretary of Labor or the Secretary of Education, to ensure that they submit complete annual performance reports that contain information that is valid and reliable, as required by WIOA sec. 116(d)(5).

(b) If a State fails to meet standards in paragraph (a) of this section as determined by the Secretary of Labor or the Secretary of Education, the appropriate Secretary will provide technical assistance and may require the State to develop and implement corrective actions, which may require the State to provide training for its subrecipients.

(c) The Secretaries of Labor and Education will provide training and technical assistance to States in order to implement this section. States must comply with the requirements of sec. 116(d)(5) of WIOA as explained in guidance.

PART 678—DESCRIPTION OF THE ONE-STOP DELIVERY SYSTEM UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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Subpart A—General Description of the One-Stop Delivery System

§ 678.300 What is the one-stop delivery system?

(a) The one-stop delivery system brings together workforce development, educational, and other human resource services in a seamless customer-focused service delivery network that enhances access to the programs' services and improves long-term employment outcomes for individuals receiving assistance. One-stop partners administer separately funded programs as a set of integrated streamlined services to customers.

(b) Title I of the Workforce Innovation and Opportunity Act (WIOA) assigns responsibilities at the local, State, and Federal level to ensure the creation and maintenance of a one-stop delivery system that enhances the range and quality of education and workforce development services that employers and individual customers can access.

(c) The system must include at least one comprehensive physical center in each local area as described in § 678.305.

(d) The system may also have additional arrangements to supplement the comprehensive center. These arrangements include:

(1) An affiliated site or a network of affiliated sites, where one or more partners make programs, services, and activities available, as described in § 678.310;

(2) A network of eligible one-stop partners, as described in §§ 678.400 through 678.410, through which each partner provides one or more of the programs, services, and activities that are linked, physically or technologically, to an affiliated site or access point that assures customers are provided information on the availability of career services, as well as other program services and activities, regardless of where they initially enter the public workforce system in the local area; and

(3) Specialized centers that address specific needs, including those of dislocated workers, youth, or key industry sectors, or clusters.

(e) Required one-stop partner programs must provide access to programs, services, and activities through electronic means if applicable and practicable. This is in addition to providing access to services through the mandatory comprehensive physical one-stop center and any affiliated sites or specialized centers. The provision of programs and services by electronic methods such as Web sites, telephones, or other means must improve the efficiency, coordination, and quality of one-stop partner services. Electronic delivery must not replace access to such services at a comprehensive one-stop center or be a substitute to making services available at an affiliated site if the partner is participating in an affiliated site. Electronic delivery systems must be in compliance with the nondiscrimination and equal opportunity provisions of WIOA sec. 188 and its implementing regulations at 29 CFR part 38.

(f) The design of the local area's one-stop delivery system must be described in the Memorandum of Understanding (MOU) executed with the one-stop partners, described in § 678.500.

§ 678.305 What is a comprehensive one-stop center and what must be provided there?

(a) A comprehensive one-stop center is a physical location where job seeker and employer customers can access the programs, services, and activities of all required one-stop partners. A comprehensive one-stop center must have at least one title I staff person physically present.

(b) The comprehensive one-stop center must provide:

(1) Career services, described in § 678.430;

(2) Access to training services described in § 680.200 of this chapter;

(3) Access to any employment and training activities carried out under sec. 134(d) of WIOA;

(4) Access to programs and activities carried out by one-stop partners listed in §§ 678.400 through 678.410, including the Employment Service program authorized under the Wagner-Peyser Act, as amended by WIOA title III (Wagner-Peyser Act Employment Service program); and

(5) Workforce and labor market information.

(c) Customers must have access to these programs, services, and activities during regular business days at a comprehensive one-stop center. The Local Workforce Development Board (WDB) may establish other service hours at other times to accommodate the schedules of individuals who work on regular business days. The State WDB will evaluate the hours of access to service as part of the evaluation of effectiveness in the one-stop certification process described in § 678.800(b).

(d) ''Access'' to each partner program and its services means:

(1) Having a program staff member physically present at the one-stop center;

(2) Having a staff member from a different partner program physically present at the one-stop center appropriately trained to provide information to customers about the programs, services, and activities available through partner programs; or

(3) Making available a direct linkage through technology to program staff who can provide meaningful information or services.

(i) A ''direct linkage'' means providing direct connection at the one-stop center, within a reasonable time, by phone or through a real-time Web-based communication to a program staff member who can provide program information or services to the customer.

(ii) A ''direct linkage'' cannot exclusively be providing a phone number or computer Web site or providing information, pamphlets, or materials.

(e) All comprehensive one-stop centers must be physically and programmatically accessible to individuals with disabilities, as described in 29 CFR part 38, the implementing regulations of WIOA sec. 188.

§ 678.310 What is an affiliated site and what must be provided there?

(a) An affiliated site, or affiliate one-stop center, is a site that makes available to job seeker and employer customers one or more of the one-stop partners' programs, services, and activities. An affiliated site does not need to provide access to every required one-stop partner program. The frequency of program staff's physical presence in the affiliated site will be determined at the local level. Affiliated sites are access points in addition to the comprehensive one-stop center(s) in each local area. If used by local areas as a part of the service delivery strategy, affiliate sites must be implemented in a manner that supplements and enhances customer access to services.

(b) As described in § 678.315, Wagner-Peyser Act employment services cannot be a stand-alone affiliated site.

(c) States, in conjunction with the Local WDBs, must examine lease agreements and property holdings throughout the one-stop delivery system in order to use property in an efficient and effective way. Where necessary and appropriate, States and Local WDBs must take expeditious steps to align lease expiration dates with efforts to consolidate one-stop operations into service points where Wagner-Peyser Act employment services are colocated as soon as reasonably possible. These steps must be included in the State Plan.

(d) All affiliated sites must be physically and programmatically accessible to individuals with disabilities, as described in 29 CFR part 38, the implementing regulations of WIOA sec. 188.

§ 678.315 Can a stand-alone Wagner-Peyser Act Employment Service office be designated as an affiliated one-stop site?

(a) Separate stand-alone Wagner-Peyser Act Employment Service offices are not permitted under WIOA, as also described in § 652.202 of this chapter.

(b) If Wagner-Peyser Act employment services are provided at an affiliated site, there must be at least one or more other partners in the affiliated site with a physical presence of combined staff more than 50 percent of the time the center is open. Additionally, the other partner must not be the partner administering local veterans' employment representatives, disabled veterans' outreach program specialists, or unemployment compensation programs. If Wagner-Peyser Act employment services and any of these 3 programs are provided at an affiliated site, an additional partner or partners must have a presence of combined staff

in the center more than 50 percent of the time the center is open.

§ 678.320 Are there any requirements for networks of eligible one-stop partners or specialized centers?

Any network of one-stop partners or specialized centers, as described in § 678.300(d)(3), must be connected to the comprehensive one-stop center and any appropriate affiliate one-stop centers, for example, by having processes in place to make referrals to these centers and the partner programs located in them. Wagner-Peyser Act employment services cannot stand alone in a specialized center. Just as described in § 678.315 for an affiliated site, a specialized center must include other programs besides Wagner-Peyser Act employment services, local veterans' employment representatives, disabled veterans' outreach program specialists, and unemployment compensation.

Subpart B—One-Stop Partners and the Responsibilities of Partners

§ 678.400 Who are the required one-stop partners?

(a) Section 121(b)(1)(B) of WIOA identifies the entities that are required partners in the local one-stop delivery systems.

(b) The required partners are the entities responsible for administering the following programs and activities in the local area:

(1) Programs authorized under title I of WIOA, including:

(i) Adults;

(ii) Dislocated workers;

(iii) Youth;

(iv) Job Corps;

(v) YouthBuild;

(vi) Native American programs; and

(vii) Migrant and seasonal farmworker programs;

(2) The Wagner-Peyser Act Employment Service program authorized under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*), as amended by WIOA title III;

(3) The Adult Education and Family Literacy Act (AEFLA) program authorized under title II of WIOA;

(4) The Vocational Rehabilitation (VR) program authorized under title I of the Rehabilitation Act of 1973 (29 U.S.C. 720 *et seq.*), as amended by WIOA title IV;

(5) The Senior Community Service Employment Program authorized under title V of the Older Americans Act of 1965 (42 U.S.C. 3056 *et seq.*);

(6) Career and technical education programs at the postsecondary level authorized under the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*);

(7) Trade Adjustment Assistance activities authorized under chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 *et seq.*);

(8) Jobs for Veterans State Grants programs authorized under chapter 41 of title 38, U.S.C.;

(9) Employment and training activities carried out under the Community Services Block Grant (42 U.S.C. 9901 *et seq.*);

(10) Employment and training activities carried out by the Department of Housing and Urban Development;

(11) Programs authorized under State unemployment compensation laws (in accordance with applicable Federal law);

(12) Programs authorized under sec. 212 of the Second Chance Act of 2007 (42 U.S.C. 17532); and

(13) Temporary Assistance for Needy Families (TANF) authorized under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), unless exempted by the Governor under § 678.405(b).

§ 678.405 Is Temporary Assistance for Needy Families a required one-stop partner?

(a) Yes, TANF, authorized under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), is a required partner.

(b) The Governor may determine that TANF will not be a required partner in the State, or within some specific local areas in the State. In this instance, the Governor must notify the Secretaries of the U.S. Departments of Labor and Health and Human Services in writing of this determination.

(c) In States, or local areas within a State, where the Governor has determined that TANF is not required to be a partner, local TANF programs may still work in collaboration or partnership with the local one-stop centers to

deliver employment and training services to the TANF population unless inconsistent with the Governor's direction.

§ 678.410 What other entities may serve as one-stop partners?

(a) Other entities that carry out a workforce development program, including Federal, State, or local programs and programs in the private sector, may serve as additional partners in the one-stop delivery system if the Local WDB and chief elected official(s) approve the entity's participation.

(b) Additional partners may include, but are not limited to:

(1) Employment and training programs administered by the Social Security Administration, including the Ticket to Work and Self-Sufficiency Program established under sec. 1148 of the Social Security Act (42 U.S.C. 1320b-19);

(2) Employment and training programs carried out by the Small Business Administration;

(3) Supplemental Nutrition Assistance Program (SNAP) employment and training programs, authorized under secs. 6(d)(4) and 6(o) of the Food and Nutrition Act of 2008 (7 U.S.C. 2015(d)(4));

(4) Client Assistance Program authorized under sec. 112 of the Rehabilitation Act of 1973 (29 U.S.C. 732);

(5) Programs authorized under the National and Community Service Act of 1990 (42 U.S.C. 12501 *et seq.*); and

(6) Other appropriate Federal, State or local programs, including, but not limited to, employment, education, and training programs provided by public libraries or in the private sector.

§ 678.415 What entity serves as the one-stop partner for a particular program in the local area?

(a) The entity that carries out the program and activities listed in § 678.400 or § 678.410, and therefore serves as the one-stop partner, is the grant recipient, administrative entity, or organization responsible for administering the funds of the specified program in the local area. The term ''entity'' does not include the service providers that contract with, or are subrecipients of, the local administrative entity. For programs that do not include local administrative entities, the responsible State agency must be the partner. Specific entities for particular programs are identified in paragraphs (b) through (e) of this section. If a program or activity listed in § 678.400 is not carried out in a local area, the requirements relating to a required one-stop partner are not applicable to such program or activity in that local one-stop delivery system.

(b) For title II of WIOA, the entity or agency that carries out the program for the purposes of paragraph (a) of this section is the sole entity or agency in the State or outlying area responsible for administering or supervising policy for adult education and literacy activities in the State or outlying area. The State eligible entity or agency may delegate its responsibilities under paragraph (a) of this section to one or more eligible providers or consortium of eligible providers.

(c) For the VR program, authorized under title I of the Rehabilitation Act of 1973, as amended by WIOA title IV, the entity that carries out the program for the purposes of paragraph (a) of this section is the designated State agencies or designated State units specified under sec. 101(a)(2) of the Rehabilitation Act that is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities.

(d) Under WIOA title I, the national programs, including Job Corps, the Native American program, YouthBuild, and Migrant and Seasonal Farmworker programs are required one-stop partners. The entity for the Native American program, YouthBuild, and Migrant and Seasonal Farmworker programs is the grantee of those respective programs. The entity for Job Corps is the Job Corps center.

(e) For the Carl D. Perkins Career and Technical Education Act of 2006, the entity that carries out the program for the purposes of paragraph (a) of this section is the eligible recipient or recipients at the postsecondary level, or a consortium of eligible recipients at the postsecondary level in the local area. The eligible recipient at the postsecondary level may also request assistance from the State eligible agency

in completing its responsibilities under paragraph (a) of this section.

§ 678.420 What are the roles and responsibilities of the required one-stop partners?

Each required partner must:

(a) Provide access to its programs or activities through the one-stop delivery system, in addition to any other appropriate locations;

(b) Use a portion of funds made available to the partner's program, to the extent consistent with the Federal law authorizing the partner's program and with Federal cost principles in 2 CFR parts 200 and 2900 (requiring, among other things, that costs are allowable, reasonable, necessary, and allocable), to:

(1) Provide applicable career services; and

(2) Work collaboratively with the State and Local WDBs to establish and maintain the one-stop delivery system. This includes jointly funding the one-stop infrastructure through partner contributions that are based upon:

(i) A reasonable cost allocation methodology by which infrastructure costs are charged to each partner based on proportionate use and relative benefit received;

(ii) Federal cost principles; and

(iii) Any local administrative cost requirements in the Federal law authorizing the partner's program. (This is further described in § 678.700.)

(c) Enter into an MOU with the Local WDB relating to the operation of the one-stop delivery system that meets the requirements of § 678.500(b);

(d) Participate in the operation of the one-stop delivery system consistent with the terms of the MOU, requirements of authorizing laws, the Federal cost principles, and all other applicable legal requirements; and

(e) Provide representation on the State and Local WDBs as required and participate in Board committees as needed.

§ 678.425 What are the applicable career services that must be provided through the one-stop delivery system by required one-stop partners?

(a) The applicable career services to be delivered by required one-stop partners are those services listed in § 678.430 that are authorized to be provided under each partner's program.

(b) One-stop centers provide services to individual customers based on individual needs, including the seamless delivery of multiple services to individual customers. There is no required sequence of services.

§ 678.430 What are career services?

Career services, as identified in sec. 134(c)(2) of WIOA, consist of three types:

(a) Basic career services must be made available and, at a minimum, must include the following services, as consistent with allowable program activities and Federal cost principles:

(1) Determinations of whether the individual is eligible to receive assistance from the adult, dislocated worker, or youth programs;

(2) Outreach, intake (including worker profiling), and orientation to information and other services available through the one-stop delivery system. For the TANF program, States must provide individuals with the opportunity to initiate an application for TANF assistance and non-assistance benefits and services, which could be implemented through the provision of paper application forms or links to the application Web site;

(3) Initial assessment of skill levels including literacy, numeracy, and English language proficiency, as well as aptitudes, abilities (including skills gaps), and supportive services needs;

(4) Labor exchange services, including—

(i) Job search and placement assistance, and, when needed by an individual, career counseling, including—

(A) Provision of information on in-demand industry sectors and occupations (as defined in sec. 3(23) of WIOA); and

(B) Provision of information on non-traditional employment; and

(ii) Appropriate recruitment and other business services on behalf of employers, including information and referrals to specialized business services other than those traditionally offered through the one-stop delivery system;

(5) Provision of referrals to and coordination of activities with other programs and services, including programs

and services within the one-stop delivery system and, when appropriate, other workforce development programs;

(6) Provision of workforce and labor market employment statistics information, including the provision of accurate information relating to local, regional, and national labor market areas, including—

(i) Job vacancy listings in labor market areas;

(ii) Information on job skills necessary to obtain the vacant jobs listed; and

(iii) Information relating to local occupations in demand and the earnings, skill requirements, and opportunities for advancement for those jobs;

(7) Provision of performance information and program cost information on eligible providers of education, training, and workforce services by program and type of providers;

(8) Provision of information, in usable and understandable formats and languages, about how the local area is performing on local performance accountability measures, as well as any additional performance information relating to the area's one-stop delivery system;

(9) Provision of information, in usable and understandable formats and languages, relating to the availability of supportive services or assistance, and appropriate referrals to those services and assistance, including: Child care; child support; medical or child health assistance available through the State's Medicaid program and Children's Health Insurance Program; benefits under SNAP; assistance through the earned income tax credit; and assistance under a State program for TANF, and other supportive services and transportation provided through that program;

(10) Provision of information and meaningful assistance to individuals seeking assistance in filing a claim for unemployment compensation.

(i) ''Meaningful assistance'' means:

(A) Providing assistance on-site using staff who are well-trained in unemployment compensation claims filing and the rights and responsibilities of claimants; or

(B) Providing assistance by phone or via other technology, as long as the assistance is provided by trained and available staff and within a reasonable time.

(ii) The costs associated in providing this assistance may be paid for by the State's unemployment insurance program, or the WIOA adult or dislocated worker programs, or some combination thereof.

(11) Assistance in establishing eligibility for programs of financial aid assistance for training and education programs not provided under WIOA.

(b) Individualized career services must be made available if determined to be appropriate in order for an individual to obtain or retain employment. These services include the following services, as consistent with program requirements and Federal cost principles:

(1) Comprehensive and specialized assessments of the skill levels and service needs of adults and dislocated workers, which may include—

(i) Diagnostic testing and use of other assessment tools; and

(ii) In-depth interviewing and evaluation to identify employment barriers and appropriate employment goals;

(2) Development of an individual employment plan, to identify the employment goals, appropriate achievement objectives, and appropriate combination of services for the participant to achieve his or her employment goals, including the list of, and information about, the eligible training providers (as described in § 680.180 of this chapter);

(3) Group counseling;

(4) Individual counseling;

(5) Career planning;

(6) Short-term pre-vocational services including development of learning skills, communication skills, interviewing skills, punctuality, personal maintenance skills, and professional conduct services to prepare individuals for unsubsidized employment or training;

(7) Internships and work experiences that are linked to careers (as described in § 680.170 of this chapter);

(8) Workforce preparation activities;

(9) Financial literacy services as described in sec. 129(b)(2)(D) of WIOA and § 681.500 of this chapter;

(10) Out-of-area job search assistance and relocation assistance; and

(11) English language acquisition and integrated education and training programs.

(c) Follow-up services must be provided, as appropriate, including: Counseling regarding the workplace, for participants in adult or dislocated worker workforce investment activities who are placed in unsubsidized employment, for up to 12 months after the first day of employment.

(d) In addition to the requirements in paragraph (a)(2) of this section, TANF agencies must identify employment services and related support being provided by the TANF program (within the local area) that qualify as career services and ensure access to them via the local one-stop delivery system.

§ 678.435 What are the business services provided through the one-stop delivery system, and how are they provided?

(a) Certain career services must be made available to local employers, specifically labor exchange activities and labor market information described in § 678.430(a)(4)(ii) and (a)(6). Local areas must establish and develop relationships and networks with large and small employers and their intermediaries. Local areas also must develop, convene, or implement industry or sector partnerships.

(b) Customized business services may be provided to employers, employer associations, or other such organizations. These services are tailored for specific employers and may include:

(1) Customized screening and referral of qualified participants in training services to employers;

(2) Customized services to employers, employer associations, or other such organizations, on employment-related issues;

(3) Customized recruitment events and related services for employers including targeted job fairs;

(4) Human resource consultation services, including but not limited to assistance with:

(i) Writing/reviewing job descriptions and employee handbooks;

(ii) Developing performance evaluation and personnel policies;

(iii) Creating orientation sessions for new workers;

(iv) Honing job interview techniques for efficiency and compliance;

(v) Analyzing employee turnover;

(vi) Creating job accommodations and using assistive technologies; or

(vii) Explaining labor and employment laws to help employers comply with discrimination, wage/hour, and safety/health regulations;

(5) Customized labor market information for specific employers, sectors, industries or clusters; and

(6) Other similar customized services.

(c) Local areas may also provide other business services and strategies that meet the workforce investment needs of area employers, in accordance with partner programs' statutory requirements and consistent with Federal cost principles. These business services may be provided through effective business intermediaries working in conjunction with the Local WDB, or through the use of economic development, philanthropic, and other public and private resources in a manner determined appropriate by the Local WDB and in cooperation with the State. Allowable activities, consistent with each partner's authorized activities, include, but are not limited to:

(1) Developing and implementing industry sector strategies (including strategies involving industry partnerships, regional skills alliances, industry skill panels, and sectoral skills partnerships);

(2) Customized assistance or referral for assistance in the development of a registered apprenticeship program;

(3) Developing and delivering innovative workforce investment services and strategies for area employers, which may include career pathways, skills upgrading, skill standard development and certification for recognized post-secondary credential or other employer use, and other effective initiatives for meeting the workforce investment needs of area employers and workers;

(4) Assistance to area employers in managing reductions in force in coordination with rapid response activities and with strategies for the aversion of layoffs, which may include strategies

such as early identification of firms at risk of layoffs, use of feasibility studies to assess the needs of and options for at-risk firms, and the delivery of employment and training activities to address risk factors;

(5) The marketing of business services to appropriate area employers, including small and mid-sized employers; and

(6) Assisting employers with accessing local, State, and Federal tax credits.

(d) All business services and strategies must be reflected in the local plan, described in § 679.560(b)(3) of this chapter.

§ 678.440 When may a fee be charged for the business services in this subpart?

(a) There is no requirement that a fee-for-service be charged to employers.

(b) No fee may be charged for services provided in § 678.435(a).

(c) A fee may be charged for services provided under § 678.435(b) and (c). Services provided under § 678.435(c) may be provided through effective business intermediaries working in conjunction with the Local WDB and may also be provided on a fee-for-service basis or through the leveraging of economic development, philanthropic, and other public and private resources in a manner determined appropriate by the Local WDB. The Local WDB may examine the services provided compared with the assets and resources available within the local one-stop delivery system and through its partners to determine an appropriate cost structure for services, if any.

(d) Any fees earned are recognized as program income and must be expended by the partner in accordance with the partner program's authorizing statute, implementing regulations, and Federal cost principles identified in Uniform Guidance.

Subpart C—Memorandum of Understanding for the One-Stop Delivery System

§ 678.500 What is the Memorandum of Understanding for the one-stop delivery system and what must be included in the Memorandum of Understanding?

(a) The MOU is the product of local discussion and negotiation, and is an agreement developed and executed between the Local WDB and the one-stop partners, with the agreement of the chief elected official and the one-stop partners, relating to the operation of the one-stop delivery system in the local area. Two or more local areas in a region may develop a single joint MOU, if they are in a region that has submitted a regional plan under sec. 106 of WIOA.

(b) The MOU must include:

(1) A description of services to be provided through the one-stop delivery system, including the manner in which the services will be coordinated and delivered through the system;

(2) Agreement on funding the costs of the services and the operating costs of the system, including:

(i) Funding of infrastructure costs of one-stop centers in accordance with §§ 678.700 through 678.755; and

(ii) Funding of the shared services and operating costs of the one-stop delivery system described in § 678.760;

(3) Methods for referring individuals between the one-stop operators and partners for appropriate services and activities;

(4) Methods to ensure that the needs of workers, youth, and individuals with barriers to employment, including individuals with disabilities, are addressed in providing access to services, including access to technology and materials that are available through the one-stop delivery system;

(5) The duration of the MOU and procedures for amending it; and

(6) Assurances that each MOU will be reviewed, and if substantial changes have occurred, renewed, not less than once every 3-year period to ensure appropriate funding and delivery of services.

(c) The MOU may contain any other provisions agreed to by the parties that

are consistent with WIOA title I, the authorizing statutes and regulations of one-stop partner programs, and the WIOA regulations.

(d) When fully executed, the MOU must contain the signatures of the Local WDB, one-stop partners, the chief elected official(s), and the time period in which the agreement is effective. The MOU must be updated not less than every 3 years to reflect any changes in the signatory official of the Board, one-stop partners, and chief elected officials, or one-stop infrastructure funding.

(e) If a one-stop partner appeal to the State regarding infrastructure costs, using the process described in § 678.750, results in a change to the one-stop partner's infrastructure cost contributions, the MOU must be updated to reflect the final one-stop partner infrastructure cost contributions.

§ 678.505 Is there a single Memorandum of Understanding for the local area, or must there be different Memoranda of Understanding between the Local Workforce Development Board and each partner?

(a) A single ''umbrella'' MOU may be developed that addresses the issues relating to the local one-stop delivery system for the Local WDB, chief elected official and all partners. Alternatively, the Local WDB (with agreement of chief elected official) may enter into separate agreements between each partner or groups of partners.

(b) Under either approach, the requirements described in § 678.500 apply. Since funds are generally appropriated annually, the Local WDB may negotiate financial agreements with each partner annually to update funding of services and operating costs of the system under the MOU.

§ 678.510 How must the Memorandum of Understanding be negotiated?

(a) WIOA emphasizes full and effective partnerships between Local WDBs, chief elected officials, and one-stop partners. Local WDBs and partners must enter into good-faith negotiations. Local WDBs, chief elected officials, and one-stop partners may also request assistance from a State agency responsible for administering the partner program, the Governor, State WDB, or other appropriate parties on other aspects of the MOU.

(b) Local WDBs and one-stop partners must establish, in the MOU, how they will fund the infrastructure costs and other shared costs of the one-stop centers. If agreement regarding infrastructure costs is not reached when other sections of the MOU are ready, an interim infrastructure funding agreement may be included instead, as described in § 678.715(c). Once agreement on infrastructure funding is reached, the Local WDB and one-stop partners must amend the MOU to include the infrastructure funding of the one-stop centers. Infrastructure funding is described in detail in subpart E of this part.

(c) The Local WDB must report to the State WDB, Governor, and relevant State agency when MOU negotiations with one-stop partners have reached an impasse.

(1) The Local WDB and partners must document the negotiations and efforts that have taken place in the MOU. The State WDB, one-stop partner programs, and the Governor may consult with the appropriate Federal agencies to address impasse situations related to issues other than infrastructure funding after attempting to address the impasse. Impasses related to infrastructure cost funding must be resolved using the State infrastructure cost funding mechanism described in § 678.730.

(2) The Local WDB must report failure to execute an MOU with a required partner to the Governor, State WDB, and the State agency responsible for administering the partner's program. Additionally, if the State cannot assist the Local WDB in resolving the impasse, the Governor or the State WDB must report the failure to the Secretary of Labor and to the head of any other Federal agency with responsibility for oversight of a partner's program.

Subpart D—One-Stop Operators

§ 678.600 Who may operate one-stop centers?

(a) One-stop operators may be a single entity (public, private, or nonprofit) or a consortium of entities. If the consortium of entities is one of one-stop partners, it must include a minimum of three of the one-stop partners described in § 678.400.

(b) The one-stop operator may operate one or more one-stop centers. There may be more than one one-stop operator in a local area.

(c) The types of entities that may be a one-stop operator include:

(1) An institution of higher education;

(2) An Employment Service State agency established under the Wagner-Peyser Act;

(3) A community-based organization, nonprofit organization, or workforce intermediary;

(4) A private for-profit entity;

(5) A government agency;

(6) A Local WDB, with the approval of the chief elected official and the Governor; or

(7) Another interested organization or entity, which is capable of carrying out the duties of the one-stop operator. Examples may include a local chamber of commerce or other business organization, or a labor organization.

(d) Elementary schools and secondary schools are not eligible as one-stop operators, except that a nontraditional public secondary school such as a night school, adult school, or an area career and technical education school may be selected.

(e) The State and Local WDBs must ensure that, in carrying out WIOA programs and activities, one-stop operators:

(1) Disclose any potential conflicts of interest arising from the relationships of the operators with particular training service providers or other service providers (further discussed in § 679.430 of this chapter);

(2) Do not establish practices that create disincentives to providing services to individuals with barriers to employment who may require longer-term career and training services; and

(3) Comply with Federal regulations and procurement policies relating to the calculation and use of profits, including those at § 683.295 of this chapter, the Uniform Guidance at 2 CFR part 200, and other applicable regulations and policies.

§ 678.605 How is the one-stop operator selected?

(a) Consistent with paragraphs (b) and (c) of this section, the Local WDB must select the one-stop operator through a competitive process, as required by sec. 121(d)(2)(A) of WIOA, at least once every 4 years. A State may require, or a Local WDB may choose to implement, a competitive selection process more than once every 4 years.

(b) In instances in which a State is conducting the competitive process described in paragraph (a) of this section, the State must follow the same policies and procedures it uses for procurement with non-Federal funds.

(c) All other non-Federal entities, including subrecipients of a State (such as local areas), must use a competitive process based on local procurement policies and procedures and the principles of competitive procurement in the Uniform Guidance set out at 2 CFR 200.318 through 200.326. All references to ''noncompetitive proposals'' in the Uniform Guidance at 2 CFR 200.320(f) will be read as ''sole source procurement'' for the purposes of implementing this section.

(d) Entities must prepare written documentation explaining the determination concerning the nature of the competitive process to be followed in selecting a one-stop operator.

§ 678.610 When is the sole-source selection of one-stop operators appropriate, and how is it conducted?

(a) States may select a one-stop operator through sole source selection when allowed under the same policies and procedures used for competitive procurement with non-Federal funds, while other non-Federal entities including subrecipients of a State (such as local areas) may select a one-stop operator through sole selection when consistent with local procurement policies and procedures and the Uniform Guidance set out at 2 CFR 200.320.

(b) In the event that sole source procurement is determined necessary and reasonable, in accordance with § 678.605(c), written documentation must be prepared and maintained concerning the entire process of making such a selection.

(c) Such sole source procurement must include appropriate conflict of interest policies and procedures. These policies and procedures must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflict of interest.

(d) A Local WDB may be selected as a one-stop operator through sole source procurement only with agreement of the chief elected official in the local area and the Governor. The Local WDB must establish sufficient conflict of interest policies and procedures and these policies and procedures must be approved by the Governor.

§ 678.615 May an entity currently serving as one-stop operator compete to be a one-stop operator under the procurement requirements of this subpart?

(a) Local WDBs may compete for and be selected as one-stop operators, as long as appropriate firewalls and conflict of interest policies and procedures are in place. These policies and procedures must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflict of interest.

(b) State and local agencies may compete for and be selected as one-stop operators by the Local WDB, as long as appropriate firewalls and conflict of interest policies and procedures are in place. These policies and procedures must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflict of interest.

(c) In the case of single-area States where the State WDB serves as the Local WDB, the State agency is eligible to compete for and be selected as operator as long as appropriate firewalls and conflict of interest policies are in place and followed for the competition. These policies and procedures must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflicts of interest.

§ 678.620 What is the one-stop operator's role?

(a) At a minimum, the one-stop operator must coordinate the service delivery of required one-stop partners and service providers. Local WDBs may establish additional roles of one-stop operator, including, but not limited to: Coordinating service providers across the one-stop delivery system, being the primary provider of services within the center, providing some of the services within the center, or coordinating service delivery in a multi-center area, which may include affiliated sites. The competition for a one-stop operator must clearly articulate the role of the one-stop operator.

(b)(1) Subject to paragraph (b)(2) of this section, a one-stop operator may not perform the following functions: Convene system stakeholders to assist in the development of the local plan; prepare and submit local plans (as required under sec. 107 of WIOA); be responsible for oversight of itself; manage or significantly participate in the competitive selection process for one-stop operators; select or terminate one-stop operators, career services, and youth providers; negotiate local performance accountability measures; or develop and submit budget for activities of the Local WDB in the local area.

(2) An entity serving as a one-stop operator, that also serves a different role within the one-stop delivery system, may perform some or all of these functions when it is acting in its other role, if it has established sufficient firewalls and conflict of interest policies and procedures. The policies and procedures must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflict of interest.

§ 678.625 Can a one-stop operator also be a service provider?

Yes, but there must be appropriate firewalls in place in regards to the competition, and subsequent oversight,

monitoring, and evaluation of performance of the service provider. The operator cannot develop, manage, or conduct the competition of a service provider in which it intends to compete. In cases where an operator is also a service provider, there must be firewalls and internal controls within the operator-service provider entity, as well as specific policies and procedures at the Local WDB level regarding oversight, monitoring, and evaluation of performance of the service provider. The firewalls must conform to the specifications in § 679.430 of this chapter for demonstrating internal controls and preventing conflicts of interest.

§ 678.630 Can State merit staff still work in a one-stop center where the operator is not a governmental entity?

Yes. State merit staff can continue to perform functions and activities in the one-stop center. The Local WDB and one-stop operator must establish a system for management of merit staff in accordance with State policies and procedures. Continued use of State merit staff for the provision of Wagner-Peyser Act services or services from other programs with merit staffing requirements must be included in the competition for and final contract with the one-stop operator when Wagner-Peyser Act services or services from other programs with merit staffing requirements are being provided.

§ 678.635 What is the compliance date of the provisions of this subpart?

(a) No later than July 1, 2017, one-stop operators selected under the competitive process described in this subpart must be in place and operating the one-stop center.

(b) By November 17, 2016, every Local WDB must demonstrate it is taking steps to prepare for competition of its one-stop operator. This demonstration may include, but is not limited to, market research, requests for information, and conducting a cost and price analysis.

Subpart E—One-Stop Operating Costs

§ 678.700 What are the one-stop infrastructure costs?

(a) Infrastructure costs of one-stop centers are nonpersonnel costs that are necessary for the general operation of the one-stop center, including:

(1) Rental of the facilities;

(2) Utilities and maintenance;

(3) Equipment (including assessment-related products and assistive technology for individuals with disabilities); and

(4) Technology to facilitate access to the one-stop center, including technology used for the center's planning and outreach activities.

(b) Local WDBs may consider common identifier costs as costs of one-stop infrastructure.

(c) Each entity that carries out a program or activities in a local one-stop center, described in §§ 678.400 through 678.410, must use a portion of the funds available for the program and activities to maintain the one-stop delivery system, including payment of the infrastructure costs of one-stop centers. These payments must be in accordance with this subpart; Federal cost principles, which require that all costs must be allowable, reasonable, necessary, and allocable to the program; and all other applicable legal requirements.

§ 678.705 What guidance must the Governor issue regarding one-stop infrastructure funding?

(a) The Governor, after consultation with chief elected officials, the State WDB, and Local WDBs, and consistent with guidance and policies provided by the State WDB, must develop and issue guidance for use by local areas, specifically:

(1) Guidelines for State-administered one-stop partner programs for determining such programs' contributions to a one-stop delivery system, based on such programs' proportionate use of such system, and relative benefit received, consistent with Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for

Federal Awards in 2 CFR part 200, including determining funding for the costs of infrastructure; and

(2) Guidance to assist Local WDBs, chief elected officials, and one-stop partners in local areas in determining equitable and stable methods of funding the costs of infrastructure at one-stop centers based on proportionate use and relative benefit received, and consistent with Federal cost principles contained in the Uniform Guidance at 2 CFR part 200.

(b) The guidance must include:

(1) The appropriate roles of the one-stop partner programs in identifying one-stop infrastructure costs;

(2) Approaches to facilitate equitable and efficient cost allocation that results in a reasonable cost allocation methodology where infrastructure costs are charged to each partner based on its proportionate use of the one-stop centers and relative benefit received, consistent with Federal cost principles at 2 CFR part 200; and

(3) The timelines regarding notification to the Governor for not reaching local agreement and triggering the State funding mechanism described in § 678.730, and timelines for a one-stop partner to submit an appeal in the State funding mechanism.

§ 678.710 How are infrastructure costs funded?

Infrastructure costs are funded either through the local funding mechanism described in § 678.715 or through the State funding mechanism described in § 678.730.

§ 678.715 How are one-stop infrastructure costs funded in the local funding mechanism?

(a) In the local funding mechanism, the Local WDB, chief elected officials, and one-stop partners agree to amounts and methods of calculating amounts each partner will contribute for one-stop infrastructure funding, include the infrastructure funding terms in the MOU, and sign the MOU. The local funding mechanism must meet all of the following requirements:

(1) The infrastructure costs are funded through cash and fairly evaluated non-cash and third-party in-kind partner contributions and include any funding from philanthropic organizations or other private entities, or through other alternative financing options, to provide a stable and equitable funding stream for ongoing one-stop delivery system operations;

(2) Contributions must be negotiated between one-stop partners, chief elected officials, and the Local WDB and the amount to be contributed must be included in the MOU;

(3) The one-stop partner program's proportionate share of funding must be calculated in accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200 based upon a reasonable cost allocation methodology whereby infrastructure costs are charged to each partner in proportion to its use of the one-stop center, relative to benefits received. Such costs must also be allowable, reasonable, necessary, and allocable;

(4) Partner shares must be periodically reviewed and reconciled against actual costs incurred, and adjusted to ensure that actual costs charged to any one-stop partners are proportionate to the use of the one-stop center and relative to the benefit received by the one-stop partners and their respective programs or activities.

(b) In developing the section of the MOU on one-stop infrastructure funding described in § 678.755, the Local WDB and chief elected officials will:

(1) Ensure that the one-stop partners adhere to the guidance identified in § 678.705 on one-stop delivery system infrastructure costs.

(2) Work with one-stop partners to achieve consensus and informally mediate any possible conflicts or disagreements among one-stop partners.

(3) Provide technical assistance to new one-stop partners and local grant recipients to ensure that those entities are informed and knowledgeable of the elements contained in the MOU and the one-stop infrastructure costs arrangement.

(c) The MOU may include an interim infrastructure funding agreement, including as much detail as the Local WDB has negotiated with one-stop partners, if all other parts of the MOU have been negotiated, in order to allow

the partner programs to operate in the one-stop centers. The interim infrastructure funding agreement must be finalized within 6 months of when the MOU is signed. If the interim infrastructure funding agreement is not finalized within that timeframe, the Local WDB must notify the Governor, as described in § 678.725.

§ 678.720 What funds are used to pay for infrastructure costs in the local one-stop infrastructure funding mechanism?

(a) In the local funding mechanism, one-stop partner programs may determine what funds they will use to pay for infrastructure costs. The use of these funds must be in accordance with the requirements in this subpart, and with the relevant partner's authorizing statutes and regulations, including, for example, prohibitions against supplanting non-Federal resources, statutory limitations on administrative costs, and all other applicable legal requirements. In the case of partners administering programs authorized by title I of WIOA, these infrastructure costs may be considered program costs. In the case of partners administering adult education and literacy programs authorized by title II of WIOA, these funds must include Federal funds made available for the local administration of adult education and literacy programs authorized by title II of WIOA. These funds may also include non-Federal resources that are cash, in-kind or third-party contributions. In the case of partners administering the Carl D. Perkins Career and Technical Education Act of 2006, funds used to pay for infrastructure costs may include funds available for local administrative expenses, non-Federal resources that are cash, in-kind or third-party contributions, and may include other funds made available by the State.

(b) There are no specific caps on the amount or percent of overall funding a one-stop partner may contribute to fund infrastructure costs under the local funding mechanism, except that contributions for administrative costs may not exceed the amount available for administrative costs under the authorizing statute of the partner program. However, amounts contributed for infrastructure costs must be allowable and based on proportionate use of the one-stop centers and relative benefit received by the partner program, taking into account the total cost of the one-stop infrastructure as well as alternate financing options, and must be consistent with 2 CFR part 200, including the Federal cost principles.

(c) Cash, non-cash, and third-party in-kind contributions may be provided by one-stop partners to cover their proportionate share of infrastructure costs.

(1) Cash contributions are cash funds provided to the Local WDB or its designee by one-stop partners, either directly or by an interagency transfer.

(2) Non-cash contributions are comprised of—

(i) Expenditures incurred by one-stop partners on behalf of the one-stop center; and

(ii) Non-cash contributions or goods or services contributed by a partner program and used by the one-stop center.

(3) Non-cash contributions, especially those set forth in paragraph (c)(2)(ii) of this section, must be valued consistent with 2 CFR 200.306 to ensure they are fairly evaluated and meet the partners' proportionate share.

(4) Third-party in-kind contributions are:

(i) Contributions of space, equipment, technology, non-personnel services, or other like items to support the infrastructure costs associated with one-stop operations, by a non-one-stop partner to support the one-stop center in general, not a specific partner; or

(ii) Contributions by a non-one-stop partner of space, equipment, technology, non-personnel services, or other like items to support the infrastructure costs associated with one-stop operations, to a one-stop partner to support its proportionate share of one-stop infrastructure costs.

(iii) In-kind contributions described in paragraphs (c)(4)(i) and (ii) of this section must be valued consistent with 2 CFR 200.306 and reconciled on a regular basis to ensure they are fairly evaluated and meet the proportionate share of the partner.

(5) All partner contributions, regardless of the type, must be reconciled on

a regular basis (*i.e.*, monthly or quarterly), comparing actual expenses incurred to relative benefits received, to ensure each partner program is contributing its proportionate share in accordance with the terms of the MOU.

§ 678.725 What happens if consensus on infrastructure funding is not reached at the local level between the Local Workforce Development Board, chief elected officials, and one-stop partners?

With regard to negotiations for infrastructure funding for Program Year (PY) 2017 and for each subsequent program year thereafter, if the Local WDB, chief elected officials, and one-stop partners do not reach consensus on methods of sufficiently funding local infrastructure through the local funding mechanism in accordance with the Governor's guidance issued under § 678.705 and consistent with the regulations in §§ 678.715 and 678.720, and include that consensus agreement in the signed MOU, then the Local WDB must notify the Governor by the deadline established by the Governor under § 678.705(b)(3). Once notified, the Governor must administer funding through the State funding mechanism, as described in §§ 678.730 through 678.738, for the program year impacted by the local area's failure to reach consensus.

§ 678.730 What is the State one-stop infrastructure funding mechanism?

(a) Consistent with sec. 121(h)(1)(A)(i)(II) of WIOA, if the Local WDB, chief elected official, and one-stop partners in a local area do not reach consensus agreement on methods of sufficiently funding the costs of infrastructure of one-stop centers for a program year, the State funding mechanism is applicable to the local area for that program year.

(b) In the State funding mechanism, the Governor, subject to the limitations in paragraph (c) of this section, determines one-stop partner contributions after consultation with the chief elected officials, Local WDBs, and the State WDB. This determination involves:

(1) The application of a budget for one-stop infrastructure costs as described in § 678.735, based on either agreement reached in the local area negotiations or the State WDB formula outlined in § 678.745;

(2) The determination of each local one-stop partner program's proportionate use of the one-stop delivery system and relative benefit received, consistent with the Uniform Guidance at 2 CFR part 200, including the Federal cost principles, the partner programs' authorizing laws and regulations, and other applicable legal requirements described in § 678.736; and

(3) The calculation of required statewide program caps on contributions to infrastructure costs from one-stop partner programs in areas operating under the State funding mechanism as described in § 678.738.

(c) In certain situations, the Governor does not determine the infrastructure cost contributions for some one-stop partner programs under the State funding mechanism.

(1) The Governor will not determine the contribution amounts for infrastructure funds for Native American program grantees described in part 684 of this chapter. The appropriate portion of funds to be provided by Native American program grantees to pay for one-stop infrastructure must be determined as part of the development of the MOU described in § 678.500 and specified in that MOU.

(2) In States in which the policymaking authority is placed in an entity or official that is independent of the authority of the Governor with respect to the funds provided for adult education and literacy activities authorized under title II of WIOA, postsecondary career and technical education activities authorized under the Carl D. Perkins Career and Technical Education Act of 2006, or VR services authorized under title I of the Rehabilitation Act of 1973 (other than sec. 112 or part C), as amended by WIOA title IV, the determination of the amount each of the applicable partners must contribute to assist in paying the infrastructure costs of one-stop centers must be made by the official or chief officer of the entity with such authority, in consultation with the Governor.

(d) Any duty, ability, choice, responsibility, or other action otherwise related to the determination of infrastructure costs contributions that is

assigned to the Governor in §§ 678.730 through 678.745 also applies to this decision-making process performed by the official or chief officer described in paragraph (c)(2) of this section.

§ 678.731 What are the steps to determine the amount to be paid under the State one-stop infrastructure funding mechanism?

(a) To initiate the State funding mechanism, a Local WDB that has not reached consensus on methods of sufficiently funding local infrastructure through the local funding mechanism as provided in § 678.725 must notify the Governor by the deadline established by the Governor under § 678.705(b)(3).

(b) Once a Local WDB has informed the Governor that no consensus has been reached:

(1) The Local WDB must provide the Governor with local negotiation materials in accordance with § 678.735(a).

(2) The Governor must determine the one-stop center budget by either:

(i) Accepting a budget previously agreed upon by partner programs in the local negotiations, in accordance with § 678.735(b)(1); or

(ii) Creating a budget for the one-stop center using the State WDB formula (described in § 678.745) in accordance with § 678.735(b)(3).

(3) The Governor then must establish a cost allocation methodology to determine the one-stop partner programs' proportionate shares of infrastructure costs, in accordance with § 678.736.

(4)(i) Using the methodology established under paragraph (b)(2)(ii) of this section, and taking into consideration the factors concerning individual partner programs listed in § 678.737(b)(2), the Governor must determine each partner's proportionate share of the infrastructure costs, in accordance with § 678.737(b)(1), and

(ii) In accordance with § 678.730(c), in some instances, the Governor does not determine a partner program's proportionate share of infrastructure funding costs, in which case it must be determined by the entities named in § 678.730(c)(1) and (2).

(5) The Governor must then calculate the statewide caps on the amounts that partner programs may be required to contribute toward infrastructure funding, according to the steps found at § 678.738(a)(1) through (4).

(6) The Governor must ensure that the aggregate total of the infrastructure contributions according to proportionate share required of all local partner programs in local areas under the State funding mechanism do not exceed the cap for that particular program, in accordance with § 678.738(b)(1). If the total does not exceed the cap, the Governor must direct each one-stop partner program to pay the amount determined under § 678.737(a) toward the infrastructure funding costs of the one-stop center. If the total does exceed the cap, then to determine the amount to direct each one-stop program to pay, the Governor may:

(i) Ascertain, in accordance with § 678.738(b)(2)(i), whether the local partner or partners whose proportionate shares are calculated above the individual program caps are willing to voluntarily contribute above the capped amount to equal that program's proportionate share; or

(ii) Choose from the options provided in § 678.738(b)(2)(ii), including having the local area re-enter negotiations to reassess each one-stop partner's proportionate share and make adjustments or identify alternate sources of funding to make up the difference between the capped amount and the proportionate share of infrastructure funding of the one-stop partner.

(7) If none of the solutions given in paragraphs (b)(6)(i) and (ii) of this section prove to be viable, the Governor must reassess the proportionate shares of each one-stop partner so that the aggregate amount attributable to the local partners for each program is less than that program's cap amount. Upon such reassessment, the Governor must direct each one-stop partner program to pay the reassessed amount toward the infrastructure funding costs of the one-stop center.

§ 678.735 How are infrastructure cost budgets for the one-stop centers in a local area determined in the State one-stop infrastructure funding mechanism?

(a) Local WDBs must provide to the Governor appropriate and relevant materials and documents used in the negotiations under the local funding

mechanism, including but not limited to: The local WIOA plan, the cost allocation method or methods proposed by the partners to be used in determining proportionate share, the proposed amounts or budget to fund infrastructure, the amount of total partner funds included, the type of funds or non-cash contributions, proposed one-stop center budgets, and any agreed upon or proposed MOUs.

(b)(1) If a local area has reached agreement as to the infrastructure budget for the one-stop centers in the local area, it must provide this budget to the Governor as required by paragraph (a) of this section. If, as a result of the agreed upon infrastructure budget, only the individual programmatic contributions to infrastructure funding based upon proportionate use of the one-stop centers and relative benefit received are at issue, the Governor may accept the budget, from which the Governor must calculate each partner's contribution consistent with the cost allocation methodologies contained in the Uniform Guidance found in 2 CFR part 200, as described in § 678.736.

(2) The Governor may also take into consideration the extent to which the partners in the local area have agreed in determining the proportionate shares, including any agreements reached at the local level by one or more partners, as well as any other element or product of the negotiating process provided to the Governor as required by paragraph (a) of this section.

(3) If a local area has not reached agreement as to the infrastructure budget for the one-stop centers in the local area, or if the Governor determines that the agreed upon budget does not adequately meet the needs of the local area or does not reasonably work within the confines of the local area's resources in accordance with the Governor's one-stop budget guidance (which is required to be issued by WIOA sec. 121(h)(1)(B) and under § 678.705), then, in accordance with § 678.745, the Governor must use the formula developed by the State WDB based on at least the factors required under § 678.745, and any associated weights to determine the local area budget.

§ 678.736 How does the Governor establish a cost allocation methodology used to determine the one-stop partner programs' proportionate shares of infrastructure costs under the State one-stop infrastructure funding mechanism?

Once the appropriate budget is determined for a local area through either method described in § 678.735 (by acceptance of a budget agreed upon in local negotiation or by the Governor applying the formula detailed in § 678.745), the Governor must determine the appropriate cost allocation methodology to be applied to the one-stop partners in such local area, consistent with the Federal cost principles permitted under 2 CFR part 200, to fund the infrastructure budget.

§ 678.737 How are one-stop partner programs' proportionate shares of infrastructure costs determined under the State one-stop infrastructure funding mechanism?

(a) The Governor must direct the one-stop partners in each local area that have not reached agreement under the local funding mechanism to pay what the Governor determines is each partner program's proportionate share of infrastructure funds for that area, subject to the application of the caps described in § 678.738.

(b)(1) The Governor must use the cost allocation methodology—as determined under § 678.736—to determine each partner's proportionate share of the infrastructure costs under the State funding mechanism, subject to considering the factors described in paragraph (b)(2) of this section.

(2) In determining each partner program's proportionate share of infrastructure costs, the Governor must take into account the costs of administration of the one-stop delivery system for purposes not related to one-stop centers for each partner (such as costs associated with maintaining the Local WDB or information technology systems), as well as the statutory requirements for each partner program, the partner program's ability to fulfill such requirements, and all other applicable legal requirements. The Governor may also take into consideration the extent to which the partners in the local area have agreed in determining

the proportionate shares, including any agreements reached at the local level by one or more partners, as well as any other materials or documents of the negotiating process, which must be provided to the Governor by the Local WDB and described in § 678.735(a).

§ 678.738 How are statewide caps on the contributions for one-stop infrastructure funding determined in the State one-stop infrastructure funding mechanism?

(a) The Governor must calculate the statewide cap on the contributions for one-stop infrastructure funding required to be provided by each one-stop partner program for those local areas that have not reached agreement. The cap is the amount determined under paragraph (a)(4) of this section, which the Governor derives by:

(1) First, determining the amount resulting from applying the percentage for the corresponding one-stop partner program provided in paragraph (d) of this section to the amount of Federal funds provided to carry out the one-stop partner program in the State for the applicable fiscal year;

(2) Second, selecting a factor (or factors) that reasonably indicates the use of one-stop centers in the State, applying such factor(s) to all local areas in the State, and determining the percentage of such factor(s) applicable to the local areas that reached agreement under the local funding mechanism in the State;

(3) Third, determining the amount resulting from applying the percentage determined in paragraph (a)(2) of this section to the amount determined under paragraph (a)(1) of this section for the one-stop partner program; and

(4) Fourth, determining the amount that results from subtracting the amount determined under paragraph (a)(3) of this section from the amount determined under paragraph (a)(1) of this section. The outcome of this final calculation results in the partner program's cap.

(b)(1) The Governor must ensure that the funds required to be contributed by each partner program in the local areas in the State under the State funding mechanism, in aggregate, do not exceed the statewide cap for each program as determined under paragraph (a) of this section.

(2) If the contributions initially determined under § 678.737 would exceed the applicable cap determined under paragraph (a) of this section, the Governor may:

(i) Ascertain if the one-stop partner whose contribution would otherwise exceed the cap determined under paragraph (a) of this section will voluntarily contribute above the capped amount, so that the total contributions equal that partner's proportionate share. The one-stop partner's contribution must still be consistent with the program's authorizing laws and regulations, the Federal cost principles in 2 CFR part 200, and other applicable legal requirements; or

(ii) Direct or allow the Local WDB, chief elected officials, and one-stop partners to: Re-enter negotiations, as necessary; reduce the infrastructure costs to reflect the amount of funds that are available for such costs without exceeding the cap levels; reassess the proportionate share of each one-stop partner; or identify alternative sources of financing for one-stop infrastructure funding, consistent with the requirement that each one-stop partner pay an amount that is consistent with the proportionate use of the one-stop center and relative benefit received by the partner, the program's authorizing laws and regulations, the Federal cost principles in 2 CFR part 200, and other applicable legal requirements.

(3) If applicable under paragraph (b)(2)(ii) of this section, the Local WDB, chief elected officials, and one-stop partners, after renegotiation, may come to agreement, sign an MOU, and proceed under the local funding mechanism. Such actions do not require the redetermination of the applicable caps under paragraph (a) of this section.

(4) If, after renegotiation, agreement among partners still cannot be reached or alternate financing cannot be identified, the Governor may adjust the specified allocation, in accordance with the amounts available and the limitations

described in paragraph (d) of this section. In determining these adjustments, the Governor may take into account information relating to the renegotiation as well as the information described in §678.735(a).

(c) *Limitations*. Subject to paragraph (a) of this section and in accordance with WIOA sec. 121(h)(2)(D), the following limitations apply to the Governor's calculations of the amount that one-stop partners in local areas that have not reached agreement under the local funding mechanism may be required under §678.736 to contribute to one-stop infrastructure funding:

(1) *WIOA formula programs and Wagner-Peyser Act Employment Service*. The portion of funds required to be contributed under the WIOA youth, adult, or dislocated worker programs, or under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) must not exceed three percent of the amount of the program in the State for a program year.

(2) *Other one-stop partners*. For required one-stop partners other than those specified in paragraphs (c)(1), (3), (5), and (6) of this section, the portion of funds required to be contributed must not exceed 1.5 percent of the amount of Federal funds provided to carry out that program in the State for a fiscal year. For purposes of the Carl D. Perkins Career and Technical Education Act of 2006, the cap on contributions is determined based on the funds made available by the State for postsecondary level programs and activities under sec. 132 of the Carl D. Perkins Career and Technical Education Act and the amount of funds used by the State under sec. 112(a)(3) of the Perkins Act during the prior year to administer postsecondary level programs and activities, as applicable.

(3) *Vocational rehabilitation*. (i) Within a State, for the entity or entities administering the programs described in WIOA sec. 121(b)(1)(B)(iv) and §678.400, the allotment is based on the one State Federal fiscal year allotment, even in instances where that allotment is shared between two State agencies, and the cumulative portion of funds required to be contributed must not exceed—

(A) 0.75 percent of the amount of Federal funds provided to carry out such program in the State for Fiscal Year 2016 for purposes of applicability of the State funding mechanism for PY 2017;

(B) 1.0 percent of the amount provided to carry out such program in the State for Fiscal Year 2017 for purposes of applicability of the State funding mechanism for PY 2018;

(C) 1.25 percent of the amount provided to carry out such program in the State for Fiscal Year 2018 for purposes of applicability of the State funding mechanism for PY 2019;

(D) 1.5 percent of the amount provided to carry out such program in the State for Fiscal Year 2019 and following years for purposes of applicability of the State funding mechanism for PY 2020 and subsequent years.

(ii) The limitations set forth in paragraph (d)(3)(i) of this section for any given fiscal year must be based on the final VR allotment to the State in the applicable Federal fiscal year.

(4) *Federal direct spending programs*. For local areas that have not reached a one-stop infrastructure funding agreement by consensus, an entity administering a program funded with direct Federal spending, as defined in sec. 250(c)(8) of the Balanced Budget and Emergency Deficit Control Act of 1985, as in effect on February 15, 2014 (2 U.S.C. 900(c)(8)), must not be required to provide more for infrastructure costs than the amount that the Governor determined (as described in §678.737).

(5) *TANF programs*. For purposes of TANF, the cap on contributions is determined based on the total Federal TANF funds expended by the State for work, education, and training activities during the prior Federal fiscal year (as reported to the Department of Health and Human Services (HHS) on the quarterly TANF Financial Report form), plus any additional amount of Federal TANF funds that the State TANF agency reasonably determines was expended for administrative costs in connection with these activities but that was separately reported to HHS as an administrative cost. The State's contribution to the one-stop infrastructure must not exceed 1.5 percent of these combined expenditures.

(6) *Community Services Block Grant (CSBG) programs*. For purposes of

CSBG, the cap on contributions will be based on the total amount of CSBG funds determined by the State to have been expended by local CSBG-eligible entities for the provision of employment and training activities during the prior Federal fiscal year for which information is available (as reported to HHS on the CSBG Annual Report) and any additional amount that the State CSBG agency reasonably determines was expended for administrative purposes in connection with these activities and was separately reported to HHS as an administrative cost. The State's contribution must not exceed 1.5 percent of these combined expenditures.

(d) For programs for which it is not otherwise feasible to determine the amount of Federal funding used by the program until the end of that program's operational year—because, for example, the funding available for education, employment, and training activities is included within funding for the program that may also be used for other unrelated activities—the determination of the Federal funds provided to carry out the program for a fiscal year under paragraph (a)(1) of this section may be determined by:

(1) The percentage of Federal funds available to the one-stop partner program that were used by the one-stop partner program for education, employment, and training activities in the previous fiscal year for which data are available; and

(2) Applying the percentage determined under paragraph (d)(1) of this section to the total amount of Federal funds available to the one-stop partner program for the fiscal year for which the determination under paragraph (a)(1) of this section applies.

§ 678.740 What funds are used to pay for infrastructure costs in the State one-stop infrastructure funding mechanism?

(a) In the State funding mechanism, infrastructure costs for WIOA title I programs, including Native American Programs described in part 684 of this chapter, may be paid using program funds, administrative funds, or both. Infrastructure costs for the Senior Community Service Employment Program under title V of the Older Americans Act (42 U.S.C. 3056 *et seq.*) may also be paid using program funds, administrative funds, or both.

(b) In the State funding mechanism, infrastructure costs for other required one-stop partner programs (listed in §§ 678.400 through 678.410) are limited to the program's administrative funds, as appropriate.

(c) In the State funding mechanism, infrastructure costs for the adult education program authorized by title II of WIOA must be paid from the funds that are available for local administration and may be paid from funds made available by the State or non-Federal resources that are cash, in-kind, or third-party contributions.

(d) In the State funding mechanism, infrastructure costs for the Carl D. Perkins Career and Technical Education Act of 2006 must be paid from funds available for local administration of postsecondary level programs and activities to eligible recipients or consortia of eligible recipients and may be paid from funds made available by the State or non-Federal resources that are cash, in-kind, or third-party contributions.

§ 678.745 What factors does the State Workforce Development Board use to develop the formula described in Workforce Innovation and Opportunity Act, which is used by the Governor to determine the appropriate one-stop infrastructure budget for each local area operating under the State infrastructure funding mechanism, if no reasonably implementable locally negotiated budget exists?

The State WDB must develop a formula, as described in WIOA sec. 121(h)(3)(B), to be used by the Governor under § 678.735(b)(3) in determining the appropriate budget for the infrastructure costs of one-stop centers in the local areas that do not reach agreement under the local funding mechanism and are, therefore, subject to the State funding mechanism. The formula identifies the factors and corresponding weights for each factor that the Governor must use, which must include: The number of one-stop centers in a local area; the population served by such centers; the services provided

by such centers; and any factors relating to the operations of such centers in the local area that the State WDB determines are appropriate. As indicated in § 678.735(b)(1), if the local area has agreed on such a budget, the Governor may accept that budget in lieu of applying the formula factors.

§ 678.750 When and how can a one-stop partner appeal a one-stop infrastructure amount designated by the State under the State infrastructure funding mechanism?

(a) The Governor must establish a process, described under sec. 121(h)(2)(E) of WIOA, for a one-stop partner administering a program described in §§ 678.400 through 678.410 to appeal the Governor's determination regarding the one-stop partner's portion of funds to be provided for one-stop infrastructure costs. This appeal process must be described in the Unified State Plan.

(b) The appeal may be made on the ground that the Governor's determination is inconsistent with proportionate share requirements in § 678.735(a), the cost contribution limitations in § 678.735(b), the cost contribution caps in § 678.738, consistent with the process described in the State Plan.

(c) The process must ensure prompt resolution of the appeal in order to ensure the funds are distributed in a timely manner, consistent with the requirements of § 683.630 of this chapter.

(d) The one-stop partner must submit an appeal in accordance with State's deadlines for appeals specified in the guidance issued under § 678.705(b)(3), or if the State has not set a deadline, within 21 days from the Governor's determination.

§ 678.755 What are the required elements regarding infrastructure funding that must be included in the one-stop Memorandum of Understanding?

The MOU, fully described in § 678.500, must contain the following information whether the local areas use either the local one-stop or the State funding method:

(a) The period of time in which this infrastructure funding agreement is effective. This may be a different time period than the duration of the MOU.

(b) Identification of an infrastructure and shared services budget that will be periodically reconciled against actual costs incurred and adjusted accordingly to ensure that it reflects a cost allocation methodology that demonstrates how infrastructure costs are charged to each partner in proportion to its use of the one-stop center and relative benefit received, and that complies with 2 CFR part 200 (or any corresponding similar regulation or ruling).

(c) Identification of all one-stop partners, chief elected officials, and Local WDB participating in the infrastructure funding arrangement.

(d) Steps the Local WDB, chief elected officials, and one-stop partners used to reach consensus or an assurance that the local area followed the guidance for the State funding process.

(e) Description of the process to be used among partners to resolve issues during the MOU duration period when consensus cannot be reached.

(f) Description of the periodic modification and review process to ensure equitable benefit among one-stop partners.

§ 678.760 How do one-stop partners jointly fund other shared costs under the Memorandum of Understanding?

(a) In addition to jointly funding infrastructure costs, one-stop partners listed in §§ 678.400 through 678.410 must use a portion of funds made available under their programs' authorizing Federal law (or fairly evaluated in-kind contributions) to pay the additional costs relating to the operation of the one-stop delivery system. These other costs must include applicable career services and may include other costs, including shared services.

(b) For the purposes of paragraph (a) of this section, shared services' costs may include the costs of shared services that are authorized for and may be commonly provided through the one-stop partner programs to any individual, such as initial intake, assessment of needs, appraisal of basic skills, identification of appropriate services to meet such needs, referrals to other one-stop partners, and business services. Shared operating costs may also

include shared costs of the Local WDB's functions.

(c) Contributions to the additional costs related to operation of the one-stop delivery system may be cash, non-cash, or third-party in-kind contributions, consistent with how these are described in § 678.720(c).

(d) The shared costs described in paragraph (a) of this section must be allocated according to the proportion of benefit received by each of the partners, consistent with the Federal law authorizing the partner's program, and consistent with all other applicable legal requirements, including Federal cost principles in 2 CFR part 200 (or any corresponding similar regulation or ruling) requiring that costs are allowable, reasonable, necessary, and allocable.

(e) Any shared costs agreed upon by the one-stop partners must be included in the MOU.

Subpart F—One-Stop Certification

§ 678.800 How are one-stop centers and one-stop delivery systems certified for effectiveness, physical and programmatic accessibility, and continuous improvement?

(a) The State WDB, in consultation with chief elected officials and Local WDBs, must establish objective criteria and procedures for Local WDBs to use when certifying one-stop centers.

(1) The State WDB, in consultation with chief elected officials and Local WDBs, must review and update the criteria every 2 years as part of the review and modification of State Plans pursuant to § 676.135 of this chapter.

(2) The criteria must be consistent with the Governor's and State WDB's guidelines, guidance, and policies on infrastructure funding decisions, described in § 678.705. The criteria must evaluate the one-stop centers and one-stop delivery system for effectiveness, including customer satisfaction, physical and programmatic accessibility, and continuous improvement.

(3) When the Local WDB is the one-stop operator as described in § 679.410 of this chapter, the State WDB must certify the one-stop center.

(b) Evaluations of effectiveness must include how well the one-stop center integrates available services for participants and businesses, meets the workforce development needs of participants and the employment needs of local employers, operates in a cost-efficient manner, coordinates services among the one-stop partner programs, and provides access to partner program services to the maximum extent practicable, including providing services outside of regular business hours where there is a workforce need, as identified by the Local WDB. These evaluations must take into account feedback from one-stop customers. They must also include evaluations of how well the one-stop center ensures equal opportunity for individuals with disabilities to participate in or benefit from one-stop center services. These evaluations must include criteria evaluating how well the centers and delivery systems take actions to comply with the disability-related regulations implementing WIOA sec. 188, set forth at 29 CFR part 38. Such actions include, but are not limited to:

(1) Providing reasonable accommodations for individuals with disabilities;

(2) Making reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination against persons with disabilities;

(3) Administering programs in the most integrated setting appropriate;

(4) Communicating with persons with disabilities as effectively as with others;

(5) Providing appropriate auxiliary aids and services, including assistive technology devices and services, where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the program or activity; and

(6) Providing for the physical accessibility of the one-stop center to individuals with disabilities.

(c) Evaluations of continuous improvement must include how well the one-stop center supports the achievement of the negotiated local levels of performance for the indicators of performance for the local area described in sec. 116(b)(2) of WIOA and part 677 of this chapter. Other continuous improvement factors may include a regular process for identifying and responding to technical assistance needs,

a regular system of continuing professional staff development, and having systems in place to capture and respond to specific customer feedback.

(d) Local WDBs must assess at least once every 3 years the effectiveness, physical and programmatic accessibility, and continuous improvement of one-stop centers and the one-stop delivery systems using the criteria and procedures developed by the State WDB. The Local WDB may establish additional criteria, or set higher standards for service coordination, than those set by the State criteria. Local WDBs must review and update the criteria every 2 years as part of the Local Plan update process described in § 676.580 of this chapter. Local WDBs must certify one-stop centers in order to be eligible to use infrastructure funds in the State funding mechanism described in § 678.730.

(e) All one-stop centers must comply with applicable physical and programmatic accessibility requirements, as set forth in 29 CFR part 38, the implementing regulations of WIOA sec. 188.

Subpart G—Common Identifier

§ 678.900 What is the common identifier to be used by each one-stop delivery system?

(a) The common one-stop delivery system identifier is ''American Job Center.''

(b) As of November 17, 2016, each one-stop delivery system must include the ''American Job Center'' identifier or ''a proud partner of the American Job Center network'' on all primary electronic resources used by thONTENTS≤ e one-stop delivery system, and on any newly printed, purchased, or created materials.

(c) As of July 1, 2017, each one-stop delivery system must include the ''American Job Center'' identifier or ''a proud partner of the American Job Center network'' on all products, programs, activities, services, electronic resources, facilities, and related property and new materials used in the one-stop delivery system.

(d) One-stop partners, States, or local areas may use additional identifiers on their products, programs, activities, services, facilities, and related property and materials.

PART 679—STATEWIDE AND LOCAL GOVERNANCE OF THE WORKFORCE DEVELOPMENT SYSTEM UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Subpart A—State Workforce Development Board

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AUTHORITY: Secs. 101, 106, 107, 108, 189, 503, Public Law 113–128, 128 Stat. 1425 (Jul. 22, 2014).

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Subpart A—State Workforce Development Board

§ 679.100 What is the purpose of the State Workforce Development Board?

The purpose of the State Workforce Development Board (WDB) is to convene State, regional, and local workforce system and partners, to—

(a) Enhance the capacity and performance of the workforce development system;

(b) Align and improve the outcomes and effectiveness of Federally-funded and other workforce programs and investments; and

(c) Through these efforts, promote economic growth.

(d) Engage public workforce system representatives, including businesses, education providers, economic development, labor representatives, and other

stakeholders to help the workforce development system achieve the purpose of the Workforce Innovation and Opportunity Act (WIOA); and

(e) Assist to achieve the State's strategic and operational vision and goals as outlined in the State Plan.

§ 679.110 What is the State Workforce Development Board?

(a) The State WDB is a board established by the Governor in accordance with the requirements of WIOA sec. 101 and this section.

(b) The membership of the State WDB must meet the requirements of WIOA sec. 101(b) and must represent diverse geographic areas of the State, including urban, rural, and suburban areas. The WDB membership must include:

(1) The Governor;

(2) A member of each chamber of the State legislature, appointed by the appropriate presiding officers of such chamber, as appropriate under State law; and

(3) Members appointed by the Governor, which must include:

(i) A majority of representatives of businesses or organizations in the State who:

(A) Are the owner or chief executive officer for the business or organization, or is an executive with the business or organization with optimum policymaking or hiring authority, and also may be members of a Local WDB as described in WIOA sec. 107(b)(2)(A)(i);

(B) Represent businesses, or organizations that represent businesses described in paragraph (b)(3)(i) of this section, that, at a minimum, provide employment and training opportunities that include high-quality, work-relevant training and development in in-demand industry sectors or occupations in the State; and

(C) Are appointed from a list of potential members nominated by State business organizations and business trade associations; and

(D) At a minimum, one member representing small businesses as defined by the U.S. Small Business Administration.

(ii) Not less than 20 percent who are representatives of the workforce within the State, which:

(A) Must include two or more representatives of labor organizations nominated by State labor federations;

(B) Must include one representative who must be a member of a labor organization or training director from a joint labor-management registered apprenticeship program, or, if no such joint program exists in the State, a member of a labor organization or training director who is a representative of an registered apprenticeship program;

(C) May include one or more representatives of community-based organizations that have demonstrated experience and expertise in addressing the employment, training, or education needs of individuals with barriers to employment, including organizations that serve veterans or provide or support competitive, integrated employment for individuals with disabilities; and

(D) May include one or more representatives of organizations that have demonstrated experience and expertise in addressing the employment, training, or education needs of eligible youth, including representatives of organizations that serve out-of-school youth.

(iii) The balance of the members:

(A) Must include representatives of the Government including:

(*1*) The lead State officials with primary responsibility for the following core programs—

(*i*) The adult, dislocated worker, and youth programs authorized under title I of WIOA and the Wagner-Peyser Act;

(*ii*) The Adult Education and Family Literacy Act (AEFLA) program authorized under title II of WIOA; and

(*iii*) The State Vocational Rehabilitation (VR) program authorized under the Rehabilitation Act of 1973, as amended by title IV of WIOA.

(*iv*) Where the lead official represents more than one core program, that official must ensure adequate representation of the needs of all core programs under his or her jurisdiction.

(*2*) Two or more chief elected officials (collectively representing both cities and counties, where appropriate).

(B) May include other appropriate representatives and officials designated

by the Governor, such as, but not limited to, State agency officials responsible for one-stop partner programs, economic development or juvenile justice programs in the State, individuals who represent an Indian tribe or tribal organization as defined in WIOA sec. 166(b), and State agency officials responsible for education programs in the State, including chief executive officers of community colleges and other institutions of higher education.

(c) The Governor must select a chairperson for the State WDB from the business representatives on the WDB described in paragraph (b)(3)(i) of this section).

(d) The Governor must establish bylaws that at a minimum address:

(1) The nomination process used by the Governor to select the State WDB chair and members;

(2) The term limitations and how the term appointments will be staggered to ensure only a portion of membership expire in a given year;

(3) The process to notify the Governor of a WDB member vacancy to ensure a prompt nominee;

(4) The proxy and alternative designee process that will be used when a WDB member is unable to attend a meeting and assigns a designee as per the following requirements:

(i) If the alternative designee is a business representative, he or she must have optimum policy-making hiring authority.

(ii) Other alternative designees must have demonstrated experience and expertise and optimum policy-making authority.

(5) The use of technology, such as phone and Web-based meetings, that must be used to promote WDB member participation;

(6) The process to ensure members actively participate in convening the workforce development system's stakeholders, brokering relationships with a diverse range of employers, and leveraging support for workforce development activities; and

(7) Other conditions governing appointment or membership on the State WDB as deemed appropriate by the Governor.

(e) Members who represent organizations, agencies or other entities described in paragraphs (b)(3)(ii) through (iii) of this section must be individuals who have optimum policy-making authority in the organization or for the core program that they represent.

(f)(1) A State WDB member may not represent more than one of the categories described in:

(i) Paragraph (b)(3)(i) of this section (business representatives);

(ii) Paragraph (b)(3)(ii) of this section (workforce representatives); or

(iii) Paragraph (b)(3)(iii) of this section (government representatives).

(2) A State WDB member may not serve as a representative of more than one subcategory under paragraph (b)(3)(ii) of this section.

(3) A State WDB member may not serve as a representative of more than one subcategory under paragraph (b)(3)(iii) of this section, except that where a single government agency is responsible for multiple required programs, the head of the agency may represent each of the required programs.

(g) All required WDB members must have voting privileges. The Governor also may convey voting privileges to non-required members.

§ 679.120 What is meant by the terms "optimum policy-making authority" and "demonstrated experience and expertise"?

For purposes of § 679.110:

(a) A representative with ''optimum policy-making authority'' is an individual who can reasonably be expected to speak affirmatively on behalf of the entity he or she represents and to commit that entity to a chosen course of action.

(b) A representative with ''demonstrated experience and expertise'' means an individual with documented leadership in developing or implementing workforce development, human resources, training and development, or a core program function. Demonstrated experience and expertise may include individuals with experience in education or training of job seekers with barriers to employment as described in § 679.110(b)(3)(ii)(C) and (D).

§ 679.130 What are the functions of the State Workforce Development Board?

Under WIOA sec. 101(d), the State WDB must assist the Governor in the:

(a) Development, implementation, and modification of the 4-year State Plan;

(b) Review of statewide policies, programs, and recommendations on actions that must be taken by the State to align workforce development programs to support a comprehensive and streamlined workforce development system. Such review of policies, programs, and recommendations must include a review and provision of comments on the State Plans, if any, for programs and activities of one-stop partners that are not core programs;

(c) Development and continuous improvement of the workforce development system, including—

(1) Identification of barriers and means for removing barriers to better coordinate, align, and avoid duplication among programs and activities;

(2) Development of strategies to support career pathways for the purpose of providing individuals, including low-skilled adults, youth, and individuals with barriers to employment, including individuals with disabilities, with workforce investment activities, education, and supportive services to enter or retain employment;

(3) Development of strategies to provide effective outreach to and improved access for individuals and employers who could benefit from workforce development system;

(4) Development and expansion of strategies to meet the needs of employers, workers, and job seekers particularly through industry or sector partnerships related to in-demand industry sectors and occupations;

(5) Identification of regions, including planning regions for the purposes of WIOA sec. 106(a), and the designation of local areas under WIOA sec. 106, after consultation with Local WDBs and chief elected officials;

(6) Development and continuous improvement of the one-stop delivery system in local areas, including providing assistance to Local WDBs, one-stop operators, one-stop partners, and providers. Such assistance includes assistance with planning and delivering services, including training and supportive services, to support effective delivery of services to workers, job seekers, and employers; and

(7) Development of strategies to support staff training and awareness across the workforce development system and its programs;

(d) Development and updating of comprehensive State performance and accountability measures to assess core program effectiveness under WIOA sec. 116(b);

(e) Identification and dissemination of information on best practices, including best practices for—

(1) The effective operation of one-stop centers, relating to the use of business outreach, partnerships, and service delivery strategies, including strategies for serving individuals with barriers to employment;

(2) The development of effective Local WDBs, which may include information on factors that contribute to enabling Local WDBs to exceed negotiated local levels of performance, sustain fiscal integrity, and achieve other measures of effectiveness; and

(3) Effective training programs that respond to real-time labor market analysis, that effectively use direct assessment and prior learning assessment to measure an individual's prior knowledge, skills, competencies, and experiences for adaptability, to support efficient placement into employment or career pathways;

(f) Development and review of statewide policies affecting the coordinated provision of services through the State's one-stop delivery system described in WIOA sec. 121(e), including the development of—

(1) Objective criteria and procedures for use by Local WDBs in assessing the effectiveness, physical and programmatic accessibility and continuous improvement of one-stop centers. Where a Local WDB serves as the one-stop operator, the State WDB must use such criteria to assess and certify the one-stop center;

(2) Guidance for the allocation of one-stop center infrastructure funds under WIOA sec. 121(h); and

(3) Policies relating to the appropriate roles and contributions of entities carrying out one-stop partner programs within the one-stop delivery system, including approaches to facilitating equitable and efficient cost allocation in the system;

(g) Development of strategies for technological improvements to facilitate access to, and improve the quality of services and activities provided through the one-stop delivery system, including such improvements to—

(1) Enhance digital literacy skills (as defined in sec. 202 of the Museum and Library Service Act, 20 U.S.C. 9101);

(2) Accelerate acquisition of skills and recognized postsecondary credentials by participants;

(3) Strengthen professional development of providers and workforce professionals; and

(4) Ensure technology is accessible to individuals with disabilities and individuals residing in remote areas;

(h) Development of strategies for aligning technology and data systems across one-stop partner programs to enhance service delivery and improve efficiencies in reporting on performance accountability measures, including design implementation of common intake, data collection, case management information, and performance accountability measurement and reporting processes and the incorporation of local input into such design and implementation to improve coordination of services across one-stop partner programs;

(i) Development of allocation formulas for the distribution of funds for employment and training activities for adults and youth workforce investment activities, to local areas as permitted under WIOA secs. 128(b)(3) and 133(b)(3);

(j) Preparation of the annual reports described in paragraphs (1) and (2) of WIOA sec. 116(d);

(k) Development of the statewide workforce and labor market information system described in sec. 15(e) of the Wagner-Peyser Act; and

(l) Development of other policies as may promote statewide objectives for and enhance the performance of the workforce development system in the State.

§ 679.140 How does the State Workforce Development Board meet its requirement to conduct business in an open manner under the "sunshine provision" of the Workforce Innovation and Opportunity Act?

(a) The State WDB must conduct business in an open manner as required by WIOA sec. 101(g).

(b) The State WDB must make available to the public, on a regular basis through electronic means and open meetings, information about the activities and functions of the State WDB, including:

(1) The State Plan, or modification to the State Plan, prior to submission of the State Plan or modification of the State Plan;

(2) Information regarding membership;

(3) Minutes of formal meetings of the State WDB upon request;

(4) State WDB by-laws as described at § 679.110(d).

§ 679.150 Under what circumstances may the Governor select an alternative entity in place of the State Workforce Development Board?

(a) The State may use any State entity that meets the requirements of WIOA sec. 101(e) to perform the functions of the State WDB. This may include:

(1) A State council;

(2) A State WDB within the meaning of the Workforce Investment Act of 1998, as in effect on the day before the date of enactment of WIOA; or

(3) A combination of regional WDBs or similar entity.

(b) If the State uses an alternative entity, the State Plan must demonstrate that the alternative entity meets all three of the requirements of WIOA sec. 101(e)(1):

(1) Was in existence on the day before the date of enactment of the Workforce Investment Act of 1998 (WIA);

(2) Is substantially similar to the State WDB described in WIOA secs. 101(a)–(c) and § 679.110; and

(3) Includes representatives of business and labor organizations in the State.

(c) If the alternative entity does not provide representatives for each of the categories required under WIOA sec. 101(b), the State Plan must explain the

manner in which the State will ensure an ongoing role for any unrepresented membership group in the workforce development system. The State WDB must maintain an ongoing and meaningful role for an unrepresented membership group, including entities carrying out the core programs, by such methods as:

(1) Regularly scheduled consultations with entities within the unrepresented membership groups;

(2) Providing an opportunity for input into the State Plan or other policy development by unrepresented membership groups; and

(3) Establishing an advisory committee of unrepresented membership groups.

(d) In parts 675 through 687 of this chapter, all references to the State WDB also apply to an alternative entity used by a State.

§ 679.160 Under what circumstances may the State Workforce Development Board hire staff?

(a) The State WDB may hire a director and other staff to assist in carrying out the functions described in WIOA sec. 101(d) and § 679.130 using funds described in WIOA sec. 129(b)(3) or sec. 134(a)(3)(B)(i).

(b) The State WDB must establish and apply a set of objective qualifications for the position of director that ensures the individual selected has the requisite knowledge, skills, and abilities to meet identified benchmarks and to assist in effectively carrying out the functions of the State WDB.

(c) The director and staff must be subject to the limitations on the payment of salary and bonuses described in WIOA sec. 194(15).

Subpart B—Workforce Innovation and Opportunity Act Local Governance (Workforce Development Areas)

§ 679.200 What is the purpose of requiring States to identify regions?

The purpose of identifying regions is to align workforce development activities and resources with larger regional economic development areas and available resources to provide coordinated and efficient services to both job seekers and employers.

§ 679.210 What are the requirements for identifying a region?

(a) The Governor must assign local areas to a region prior to submission of the State Unified or Combined Plan, in order for the State to receive WIOA title I, subtitle B adult, dislocated worker, and youth allotments.

(b) The Governor must develop a policy and process for identifying regions. Such policy must include:

(1) Consultation with the Local WDBs and chief elected officials (CEOs) in the local area(s) as required in WIOA sec. 102(b)(2)(D)(i)(II) and WIOA sec. 106(a)(1); and

(2) Consideration of the extent to which the local areas in a proposed region:

(i) Share a single labor market;

(ii) Share a common economic development area; and

(iii) Possess the Federal and non-Federal resources, including appropriate education and training institutions, to administer activities under WIOA subtitle B.

(c) In addition to the required criteria described in paragraph (b)(2) of this section, other factors the Governor also may consider include:

(1) Population centers;

(2) Commuting patterns;

(3) Land ownership;

(4) Industrial composition;

(5) Location quotients;

(6) Labor force conditions;

(7) Geographic boundaries; and

(8) Additional factors as determined by the Secretary.

(d) Regions must consist of:

(1) One local area;

(2) Two or more contiguous local areas in a single State; or

(3) Two or more contiguous local areas in two or more States.

(e) Planning regions are those regions described in paragraph (d)(2) or (3) of this section. Planning regions are subject to the regional planning requirements in § 679.510.

§ 679.220 What is the purpose of the local area?

(a) The purpose of a local area is to serve as a jurisdiction for the administration of workforce development activities and execution of adult, dislocated worker, and youth funds allocated by the State. Such areas may be aligned with a region identified in WIOA sec. 106(a)(1) or may be components of a planning region, each with its own Local WDB. Also, significantly, local areas are the areas within which Local WDBs oversee their functions, including strategic planning, operational alignment and service delivery design, and a jurisdiction where partners align resources at a sub-State level to design and implement overall service delivery strategies.

(b) The Governor must designate local areas (local areas) in order for the State to receive adult, dislocated worker, and youth funding under title I, subtitle B of WIOA.

§ 679.230 What are the general procedural requirements for designation of local areas?

As part of the process of designating or redesignating a local area, the Governor must develop a policy for designation of local areas that must include:

(a) Consultation with the State WDB;

(b) Consultation with the chief elected officials and affected Local WDBs; and

(c) Consideration of comments received through a public comment process which must:

(1) Offer adequate time for public comment prior to designation of the local area; and

(2) Provide an opportunity for comment by representatives of Local WDBs, chief elected officials, businesses, institutions of higher education, labor organizations, other primary stakeholders, and the general public regarding the designation of the local area.

§ 679.240 What are the substantive requirements for designation of local areas that were not designated as local areas under the Workforce Investment Act of 1998?

(a) Except as provided in § 679.250, the Governor may designate or redesignate a local area in accordance with policies and procedures developed by the Governor, which must include at a minimum consideration of the extent to which the proposed area:

(1) Is consistent with local labor market areas;

(2) Has a common economic development area; and

(3) Has the Federal and non-Federal resources, including appropriate education and training institutions, to administer activities under WIOA subtitle B.

(b) The Governor may approve a request at any time for designation as a workforce development area from any unit of general local government, including a combination of such units, if the State WDB determines that the area meets the requirements of paragraph (a)(1) of this section and recommends designation.

(c) Regardless of whether a local area has been designated under this section or § 679.250, the Governor may redesignate a local area if the redesignation has been requested by a local area and the Governor approves the request.

§ 679.250 What are the requirements for initial and subsequent designation of workforce development areas that had been designated as local areas under the Workforce Investment Act of 1998?

(a) If the chief elected official and Local WDB in a local area submits a request for initial designation, the Governor must approve the request if, for the 2 program years preceding the date of enactment of WIOA, the following criteria are met:

(1) The local area was designated as a local area for purposes of WIA;

(2) The local area performed successfully; and

(3) The local area sustained fiscal integrity.

(b) Subject to paragraph (c) of this section, after the period of initial designation, if the chief elected official and Local WDB in a local area submits

a request for subsequent designation, the Governor must approve the request if the following criteria are met for the 2 most recent program years of initial designation:

(1) The local area performed successfully;

(2) The local area sustained fiscal integrity; and

(3) In the case of a local area in a planning region, the local area met the regional planning requirements described in WIOA sec. 106(c)(1).

(c) No determination of subsequent eligibility may be made before the conclusion of Program Year (PY) 2017.

(d) The Governor:

(1) May review a local area designated under paragraph (b) of this section at any time to evaluate whether that the area continues to meet the requirements for subsequent designation under that paragraph; and

(2) Must review a local area designated under paragraph (b) of this section before submitting its State Plan during each 4-year State planning cycle to evaluate whether the area continues to meet the requirements for subsequent designation under that paragraph.

(e) For purposes of subsequent designation under paragraphs (b) and (d) of this section, the local area and chief elected official must be considered to have requested continued designation unless the local area and chief elected official notify the Governor that they no longer seek designation.

(f) Local areas designated under § 679.240 or States designated as single-area States under § 679.270 are not subject to the requirements described in paragraph (b) of this section related to the subsequent designation of a local area.

(g) The Governor may approve, under paragraph (c) of this section, a request for designation as a local area from areas served by rural concentrated employment programs as described in WIOA sec. 107(c)(1)(C).

§ 679.260 What do the terms "performed successfully" and "sustained fiscal integrity" mean for purposes of designating local areas?

(a) For the purpose of initial local area designation, the term ''performed successfully'' means that the local area met or exceeded the levels of performance the Governor negotiated with the Local WDB and chief elected official under WIA sec. 136(c) for the last 2 full program years before the enactment of WIOA, and that the local area has not failed any individual measure for the last 2 consecutive program years before the enactment of WIOA.

(b) For the purpose of determining subsequent local area designation, the term ''performed successfully'' means that the local area met or exceeded the levels of performance the Governor negotiated with the Local WDB and chief elected official for core indicators of performance as provided in paragraphs (b)(1) and (2) of this section as appropriate, and that the local area has not failed any individual measure for the last 2 consecutive program years in accordance with a State-established definition, provided in the State Plan, of met or exceeded performance.

(1) For subsequent designation determinations made at the conclusion of PY 2017, a finding of whether a local area performed successfully must be limited to having met or exceeded the negotiated levels for the Employment Rate 2nd Quarter after Exit and the Median Earnings indicators of performance, as described at § 677.155(a)(1)(i) and (iii) of this chapter respectively, for PY 2016 and PY 2017.

(2) For subsequent designation determinations made at the conclusion of PY 2018, or at any point thereafter, a finding of whether a local area performed successfully must be based on all six of the WIOA indicators of performance as described at § 677.155(a)(1)(i) through (vi) of this chapter for the 2 most recently completed program years.

(c) For the purpose of determining initial and subsequent local area designation under § 679.250(a) and (b), the term ''sustained fiscal integrity'' means that the Secretary has not made a formal determination that either the grant recipient or the administrative entity of the area misexpended funds due to willful disregard of the requirements of the provision involved, gross negligence, or failure to comply with accepted standards of administration for the 2-year period preceding the determination.

§ 679.270 What are the special designation provisions for single-area States?

(a) The Governor of any State that was a single-State local area under the WIA as in effect on July 1, 2013 may designate the State as a single-State local area under WIOA.

(b) The Governor of a State local area under paragraph (a) of this section who seeks to designate the State as a single-State local area under WIOA must:

(1) Identify the State as a single-area State in the Unified or Combined State Plan; and

(2) Include the local plan for approval as part of the Unified or Combined State Plan.

(c) The State WDB for a single-area State must act as the Local WDB and carry out the functions of the Local WDB in accordance with WIOA sec. 107 and § 679.370, except that the State is not required to meet and report on a set of local performance accountability measures.

(d) Single-area States must conduct the functions of the Local WDB as outlined in paragraph (c) of this section to achieve the incorporation of local interests but may do so in a manner that reduces unnecessary burden and duplication of processes.

(e) States must carry out the duties of State and Local WDBs in accordance with guidance issued by the Secretary of Labor.

§ 679.280 How does the State fulfill the requirement to provide assistance to local areas within a planning region that wish to redesignate into a single local area?

(a) When the chief elected officials and Local WDBs of each local area within a planning region make a request to the Governor to redesignate into a single local area, the State WDB must authorize statewide adult, dislocated worker, and youth program funds to facilitate such redesignation.

(b) When statewide funds are not available, the State may provide funds for redesignation in the next available program year.

(c) Redesignation activities that may be carried out by the local areas include:

(1) Convening sessions and conferences;

(2) Renegotiation of contracts and agreements; and

(3) Other activities directly associated with the redesignation as deemed appropriate by the State WDB.

§ 679.290 What right does an entity have to appeal the Governor's decision rejecting a request for designation as a workforce development area?

(a) A unit of local government (or combination of units) or a local area which has requested but has been denied its request for designation as a workforce development area under § 679.250 may appeal the decision to the State WDB, in accordance with appeal procedures established in the State Plan and § 683.630(a) of this chapter.

(b) If a decision on the appeal is not rendered in a timely manner or if the appeal to the State WDB does not result in designation, the entity may request review by the Secretary of Labor, under the procedures set forth at § 683.640 of this chapter.

Subpart C—Local Workforce Development Boards

§ 679.300 What is the vision and purpose of the Local Workforce Development Board?

(a) The vision for the Local WDB is to serve as a strategic leader and convener of local workforce development system stakeholders. The Local WDB partners with employers and the workforce development system to develop policies and investments that support public workforce system strategies that support regional economies, the development of effective approaches including local and regional sector partnerships and career pathways, and high quality, customer centered service delivery and service delivery approaches;

(b) The purpose of the Local WDB is to—

(1) Provide strategic and operational oversight in collaboration with the required and additional partners and workforce stakeholders to help develop a comprehensive and high-quality workforce development system in the local area and larger planning region;

(2) Assist in the achievement of the State's strategic and operational vision and goals as outlined in the Unified State Plan or Combined State Plan; and

(3) Maximize and continue to improve the quality of services, customer satisfaction, effectiveness of the services provided.

§ 679.310 What is the Local Workforce Development Board?

(a) The Local WDB is appointed by the chief elected official(s) in each local area in accordance with State criteria established under WIOA sec. 107(b), and is certified by the Governor every 2 years, in accordance with WIOA sec. 107(c)(2).

(b) In partnership with the chief elected official(s), the Local WDB sets policy for the portion of the statewide workforce development system within the local area and consistent with State policies.

(c) The Local WDB and the chief elected official(s) may enter into an agreement that describes the respective roles and responsibilities of the parties.

(d) The Local WDB, in partnership with the chief elected official(s), develops the local plan and performs the functions described in WIOA sec. 107(d) and § 679.370.

(e) If a local area includes more than one unit of general local government in accordance with WIOA sec. 107(c)(1)(B), the chief elected officials of such units may execute an agreement to describe their responsibilities for carrying out the roles and responsibilities. If the chief elected officials are unable to reach agreement after a reasonable effort, the Governor may appoint the members of the Local WDB from individuals nominated or recommended as specified in WIOA sec. 107(b).

(f) If the State Plan indicates that the State will be treated as a local area under WIOA, the State WDB must carry out the roles of the Local WDB in accordance with WIOA sec. 107, except that the State is not required to meet and report on a set of local performance accountability measures.

(g) The CEO must establish by-laws, consistent with State policy for Local WDB membership, that at a minimum address:

(1) The nomination process used by the CEO to select the Local WDB chair and members;

(2) The term limitations and how the term appointments will be staggered to ensure only a portion of membership expire in a given year;

(3) The process to notify the CEO of a WDB member vacancy to ensure a prompt nominee;

(4) The proxy and alternative designee process that will be used when a WDB member is unable to attend a meeting and assigns a designee as per the requirements at § 679.110(d)(4);

(5) The use of technology, such as phone and Web-based meetings, that will be used to promote WDB member participation;

(6) The process to ensure WDB members actively participate in convening the workforce development system's stakeholders, brokering relationships with a diverse range of employers, and leveraging support for workforce development activities; and

(7) A description of any other conditions governing appointment or membership on the Local WDB as deemed appropriate by the CEO.

§ 679.320 Who are the required members of the Local Workforce Development Board?

(a) For each local area in the State, the members of Local WDB must be selected by the chief elected official consistent with criteria established under WIOA sec. 107(b)(1) and criteria established by the Governor, and must meet the requirements of WIOA sec. 107(b)(2).

(b) A majority of the members of the Local WDB must be representatives of business in the local area. At a minimum, two members must represent small business as defined by the U.S. Small Business Administration. Business representatives serving on Local WDBs also may serve on the State WDB. Each business representative must meet the following criteria:

(1) Be an owner, chief executive officer, chief operating officer, or other individual with optimum policy-making or hiring authority; and

(2) Provide employment opportunities in in-demand industry sectors or

occupations, as those terms are defined in WIOA sec. 3(23).

(c) At least 20 percent of the members of the Local WDB must be workforce representatives. These representatives:

(1) Must include two or more representatives of labor organizations, where such organizations exist in the local area. Where labor organizations do not exist, representatives must be selected from other employee representatives;

(2) Must include one or more representatives of a joint labor-management, or union affiliated, registered apprenticeship program within the area who must be a training director or a member of a labor organization. If no union affiliated registered apprenticeship programs exist in the area, a representative of a registered apprenticeship program with no union affiliation must be appointed, if one exists;

(3) May include one or more representatives of community-based organizations that have demonstrated experience and expertise in addressing the employment, training or education needs of individuals with barriers to employment, including organizations that serve veterans or provide or support competitive integrated employment for individuals with disabilities; and

(4) May include one or more representatives of organizations that have demonstrated experience and expertise in addressing the employment, training, or education needs of eligible youth, including representatives of organizations that serve out-of-school youth.

(d) The Local WDB also must include:

(1) At least one eligible training provider administering adult education and literacy activities under WIOA title II;

(2) At least one representative from an institution of higher education providing workforce investment activities, including community colleges; and

(3) At least one representative from each of the following governmental and economic and community development entities:

(i) Economic and community development entities;

(ii) The State Employment Service office under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) serving the local area; and

(iii) The programs carried out under title I of the Rehabilitation Act of 1973, other than sec. 112 or part C of that title;

(e) The membership of Local WDBs may include individuals or representatives of other appropriate entities in the local area, including:

(1) Entities administering education and training activities who represent local educational agencies or community-based organizations with demonstrated expertise in addressing the education or training needs for individuals with barriers to employment;

(2) Governmental and economic and community development entities who represent transportation, housing, and public assistance programs;

(3) Philanthropic organizations serving the local area; and

(4) Other appropriate individuals as determined by the chief elected official.

(f) Members must be individuals with optimum policy-making authority within the entities they represent.

(g) Chief elected officials must establish a formal nomination and appointment process, consistent with the criteria established by the Governor and State WDB under sec. 107(b)(1) of WIOA for appointment of members of the Local WDBs, that ensures:

(1) Business representatives are appointed from among individuals who are nominated by local business organizations and business trade associations;

(2) Labor representatives are appointed from among individuals who are nominated by local labor federations (or, for a local area in which no employees are represented by such organizations, other representatives of employees); and

(3) When there is more than one local area provider of adult education and literacy activities under title II, or multiple institutions of higher education providing workforce investment activities as described in WIOA sec. 107(b)(2)(C)(i) or (ii), nominations are solicited from those particular entities.

(h) An individual may be appointed as a representative of more than one entity if the individual meets all the criteria for representation, including the criteria described in paragraphs (c) through (g) of this section, for each entity.

(i) All required WDB members must have voting privilege. The chief elected official may convey voting privileges to non-required members.

§ 679.330 Who must chair a Local Workforce Development Board?

The Local WDB must elect a chairperson from among the business representatives on the WDB.

§ 679.340 What is meant by the terms "optimum policy-making authority" and "demonstrated experience and expertise"?

For purposes of selecting representatives to Local WDBs:

(a) A representative with ''optimum policy-making authority'' is an individual who can reasonably be expected to speak affirmatively on behalf of the entity he or she represents and to commit that entity to a chosen course of action.

(b) A representative with ''demonstrated experience and expertise'' means an individual who:

(1) Is a workplace learning advisor as defined in WIOA sec. 3(70);

(2) Contributes to the field of workforce development, human resources, training and development, or a core program function; or

(3) The Local WDB recognizes for valuable contributions in education or workforce development related fields.

§ 679.350 What criteria will be used to establish the membership of the Local Workforce Development Board?

The Local WDB is appointed by the chief elected official(s) in the local area in accordance with State criteria established under WIOA sec. 107(b), and is certified by the Governor every 2 years, in accordance with WIOA sec. 107(c)(2).

§ 679.360 What is a standing committee, and what is its relationship to the Local Workforce Development Board?

(a) Standing committees may be established by the Local WDB to provide information and assist the Local WDB in carrying out its responsibilities under WIOA sec. 107. Standing committees must be chaired by a member of the Local WDB, may include other members of the Local WDB, and must include other individuals appointed by the Local WDB who are not members of the Local WDB and who have demonstrated experience and expertise in accordance with § 679.340(b) and as determined by the Local WDB. Standing committees may include each of the following:

(1) A standing committee to provide information and assist with operational and other issues relating to the one-stop delivery system, which may include representatives of the one-stop partners.

(2) A standing committee to provide information and to assist with planning, operational, and other issues relating to the provision of services to youth, which must include community-based organizations with a demonstrated record of success in serving eligible youth.

(3) A standing committee to provide information and to assist with operational and other issues relating to the provision of services to individuals with disabilities, including issues relating to compliance with WIOA sec. 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) regarding providing programmatic and physical access to the services, programs, and activities of the one-stop delivery system, as well as appropriate training for staff on providing supports for or accommodations to, and finding employment opportunities for, individuals with disabilities.

(b) The Local WDB may designate other standing committees in addition to those specified in paragraph (a) of this section.

(c) Local WDBs may designate an entity in existence as of the date of the

enactment of WIOA, such as an effective youth council, to serve as a standing committee as long as the entity meets the requirements of WIOA sec. 107(b)(4).

§ 679.370 What are the functions of the Local Workforce Development Board?

As provided in WIOA sec. 107(d), the Local WDB must:

(a) Develop and submit a 4-year local plan for the local area, in partnership with the chief elected official and consistent with WIOA sec. 108;

(b) If the local area is part of a planning region that includes other local areas, develop and submit a regional plan in collaboration with other local areas. If the local area is part of a planning region, the local plan must be submitted as a part of the regional plan;

(c) Conduct workforce research and regional labor market analysis to include:

(1) Analyses and regular updates of economic conditions, needed knowledge and skills, workforce, and workforce development (including education and training) activities to include an analysis of the strengths and weaknesses (including the capacity to provide) of such services to address the identified education and skill needs of the workforce and the employment needs of employers;

(2) Assistance to the Governor in developing the statewide workforce and labor market information system under the Wagner-Peyser Act for the region; and

(3) Other research, data collection, and analysis related to the workforce needs of the regional economy as the WDB, after receiving input from a wide array of stakeholders, determines to be necessary to carry out its functions;

(d) Convene local workforce development system stakeholders to assist in the development of the local plan under § 679.550 and in identifying non-Federal expertise and resources to leverage support for workforce development activities. Such stakeholders may assist the Local WDB and standing committees in carrying out convening, brokering, and leveraging functions at the direction of the Local WDB;

(e) Lead efforts to engage with a diverse range of employers and other entities in the region in order to:

(1) Promote business representation (particularly representatives with optimum policy-making or hiring authority from employers whose employment opportunities reflect existing and emerging employment opportunities in the region) on the Local WDB;

(2) Develop effective linkages (including the use of intermediaries) with employers in the region to support employer utilization of the local workforce development system and to support local workforce investment activities;

(3) Ensure that workforce investment activities meet the needs of employers and support economic growth in the region by enhancing communication, coordination, and collaboration among employers, economic development entities, and service providers; and

(4) Develop and implement proven or promising strategies for meeting the employment and skill needs of workers and employers (such as the establishment of industry and sector partnerships), that provide the skilled workforce needed by employers in the region, and that expand employment and career advancement opportunities for workforce development system participants in in-demand industry sectors or occupations;

(f) With representatives of secondary and postsecondary education programs, lead efforts to develop and implement career pathways within the local area by aligning the employment, training, education, and supportive services that are needed by adults and youth, particularly individuals with barriers to employment;

(g) Lead efforts in the local area to identify and promote proven and promising strategies and initiatives for meeting the needs of employers, workers and job seekers, and identify and disseminate information on proven and promising practices carried out in other local areas for meeting such needs;

(h) Develop strategies for using technology to maximize the accessibility and effectiveness of the local workforce development system for employers, and workers and job seekers, by:

(1) Facilitating connections among the intake and case management information systems of the one-stop partner programs to support a comprehensive workforce development system in the local area;

(2) Facilitating access to services provided through the one-stop delivery system involved, including access in remote areas;

(3) Identifying strategies for better meeting the needs of individuals with barriers to employment, including strategies that augment traditional service delivery, and increase access to services and programs of the one-stop delivery system, such as improving digital literacy skills; and

(4) Leveraging resources and capacity within the local workforce development system, including resources and capacity for services for individuals with barriers to employment;

(i) In partnership with the chief elected official for the local area:

(1) Conduct oversight of youth workforce investment activities authorized under WIOA sec. 129(c), adult and dislocated worker employment and training activities under WIOA secs. 134(c) and (d), and the entire one-stop delivery system in the local area;

(2) Ensure the appropriate use and management of the funds provided under WIOA subtitle B for the youth, adult, and dislocated worker activities and one-stop delivery system in the local area; and

(3) Ensure the appropriate use management, and investment of funds to maximize performance outcomes under WIOA sec. 116;

(j) Negotiate and reach agreement on local performance indicators with the chief elected official and the Governor;

(k) Negotiate with CEO and required partners on the methods for funding the infrastructure costs of one-stop centers in the local area in accordance with § 678.715 of this chapter or must notify the Governor if they fail to reach agreement at the local level and will use a State infrastructure funding mechanism;

(l) Select the following providers in the local area, and where appropriate terminate such providers in accordance with 2 CFR part 200:

(1) Providers of youth workforce investment activities through competitive grants or contracts based on the recommendations of the youth standing committee (if such a committee is established); however, if the Local WDB determines there is an insufficient number of eligible training providers in a local area, the Local WDB may award contracts on a sole-source basis as per the provisions at WIOA sec. 123(b);

(2) Providers of training services consistent with the criteria and information requirements established by the Governor and WIOA sec. 122;

(3) Providers of career services through the award of contracts, if the one-stop operator does not provide such services; and

(4) One-stop operators in accordance with §§ 678.600 through 678.635 of this chapter;

(m) In accordance with WIOA sec. 107(d)(10)(E) work with the State to ensure there are sufficient numbers and types of providers of career services and training services serving the local area and providing the services in a manner that maximizes consumer choice, as well as providing opportunities that lead to competitive integrated employment for individuals with disabilities;

(n) Coordinate activities with education and training providers in the local area, including:

(1) Reviewing applications to provide adult education and literacy activities under WIOA title II for the local area to determine whether such applications are consistent with the local plan;

(2) Making recommendations to the eligible agency to promote alignment with such plan; and

(3) Replicating and implementing cooperative agreements to enhance the provision of services to individuals with disabilities and other individuals, such as cross training of staff, technical assistance, use and sharing of information, cooperative efforts with employers, and other efforts at cooperation, collaboration, and coordination;

(o) Develop a budget for the activities of the Local WDB, with approval of the chief elected official and consistent with the local plan and the duties of the Local WDB;

(p) Assess, on an annual basis, the physical and programmatic accessibility of all one-stop centers in the local area, in accordance with WIOA sec. 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*); and

(q) Certification of one-stop centers in accordance with § 678.800 of this chapter.

§ 679.380 How does the Local Workforce Development Board satisfy the consumer choice requirements for career services and training services?

(a) In accordance with WIOA sec. 122 and in working with the State, the Local WDB satisfies the consumer choice requirement for training services by:

(1) Determining the initial eligibility of entities providing a program of training services, renewing the eligibility of providers, and considering the possible termination of an eligible training provider due to the provider's submission of inaccurate eligibility and performance information or the provider's substantial violation of WIOA;

(2) Working with the State to ensure there are sufficient numbers and types of providers of training services, including eligible training providers with expertise in assisting individuals with disabilities and eligible training providers with expertise in assisting adults in need of adult education and literacy activities described under WIOA sec. 107(d)(10)(E), serving the local area;

(3) Ensuring the dissemination and appropriate use of the State list through the local one-stop delivery system;

(4) Receiving performance and cost information from the State and disseminating this information through the one-stop delivery systems within the State; and

(5) Providing adequate access to services for individuals with disabilities.

(b) Working with the State, the Local WDB satisfies the consumer choice requirement for career services by:

(1) Determining the career services that are best performed by the one-stop operator consistent with §§ 678.620 and 678.625 of this chapter and career services that require contracting with a career service provider; and

(2) Identifying a wide-array of potential career service providers and awarding contracts where appropriate including to providers to ensure:

(i) Sufficient access to services for individuals with disabilities, including opportunities that lead to integrated, competitive employment for individuals with disabilities; and

(ii) Sufficient access for adult education and literacy activities.

§ 679.390 How does the Local Workforce Development Board meet its requirement to conduct business in an open manner under the "sunshine provision" of the Workforce Innovation and Opportunity Act?

The Local WDB must conduct its business in an open manner as required by WIOA sec. 107(e), by making available to the public, on a regular basis through electronic means and open meetings, information about the activities of the Local WDB. This includes:

(a) Information about the Local Plan, or modification to the Local Plan, before submission of the plan;

(b) List and affiliation of Local WDB members;

(c) Selection of one-stop operators;

(d) Award of grants or contracts to eligible training providers of workforce investment activities including providers of youth workforce investment activities;

(e) Minutes of formal meetings of the Local WDB; and

(f) Local WDB by-laws, consistent with § 679.310(g).

§ 679.400 Who are the staff to the Local Workforce Development Board and what is their role?

(a) WIOA sec. 107(f) grants Local WDBs authority to hire a director and other staff to assist in carrying out the functions of the Local WDB.

(b) Local WDBs must establish and apply a set of qualifications for the position of director that ensures the individual selected has the requisite knowledge, skills, and abilities to meet identified benchmarks and to assist in carrying out the functions of the Local WDB.

(c) The Local WDB director and staff must be subject to the limitations on the payment of salary and bonuses described in WIOA sec. 194(15).

(d) In general, Local WDB staff only may assist the Local WDB fulfill the required functions at WIOA sec. 107(d).

(e) Should the WDB select an entity to staff the WDB that provides additional workforce functions beyond the functions described at WIOA sec. 107(d), such an entity is required to enter into a written agreement with the Local WDB and chief elected official(s) to clarify their roles and responsibilities as required by § 679.430.

§ 679.410 Under what conditions may a Local Workforce Development Board directly be a provider of career services, or training services, or act as a one-stop operator?

(a)(1) A Local WDB may be selected as a one-stop operator:

(i) Through sole source procurement in accordance with § 678.610 of this chapter; or

(ii) Through successful competition in accordance with § 678.615 of this chapter.

(2) The chief elected official in the local area and the Governor must agree to the selection described in paragraph (a)(1) of this section.

(3) Where a Local WDB acts as a one-stop operator, the State must ensure certification of one-stop centers in accordance with § 678.800 of this chapter.

(b) A Local WDB may act as a provider of career services only with the agreement of the chief elected official in the local area and the Governor.

(c) A Local WDB is prohibited from providing training services, unless the Governor grants a waiver in accordance with the provisions in WIOA sec. 107(g)(1).

(1) The State must develop a procedure for approving waivers that includes the criteria at WIOA sec. 107(g)(1)(B)(i):

(i) Satisfactory evidence that there is an insufficient number of eligible training providers of such a program of training services to meet local demand in the local area;

(ii) Information demonstrating that the WDB meets the requirements for eligible training provider services under WIOA sec. 122; and

(iii) Information demonstrating that the program of training services prepares participants for an in-demand industry sector or occupation in the local area.

(2) The local area must make the proposed request for a waiver available to eligible training providers and other interested members of the public for a public comment period of not less than 30 days and includes any comments received during this time in the final request for the waiver.

(3) The waiver must not exceed the duration of the local plan and may be renewed by submitting a new waiver request consistent with paragraphs (c)(1) and (2) of this section for additional periods, not to exceed the durations of such subsequent plans.

(4) The Governor may revoke the waiver if the Governor determines the waiver is no longer needed or that the Local WDB involved has engaged in a pattern of inappropriate referrals to training services operated by the Local WDB.

(d) The restrictions on the provision of career and training services by the Local WDB, as one-stop operator, also apply to staff of the Local WDB.

§ 679.420 What are the functions of the local fiscal agent?

(a) In order to assist in administration of the grant funds, the chief elected official or the Governor, where the Governor serves as the local grant recipient for a local area, may designate an entity to serve as a local fiscal agent. Designation of a fiscal agent does not relieve the chief elected official or Governor of liability for the misuse of grant funds. If the CEO designates a fiscal agent, the CEO must ensure this agent has clearly defined roles and responsibilities.

(b) In general the fiscal agent is responsible for the following functions:

(1) Receive funds.

(2) Ensure sustained fiscal integrity and accountability for expenditures of funds in accordance with Office of Management and Budget circulars, WIOA and the corresponding Federal Regulations and State policies.

(3) Respond to audit financial findings.

(4) Maintain proper accounting records and adequate documentation.

(5) Prepare financial reports.

(6) Provide technical assistance to subrecipients regarding fiscal issues.

(c) At the direction of the Local WDB or the State WDB in single-area States, the fiscal agent may have the following additional functions:

(1) Procure contracts or obtain written agreements.

(2) Conduct financial monitoring of service providers.

(3) Ensure independent audit of all employment and training programs.

§ 679.430 How do entities performing multiple functions in a local area demonstrate internal controls and prevent conflict of interest?

Local organizations often function simultaneously in a variety of roles, including local fiscal agent, Local WDB staff, one-stop operator, and direct provider of services. Any organization that has been selected or otherwise designated to perform more than one of these functions must develop a written agreement with the Local WDB and CEO to clarify how the organization will carry out its responsibilities while demonstrating compliance with WIOA and corresponding regulations, relevant Office of Management and Budget circulars, and the State's conflict of interest policy.

Subpart D—Regional and Local Plan

§ 679.500 What is the purpose of the regional and local plan?

(a) The local plan serves as 4-year action plan to develop, align, and integrate service delivery strategies and to support the State's vision and strategic and operational goals. The local plan sets forth the strategy to:

(1) Direct investments in economic, education, and workforce training programs to focus on providing relevant education and training to ensure that individuals, including youth and individuals with barriers to employment, have the skills to compete in the job market and that employers have a ready supply of skilled workers;

(2) Apply job-driven strategies in the one-stop delivery system;

(3) Enable economic, education, and workforce partners to build a skilled workforce through innovation in, and alignment of, employment, training, and education programs; and

(4) Incorporate the local plan into the regional plan per § 679.540.

(b) In the case of planning regions, a regional plan is required to meet the purposes described in paragraph (a) of this section and to coordinate resources among multiple WDBs in a region.

(c) The Governor must establish and disseminate to Local WDBs and regional planning areas a policy for the submission of local and regional plans. The policy must set a deadline for the submission of the regional and local plans that accounts for the activities required in plan development outlined in §§ 679.510 and 679.550.

§ 679.510 What are the requirements for regional planning?

(a) Local WDBs and chief elected officials within an identified planning region (as defined in WIOA secs. 106(a)(2)(B)–(C) and § 679.200) must:

(1) Participate in a regional planning process that results in:

(i) The preparation of a regional plan, as described in paragraph (a)(2) of this section and consistent with any guidance issued by the Department;

(ii) The establishment of regional service strategies, including use of cooperative service delivery agreements;

(iii) The development and implementation of sector initiatives for in-demand industry sectors or occupations for the planning region;

(iv) The collection and analysis of regional labor market data (in conjunction with the State) which must include the local planning requirements at § 679.560(a)(1)(i) and (ii);

(v) The coordination of administrative cost arrangements, including the pooling of funds for administrative costs, as appropriate;

(vi) The coordination of transportation and other supportive services as appropriate;

(vii) The coordination of services with regional economic development services and providers; and

(viii) The establishment of an agreement concerning how the planning region will collectively negotiate and reach agreement with the Governor on local levels of performance for, and report on, the performance accountability measures described in WIOA sec. 116(c) for local areas or the planning region.

(2) Prepare, submit, and obtain approval of a single regional plan that:

(i) Includes a description of the activities described in paragraph (a)(1) of this section; and

(ii) Incorporates local plans for each of the local areas in the planning region, consistent with § 679.540(a).

(b) Consistent with § 679.550(b), the Local WDBs representing each local area in the planning region must provide an opportunity for public comment on the development of the regional plan or subsequent plan modifications before submitting the plan to the Governor. To provide adequate opportunity for public comment, the Local WDBs must:

(1) Make copies of the proposed regional plan available to the public through electronic and other means, such as public hearings and local news media;

(2) Include an opportunity for comment by members of the public, including representatives of business, labor organizations, and education;

(3) Provide no more than a 30-day period for comment on the plan before its submission to the Governor, beginning on the date on which the proposed plan is made available; and

(4) The Local WDBs must submit any comments that express disagreement with the plan to the Governor along with the plan.

(5) Consistent with WIOA sec. 107(e), the Local WDB must make information about the plan available to the public on a regular basis through electronic means and open meetings.

(c) The State must provide technical assistance and labor market data, as requested by local areas, to assist with regional planning and subsequent service delivery efforts.

(d) As they relate to regional areas and regional plans, the terms local area and local plan are defined in WIOA secs. 106(c)(3)(A)–(B).

§ 679.520 What are the requirements for approval of a regional plan?

Consistent with the requirements of § 679.570, the Governor must review completed plans (including a modification to the plan). Such plans will be considered approved 90 days after receipt of the plan unless the Governor determines in writing that:

(a) There are deficiencies in workforce investment activities that have been identified through audits and the local area has not made acceptable progress in implementing plans to address deficiencies; or

(b) The plan does not comply with applicable provisions of WIOA and the WIOA regulations, including the required consultations and public comment provisions, and the nondiscrimination requirements of 29 CFR part 38.

(c) The plan does not align with the State Plan, including with regard to the alignment of the core programs to support the strategy identified in the State Plan in accordance with WIOA sec. 102(b)(1)(E) and § 676.105 of this chapter.

§ 679.530 When must the regional plan be modified?

(a) Consistent with § 679.580, the Governor must establish procedures governing the modification of regional plans.

(b) At the end of the first 2-year period of the 4-year local plan, the Local WDBs within a planning region, in partnership with the appropriate chief elected officials, must review the regional plan and prepare and submit modifications to the regional plan to reflect changes:

(1) In regional labor market and economic conditions; and

(2) Other factors affecting the implementation of the local plan, including but not limited to changes in the financing available to support WIOA title I and partner-provided WIOA services.

§ 679.540 How are local planning requirements reflected in a regional plan?

(a) The regional plan must address the requirements at WIOA secs. 106(c)(1)(A)–(H), and incorporate the

local planning requirements identified for local plans at WIOA secs. 108(b)(1)–(22).

(b) The Governor may issue regional planning guidance that allows Local WDBs and chief elected officials in a planning region to address any local plan requirements through the regional plan where there is a shared regional responsibility.

§ 679.550 What are the requirements for the development of the local plan?

(a) Under WIOA sec. 108, each Local WDB must, in partnership with the appropriate chief elected officials, develop and submit a comprehensive 4-year plan to the Governor.

(1) The plan must identify and describe the policies, procedures, and local activities that are carried out in the local area, consistent with the State Plan.

(2) If the local area is part of a planning region, the Local WDB must comply with WIOA sec. 106(c) and §§ 679.510 through 679.540 in the preparation and submission of a regional plan.

(b) Consistent with § 679.510(b), the Local WDB must provide an opportunity for public comment on the development of the local plan or subsequent plan modifications before submitting the plan to the Governor. To provide adequate opportunity for public comment, the Local WDB must:

(1) Make copies of the proposed local plan available to the public through electronic and other means, such as public hearings and local news media;

(2) Include an opportunity for comment by members of the public, including representatives of business, labor organizations, and education;

(3) Provide no more than a 30-day period for comment on the plan before its submission to the Governor, beginning on the date on which the proposed plan is made available, prior to its submission to the Governor; and

(4) The Local WDB must submit any comments that express disagreement with the plan to the Governor along with the plan.

(5) Consistent WIOA sec. 107(e), the Local WDB must make information about the plan available to the public on a regular basis through electronic means and open meetings.

§ 679.560 What are the contents of the local plan?

(a) The local workforce investment plan must describe strategic planning elements, including:

(1) A regional analysis of:

(i) Economic conditions including existing and emerging in-demand industry sectors and occupations; and

(ii) Employment needs of employers in existing and emerging in-demand industry sectors and occupations.

(iii) As appropriate, a local area may use an existing analysis, which is a timely current description of the regional economy, to meet the requirements of paragraphs (a)(1)(i) and (ii) of this section;

(2) Knowledge and skills needed to meet the employment needs of the employers in the region, including employment needs in in-demand industry sectors and occupations;

(3) An analysis of the regional workforce, including current labor force employment and unemployment data, information on labor market trends, and educational and skill levels of the workforce, including individuals with barriers to employment;

(4) An analysis of workforce development activities, including education and training, in the region. This analysis must include the strengths and weaknesses of workforce development activities and capacity to provide the workforce development activities to address the education and skill needs of the workforce, including individuals with barriers to employment, and the employment needs of employers;

(5) A description of the Local WDB's strategic vision to support regional economic growth and economic self-sufficiency. This must include goals for preparing an educated and skilled workforce (including youth and individuals with barriers to employment), and goals relating to the performance accountability measures based on performance indicators described in § 677.155(a)(1) of this chapter; and

(6) Taking into account analyses described in paragraphs (a)(1) through (4) of this section, a strategy to work with the entities that carry out the core

programs and required partners to align resources available to the local area, to achieve the strategic vision and goals described in paragraph (a)(5) of this section.

(b) The plan must include a description of the following requirements at WIOA secs. 108(b)(2)–(21):

(1) The workforce development system in the local area that identifies:

(i) The programs that are included in the system; and

(ii) How the Local WDB will support the strategy identified in the State Plan under § 676.105 of this chapter and work with the entities carrying out core programs and other workforce development programs, including programs of study authorized under the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*) to support service alignment;

(2) How the Local WDB will work with entities carrying out core programs to:

(i) Expand access to employment, training, education, and supportive services for eligible individuals, particularly eligible individuals with barriers to employment;

(ii) Facilitate the development of career pathways and co-enrollment, as appropriate, in core programs; and

(iii) Improve access to activities leading to a recognized postsecondary credential (including a credential that is an industry-recognized certificate or certification, portable, and stackable);

(3) The strategies and services that will be used in the local area:

(i) To facilitate engagement of employers in workforce development programs, including small employers and employers in in-demand industry sectors and occupations;

(ii) To support a local workforce development system that meets the needs of businesses in the local area;

(iii) To better coordinate workforce development programs and economic development;

(iv) To strengthen linkages between the one-stop delivery system and unemployment insurance programs; and

(v) That may include the implementation of initiatives such as incumbent worker training programs, on-the-job training programs, customized training programs, industry and sector strategies, career pathways initiatives, utilization of effective business intermediaries, and other business services and strategies designed to meet the needs of regional employers. These initiatives must support the strategy described in paragraph (b)(3) of this section;

(4) An examination of how the Local WDB will coordinate local workforce investment activities with regional economic development activities that are carried out in the local area and how the Local WDB will promote entrepreneurial skills training and microenterprise services;

(5) The one-stop delivery system in the local area, including:

(i) How the Local WDB will ensure the continuous improvement of eligible providers through the system and that such providers will meet the employment needs of local employers, workers, and job seekers;

(ii) How the Local WDB will facilitate access to services provided through the one-stop delivery system, including in remote areas, through the use of technology and other means;

(iii) How entities within the one-stop delivery system, including one-stop operators and the one-stop partners, will comply with WIOA sec. 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) regarding the physical and programmatic accessibility of facilities, programs and services, technology, and materials for individuals with disabilities, including providing staff training and support for addressing the needs of individuals with disabilities; and

(iv) The roles and resource contributions of the one-stop partners;

(6) A description and assessment of the type and availability of adult and dislocated worker employment and training activities in the local area;

(7) A description of how the Local WDB will coordinate workforce investment activities carried out in the local area with statewide rapid response activities;

(8) A description and assessment of the type and availability of youth workforce investment activities in the local area including activities for

youth who are individuals with disabilities, which must include an identification of successful models of such activities;

(9) How the Local WDB will coordinate relevant secondary and postsecondary education programs and activities with education and workforce investment activities to coordinate strategies, enhance services, and avoid duplication of services;

(10) How the Local WDB will coordinate WIOA title I workforce investment activities with the provision of transportation and other appropriate supportive services in the local area;

(11) Plans, assurances, and strategies for maximizing coordination, improving service delivery, and avoiding duplication of Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) services and other services provided through the one-stop delivery system;

(12) How the Local WDB will coordinate WIOA title I workforce investment activities with adult education and literacy activities under WIOA title II. This description must include how the Local WDB will carry out the review of local applications submitted under title II consistent with WIOA secs. 107(d)(11)(A) and (B)(i) and WIOA sec. 232;

(13) Copies of executed cooperative agreements which define how all local service providers, including additional providers, will carry out the requirements for integration of and access to the entire set of services available in the local one-stop delivery system. This includes cooperative agreements (as defined in WIOA sec. 107(d)(11)) between the Local WDB or other local entities described in WIOA sec. 101(a)(11)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 721(a)(11)(B)) and the local office of a designated State agency or designated State unit administering programs carried out under title I of the Rehabilitation Act (29 U.S.C. 720 *et seq.*) (other than sec. 112 or part C of that title (29 U.S.C. 732, 741) and subject to sec. 121(f)) in accordance with sec. 101(a)(11) of the Rehabilitation Act (29 U.S.C. 721(a)(11)) with respect to efforts that will enhance the provision of services to individuals with disabilities and to other individuals, such as cross training of staff, technical assistance, use and sharing of information, cooperative efforts with employers, and other efforts at cooperation, collaboration, and coordination;

(14) An identification of the entity responsible for the disbursal of grant funds described in WIOA sec. 107(d)(12)(B)(i)(III), as determined by the chief elected official or the Governor under WIOA sec. 107(d)(12)(B)(i);

(15) The competitive process that will be used to award the subgrants and contracts for WIOA title I activities;

(16) The local levels of performance negotiated with the Governor and chief elected official consistent with WIOA sec. 116(c), to be used to measure the performance of the local area and to be used by the Local WDB for measuring the performance of the local fiscal agent (where appropriate), eligible providers under WIOA title I subtitle B, and the one-stop delivery system in the local area;

(17) The actions the Local WDB will take toward becoming or remaining a high-performing WDB, consistent with the factors developed by the State WDB;

(18) How training services outlined in WIOA sec. 134 will be provided through the use of individual training accounts, including, if contracts for training services will be used, how the use of such contracts will be coordinated with the use of individual training accounts under that chapter, and how the Local WDB will ensure informed customer choice in the selection of training programs regardless of how the training services are to be provided;

(19) The process used by the Local WDB, consistent with WIOA sec. 108(d), to provide a 30-day public comment period prior to submission of the plan, including an opportunity to have input into the development of the local plan, particularly for representatives of businesses, education, and labor organizations;

(20) How one-stop centers are implementing and transitioning to an integrated, technology-enabled intake and case management information system for programs carried out under WIOA and by one-stop partners; and

(21) The direction given by the Governor and the Local WDB to the one-

stop operator to ensure priority for adult career and training services will be given to recipients of public assistance, other low-income individuals, and individuals who are basic skills deficient consistent with WIOA sec. 134(c)(3)(E) and § 680.600 of this chapter.

(c) The local plan must include any additional information required by the Governor.

(d) The local plan must identify the portions that the Governor has designated as appropriate for common response in the regional plan where there is a shared regional responsibility, as permitted by § 679.540(b).

(e) Comments submitted during the public comment period that represent disagreement with the plan must be submitted with the local plan.

§ 679.570 What are the requirements for approval of a local plan?

(a) Consistent with the requirements at § 679.520 the Governor must review completed plans (including a modification to the plan). Such plans will be considered approved 90 days after the Governor receives the plan unless the Governor determines in writing that:

(1) There are deficiencies in workforce investment activities that have been identified through audits and the local area has not made acceptable progress in implementing plans to address deficiencies; or

(2) The plan does not comply with applicable provisions of WIOA and the WIOA regulations, including the required consultations and public comment provisions, and the nondiscrimination requirements of 29 CFR part 38.

(3) The plan does not align with the State Plan, including with regard to the alignment of the core programs to support the strategy identified in the State Plan in accordance with WIOA sec. 102(b)(1)(E) and § 676.105 of this chapter.

(b) In cases where the State is a single local area:

(1) The State must incorporate the local plan into the State's Unified or Combined State Plan and submit it to the U.S. Department of Labor in accordance with the procedures described in § 676.105 of this chapter.

(2) The Secretary of Labor performs the roles assigned to the Governor as they relate to local planning activities.

(3) The Secretary of Labor will issue planning guidance for such States.

§ 679.580 When must the local plan be modified?

(a) Consistent with the requirements at § 679.530, the Governor must establish procedures governing the modification of local plans.

(b) At the end of the first 2-year period of the 4-year local plan, each Local WDB, in partnership with the appropriate chief elected officials, must review the local plan and prepare and submit modifications to the local plan to reflect changes:

(1) In labor market and economic conditions; and

(2) Other factors affecting the implementation of the local plan, including but not limited to:

(i) Significant changes in local economic conditions;

(ii) Changes in the financing available to support WIOA title I and partner-provided WIOA services;

(iii) Changes to the Local WDB structure; and

(iv) The need to revise strategies to meet local performance goals.

Subpart E—Waivers/WorkFlex (Workforce Flexibility Plan)

§ 679.600 What is the purpose of the general statutory and regulatory waiver authority in the Workforce Innovation and Opportunity Act?

(a) The purpose of the general statutory and regulatory waiver authority provided at sec. 189(i)(3) of the WIOA is to provide flexibility to States and local areas and enhance their ability to improve the statewide workforce development system to achieve the goals and purposes of WIOA.

(b) A waiver may be requested to address impediments to the implementation of a Unified or Combined State Plan, including the continuous improvement strategy, consistent with the purposes of title I of WIOA as identified in § 675.100 of this chapter.

§ 679.610 What provisions of the Workforce Innovation and Opportunity Act and the Wagner-Peyser Act may be waived, and what provisions may not be waived?

(a) The Secretary may waive for a State, or local area in a State, any of the statutory or regulatory requirements of subtitles A, B and E of title I of WIOA, except for requirements relating to:

(1) Wage and labor standards;

(2) Non-displacement protections;

(3) Worker rights;

(4) Participation and protection of workers and participants;

(5) Grievance procedures and judicial review;

(6) Nondiscrimination;

(7) Allocation of funds to local areas;

(8) Eligibility of providers or participants;

(9) The establishment and functions of local areas and Local WDBs;

(10) Procedures for review and approval of State and Local plans;

(11) The funding of infrastructure costs for one-stop centers; and

(12) Other requirements relating to the basic purposes of title I of WIOA described in § 675.100 of this chapter.

(b) The Secretary may waive for a State, or local area in a State, any of the statutory or regulatory requirements of secs. 8 through 10 of the Wagner- Peyser Act (29 U.S.C. 49g–49i) except for requirements relating to:

(1) The provision of services to unemployment insurance claimants and veterans; and

(2) Universal access to the basic labor exchange services without cost to job seekers.

§ 679.620 Under what conditions may a Governor request, and the Secretary approve, a general waiver of statutory or regulatory requirements under the Workforce Innovation and Opportunity Act?

(a) The Secretary will issue guidelines under which the States may request general waivers of WIOA and Wagner-Peyser Act requirements.

(b) A Governor may request a general waiver in consultation with appropriate chief elected officials:

(1) By submitting a waiver plan which may accompany the State's WIOA 4-year Unified or Combined State Plan or 2-year modification; or

(2) After a State's WIOA Plan is approved, by separately submitting a waiver plan.

(c) A Governor's waiver request may seek waivers for the entire State or for one or more local areas within the State.

(d) A Governor requesting a general waiver must submit to the Secretary a plan to improve the statewide workforce development system that:

(1) Identifies the statutory or regulatory requirements for which a waiver is requested and the goals that the State or local area, as appropriate, intends to achieve as a result of the waiver and how those goals relate to the Unified or Combined State Plan;

(2) Describes the actions that the State or local area, as appropriate, has undertaken to remove State or local statutory or regulatory barriers;

(3) Describes the goals of the waiver and the expected programmatic outcomes if the request is granted;

(4) Describes how the waiver will align with the Department's policy priorities, such as:

(i) Supporting employer engagement;

(ii) Connecting education and training strategies;

(iii) Supporting work-based learning;

(iv) Improving job and career results; and

(v) Other priorities as articulated in guidance;

(5) Describes the individuals affected by the waiver, including how the waiver will impact services for disadvantaged populations or individuals with multiple barriers to employment; and

(6) Describes the processes used to:

(i) Monitor the progress in implementing the waiver;

(ii) Provide notice to any Local WDB affected by the waiver;

(iii) Provide any Local WDB affected by the waiver an opportunity to comment on the request;

(iv) Ensure meaningful public comment, including comment by business and organized labor, on the waiver; and

(v) Collect and report information about waiver outcomes in the State's WIOA Annual Report.

(7) The Secretary may require that States provide the most recent data

available about the outcomes of the existing waiver in cases where the State seeks renewal of a previously approved waiver.

(e) The Secretary will issue a decision on a waiver request within 90 days after the receipt of the original waiver request.

(f) The Secretary will approve a waiver request if and only to the extent that:

(1) The Secretary determines that the requirements for which a waiver is requested impede the ability of either the State or local area to implement the State's Plan to improve the statewide workforce development system;

(2) The Secretary determines that the waiver plan meets all of the requirements of WIOA sec. 189(i)(3) and §§ 679.600 through 679.620; and

(3) The State has executed a memorandum of understanding (MOU) with the Secretary requiring the State to meet, or ensure that the local area meets, agreed-upon outcomes and to implement other appropriate measures to ensure accountability.

(g) A waiver may be approved for as long as the Secretary determines appropriate, but for not longer than the duration of the State's existing Unified or Combined State Plan.

(h) The Secretary may revoke a waiver granted under this section if the Secretary determines that the State has failed to meet the agreed upon outcomes, measures, failed to comply with the terms and conditions in the MOU described in paragraph (f) of this section or any other document establishing the terms and conditions of the waiver, or if the waiver no longer meets the requirements of §§ 679.600 through 679.620.

§ 679.630 Under what conditions may the Governor submit a workforce flexibility plan?

(a) A State may submit to the Secretary, and the Secretary may approve, a workforce flexibility (workflex) plan under which the State is authorized to waive, in accordance with the plan:

(1) Any of the statutory or regulatory requirements under title I of WIOA applicable to local areas, if the local area requests the waiver in a waiver application, except for:

(i) Requirements relating to the basic purposes of title I of WIOA described in § 675.100 of this chapter;

(ii) Wage and labor standards;

(iii) Grievance procedures and judicial review;

(iv) Nondiscrimination;

(v) Eligibility of participants;

(vi) Allocation of funds to local areas;

(vii) Establishment and functions of local areas and Local WDBs;

(viii) Procedures for review and approval of local plans; and

(ix) Worker rights, participation, and protection.

(2) Any of the statutory or regulatory requirements applicable to the State under secs. 8 through 10 of the Wagner-Peyser Act (29 U.S.C. 49g-49i), except for requirements relating to:

(i) The provision of services to unemployment insurance claimants and veterans; and

(ii) Universal access to basic labor exchange services without cost to job seekers.

(3) Any of the statutory or regulatory requirements applicable under the Older Americans Act of 1965 (OAA) (42 U.S.C. 3001 *et seq.*), to State agencies on aging with respect to activities carried out using funds allotted under OAA sec. 506(b) (42 U.S.C. 3056d(b)), except for requirements relating to:

(i) The basic purposes of OAA;

(ii) Wage and labor standards;

(iii) Eligibility of participants in the activities; and

(iv) Standards for grant agreements.

(b) A workforce flexibility plan submitted under paragraph (a) of this section must include descriptions of:

(1) The process by which local areas in the State may submit and obtain State approval of applications for waivers of requirements under title I of WIOA;

(2) A description of the criteria the State will use to approve local area waiver requests and how such requests support implementation of the goals identified State Plan;

(3) The statutory and regulatory requirements of title I of WIOA that are likely to be waived by the State under the workforce flexibility plan;

(4) The statutory and regulatory requirements of secs. 8 through 10 of the

Wagner-Peyser Act that are proposed for waiver, if any;

(5) The statutory and regulatory requirements of the OAA that are proposed for waiver, if any;

(6) The outcomes to be achieved by the waivers described in paragraphs (b)(1) through (5) of this section including, where appropriate, revisions to adjusted levels of performance included in the State or local plan under title I of WIOA, and a description of the data or other information the State will use to track and assess outcomes; and

(7) The measures to be taken to ensure appropriate accountability for Federal funds in connection with the waivers.

(c) A State's workforce flexibility plan may accompany the State's Unified or Combined State Plan, 2-year modification, or may be submitted separately as a modification to that plan.

(d) The Secretary may approve a workforce flexibility plan consistent with the period of approval of the State's Unified or Combined State Plan, and not for more than 5 years.

(e) Before submitting a workforce flexibility plan to the Secretary for approval, the State must provide adequate notice and a reasonable opportunity for comment on the proposed waiver requests under the workforce flexibility plan to all interested parties and to the general public.

(f) The Secretary will issue guidelines under which States may request designation as a work-flex State. These guidelines may require a State to implement an evaluation of the impact of work-flex in the State.

§ 679.640 What limitations apply to the State's workforce flexibility plan authority under the Workforce Innovation and Opportunity Act?

(a)(1) Under work-flex waiver authority a State must not waive the WIOA, Wagner-Peyser Act or OAA requirements which are excepted from the work-flex waiver authority and described in § 679.630(a).

(2) Requests to waive statutory and regulatory requirements of title I of WIOA applicable at the State level may not be granted under work-flex waiver authority granted to a State. Such requests only may be granted by the Secretary under the general waiver authority described at §§ 679.610 through 679.620.

(b) As required in § 679.630(b)(6), States must address the outcomes to result from work-flex waivers as part of its workforce flexibility plan. The Secretary may terminate a State's work-flex designation if the State fails to meet agreed-upon outcomes or other terms and conditions contained in its workforce flexibility plan.

PART 680—ADULT AND DISLOCATED WORKER ACTIVITIES UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Subpart A—Delivery of Adult and Dislocated Worker Activities Under Title I of the Workforce Innovation and Opportunity Act

Sec.

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Subpart A—Delivery of Adult and Dislocated Worker Activities Under Title I of the Workforce Innovation and Opportunity Act

§ 680.100 What is the role of the adult and dislocated worker programs in the one-stop delivery system?

(a) The one-stop delivery system is the basic delivery system for adult and dislocated worker services. Through this system, adults and dislocated workers can access a continuum of services. The services are classified as career and training services.

(b) The chief elected official or his/her designee(s), as the local grant recipient(s) for the adult and dislocated worker programs, is a required one-stop partner and is subject to the provisions relating to such partners described in part 678 of this chapter. Consistent with those provisions:

(1) Career services for adults and dislocated workers must be made available in at least one one-stop center in each local area. Services also may be available elsewhere, either at affiliated sites or at specialized centers. For example, specialized centers may be established to serve workers being dislocated from a particular employer or industry, or to serve residents of public housing.

(2) Through the one-stop delivery system, adults and dislocated workers needing training are provided Individual Training Accounts (ITAs) and access to lists of eligible training providers and programs of training. These lists contain quality consumer information, including cost and performance information for each of the providers' programs, so that participants can make informed choices on where to use their ITAs. (ITAs are more fully discussed in subpart C of this part.)

§ 680.110 When must adults and dislocated workers be registered and considered a participant?

(a) Registration is the process for collecting information to support a determination of eligibility. This information may be collected through methods that include electronic data transfer, personal interview, or an individual's application. Individuals are considered participants when they have received a Workforce Innovation and Opportunity Act (WIOA) service other than self-service or information-only activities and have satisfied all applicable programmatic requirements for the provision of services, such as eligibility determination (*see* § 677.150(a) of this chapter).

(b) Adults and dislocated workers who receive services funded under WIOA title I other than self-service or information-only activities must be registered and must be a participant.

(c) EO data, as defined in § 675.300 of this chapter, must be collected on every individual who is interested in being considered for WIOA title I financially assisted aid, benefits, services, or training by a recipient, and who has signified that interest by submitting personal information in response to a

request from the grant recipient or designated service provider.

§ 680.120 What are the eligibility criteria for career services for adults in the adult and dislocated worker programs?

To be eligible to receive career services as an adult in the adult and dislocated worker programs, an individual must be 18 years of age or older. To be eligible for any dislocated worker programs, an eligible adult must meet the criteria of § 680.130. Eligibility criteria for training services are found at § 680.210.

§ 680.130 What are the eligibility criteria for career services for dislocated workers in the adult and dislocated worker programs?

(a) To be eligible to receive career services as a dislocated worker in the adult and dislocated worker programs, an individual must meet the definition of ''dislocated worker'' at WIOA sec. 3(15). Eligibility criteria for training services are found at § 680.210.

(b) Governors and Local Workforce Development Boards (WDBs) may establish policies and procedures for one-stop centers to use in determining an individual's eligibility as a dislocated worker, consistent with the definition at WIOA sec. 3(15). These policies and procedures may address such conditions as:

(1) What constitutes a ''general announcement'' of plant closing under WIOA sec. 3(15)(B)(ii) or (iii);

(2) What constitutes ''unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters'' for determining the eligibility of self-employed individuals, including family members and farm workers or ranch hands, under WIOA sec. 3(15)(C); and

(3) What constitutes ''unlikely to return to a previous industry or occupation'' under WIOA sec. 3(15)(A)(iii), consistent with § 680.660.

§ 680.140 What Workforce Innovation and Opportunity Act title I adult and dislocated worker services are Local Workforce Development Boards required and permitted to provide?

(a) WIOA title I formula funds allocated to local areas for adults and dislocated workers must be used to provide career and training services through the one-stop delivery system. Local WDBs determine the most appropriate mix of these services, but both types must be available for eligible adults and dislocated workers. Different eligibility criteria apply for each type of services. *See* §§ 680.120, 680.130, and 680.210.

(b) WIOA title I funds also may be used to provide the additional services described in WIOA sec. 134(d), including:

(1) Job seeker services, such as:

(i) Customer support to enable individuals with barriers to employment (including individuals with disabilities) and veterans, to navigate among multiple services and activities;

(ii) Training programs for displaced homemakers and for individuals training for nontraditional employment (as defined in WIOA sec. 3(37) as occupations or fields of work in which individuals of one gender comprise less than 25 percent of the individuals so employed), in conjunction with programs operated in the local area;

(iii) Work support activities for low-wage workers, in coordination with one-stop partners, which will provide opportunities for these workers to retain or enhance employment. These activities may include any activities available under the WIOA adult and dislocated worker programs in coordination with activities and resources available through partner programs. These activities may be provided in a manner that enhances the worker's ability to participate, for example by providing them at nontraditional hours or providing on-site child care;

(iv) Supportive services, including needs-related payments, as described in subpart G of this part; and

(v) Transitional jobs, as described in § 680.190, to individuals with barriers to

employment who are chronically unemployed or have an inconsistent work history;

(2) Employer services, such as:

(i) Customized screening and referral of qualified participants in training services to employers;

(ii) Customized employment-related services to employers, employer associations, or other such organization on a fee-for-service basis that are in addition to labor exchange services available to employers under the Wagner-Peyser Act Employment Service;

(iii) Activities to provide business services and strategies that meet the workforce investment needs of area employers, as determined by the Local WDB and consistent with the local plan (*see* § 678.435 of this chapter and WIOA sec. 134(d)(1)(A)(ix)); and

(3) Coordination activities, such as:

(i) Employment and training activities in coordination with child support enforcement activities, as well as child support services and assistance activities, of the State and local agencies carrying out part D of title IV of the Social Security Act (42 U.S.C. 651 *et seq.*);

(ii) Employment and training activities in coordination with cooperative extension programs carried out by the Department of Agriculture;

(iii) Employment and training activities in coordination with activities to facilitate remote access to services provided through a one-stop delivery system, including facilitating access through the use of technology;

(iv) Improving coordination between workforce investment activities and economic development activities carried out within the local area involved, and to promote entrepreneurial skills training and microenterprise services;

(v) Improving services and linkages between the local workforce development system (including the local one-stop delivery system) and employers, including small employers, in the local area;

(vi) Strengthening linkages between the one-stop delivery system and the unemployment insurance programs; and

(vii) Improving coordination between employment and training activities and programs carried out in the local area for individuals with disabilities, including programs carried out by State agencies relating to intellectual disabilities and developmental disabilities, activities carried out by Statewide Independent Living Councils established under sec. 705 of the Rehabilitation Act of 1973 (29 U.S.C. 796d), programs funded under part B of chapter 1 of title VII of such Act (29 U.S.C. 796e *et seq.*), and activities carried out by centers for independent living, as defined in sec. 702 of such Act (29 U.S.C. 796a);

(4) Implementing a Pay-for-Performance contract strategy for training services in accordance with §§ 683.500 through 683.530 of this chapter for which up to 10 percent of the Local WDB's total adult and dislocated worker funds may be used;

(5) Technical assistance for one-stop centers, partners, and eligible training providers (ETPs) on the provision of service to individuals with disabilities in local areas, including staff training and development, provision of outreach and intake assessments, service delivery, service coordination across providers and programs, and development of performance accountability measures;

(6) Activities to adjust the economic self-sufficiency standards referred to in WIOA sec. 134(a)(3)(A)(xii) for local factors or activities to adopt, calculate or commission for approval, economic self-sufficiency standards for the local areas that specify the income needs of families, by family size, the number and ages of children in the family, and sub-State geographical considerations;

(7) Implementing promising service to workers and businesses, which may include support for education, training, skill upgrading, and statewide networking for employees to become workplace learning advisors and maintain proficiency in carrying out the activities associated with such advising; and

(8) Incumbent worker training programs, as described in subpart F of this part.

§ 680.150 What career services must be provided to adults and dislocated workers?

(a) At a minimum, all of the basic career services described in WIOA secs. 134(c)(2)(A)(i)–(xi) and § 678.430(a) of this chapter must be provided in each local area through the one-stop delivery system.

(b) Individualized career services described in WIOA sec. 134(c)(2)(A)(xii) and § 678.430(b) of this chapter must be made available, if determined appropriate in order for an individual to obtain or retain employment.

(c) Follow-up services, as described in WIOA sec. 134(c)(2)(A)(xiii) and § 678.430(c) of this chapter, must be made available, as determined appropriate by the Local WDB, for a minimum of 12 months following the first day of employment, to participants who are placed in unsubsidized employment.

§ 680.160 How are career services delivered?

Career services must be provided through the one-stop delivery system. Career services may be provided directly by the one-stop operator or through contracts with service providers that are approved by the Local WDB. The Local WDB only may be a provider of career services when approved by the chief elected official and the Governor in accordance with the requirements of WIOA sec. 107(g)(2) and § 679.410 of this chapter.

§ 680.170 What is the individual employment plan?

The individual employment plan (IEP) is an individualized career service, under WIOA sec. 134(c)(2)(A)(xii)(II), that is developed jointly by the participant and career planner when determined appropriate by the one-stop center or one-stop partner. The plan is an ongoing strategy to identify employment goals, achievement objectives, and an appropriate combination of services for the participant to achieve the employment goals.

§ 680.180 What is an internship or work experience for adults and dislocated workers?

For the purposes of WIOA sec. 134(c)(2)(A)(xii)(VII), an internship or work experience is a planned, structured learning experience that takes place in a workplace for a limited period of time. Internships and other work experience may be paid or unpaid, as appropriate and consistent with other laws, such as the Fair Labor Standards Act. An internship or other work experience may be arranged within the private for profit sector, the non-profit sector, or the public sector. Labor standards apply in any work experience setting where an employee/employer relationship, as defined by the Fair Labor Standards Act, exists. Transitional jobs are a type of work experience, as described in §§ 680.190 and 680.195.

§ 680.190 What is a transitional job?

A transitional job is one that provides a time-limited work experience, that is wage-paid and subsidized, and is in the public, private, or non-profit sectors for those individuals with barriers to employment who are chronically unemployed or have inconsistent work history, as determined by the Local WDB. These jobs are designed to enable an individual to establish a work history, demonstrate work success in an employee-employer relationship, and develop the skills that lead to unsubsidized employment.

§ 680.195 What funds may be used for transitional jobs?

The local area may use up to 10 percent of their combined total of adult and dislocated worker allocations for transitional jobs as described in § 680.190. Transitional jobs must be combined with comprehensive career services (*see* § 680.150) and supportive services (*see* § 680.900).

Subpart B—Training Services

§ 680.200 What are training services for adults and dislocated workers?

Types of training services are listed in WIOA sec. 134(c)(3)(D) and in paragraphs (a) through (k) of this section.

This list is not all-inclusive and additional training services may be provided.

(a) Occupational skills training, including training for nontraditional employment;

(b) On-the-job training (OJT) (*see* §§ 680.700, 680.710, 680.720, and 680.730);

(c) Incumbent worker training, in accordance with WIOA sec. 134(d)(4) and §§ 680.780, 680.790, 680.800, 680.810, and 680.820;

(d) Programs that combine workplace training with related instruction, which may include cooperative education programs;

(e) Training programs operated by the private sector;

(f) Skills upgrading and retraining;

(g) Entrepreneurial training;

(h) Transitional jobs in accordance with WIOA sec 134(d)(5) and §§ 680.190 and 680.195;

(i) Job readiness training provided in combination with services listed in paragraphs (a) through (h) of this section;

(j) Adult education and literacy activities, including activities of English language acquisition and integrated education and training programs, provided concurrently or in combination with training services listed in paragraphs (a) through (g) of this section; and

(k) Customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of the training (*see* §§ 680.760 and 680.770).

§ 680.210 Who may receive training services?

Under WIOA sec. 134(c)(3)(A) training services may be made available to employed and unemployed adults and dislocated workers who:

(a) A one-stop center or one-stop partner determines, after an interview, evaluation, or assessment, and career planning, are:

(1) Unlikely or unable to obtain or retain employment that leads to economic self-sufficiency or wages comparable to or higher than wages from previous employment through career services;

(2) In need of training services to obtain or retain employment leading to economic self-sufficiency or wages comparable to or higher than wages from previous employment; and

(3) Have the skills and qualifications to participate successfully in training services;

(b) Select a program of training services that is directly linked to the employment opportunities in the local area or the planning region, or in another area to which the individuals are willing to commute or relocate;

(c) Are unable to obtain grant assistance from other sources to pay the costs of such training, including such sources as State-funded training funds, Trade Adjustment Assistance (TAA), and Federal Pell Grants established under title IV of the Higher Education Act of 1965, or require WIOA assistance in addition to other sources of grant assistance, including Federal Pell Grants (provisions relating to fund coordination are found at § 680.230 and WIOA sec. 134(c)(3)(B)); and

(d) If training services are provided through the adult funding stream, are determined eligible in accordance with the State and local priority system in effect for adults under WIOA sec. 134(c)(3)(E) and § 680.600.

§ 680.220 Are there particular career services an individual must receive before receiving training services under the Workforce Innovation and Opportunity Act?

(a) Yes, except as provided by paragraph (b) of this section, an individual must at a minimum receive either an interview, evaluation, or assessment, and career planning or any other method through which the one-stop center or partner can obtain enough information to make an eligibility determination to be determined eligible for training services under WIOA sec. 134(c)(3)(A)(i) and § 680.210. Where appropriate, a recent interview, evaluation, or assessment, may be used for the assessment purpose.

(b) The case file must contain a determination of need for training services under § 680.210 as determined through the interview, evaluation, or assessment, and career planning informed by local labor market information and training provider performance

information, or through any other career service received. There is no requirement that career services be provided as a condition to receipt of training services; however, if career services are not provided before training, the Local WDB must document the circumstances that justified its determination to provide training without first providing the services described in paragraph (a) of this section.

(c) There is no Federally required minimum time period for participation in career services before receiving training services.

§ 680.230 What are the requirements for coordination of Workforce Innovation and Opportunity Act training funds and other grant assistance?

(a) WIOA funding for training is limited to participants who:

(1) Are unable to obtain grant assistance from other sources to pay the costs of their training; or

(2) Require assistance beyond that available under grant assistance from other sources to pay the costs of such training. Programs and training providers must coordinate funds available to pay for training as described in paragraphs (b) and (c) of this section. In making the determination under this paragraph (a), one-stop centers may take into account the full cost of participating in training services, including the cost of support services and other appropriate costs.

(b) One-stop centers must coordinate training funds available and make funding arrangements with one-stop partners and other entities to apply the provisions of paragraph (a) of this section. One-stop centers must consider the availability of other sources of grants to pay for training costs such as Temporary Assistance for Needy Families (TANF), State-funded training funds, and Federal Pell Grants, so that WIOA funds supplement other sources of training grants.

(c) A WIOA participant may enroll in WIOA-funded training while his/her application for a Pell Grant is pending as long as the one-stop center has made arrangements with the training provider and the WIOA participant regarding allocation of the Pell Grant, if it is subsequently awarded. In that case, the training provider must reimburse the one-stop center the WIOA funds used to underwrite the training for the amount the Pell Grant covers, including any education fees the training provider charges to attend training. Reimbursement is not required from the portion of Pell Grant assistance disbursed to the WIOA participant for education-related expenses.

Subpart C—Individual Training Accounts

§ 680.300 How are training services provided?

Training services for eligible individuals are typically provided by training providers who receive payment for their services through an ITA. The ITA is a payment agreement established on behalf of a participant with a training provider. WIOA title I adult and dislocated workers purchase training services from State eligible training providers they select in consultation with the career planner, which includes discussion of program quality and performance information on the available eligible training providers. Payments from ITAs may be made in a variety of ways, including the electronic transfer of funds through financial institutions, vouchers, or other appropriate methods. Payments also may be made incrementally, for example, through payment of a portion of the costs at different points in the training course. Under limited conditions, as provided in § 680.320 and WIOA sec. 134(d)(3)(G), a Local WDB may contract for these services, rather than using an ITA for this purpose. In some limited circumstances, the Local WDB may itself provide the training services, but only if it obtains a waiver from the Governor for this purpose, and the Local WDB meets the other requirements of § 679.410 of this chapter and WIOA sec. 107(g)(1).

§ 680.310 Can the duration and amount of Individual Training Accounts be limited?

(a) Yes, the State or Local WDB may impose limits on ITAs, such as limitations on the dollar amount and/or duration.

(b) Limits to ITAs may be established in different ways:

(1) There may be a limit for an individual participant that is based on the needs identified in the IEP, such as the participant's occupational choice or goal and the level of training needed to succeed in that goal; or

(2) There may be a policy decision by the State WDB or Local WDB to establish a range of amounts and/or a maximum amount applicable to all ITAs.

(c) Limitations established by State or Local WDB policies must be described in the State or Local Plan, respectively, but must not be implemented in a manner that undermines WIOA's requirement that training services are provided in a manner that maximizes customer choice in the selection of an ETP. Exceptions to ITA limitations may be provided for individual cases and must be described in State or Local WDB policies.

(d) An individual may select training that costs more than the maximum amount available for ITAs under a State or local policy when other sources of funds are available to supplement the ITA. These other sources may include: Pell Grants; scholarships; severance pay; and other sources.

§ 680.320 Under what circumstances may mechanisms other than Individual Training Accounts be used to provide training services?

(a) Contracts for services may be used instead of ITAs only when one or more of the following five exceptions apply, and the local area has fulfilled the consumer choice requirements of § 680.340:

(1) When the services provided are on-the-job-training (OJT), customized training, incumbent worker training, or transitional jobs.

(2) When the Local WDB determines that there are an insufficient number of eligible training providers in the local area to accomplish the purpose of a system of ITAs. The determination process must include a public comment period for interested providers of at least 30 days, and be described in the Local Plan.

(3) When the Local WDB determines that there is a training services program of demonstrated effectiveness offered in the area by a community-based organization or another private organization to serve individuals with barriers to employment, as described in paragraph (b) of this section. The Local WDB must develop criteria to be used in determining demonstrated effectiveness, particularly as it applies to the individuals with barriers to employment to be served. The criteria may include:

(i) Financial stability of the organization;

(ii) Demonstrated performance in the delivery of services to individuals with barriers to employment through such means as program completion rate; attainment of the skills, certificates or degrees the program is designed to provide; placement after training in unsubsidized employment; and retention in employment; and

(iii) How the specific program relates to the workforce investment needs identified in the local plan.

(4) When the Local WDB determines that it would be most appropriate to contract with an institution of higher education (*see* WIOA sec. 3(28)) or other provider of training services in order to facilitate the training of multiple individuals in in-demand industry sectors or occupations, provided that the contract does not limit consumer choice.

(5) When the Local WDB is considering entering into a Pay-for-Performance contract, and the Local WDB ensures that the contract is consistent with § 683.510 of this chapter.

(b) Under paragraph (a)(3) of this section, individuals with barriers to employment include those individuals in one or more of the following categories, as prescribed by WIOA sec. 3(24):

(1) Displaced homemakers;

(2) Low-income individuals;

(3) Indians, Alaska Natives, and Native Hawaiians;

(4) Individuals with disabilities;

(5) Older individuals, *i.e.*, those aged 55 or over;

(6) Ex-offenders;

(7) Homeless individuals;

(8) Youth who are in or have aged out of the foster care system;

(9) Individuals who are English language learners, individuals who have

low levels of literacy, and individuals facing substantial cultural barriers;

(10) Eligible migrant and seasonal farmworkers, defined in WIOA sec. 167(i);

(11) Individuals within 2 years of exhausting lifetime eligibility under TANF (part A of title IV of the Social Security Act);

(12) Single-parents (including single pregnant women);

(13) Long-term unemployed individuals; or

(14) Other groups determined by the Governor to have barriers to employment.

(c) The Local Plan must describe the process to be used in selecting the providers under a contract for services.

§ 680.330 How can Individual Training Accounts, supportive services, and needs-related payments be used to support placing participating adults and dislocated workers into a registered apprenticeship program and support participants once they are in a registered apprenticeship program?

Registered apprenticeships automatically qualify to be a on a State's eligible training provider list (ETPL) as described in § 680.470.

(a) ITAs can be used to support placing participants in registered apprenticeship through:

(1) Pre-apprenticeship training, as defined in § 681.480 of this chapter; and

(2) Training services provided under a registered apprenticeship program.

(b) Supportive services may be provided as described in §§ 680.900 and 680.910.

(c) Needs-related payments may be provided as described in §§ 680.930, 680.940, 680.950, 680.960, and 680.970.

(d) Work-based training options also may be used to support participants in registered apprenticeship programs (*see* §§ 680.740 and 680.750).

§ 680.340 What are the requirements for consumer choice?

(a) Training services, whether under ITAs or under contract, must be provided in a manner that maximizes informed consumer choice in selecting an eligible provider.

(b) Each Local WDB, through the one-stop center, must make available to customers the State list of eligible training providers required in WIOA sec. 122(d). The list includes a description of the programs through which the providers may offer the training services, and the performance and cost information about those providers described in WIOA sec. 122(d). Additionally, the Local WDB must make available information identifying eligible providers as may be required by the Governor under WIOA sec. 122(h) (where applicable).

(c) An individual who has been determined eligible for training services under § 680.210 may select a provider described in paragraph (b) of this section after consultation with a career planner. Unless the program has exhausted training funds for the program year, the one-stop center must refer the individual to the selected provider, and establish an ITA for the individual to pay for training. For purposes of this paragraph (c), a referral may be carried out by providing a voucher or certificate to the individual to obtain the training.

(d) The cost of referral of an individual with an ITA to a training provider is paid by the applicable adult or dislocated worker program under title I of WIOA.

(e) Each Local WDB, through the one-stop center, may coordinate funding for ITAs with funding from other Federal, State, local, or private job training programs or sources to assist the individual in obtaining training services.

(f) Consistent with paragraph (a) of this section, priority consideration must be given to programs that lead to recognized postsecondary credentials (defined at WIOA sec. 3(52)) that are aligned with in-demand industry sectors or occupations in the local area.

§ 680.350 May Workforce Innovation and Opportunity Act title I adult and dislocated worker funds be used to directly support adult education and literacy activities?

Yes, under WIOA sec. 134(c)(3)(D)(x), title I funds may provide adult education and literacy activities if they are provided concurrently or in combination with one or more of the following training services:

(a) Occupational skills training, including training for nontraditional employment;

(b) OJT;

(c) Incumbent worker training (as described in §§ 680.780, 680.790, 680.800, 680.810, and 680.820);

(d) Programs that combined workplace training and related instruction, which may include cooperative education programs;

(e) Training programs operated by the private sector;

(f) Skill upgrading and retraining; or

(g) Entrepreneurial training.

Subpart D—Eligible Training Providers

§ 680.400 What is the purpose of this subpart?

(a) This subpart describes the process for determining eligible training providers and programs for WIOA title I, subtitle B adult, dislocated worker, and out-of-school youth (OSY) aged 16–24 training participants and for publicly disseminating the list of these providers with relevant information about their programs. The workforce development system established under WIOA emphasizes informed consumer choice, job-driven training, provider performance, and continuous improvement. The quality and selection of providers and programs of training services is vital to achieving these core principles.

(b) The State list of eligible training providers and programs and the related eligibility procedures ensure the accountability, quality and labor-market relevance of programs of training services that receive funds through WIOA title I, subtitle B. The State list of eligible training providers and programs also is a means for ensuring informed customer choice for individuals eligible for training. In administering the eligible training provider eligibility process, States and local areas must work to ensure that qualified providers offering a wide variety of job-driven programs of training services are available. The State list of eligible training providers and programs is made publicly available online through Web sites and searchable databases as well as any other means the State uses to disseminate information to consumers, including formats accessible to individuals with disabilities. The list must be accompanied by relevant performance and cost information and must be presented in a way that is easily understood, in order to maximize informed consumer choice and serve all significant population groups, and also must be available in an electronic format. The State eligible training provider performance reports, as required under WIOA sec. 116(d)(4), are addressed separately in § 677.230 of this chapter.

§ 680.410 What is an eligible training provider?

An ETP:

(a) Is the only type of entity that receives funding for training services, as defined in § 680.200, through an individual training account;

(b) Must be included on the State list of eligible training providers and programs under this subpart;

(c) Must provide a program of training services; and

(d) Must be one of the following types of entities:

(1) Institutions of higher education that provide a program which leads to a recognized postsecondary credential;

(2) Entities that carry out programs registered under the National Apprenticeship Act (29 U.S.C. 50 *et seq.*); or

(3) Other public or private providers of training services, which may include:

(i) Community-based organizations;

(ii) Joint labor-management organizations; and

(iii) Eligible providers of adult education and literacy activities under title II of WIOA if such activities are provided in combination with training services described at § 680.350.

§ 680.420 What is a "program of training services"?

A program of training services is one or more courses or classes, or a structured regimen, that provides the services in § 680.200 and leads to:

(a) An industry-recognized certificate or certification, a certificate of completion of a registered apprenticeship, a license recognized by the State involved or the Federal government, an associate or baccalaureate degree;

(b) Consistent with § 680.350, a secondary school diploma or its equivalent;

(c) Employment; or

(d) Measurable skill gains toward a credential described in paragraph (a) or (b) of this section or employment.

§ 680.430 Who is responsible for managing the training provider eligibility process?

(a) The Governor, in consultation with the State WDB, establishes the criteria, information requirements, and procedures, including procedures identifying the respective roles of the State and local areas, governing the eligibility of providers and programs of training services to receive funds through ITAs.

(b) The Governor may designate a State agency (or appropriate State entity) to assist in carrying out the process and procedures for determining the eligibility of training providers and programs of training services. The Governor or such agency (or appropriate State entity) is responsible for:

(1) Ensuring the development and maintenance of the State list of eligible training providers and programs, as described in §§ 680.450 (initial eligibility), 680.460 (continued eligibility), and 680.490 (performance and cost information reporting requirements);

(2) Ensuring that programs meet eligibility criteria and performance levels established by the State, including verifying the accuracy of the information;

(3) Removing programs that do not meet State-established program criteria or performance levels, as described in § 680.480(c);

(4) Taking appropriate enforcement actions against providers that intentionally provide inaccurate information, or that substantially violate the requirements of WIOA, as described in § 680.480(a) and (b); and

(5) Disseminating the State list of eligible training providers and programs, accompanied by performance and cost information relating to each program, to the public and the Local WDBs throughout the State, as further described in § 680.500.

(c) The Local WDB must:

(1) Carry out the procedures assigned to the Local WDB by the State, such as determining the initial eligibility of entities providing a program of training services, renewing the eligibility of providers and programs, and considering the possible termination of an eligible training provider due to the provider's submission of inaccurate eligibility and performance information or the provider's substantial violation of WIOA requirements;

(2) Work with the State to ensure there are sufficient numbers and types of providers of training services, including eligible providers with expertise in assisting individuals with disabilities and eligible providers with expertise in assisting adults in need of adult education and literacy activities described under WIOA sec. 107(d)(10)(E), serving the local area; and

(3) Ensure the dissemination and appropriate use of the State list of eligible training providers and programs through the local one-stop delivery system, including formats accessible to individuals with disabilities.

(d) The Local WDB may make recommendations to the Governor on the procedure used in determining eligibility of providers and programs.

(e) The Local WDB may, except with respect to registered apprenticeship programs:

(1) Require additional criteria and information from local providers as criteria to become or remain eligible in that local area; and

(2) Set higher levels of performance than those required by the State as criteria for local programs to become or remain eligible to provide services in that local area.

§ 680.440 [Reserved]

§ 680.450 What is the initial eligibility process for new providers and programs?

(a) All providers and programs that have not previously been eligible to provide training services under WIOA sec. 122 or WIA sec. 122, except for registered apprenticeship programs, must submit required information to be considered for initial eligibility in accordance with the Governor's procedures.

(b) Apprenticeship programs registered under the National Apprenticeship Act are exempt from initial eligibility procedures. Registered apprenticeship programs must be included and maintained on the State list of eligible training providers and programs as long as the program remains registered, unless the registered apprenticeship program is removed from the list for a reason set forth in § 680.470. Procedures for registered apprenticeship programs to be included and maintained on the list are described in § 680.470.

(c) In establishing the State requirements described in paragraph (e) of this section, the Governor must, in consultation with the State WDB, develop a procedure for determining the eligibility of training providers and programs. This procedure, which must be described in the State Plan, must be developed after:

(1) Soliciting and taking into consideration recommendations from Local WDBs and providers of training services within the State;

(2) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on the procedure; and

(3) Designating a specific time period for soliciting and considering the recommendations of Local WDBs and providers, and for providing an opportunity for public comment.

(d) For institutions of higher education that provide a program that leads to a recognized postsecondary credential and for other public or private providers of programs of training services, including joint labor-management organizations, and providers of adult education and literacy activities, the Governor must establish criteria and State requirements for providers and programs seeking initial eligibility.

(e) The Governor must require providers and programs seeking initial eligibility to provide verifiable program specific performance information. At a minimum, these criteria must require applicant providers to:

(1) Describe each program of training services to be offered;

(2) Provide information addressing a factor related to the indicators of performance, as described in WIOA secs. 116(b)(2)(A)(i)(I)–(IV) and § 680.460(g)(1) through (4) which include unsubsidized employment during the second quarter after exit, unsubsidized employment during the fourth quarter after exit, median earnings and credentials attainment;

(3) Describe whether the provider is in a partnership with a business;

(4) Provide other information the Governor may require in order to demonstrate high quality programs of training services, which may include information related to training services that lead to a recognized postsecondary credential; and

(5) Provide information that addresses alignment of the training services with in-demand industry sectors and occupations, to the extent possible.

(f) In establishing the initial eligibility procedures and criteria, the Governor may establish minimum performance standards, based on the performance information described in paragraph (e) of this section.

(g) Under WIOA sec. 122(b)(4)(B), eligible training providers receive initial eligibility for only 1 year for a particular program.

(h) After the initial eligibility expires, these initially eligible training providers are subject to the Governor's application procedures for continued eligibility, described at § 680.460, in order to remain eligible.

§ 680.460 What is the application procedure for continued eligibility?

(a) The Governor must establish an application procedure for eligible training providers and programs to maintain their continued eligibility. The application procedure must take into account the program's prior eligibility status.

(1) Training providers and programs that were previously eligible under WIA will be subject to the application procedure for continued eligibility after the close of the Governor's transition period for implementation.

(2) Training providers and programs that were not previously eligible under WIA and have been determined to be initially eligible under WIOA, under

the procedures described at § 680.450, will be subject to the application procedure for continued eligibility after their initial eligibility expires.

(b) The Governor must develop this procedure after:

(1) Soliciting and taking into consideration recommendations from Local WDBs and providers of training services within the State;

(2) Providing an opportunity for interested members of the public, including representatives of business and labor organizations, to submit comments on such procedure; and

(3) Designating a specific time period for soliciting and considering the recommendations of Local WDBs and providers, and for providing an opportunity for public comment.

(c) Procedures for registered apprenticeship programs to be included and maintained on the list are described in § 680.470. Apprenticeship programs registered under the National Apprenticeship Act must be included and maintained on the State list of eligible training providers and programs as long as the program remains registered, unless the registered apprenticeship program is removed from the list for a reason set forth in § 680.470.

(d) The application procedure must describe the roles of the State and local areas in receiving and reviewing provider applications and in making eligibility determinations.

(e) The application procedure must be described in the State Plan.

(f) In establishing eligibility criteria, the Governor must take into account:

(1) The performance of the eligible training provider's program on:

(i) The performance accountability measures described in WIOA secs. 116(b)(2)(A)(i)(I)–(IV) and the other matters required by WIOA sec. 122(b)(2);

(ii) Other appropriate measures of performance outcomes determined by the Governor for program participants receiving training services under WIOA title I, subtitle B, taking into consideration the characteristics of the population served and relevant economic conditions; and

(iii) Outcomes of the program for students in general with respect to employment and earnings as defined in WIOA sec. 116(b)(2).

(iv) All of these measures may include minimum performance standards.

(v) Until data from the conclusion of each performance indicator's first data cycle are available, the Governor may take into account alternate factors related to the measures described in paragraphs (f)(1)(i) through (iv) of this section.

(2) Ensuring access to training services throughout the State, including in rural areas, and through the use of technology;

(3) Information reported to State agencies on Federal and State training programs other than programs within WIOA title I, subtitle B;

(4) The degree to which programs of training services relate to in-demand industry sectors and occupations in the State;

(5) State licensure requirements of training providers;

(6) Encouraging the use of industry-recognized certificates and credentials;

(7) The ability of providers to offer programs of training services that lead to postsecondary credentials;

(8) The quality of the program of training services including a program that leads to a recognized postsecondary credential;

(9) The ability of the providers to provide training services to individuals who are employed and individuals with barriers to employment;

(10) Whether the providers timely and accurately submitted all of the information required for completion of eligible training provider performance reports required under WIOA sec. 116(d)(4) and all of the information required for initial and continued eligibility in this subpart; and

(11) Other factors that the Governor determines are appropriate in order to ensure: The accountability of providers; that one-stop centers in the State will meet the needs of local employers and participants; and, that participants will be given an informed choice among providers.

(g) The information requirements that the Governor establishes under

paragraph (f)(1) of this section must require eligible training providers to submit appropriate, accurate, and timely information for participants receiving training under WIOA title I, subtitle B. That information must include:

(1) The percentage of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(2) The percentage of program participants who are in unsubsidized employment during the fourth quarter after exit from the program;

(3) The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(4) The percentage of program participants who obtain a recognized postsecondary credential, or a secondary school diploma or its recognized equivalent during participation in or within 1 year after exit from the program;

(5) Information on recognized postsecondary credentials received by program participants;

(6) Information on cost of attendance, including costs of tuition and fees, for program participants;

(7) Information on the program completion rate for such participants.

(h) The eligibility criteria must require that:

(1) Providers submit performance and cost information as described in paragraph (g) of this section and in the Governor's procedures for each program of training services for which the provider has been determined to be eligible, in a timeframe and manner determined by the State, but at least every 2 years; and

(2) That the collection of information required to demonstrate compliance with the criteria is not unduly burdensome or costly to providers.

(i) The procedure for continued eligibility also must provide for the State biennially to review provider eligibility information to assess the renewal of training provider eligibility. Such procedures may establish minimum levels of training provider performance as criteria for continued eligibility.

(j) The procedure for biennial review of the provider eligibility must include verification of the registration status of registered apprenticeship programs and removal of any registered apprenticeship programs as described in § 680.470.

(k) The Governor may establish procedures and timeframes for providing technical assistance to eligible training providers who are not intentionally supplying inaccurate information or who have not substantially violated any of the requirements under this section but are failing to meet the criteria and information requirements due to undue cost or burden.

(l) The Governor's procedures must include what the Governor considers to be a substantial violation of the requirement to timely and accurately submit all of the information required for completion of the eligible training provider performance reports required under WIOA sec. 116(d)(4) and all of the information required for initial and continued eligibility in this subpart.

(1) The Governor's procedures on determining a substantial violation must take into account exceptional circumstances beyond the provider's control, such as natural disasters, unexpected personnel transitions, and unexpected technology-related issues.

(2) Providers who substantially violate the requirement in paragraph (g) of this section to timely and accurately submit all required information must be removed from the State list of eligible training providers and programs, as provided in § 680.480(b).

§ 680.470 What are the procedures for including and removing registered apprenticeship programs on a State list of eligible training providers and programs?

(a) All registered apprenticeship programs that are registered with the U.S. Department of Labor, Office of Apprenticeship, or a recognized State apprenticeship agency, are automatically eligible to be included in the State list of eligible training providers and programs. All registered apprenticeship programs must be informed of their automatic eligibility to be included on the list, and must be provided an opportunity to consent to their inclusion, before being placed on the State list of eligible training providers and programs. The Governor must establish a

mechanism for registered apprenticeship program sponsors in the State to be informed of their automatic eligibility and to indicate that the program sponsor wishes to be included on the State list of eligible training providers and programs. This mechanism must place minimal burden on registered apprenticeship program sponsors and must be developed in accordance with guidance from the U.S. Department of Labor Office of Apprenticeship or with the assistance of the recognized State apprenticeship agency, as applicable.

(b) Once on the State list of eligible training providers and programs, registered apprenticeship programs will remain on the list:

(1) Until they are deregistered;

(2) Until the registered apprenticeship program notifies the State that it no longer wants to be included on the list; or

(3) Until the registered apprenticeship program is determined to have intentionally supplied inaccurate information or to have substantially violated any provision of title I of WIOA or the WIOA regulations, including 29 CFR part 38.

(c) A registered apprenticeship program whose eligibility is terminated under paragraph (b)(3) of this section must be terminated for not less than 2 years and is liable to repay all youth, adult, and dislocated worker training funds it received during the period of noncompliance. The Governor must specify in the procedures required by § 680.480 which individual or entity is responsible for making these determinations and the process by which the determination will be made, which must include an opportunity for a hearing that meets the requirements of § 683.630(b) of this chapter.

(d) Inclusion of a registered apprenticeship in the State list of eligible training providers and programs allows an individual who is eligible to use WIOA title I, subtitle B funds to use those funds toward registered apprenticeship training, consistent with their availability and limitations as prescribed by § 680.300. The use of ITAs and other WIOA title I, subtitle B funds toward registered apprenticeship training is further described in § 680.330.

(e) The Governor is encouraged to consult with the State and Local WDBs, ETA's Office of Apprenticeship, recognized State apprenticeship agencies (where they exist in the Governor's State) or other State agencies, to establish voluntary reporting of performance information.

(f) Pre-apprenticeship providers that wish to provide training services to participants using WIOA title I, subtitle B funds are subject to the eligibility procedures of this subpart.

§ 680.480 May an eligible training provider lose its eligibility?

(a) Yes. A training provider must meet the Governors requirements for eligibility and provide accurate information in order to retain its status as an eligible training provider.

(b) Providers determined to have intentionally supplied inaccurate information or to have substantially violated any provision of title I of WIOA or the WIOA regulations, including 29 CFR part 38, must be removed from the State list of eligible training providers and programs in accordance with the enforcement provisions of WIOA sec. 122(f). A provider whose eligibility is terminated under these conditions must be terminated for not less than 2 years and is liable to repay all youth, adult, and dislocated worker training funds it received during the period of noncompliance. The Governor must specify in the procedures which individual or entity is responsible for making these determinations and the process by which the determination will be made, which must include an opportunity for a hearing that meets the requirements of § 683.630(b) of this chapter.

(c) As a part of the biennial review of eligibility established by the Governor, the State must remove programs of training services that fail to meet criteria established by the Governor to remain eligible, which may include failure to meet established minimum performance levels. Registered apprenticeship programs only may be removed for the reasons set forth in § 680.470.

(d) The Governor must establish an appeals procedure for providers of training services to appeal a denial of eligibility under this subpart that

meets the requirements of § 683.630(b) of this chapter, which explains the appeals process for denial or termination of eligibility of a provider of training services.

(e) Where a Local WDB has established higher minimum performance standards, according to § 680.430(e), the Local WDB may remove a program of training services from the eligible programs in that local area for failure to meet those higher performance standards. Training providers may appeal a denial of eligibility under § 683.630(b) of this chapter.

§ 680.490 What kind of performance and cost information must eligible training providers other than registered apprenticeship programs provide for each program of training services?

(a) In accordance with the State procedure under § 680.460(i), eligible training providers, except registered apprenticeship programs, must submit, at least every 2 years, appropriate, timely, and accurate performance and cost information.

(b) Program-specific performance information must include:

(1) The information described in WIOA sec. 122(b)(2)(A) for individuals participating in the programs of training services who are receiving assistance under WIOA. This information includes indicators of performance as described in WIOA secs. 116(b)(2)(I)–(IV) and § 680.460(g)(1) through (4);

(2) Information identifying the recognized postsecondary credentials received by such participants in § 680.460(g)(5);

(3) Program cost information, including tuition and fees, for WIOA participants in the program in § 680.460(g)(6); and

(4) Information on the program completion rate for WIOA participants in § 680.460(g)(7).

(c) Governors may require any additional performance information (such as the information described at WIOA sec. 122(b)(1)) that the Governor determines to be appropriate to determine, maintain eligibility, or better to inform consumers.

(d) Governors must establish a procedure by which a provider can demonstrate that providing additional information required under this section would be unduly burdensome or costly. If the Governor determines that providers have demonstrated such extraordinary costs or undue burden:

(1) The Governor must provide access to cost-effective methods for the collection of the information;

(2) The Governor may provide additional resources to assist providers in the collection of the information from funds for statewide workforce investment activities reserved under WIOA secs. 128(a) and 133(a)(1); or

(3) The Governor may take other steps to assist eligible training providers in collecting and supplying required information such as offering technical assistance.

§ 680.500 How is the State list of eligible training providers and programs disseminated?

(a) In order to assist participants in choosing employment and training activities, the Governor or State agency must disseminate the State list of eligible training providers and programs and accompanying performance and cost information to Local WDBs in the State and to members of the public online, including through Web sites and searchable databases, and through whatever other means the State uses to disseminate information to consumers, including the one-stop delivery system and its program partners throughout the State.

(b) The State list of eligible training providers and programs and information must be updated regularly and provider and program eligibility must be reviewed biennially according to the procedures established by the Governor in § 680.460(i).

(c) In order to ensure informed consumer choice, the State list of eligible training providers and programs and accompanying information must be widely available to the public through electronic means, including Web sites and searchable databases, as well as through any other means the State uses to disseminate information to consumers. The list and accompanying information must be available through the one-stop delivery system and its partners including the State's secondary and postsecondary education

systems. The list must be accessible to individuals seeking information on training outcomes, as well as participants in employment and training activities funded under WIOA, including those under § 680.210, and other programs. In accordance with WIOA sec. 188, the State list also must be accessible to individuals with disabilities.

(d) The State list of eligible training providers and programs must be accompanied by appropriate information to assist participants in choosing employment and programs of training services. Such information must include:

(1) Recognized postsecondary credential(s) offered;

(2) Provider information supplied to meet the Governor's eligibility procedure as described in §§ 680.450 and 680.460;

(3) Performance and cost information as described in § 680.490; and

(4) Additional information as the Governor determines appropriate.

(e) The State list of eligible training providers and programs and accompanying information must be made available in a manner that does not reveal personally identifiable information about an individual participant. In addition, in developing the information to accompany the State list described in § 680.490(b), disclosure of personally identifiable information from an education record must be carried out in accordance with the Family Educational Rights and Privacy Act, including the circumstances relating to prior written consent.

§ 680.510 In what ways can a Local Workforce Development Board supplement the information available from the State list of eligible training providers and programs?

(a) Local WDBs may supplement the criteria and information requirements established by the Governor in order to support informed consumer choice and the achievement of local performance indicators. However, the Local WDB may not do so for registered apprenticeship programs.

(b) This additional information may include:

(1) Information on programs of training services that are linked to occupations in demand in the local area;

(2) Performance and cost information, including program-specific performance and cost information, for the local outlet(s) of multi-site eligible training providers;

(3) Information that shows how programs are responsive to local requirements; and

(4) Other appropriate information related to the objectives of WIOA.

§ 680.520 May individuals choose training providers and programs located outside of the local area or outside of the State?

(a) An individual may choose training providers and programs outside of the local area provided the training program is on the State list, in accordance with local policies and procedures.

(b) An individual may choose eligible training providers and programs outside of the State consistent with State and local policies and procedures. State policies and procedures may provide for reciprocal or other agreements established with another State to permit eligible training providers in a State to accept ITAs provided by the other State.

§ 680.530 What eligibility requirements apply to providers of on-the-job-training, customized training, incumbent worker training, and other training exceptions?

(a) Providers of on-the-job training, customized training, incumbent worker training, internships, paid or unpaid work experience, or transitional jobs are not subject to the requirements applicable to entities listed on the eligible training provider list, and are not included on the State list of eligible training providers and programs.

(b) For providers of training described in paragraph (a) of this section, the Governor may establish performance criteria those providers must meet to receive funds under the adult or dislocated worker programs pursuant to a contract as provided in § 680.320.

(c) One-stop operators in a local area must collect such performance information as the Governor may require and determine whether the providers meet any performance criteria the

Governor may establish under paragraph (b) of this section.

(d) One-stop operators must disseminate information identifying providers and programs that have met the Governor's performance criteria, along with the relevant performance information about them, through the one-stop delivery system.

Subpart E—Priority and Special Populations

§ 680.600 What priority must be given to low-income adults and public assistance recipients and individuals who are basic skills deficient served with adult funds under title I of the Workforce Innovation and Opportunity Act?

(a) WIOA sec. 134(c)(3)(E) states that priority for individualized career services (*see* § 678.430(b) of this chapter) and training services funded with title I adult funds must be given to recipients of public assistance, other low-income individuals, and individuals who are basic skills deficient (as defined in WIOA sec. 3(5)(B)) in the local area.

(b) States and local areas must establish criteria by which the one-stop center will apply the priority under WIOA sec. 134(c)(3)(E). Such criteria may include the availability of other funds for providing employment and training-related services in the local area, the needs of the specific groups within the local area, and other appropriate factors.

(c) The priority established under paragraph (a) of this section does not necessarily mean that these services only may be provided to recipients of public assistance, other low-income individuals, and individuals who are basic skills deficient. The Local WDB and the Governor may establish a process that also gives priority to other individuals eligible to receive such services, provided that it is consistent with priority of service for veterans (*see* § 680.650) and the priority provisions of WIOA sec. 134(c)(3)(E), discussed above in paragraphs (a) and (b) of this section.

§ 680.610 Does the statutory priority for use of adult funds also apply to dislocated worker funds?

No, the statutory priority only applies to adult funds and only applies to providing individualized career services, as described in § 680.150(b), and training services. Funds allocated for dislocated workers are not subject to this requirement.

§ 680.620 How does the Temporary Assistance for Needy Families program relate to the one-stop delivery system?

The local TANF program is a required partner in the one-stop delivery system. Part 678 of this chapter describes the roles of such partners in the one-stop delivery system and it applies to the TANF program. TANF serves individuals who also may be served by the WIOA programs and, through appropriate linkages and referrals, these customers will have access to a broader range of services through the cooperation of the TANF program in the one-stop delivery system. TANF participants, who are determined to be WIOA eligible, and who need occupational skills training may be referred through the one-stop delivery system to receive WIOA training, when TANF grant and other grant funds are not available to the individual in accordance with § 680.230(a). WIOA participants who also are determined TANF eligible may be referred to the TANF program for assistance.

§ 680.630 How does a displaced homemaker qualify for services under title I of the Workforce Innovation and Opportunity Act?

(a) Individuals who meet the definitions of a ''displaced homemaker'' (*see* WIOA sec. 3(16)) qualify for career and training services with dislocated worker title I funds.

(b) Displaced homemakers also may qualify for career and training services with adult funds under title I if the requirements of this part are met (*see* §§ 680.120 and 680.600).

(c) Displaced homemakers also may be served in statewide employment and training projects conducted with reserve funds for innovative programs for

displaced homemakers, as described in § 682.210(c) of this chapter.

(d) The definition of displaced homemaker includes the dependent spouse of a member of the Armed Forces on active duty (as defined in sec. 101(d)(1) of title 10, United States Code) and whose family income is significantly reduced because of a deployment, a call or order to active duty under a provision of law referred to in sec. 101(a)(13)(B) of title 10, United State Code, a permanent change of station, or the service-connected death or disability of the member.

§ 680.640 May an individual with a disability whose family does not meet income eligibility criteria under the Workforce Innovation and Opportunity Act be eligible for priority as a low-income adult?

Yes, even if the family of an individual with a disability does not meet the income eligibility criteria, the individual with a disability is to be considered a low-income individual if the individual's own income:

(a) Meets the income criteria established in WIOA sec. 3(36)(A)(vi); or

(b) Meets the income eligibility criteria for payments under any Federal, State or local public assistance program (see WIOA sec. 3(36)(A)(i)).

§ 680.650 Do veterans receive priority of service under the Workforce Innovation and Opportunity Act?

Yes, veterans, as defined under WIOA sec. 3(63)(A) and 38 U.S.C. 101, receive priority of service in all Department of Labor-funded training programs under 38 U.S.C. 4215 and described in 20 CFR part 1010. A veteran still must meet each program's eligibility criteria to receive services under the respective employment and training program. For income-based eligibility determinations, amounts paid while on active duty or paid by the Department of Veterans Affairs (VA) for vocational rehabilitation, disability payments, or related VA-funded programs are not to be considered as income, in accordance with 38 U.S.C. 4213 and § 683.230 of this chapter.

§ 680.660 Are separating military service members eligible for dislocated worker activities under the Workforce Innovation and Opportunity Act?

If the separating service member is separating from the Armed Forces with a discharge that is anything other than dishonorable, the separating service member qualifies for dislocated worker activities based on the following criteria:

(a) The separating service member has received a notice of separation, a DD–214 from the Department of Defense, or other documentation showing a separation or imminent separation from the Armed Forces to satisfy the termination or layoff part of the dislocated worker eligibility criteria in WIOA sec. 3(15)(A)(i);

(b) The separating service member qualifies for the dislocated worker eligibility criteria on eligibility for or exhaustion of unemployment compensation in WIOA sec. 3(15)(A)(ii)(I) or (II); and,

(c) As a separating service member, the individual meets the dislocated worker eligibility criteria that the individual is unlikely to return to a previous industry or occupation in WIOA sec. 3(15)(A)(iii).

Subpart F—Work-Based Training

§ 680.700 What are the requirements for on-the-job training?

(a) OJT is defined at WIOA sec. 3(44). OJT is provided under a contract with an employer or registered apprenticeship program sponsor in the public, private non-profit, or private sector. Through the OJT contract, occupational training is provided for the WIOA participant in exchange for the reimbursement, typically up to 50 percent of the wage rate of the participant, for the extraordinary costs of providing the training and supervision related to the training. In limited circumstances, as provided in WIOA sec. 134(c)(3)(h) and § 680.730, the reimbursement may be up to 75 percent of the wage rate of the participant.

(b) OJT contracts under WIOA title I, must not be entered into with an employer who has received payments under previous contracts under WIOA

or WIA if the employer has exhibited a pattern of failing to provide OJT participants with continued long-term employment as regular employees with wages and employment benefits (including health benefits) and working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same type of work.

(c) An OJT contract must be limited to the period of time required for a participant to become proficient in the occupation for which the training is being provided. In determining the appropriate length of the contract, consideration should be given to the skill requirements of the occupation, the academic and occupational skill level of the participant, prior work experience, and the participant's IEP.

§ 680.710 What are the requirements for on-the-job training contracts for employed workers?

OJT contracts may be written for eligible employed workers when:

(a) The employee is not earning a self-sufficient wage or wages comparable to or higher than wages from previous employment, as determined by Local WDB policy;

(b) The requirements in § 680.700 are met; and

(c) The OJT relates to the introduction of new technologies, introduction to new production or service procedures, upgrading to new jobs that require additional skills, workplace literacy, or other appropriate purposes identified by the Local WDB.

§ 680.720 What conditions govern on-the-job training payments to employers?

(a) OJT payments to employers are deemed to be compensation for the extraordinary costs associated with training participants and potentially lower productivity of the participants while in the OJT.

(b) Employers may be reimbursed up to 50 percent of the wage rate of an OJT participant, and up to 75 percent using the criteria in § 680.730, for the extraordinary costs of providing the training and additional supervision related to the OJT.

(c) Employers are not required to document such extraordinary costs.

§ 680.730 Under what conditions may a Governor or Local Workforce Development Board raise the on-the-job training reimbursement rate up to 75 percent of the wage rate?

(a) The Governor may increase the reimbursement rate for OJT contracts funded through the statewide employment and training activities described in § 682.210 of this chapter up to 75 percent, and the Local WDB also may increase the reimbursement rate for OJT contracts described in § 680.320(a)(1) up to 75 percent, when taking into account the following factors:

(1) The characteristics of the participants taking into consideration whether they are ''individuals with barriers to employment,'' as defined in WIOA sec. 3(24);

(2) The size of the employer, with an emphasis on small businesses;

(3) The quality of employer-provided training and advancement opportunities, for example if the OJT contract is for an in-demand occupation and will lead to an industry-recognized credential; and

(4) Other factors the Governor or Local WDB may determine to be appropriate, which may include the number of employees participating, wage and benefit levels of the employees (both at present and after completion), and relation of the training to the competitiveness of the participant.

(b) Governors or Local WDBs must document the factors used when deciding to increase the wage reimbursement levels above 50 percent up to 75 percent.

§ 680.740 How can on-the-job training funds be used to support placing participants into a registered apprenticeship program?

(a) OJT contracts may be entered into with registered apprenticeship program sponsors or participating employers in registered apprenticeship programs for the OJT portion of the registered apprenticeship program consistent with § 680.700. Depending on the length of the registered apprenticeship and State and local OJT policies, these funds may cover some or all of the registered apprenticeship training.

(b) If the apprentice is unemployed at the time of participation, the OJT must be conducted as described in § 680.700. If the apprentice is employed at the time of participation, the OJT must be conducted as described in § 680.710.

§ 680.750 Can Individual Training Account and on-the-job training funds be combined to support placing participants into a registered apprenticeship program?

There is no Federal prohibition on using both ITA and OJT funds when placing participants into a registered apprenticeship program. See § 680.330 on using ITAs to support participants in registered apprenticeship.

§ 680.760 What is customized training?

Customized training is training:

(a) That is designed to meet the special requirements of an employer (including a group of employers);

(b) That is conducted with a commitment by the employer to employ an individual upon successful completion of the training; and

(c) For which the employer pays for a significant cost of the training, as determined by the Local WDB in accordance with the factors identified in WIOA sec. 3(14).

§ 680.770 What are the requirements for customized training for employed workers?

Customized training of an eligible employed individual may be provided for an employer or a group of employers when:

(a) The employee is not earning a self-sufficient wage or wages comparable to or higher than wages from previous employment, as determined by Local WDB policy;

(b) The requirements in § 680.760 are met; and

(c) The customized training relates to the purposes described in § 680.710(c) or other appropriate purposes identified by the Local WDB.

§ 680.780 Who is an "incumbent worker" for purposes of statewide and local employment and training activities?

States and local areas must establish policies and definitions to determine which workers, or groups of workers, are eligible for incumbent worker services. To qualify as an incumbent worker, the incumbent worker needs to be employed, meet the Fair Labor Standards Act requirements for an employer-employee relationship, and have an established employment history with the employer for 6 months or more, with the following exception: In the event that the incumbent worker training is being provided to a cohort of employees, not every employee in the cohort must have an established employment history with the employer for 6 months or more as long as a majority of those employees being trained do meet the employment history requirement. An incumbent worker does not have to meet the eligibility requirements for career and training services for adults and dislocated workers under WIOA, unless they also are enrolled as a participant in the WIOA adult or dislocated worker program.

§ 680.790 What is incumbent worker training?

Incumbent worker training must satisfy the requirements in WIOA sec. 134(d)(4) and increase the competitiveness of the employee or employer. For purposes of WIOA sec. 134(d)(4)(B), incumbent worker training is training:

(a) Designed to meet the special requirements of an employer (including a group of employers) to retain a skilled workforce or avert the need to lay off employees by assisting the workers in obtaining the skills necessary to retain employment.

(b) Conducted with a commitment by the employer to retain or avert the layoffs of the incumbent worker(s) trained.

§ 680.800 What funds may be used for incumbent worker training?

(a) The local area may reserve up to 20 percent of their combined total of adult and dislocated worker allocations for incumbent worker training as described in § 680.790;

(b) The State may use their statewide activities funds (per WIOA sec. 134(a)(3)(A)(i)) and Rapid Response funds for statewide incumbent worker training activities (*see* §§ 682.210(b) and 682.320(b)(4) of this chapter).

§ 680.810 What criteria must be taken into account for an employer to be eligible to receive local incumbent worker training funds?

The Local WDB must consider under WIOA sec. 134(d)(4)(A)(ii):

(a) The characteristics of the individuals in the program;

(b) The relationship of the training to the competitiveness of an individual and the employer; and

(c) Other factors the Local WDB determines appropriate, including number of employees trained, wages and benefits including post training increases, and the existence of other training opportunities provided by the employer.

§ 680.820 Are there cost sharing requirements for local area incumbent worker training?

Yes. Under WIOA secs. 134(d)(4)(C) and 134(d)(4)(D)(i)–(iii), employers participating in incumbent worker training are required to pay the non-Federal share of the cost of providing training to their incumbent workers. The amount of the non-Federal share depends upon the limits established under WIOA secs. 134(d)(4)(ii)(C) and (D).

§ 680.830 May funds provided to employers for work-based training be used to assist, promote, or deter union organizing?

No. Funds provided to employers for work-based training, as described in this subpart, must not be used to directly or indirectly assist, promote, or deter union organizing.

§ 680.840 May funds provided to employers for work-based training and other work experiences be used to fill job openings as a result of a labor dispute?

No. Funds provided to employers for work-based training, as described in this subpart and in subpart A of this part, may not be used to directly or indirectly aid in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.

Subpart G—Supportive Services

§ 680.900 What are supportive services for adults and dislocated workers?

Supportive services for adults and dislocated workers are defined at WIOA sec. 3(59) and secs. 134(d)(2) and (3). Local WDBs, in consultation with the one-stop partners and other community service providers, must develop a policy on supportive services that ensures resource and service coordination in the local area. The policy should address procedures for referral to such services, including how such services will be funded when they are not otherwise available from other sources. The provision of accurate information about the availability of supportive services in the local area, as well as referral to such activities, is one of the career services that must be available to adults and dislocated workers through the one-stop delivery system. (WIOA sec. 134(c)(2)(A)(ix) and § 678.430 of this chapter). Local WDBs must ensure that needs-related payments are made in a manner consistent with §§ 680.930, 680.940, 680.950, 680.960, and 680.970. Supportive services are services that are necessary to enable an individual to participate in activities authorized under WIOA sec. 134(c)(2) and (3). These services may include, but are not limited to, the following:

(a) Linkages to community services;

(b) Assistance with transportation;

(c) Assistance with child care and dependent care;

(d) Assistance with housing;

(e) Needs-related payments, as described at §§ 680.930, 680.940, 680.950, 680.960, and 680.970;

(f) Assistance with educational testing;

(g) Reasonable accommodations for individuals with disabilities;

(h) Legal aid services;

(i) Referrals to health care;

(j) Assistance with uniforms or other appropriate work attire and work-related tools, including such items as eyeglasses and protective eye gear;

(k) Assistance with books, fees, school supplies, and other necessary items for students enrolled in postsecondary education classes; and

(l) Payments and fees for employment and training-related applications, tests, and certifications.

§ 680.910 When may supportive services be provided to participants?

(a) Supportive services may only be provided to individuals who are:

(1) Participating in career or training services as defined in WIOA secs. 134(c)(2) and (3); and

(2) Unable to obtain supportive services through other programs providing such services.

(b) Supportive services only may be provided when they are necessary to enable individuals to participate in career service or training activities.

§ 680.920 Are there limits on the amount or duration of funds for supportive services?

(a) Local WDBs may establish limits on the provision of supportive services or provide the one-stop center with the authority to establish such limits, including a maximum amount of funding and maximum length of time for supportive services to be available to participants.

(b) Procedures also may be established to allow one-stop centers to grant exceptions to the limits established under paragraph (a) of this section.

§ 680.930 What are needs-related payments?

Needs-related payments provide financial assistance to participants for the purpose of enabling them to participate in training and are a supportive service authorized by WIOA sec. 134(d)(3). Unlike other supportive services, in order to qualify for needs-related payments a participant must be enrolled in training.

§ 680.940 What are the eligibility requirements for adults to receive needs-related payments?

Adults must:

(a) Be unemployed;

(b) Not qualify for, or have ceased qualifying for, unemployment compensation; and

(c) Be enrolled in a program of training services under WIOA sec. 134(c)(3).

§ 680.950 What are the eligibility requirements for dislocated workers to receive needs-related payments?

To receive needs-related payments, a dislocated worker must:

(a) Be unemployed, and:

(1) Have ceased to qualify for unemployment compensation or trade readjustment allowance under TAA; and

(2) Be enrolled in a program of training services under WIOA sec. 134(c)(3) by the end of the 13th week after the most recent layoff that resulted in a determination of the worker's eligibility as a dislocated worker, or, if later, by the end of the 8th week after the worker is informed that a short-term layoff will exceed 6 months; or

(b) Be unemployed and did not qualify for unemployment compensation or trade readjustment assistance under TAA and be enrolled in a program of training services under WIOA sec. 134(c)(3).

§ 680.960 May needs-related payments be paid while a participant is waiting to start training classes?

Yes, payments may be provided if the participant has been accepted in a training program that will begin within 30 calendar days. The Governor may authorize local areas to extend the 30-day period to address appropriate circumstances.

§ 680.970 How is the level of needs-related payments determined?

(a) The payment level for adults must be established by the Local WDB. For statewide projects, the payment level for adults must be established by the State WDB.

(b) For dislocated workers, payments must not exceed the greater of either of the following levels:

(1) The applicable weekly level of the unemployment compensation benefit, for participants who were eligible for unemployment compensation as a result of the qualifying dislocation; or

(2) The poverty level for an equivalent period, for participants who did not qualify for unemployment compensation as a result of the qualifying layoff. The weekly payment level must be adjusted to reflect changes in total family income, as determined by Local WDB policies.

PART 681—YOUTH ACTIVITIES UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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Subpart A—Standing Youth Committees

§681.100 What is a standing youth committee?

The Workforce Innovation and Opportunity Act (WIOA) eliminates the requirement for Local Workforce Development Boards (WDBs) to establish a youth council. However, the Department encourages Local WDBs to establish a standing committee to provide information and to assist with planning, operational, oversight, and other issues relating to the provision of services to youth. If the Local WDB does not designate a standing youth committee, it retains responsibility for all aspects of youth formula programs.

§681.110 Who is included on a standing youth committee?

(a) If a Local WDB decides to form a standing youth committee, the committee must include a member of the Local WDB, who chairs the committee, members of community-based organizations with a demonstrated record of success in serving eligible youth, and other individuals with appropriate expertise and experience who are not members of the Local WDB.

(b) The committee must reflect the needs of the local area. The committee members appointed for their experience and expertise may bring their expertise to help the committee address the employment, training, education, human and supportive service needs of eligible youth including out-of-school youth (OSY). Members may represent agencies such as secondary and post-secondary education, training, health, disability, mental health, housing, public assistance, and justice, or be representatives of philanthropic or economic and community development organizations, and employers. The committee may also include parents, participants, and youth.

(c) A Local WDB may designate an existing entity such as an effective youth council as the standing youth committee if it fulfills the requirements above in paragraph (a) of this section.

§681.120 What does a standing youth committee do?

Under the direction of the Local WDB, a standing youth committee may:

(a) Recommend policy direction to the Local WDB for the design, development, and implementation of programs that benefit all youth;

(b) Recommend the design of a comprehensive community workforce development system to ensure a full range of services and opportunities for all youth, including disconnected youth;

(c) Recommend ways to leverage resources and coordinate services among schools, public programs, and community-based organizations serving youth;

(d) Recommend ways to coordinate youth services and recommend eligible youth service providers;

(e) Provide on-going leadership and support for continuous quality improvement for local youth programs;

(f) Assist with planning, operational, and other issues relating to the provision of services to youth; and

(g) If so delegated by the Local WDB after consultation with the chief elected official (CEO), oversee eligible youth providers, as well as other youth program oversight responsibilities.

Subpart B—Eligibility for Youth Services

§681.200 Who is eligible for youth services?

Both in-school youth (ISY) and OSY are eligible for youth services.

§ 681.210 Who is an "out-of-school youth"?

An OSY is an individual who is:

(a) Not attending any school (as defined under State law);

(b) Not younger than age 16 or older than age 24 at time of enrollment. Because age eligibility is based on age at enrollment, participants may continue to receive services beyond the age of 24 once they are enrolled in the program; and

(c) One or more of the following:

(1) A school dropout;

(2) A youth who is within the age of compulsory school attendance, but has not attended school for at least the most recent complete school year calendar quarter. School year calendar quarter is based on how a local school district defines its school year quarters. In cases where schools do not use quarters, local programs must use calendar year quarters;

(3) A recipient of a secondary school diploma or its recognized equivalent who is a low-income individual and is either basic skills deficient or an English language learner;

(4) An offender;

(5) A homeless individual aged 16 to 24 who meets the criteria defined in sec. 41403(6) of the Violence Against Women Act of 1994 (42 U.S.C. 14043e–2(6)), a homeless child or youth aged 16 to 24 who meets the criteria defined in sec. 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)) or a runaway;

(6) An individual in foster care or who has aged out of the foster care system or who has attained 16 years of age and left foster care for kinship guardianship or adoption, a child eligible for assistance under sec. 477 of the Social Security Act (42 U.S.C. 677), or in an out-of-home placement;

(7) An individual who is pregnant or parenting;

(8) An individual with a disability; or

(9) A low-income individual who requires additional assistance to enter or complete an educational program or to secure or hold employment.

§ 681.220 Who is an "in-school youth"?

An ISY is an individual who is:

(a) Attending school (as defined by State law), including secondary and postsecondary school;

(b) Not younger than age 14 or (unless an individual with a disability who is attending school under State law) older than age 21 at time of enrollment. Because age eligibility is based on age at enrollment, participants may continue to receive services beyond the age of 21 once they are enrolled in the program;

(c) A low-income individual; and

(d) One or more of the following:

(1) Basic skills deficient;

(2) An English language learner;

(3) An offender;

(4) A homeless individual aged 14 to 21 who meets the criteria defined in sec. 41403(6) of the Violence Against Women Act of 1994 (42 U.S.C. 14043e–2(6)), a homeless child or youth aged 14 to 21 who meets the criteria defined in sec. 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), or a runaway;

(5) An individual in foster care or who has aged out of the foster care system or who has attained 16 years of age and left foster care for kinship guardianship or adoption, a child eligible for assistance under sec. 477 of the Social Security Act (42 U.S.C. 677), or in an out-of-home placement;

(6) An individual who is pregnant or parenting;

(7) An individual with a disability; or

(8) An individual who requires additional assistance to complete an educational program or to secure or hold employment.

§ 681.230 What does "school" refer to in the "not attending or attending any school" in the out-of-school and in-school eligibility criteria?

In general, the applicable State law for secondary and postsecondary institutions defines ''school.'' However, for purposes of WIOA, the Department does not consider providers of adult education under title II of WIOA, YouthBuild programs, the Job Corps program, high school equivalency programs, or dropout re-engagement programs to be schools. Therefore, in all cases except the one provided below, WIOA youth programs may consider a youth to be an OSY for purposes of WIOA youth program eligibility if he or she attend adult education provided

under title II of WIOA, YouthBuild, Job Corps, high school equivalency programs, or dropout re-engagement programs regardless of the funding source of those programs. Youth attending high school equivalency programs funded by the public K–12 school system who are classified by the school system as still enrolled in school are an exception; they are considered ISY.

§ 681.240 When do local youth programs verify dropout status?

Local WIOA youth programs must verify a youth's dropout status at the time of WIOA youth program enrollment. An individual who is out of school at the time of enrollment, and subsequently placed in any school, is an OSY for the purposes of the 75 percent expenditure requirement for OSY throughout his/her participation in the program.

§ 681.250 Who does the low-income eligibility requirement apply to?

(a) For OSY, only those youth who are the recipient of a secondary school diploma or its recognized equivalent and are either basic skills deficient or an English language learner, and youth who require additional assistance to enter or complete an educational program or to secure or hold employment, must be low-income. All other OSY meeting OSY eligibility under § 681.210(c)(1), (2), (4), (5), (6), (7), and (8) are not required to be low-income.

(b) All ISY must be low-income to meet the ISY eligibility criteria, except those that fall under the low-income exception.

(c) WIOA allows a low-income exception where five percent of WIOA youth may be participants who ordinarily would be required to be low-income for eligibility purposes and meet all other eligibility criteria for WIOA youth except the low-income criteria. A program must calculate the five percent based on the percent of newly enrolled youth in the local area's WIOA youth program in a given program year who would ordinarily be required to meet the low-income criteria.

(d) In addition to the criteria in the definition of ''low-income individual'' in WIOA sec. 3(36), a youth is low-income if he or she receives or is eligible to receive a free or reduced price lunch under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 *et seq.* or if he or she lives in a high poverty area.

§ 681.260 How does the Department define "high poverty area" for the purposes of the special regulation for low-income youth in the Workforce Innovation and Opportunity Act?

A youth who lives in a high poverty area is automatically considered to be a low-income individual. A high poverty area is a Census tract, a set of contiguous Census tracts, an American Indian Reservation, Oklahoma Tribal Statistical Area (as defined by the U.S. Census Bureau), Alaska Native Village Statistical Area or Alaska Native Regional Corporation Area, Native Hawaiian Homeland Area, or other tribal land as defined by the Secretary in guidance or county that has a poverty rate of at least 25 percent as set every 5 years using American Community Survey 5-Year data.

§ 681.270 May a local program use eligibility for free or reduced price lunches under the National School Lunch Program as a substitute for the income eligibility criteria under title I of the Workforce Innovation and Opportunity Act?

Yes, WIOA sec. 3(36) defines a low-income individual to include an individual who receives (or is eligible to receive) a free or reduced price lunch under the Richard B. Russell National School Lunch Act.

§ 681.280 Is a youth with a disability eligible for youth services under the Workforce Innovation and Opportunity Act if his or her family income exceeds the income eligibility criteria?

Yes, for an individual with a disability, income level for eligibility purposes is based on the individual's own income rather than his or her family's income. WIOA sec. 3(36)(A)(vi) states that an individual with a disability whose own income meets the low-income definition in clause (ii) (income that does not exceed the higher of the poverty line or 70 percent of the lower living standard income level), but who is a member of a family whose income

exceeds this income requirement is eligible for youth services. Furthermore, only ISY with a disability must be low income. OSY with a disability are not required to be low-income.

§ 681.290 How does the Department define the "basic skills deficient" criterion in this part?

(a) As used in § 681.210(c)(3), a youth is ''basic skills deficient'' if he or she:

(1) Have English reading, writing, or computing skills at or below the 8th grade level on a generally accepted standardized test; or

(2) Are unable to compute or solve problems, or read, write, or speak English at a level necessary to function on the job, in the individual's family, or in society.

(b) The State or Local WDB must establish its policy on paragraph (a)(2) of this section in its respective State or local plan.

(c) In assessing basic skills, local programs must use assessment instruments that are valid and appropriate for the target population, and must provide reasonable accommodation in the assessment process, if necessary, for individuals with disabilities.

§ 681.300 How does the Department define the "requires additional assistance to enter or complete an educational program, or to secure and hold employment" criterion in this part for OSY?

Either the State or the local level may establish definitions and eligibility documentation requirements for the ''requires additional assistance to enter or complete an educational program, or to secure and hold employment'' criterion of § 681.210(c)(9). In cases where the State WDB establishes State policy on this criterion, the State WDB must include the definition in the State Plan. In cases where the State WDB does not establish a policy, the Local WDB must establish a policy in its local plan if using this criterion.

§ 681.310 How does the Department define the "requires additional assistance to complete an educational program, or to secure and hold employment" criterion in this part for ISY?

(a) Either the State or the local level may establish definitions and eligibility documentation requirements for the ''requires additional assistance to complete an educational program, or to secure and hold employment'' criterion of § 681.220(d)(8). In cases where the State WDB establishes State policy on this criterion, the State WDB must include the definition in the State Plan. In cases where the State WDB does not establish a policy, the Local WDB must establish a policy in its local plan if using this criterion.

(b) In each local area, not more than five percent of the ISY newly enrolled in a given program year may be eligible based on the ''requires additional assistance to complete an educational program or to secure or hold employment'' criterion.

§ 681.320 Must youth participants enroll to participate in the youth program?

(a) Yes, to participate in youth programs, participants must enroll in the WIOA youth program.

(b) In order to be a participant in the WIOA youth program, all of the following must occur:

(1) An eligibility determination;

(2) The provision of an objective assessment;

(3) Development of an individual service strategy; and

(4) Participation in any of the 14 WIOA youth program elements.

Subpart C—Youth Program Design, Elements, and Parameters

§ 681.400 What is the process used to select eligible youth service providers?

(a) The grant recipient/fiscal agent has the option to provide directly some or all of the youth workforce investment activities.

(b) However, as provided in WIOA sec. 123, if a Local WDB chooses to award grants or contracts to youth service providers to carry out some or all of

the youth workforce investment activities, the Local WDB must award such grants or contracts on a competitive basis, subject to the exception explained in paragraph (b)(4) of this section:

(1) The Local WDB must identify youth service providers based on criteria established in the State Plan (including such quality criteria established by the Governor for a training program that leads to a recognized postsecondary credential) and take into consideration the ability of the provider to meet performance accountability measures based on the primary indicators of performance for youth programs.

(2) The Local WDB must procure the youth service providers in accordance with the Uniform Guidance at 2 CFR parts 200 and 2900, in addition to applicable State and local procurement laws.

(3) If the Local WDB establishes a standing youth committee under § 681.100 it may assign the committee the function of selecting of grants or contracts.

(4) Where the Local WDB determines there are an insufficient number of eligible youth providers in the local area, such as a rural area, the Local WDB may award grants or contracts on a sole source basis.

§ 681.410 Does the requirement that a State and local area expend at least 75 percent of youth funds to provide services to out-of-school youth apply to all youth funds?

Yes. The 75 percent requirement applies to both statewide youth activities funds and local youth funds with 2 exceptions.

(a) Only statewide funds spent on direct services to youth are subject to the OSY expenditure requirement. Funds spent on statewide youth activities that do not provide direct services to youth, such as most of the required statewide youth activities listed in WIOA sec. 129(b)(1), are not subject to the OSY expenditure requirement. For example, administrative costs, monitoring, and technical assistance are not subject to OSY expenditure requirement; while funds spent on direct services to youth such as statewide demonstration projects, are subject to the OSY expenditure requirement.

(b) For a State that receives a small State minimum allotment under WIOA sec. 127(b)(1)(C)(iv)(II) for youth or WIOA sec. 132(b)(1)(B)(iv)(II) for adults, the State may submit a request to the Secretary to decrease the percentage to not less than 50 percent for a local area in the State, and the Secretary may approve such a request for that program year, if the State meets the following requirements:

(1) After an analysis of the ISY and OSY populations in the local area, the State determines that the local area will be unable to use at least 75 percent of the local area WIOA youth funds to serve OSY due to a low number of OSY; and

(2) The State submits to the Secretary, for the local area, a request including a proposed percentage decreased to not less than 50 percent to provide workforce investment activities for OSY.

(c) In the exercise of discretion afforded by WIOA sec. 129(a)(4), the Secretary has determined that requests to decrease the percentage of funds used to provide youth workforce investment activities for OSY will not be granted to States that received 90 percent of the allotment percentage for the past year. Therefore, when the Secretary receives such a request from a State, the request will be denied.

(d) For local area funds, the administrative costs of carrying out local workforce investment activities described in WIOA sec. 128(b)(4) are not subject to the OSY expenditure requirement. All other local area youth funds beyond the administrative costs are subject to the OSY expenditure requirement.

§ 681.420 How must Local Workforce Development Boards design Workforce Innovation and Opportunity Act youth programs?

(a) The design framework services of local youth programs must:

(1) Provide for an objective assessment of each youth participant that meets the requirements of WIOA sec. 129(c)(1)(A), and includes a review of the academic and occupational skill levels, as well as the service needs and

strengths, of each youth for the purpose of identifying appropriate services and career pathways for participants and informing the individual service strategy;

(2) Develop, and update as needed, an individual service strategy based on the needs of each youth participant that is directly linked to one or more indicators of performance described in WIOA sec. 116(b)(2)(A)(ii), that identifies career pathways that include education and employment goals, that considers career planning and the results of the objective assessment and that prescribes achievement objectives and services for the participant; and

(3) Provide case management of youth participants, including follow-up services.

(b) The local plan must describe the design framework for youth programs in the local area, and how the 14 program elements required in § 681.460 are to be made available within that framework.

(c) Local WDBs must ensure appropriate links to entities that will foster the participation of eligible local area youth. Such links may include connections to:

(1) Local area justice and law enforcement officials;

(2) Local public housing authorities;

(3) Local education agencies;

(4) Local human service agencies;

(5) WIOA title II adult education providers;

(6) Local disability-serving agencies and providers and health and mental health providers;

(7) Job Corps representatives; and

(8) Representatives of other area youth initiatives, such as YouthBuild, and including those that serve homeless youth and other public and private youth initiatives.

(d) Local WDBs must ensure that WIOA youth service providers meet the referral requirements in WIOA sec. 129(c)(3)(A) for all youth participants, including:

(1) Providing these participants with information about the full array of applicable or appropriate services available through the Local WDBs or other eligible providers, or one-stop partners; and

(2) Referring these participants to appropriate training and educational programs that have the capacity to serve them either on a sequential or concurrent basis.

(e) If a youth applies for enrollment in a program of workforce investment activities and either does not meet the enrollment requirements for that program or cannot be served by that program, the eligible training provider of that program must ensure that the youth is referred for further assessment, if necessary, or referred to appropriate programs to meet the skills and training needs of the youth.

(f) In order to meet the basic skills and training needs of applicants who do not meet the eligibility requirements of a particular program or who cannot be served by the program, each youth provider must ensure that these youth are referred:

(1) For further assessment, as necessary; and

(2) To appropriate programs, in accordance with paragraph (d)(2) of this section.

(g) Local WDBs must ensure that parents, youth participants, and other members of the community with experience relating to youth programs are involved in both the design and implementation of its youth programs.

(h) The objective assessment required under paragraph (a)(1) of this section or the individual service strategy required under paragraph (a)(2) of this section is not required if the program provider determines that it is appropriate to use a recent objective assessment or individual service strategy that was developed under another education or training program.

(i) The Local WDBs may implement a WIOA Pay-for-Performance contract strategy for program elements described at § 681.460, for which the Local WDB may reserve and use not more than 10 percent of the total funds allocated to the local area under WIOA sec. 128(b). For additional regulations on WIOA Pay-for-Performance contract strategies, see § 683.500 of this chapter.

§ 681.430 May youth participate in both the Workforce Innovation and Opportunity Act (WIOA) youth and adult programs concurrently, and how do local program operators track concurrent enrollment in the WIOA youth and adult programs?

(a) Yes, individuals who meet the respective program eligibility requirements may participate in adult and youth programs concurrently. Such individuals must be eligible under the youth or adult eligibility criteria applicable to the services received. Local program operators may determine, for these individuals, the appropriate level and balance of services under the youth and adult programs.

(b) Local program operators must identify and track the funding streams which pay the costs of services provided to individuals who are participating in youth and adult programs concurrently, and ensure no duplication of services.

(c) Individuals who meet the respective program eligibility requirements for WIOA youth title I and title II may participate in title I youth and title II concurrently.

§ 681.440 How does a local youth program determine if an 18 to 24 year old is enrolled in the Workforce Innovation and Opportunity Act (WIOA) youth program or the WIOA adult program?

A local program must determine the appropriate program for the participant based on the service needs of the participant and if the participant is career-ready based on an assessment of their occupational skills, prior work experience, employability, and the participant's needs.

§ 681.450 For how long must a local Workforce Innovation and Opportunity Act youth program serve a participant?

Local youth programs must provide service to a participant for the amount of time necessary to ensure successful preparation to enter postsecondary education and/or unsubsidized employment. While there is no minimum or maximum time a youth can participate in the WIOA youth program, programs must link participation to the individual service strategy and not the timing of youth service provider contracts or program years.

§ 681.460 What services must local programs offer to youth participants?

(a) Local programs must make each of the following 14 services available to youth participants:

(1) Tutoring, study skills training, instruction and evidence-based dropout prevention and recovery strategies that lead to completion of the requirements for a secondary school diploma or its recognized equivalent (including a recognized certificate of attendance or similar document for individuals with disabilities) or for a recognized postsecondary credential;

(2) Alternative secondary school services, or dropout recovery services, as appropriate;

(3) Paid and unpaid work experiences that have academic and occupational education as a component of the work experience, which may include the following types of work experiences:

(i) Summer employment opportunities and other employment opportunities available throughout the school year;

(ii) Pre-apprenticeship programs;

(iii) Internships and job shadowing; and

(iv) On-the-job training opportunities;

(4) Occupational skill training, which includes priority consideration for training programs that lead to recognized postsecondary credentials that align with in-demand industry sectors or occupations in the local area involved, if the Local WDB determines that the programs meet the quality criteria described in WIOA sec. 123;

(5) Education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(6) Leadership development opportunities, including community service and peer-centered activities encouraging responsibility and other positive social and civic behaviors;

(7) Supportive services, including the services listed in § 681.570;

(8) Adult mentoring for a duration of at least 12 months, that may occur

both during and after program participation;

(9) Follow-up services for not less than 12 months after the completion of participation, as provided in § 681.580;

(10) Comprehensive guidance and counseling, which may include drug and alcohol abuse counseling, as well as referrals to counseling, as appropriate to the needs of the individual youth;

(11) Financial literacy education;

(12) Entrepreneurial skills training;

(13) Services that provide labor market and employment information about in-demand industry sectors or occupations available in the local area, such as career awareness, career counseling, and career exploration services; and

(14) Activities that help youth prepare for and transition to postsecondary education and training.

(b) Local programs have the discretion to determine what specific program services a youth participant receives, based on each participant's objective assessment and individual service strategy. Local programs are not required to provide every program service to each participant.

(c) When available, the Department encourages local programs to partner with existing local, State, or national entities that can provide program element(s) at no cost to the local youth program.

§ 681.470 Does the Department require local programs to use Workforce Innovation and Opportunity Act funds for each of the 14 program elements?

No. The Department does not require local programs to use WIOA youth funds for each of the program elements. Local programs may leverage partner resources to provide some of the readily available program elements. However, the local area must ensure that if a program element is not funded with WIOA title I youth funds, the local program has an agreement in place with a partner organization to ensure that the program element will be offered. The Local WDB must ensure that the program element is closely connected and coordinated with the WIOA youth program.

§ 681.480 What is a pre-apprenticeship program?

A pre-apprenticeship is a program designed to prepare individuals to enter and succeed in an apprenticeship program registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et. seq.*) (referred to in this part as a ''registered apprenticeship'' or ''registered apprenticeship program'') and includes the following elements:

(a) Training and curriculum that aligns with the skill needs of employers in the economy of the State or region involved;

(b) Access to educational and career counseling and other supportive services, directly or indirectly;

(c) Hands-on, meaningful learning activities that are connected to education and training activities, such as exploring career options, and understanding how the skills acquired through coursework can be applied toward a future career;

(d) Opportunities to attain at least one industry-recognized credential; and

(e) A partnership with one or more registered apprenticeship programs that assists in placing individuals who complete the pre-apprenticeship program in a registered apprenticeship program.

§ 681.490 What is adult mentoring?

(a) Adult mentoring for youth must:

(1) Last at least 12 months and may take place both during the program and following exit from the program;

(2) Be a formal relationship between a youth participant and an adult mentor that includes structured activities where the mentor offers guidance, support, and encouragement to develop the competence and character of the mentee; and

(3) While group mentoring activities and mentoring through electronic means are allowable as part of the mentoring activities, at a minimum, the local youth program must match the youth with an individual mentor with whom the youth interacts on a face-to-face basis.

(b) Mentoring may include workplace mentoring where the local program

matches a youth participant with an employer or employee of a company.

§ 681.500 What is financial literacy education?

The financial literacy education program element may include activities which:

(a) Support the ability of participants to create budgets, initiate checking and savings accounts at banks, and make informed financial decisions;

(b) Support participants in learning how to effectively manage spending, credit, and debt, including student loans, consumer credit, and credit cards;

(c) Teach participants about the significance of credit reports and credit scores; what their rights are regarding their credit and financial information; how to determine the accuracy of a credit report and how to correct inaccuracies; and how to improve or maintain good credit;

(d) Support a participant's ability to understand, evaluate, and compare financial products, services, and opportunities and to make informed financial decisions;

(e) Educate participants about identity theft, ways to protect themselves from identify theft, and how to resolve cases of identity theft and in other ways understand their rights and protections related to personal identity and financial data;

(f) Support activities that address the particular financial literacy needs of non-English speakers, including providing the support through the development and distribution of multilingual financial literacy and education materials;

(g) Support activities that address the particular financial literacy needs of youth with disabilities, including connecting them to benefits planning and work incentives counseling;

(h) Provide financial education that is age appropriate, timely, and provides opportunities to put lessons into practice, such as by access to safe and affordable financial products that enable money management and savings; and

(i) Implement other approaches to help participants gain the knowledge, skills, and confidence to make informed financial decisions that enable them to attain greater financial health and stability by using high quality, age-appropriate, and relevant strategies and channels, including, where possible, timely and customized information, guidance, tools, and instruction.

§ 681.510 What is comprehensive guidance and counseling?

Comprehensive guidance and counseling provides individualized counseling to participants. This includes drug and alcohol abuse counseling, mental health counseling, and referral to partner programs, as appropriate. When referring participants to necessary counseling that cannot be provided by the local youth program or its service providers, the local youth program must coordinate with the organization it refers to in order to ensure continuity of service.

§ 681.520 What are leadership development opportunities?

Leadership development opportunities are opportunities that encourage responsibility, confidence, employability, self-determination, and other positive social behaviors such as:

(a) Exposure to postsecondary educational possibilities;

(b) Community and service learning projects;

(c) Peer-centered activities, including peer mentoring and tutoring;

(d) Organizational and team work training, including team leadership training;

(e) Training in decision-making, including determining priorities and problem solving;

(f) Citizenship training, including life skills training such as parenting and work behavior training;

(g) Civic engagement activities which promote the quality of life in a community; and

(h) Other leadership activities that place youth in a leadership role such as serving on youth leadership committees, such as a Standing Youth Committee.

§ 681.530 What are positive social and civic behaviors?

Positive social and civic behaviors are outcomes of leadership opportunities, which are incorporated by local programs as part of their menu of services. Positive social and civic behaviors focus on areas that may include the following:

(a) Positive attitudinal development;

(b) Self-esteem building;

(c) Openness to work with individuals from diverse backgrounds;

(d) Maintaining healthy lifestyles, including being alcohol- and drug-free;

(e) Maintaining positive social relationships with responsible adults and peers, and contributing to the well-being of one's community, including voting;

(f) Maintaining a commitment to learning and academic success;

(g) Avoiding delinquency; and

(h) Positive job attitudes and work skills.

§ 681.540 What is occupational skills training?

(a) The Department defines occupational skills training as an organized program of study that provides specific vocational skills that lead to proficiency in performing actual tasks and technical functions required by certain occupational fields at entry, intermediate, or advanced levels. Local areas must give priority consideration to training programs that lead to recognized postsecondary credentials that align with in-demand industry sectors or occupations in the local area. Such training must:

(1) Be outcome-oriented and focused on an occupational goal specified in the individual service strategy;

(2) Be of sufficient duration to impart the skills needed to meet the occupational goal; and

(3) Lead to the attainment of a recognized postsecondary credential.

(b) The chosen occupational skills training must meet the quality standards in WIOA sec. 123.

§ 681.550 Are Individual Training Accounts permitted for youth participants?

Yes. In order to enhance individual participant choice in their education and training plans and provide flexibility to service providers, the Department allows WIOA Individual Training Accounts (ITAs) for OSY, ages 16 to 24 using WIOA youth funds when appropriate.

§ 681.560 What is entrepreneurial skills training and how is it taught?

Entrepreneurial skills training provides the basics of starting and operating a small business.

(a) Such training must develop the skills associated with entrepreneurship. Such skills may include, but are not limited to, the ability to:

(1) Take initiative;

(2) Creatively seek out and identify business opportunities;

(3) Develop budgets and forecast resource needs;

(4) Understand various options for acquiring capital and the trade-offs associated with each option; and

(5) Communicate effectively and market oneself and one's ideas.

(b) Approaches to teaching youth entrepreneurial skills include, but are not limited to, the following:

(1) Entrepreneurship education that provides an introduction to the values and basics of starting and running a business. Entrepreneurship education programs often guide youth through the development of a business plan and also may include simulations of business start-up and operation.

(2) Enterprise development which provides supports and services that incubate and help youth develop their own businesses. Enterprise development programs go beyond entrepreneurship education by helping youth access small loans or grants that are needed to begin business operation and by providing more individualized attention to the development of viable business ideas.

(3) Experiential programs that provide youth with experience in the day-to-day operation of a business. These programs may involve the development of a youth-run business that young people participating in the program work in and manage. Or, they may facilitate placement in apprentice or internship positions with adult entrepreneurs in the community.

§ 681.570 What are supportive services for youth?

Supportive services for youth, as defined in WIOA sec. 3(59), are services that enable an individual to participate in WIOA activities. These services include, but are not limited to, the following:

(a) Linkages to community services;

(b) Assistance with transportation;

(c) Assistance with child care and dependent care;

(d) Assistance with housing;

(e) Needs-related payments;

(f) Assistance with educational testing;

(g) Reasonable accommodations for youth with disabilities;

(h) Legal aid services;

(i) Referrals to health care;

(j) Assistance with uniforms or other appropriate work attire and work-related tools, including such items as eyeglasses and protective eye gear;

(k) Assistance with books, fees, school supplies, and other necessary items for students enrolled in postsecondary education classes; and

(l) Payments and fees for employment and training-related applications, tests, and certifications.

§ 681.580 What are follow-up services for youth?

(a) Follow-up services are critical services provided following a youth's exit from the program to help ensure the youth is successful in employment and/or postsecondary education and training. Follow-up services may include regular contact with a youth participant's employer, including assistance in addressing work-related problems that arise.

(b) Follow-up services for youth also may include the following program elements:

(1) Supportive services;

(2) Adult mentoring;

(3) Financial literacy education;

(4) Services that provide labor market and employment information about in-demand industry sectors or occupations available in the local area, such as career awareness, career counseling, and career exploration services; and

(5) Activities that help youth prepare for and transition to postsecondary education and training.

(c) All youth participants must be offered an opportunity to receive follow-up services that align with their individual service strategies. Furthermore, follow-up services must be provided to all participants for a minimum of 12 months unless the participant declines to receive follow-up services or the participant cannot be located or contacted. Follow-up services may be provided beyond 12 months at the State or Local WDB's discretion. The types of services provided and the duration of services must be determined based on the needs of the individual and therefore, the type and intensity of follow-up services may differ for each participant. Follow-up services must include more than only a contact attempted or made for securing documentation in order to report a performance outcome.

§ 681.590 What is the work experience priority and how will local youth programs track the work experience priority?

(a) Local youth programs must expend not less than 20 percent of the funds allocated to them to provide ISY and OSY with paid and unpaid work experiences that fall under the categories listed in § 681.460(a)(3) and further defined in § 681.600.

(b) Local WIOA youth programs must track program funds spent on paid and unpaid work experiences, including wages and staff costs for the development and management of work experiences, and report such expenditures as part of the local WIOA youth financial reporting. The percentage of funds spent on work experience is calculated based on the total local area youth funds expended for work experience rather than calculated separately for ISY and OSY. Local area administrative costs are not subject to the 20 percent minimum work experience expenditure requirement.

§ 681.600 What are work experiences?

(a) Work experiences are a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate. A work experience may take place in the private for-profit sector, the nonprofit sector, or the public sector.

Labor standards apply in any work experience where an employee/employer relationship, as defined by the Fair Labor Standards Act or applicable State law, exists. Consistent with § 680.840 of this chapter, funds provided for work experiences may not be used to directly or indirectly aid in the filling of a job opening that is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage. Work experiences provide the youth participant with opportunities for career exploration and skill development.

(b) Work experiences must include academic and occupational education. The educational component may occur concurrently or sequentially with the work experience. Further academic and occupational education may occur inside or outside the work site.

(c) The types of work experiences include the following categories:

(1) Summer employment opportunities and other employment opportunities available throughout the school year;

(2) Pre-apprenticeship programs;

(3) Internships and job shadowing; and

(4) On-the-job training (OJT) opportunities as defined in WIOA sec. 3(44) and in § 680.700 of this chapter.

§ 681.610 Does the Workforce Innovation and Opportunity Act require Local Workforce Development Boards to offer summer employment opportunities in the local youth program?

No, WIOA does not require Local WDBs to offer summer youth employment opportunities as summer employment is no longer its own program element under WIOA. However, WIOA does require Local WDBs to offer work experience opportunities using at least 20 percent of their funding, which may include summer employment.

§ 681.620 How are summer employment opportunities administered?

Summer employment opportunities are a component of the work experience program element. If youth service providers administer the work experience program element, they must be selected by the Local WDB according to the requirements of WIOA sec. 123 and § 681.400, based on criteria contained in the State Plan. However, the summer employment administrator does not need to select the employers who are providing the employment opportunities through a competitive process.

§ 681.630 What does education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster mean?

This program element reflects an integrated education and training model and describes how workforce preparation activities, basic academic skills, and hands-on occupational skills training are to be taught within the same time frame and connected to training in a specific occupation, occupational cluster, or career pathway.

§ 681.640 Are incentive payments to youth participants permitted?

Yes, incentive payments to youth participants are permitted for recognition and achievement directly tied to training activities and work experiences. The local program must have written policies and procedures in place governing the award of incentives and must ensure that such incentive payments are:

(a) Tied to the goals of the specific program;

(b) Outlined in writing before the commencement of the program that may provide incentive payments;

(c) Align with the local program's organizational policies; and

(d) Are in accordance with the requirements contained in 2 CFR part 200.

§ 681.650 How can parents, youth, and other members of the community get involved in the design and implementation of local youth programs?

Local WDBs and programs must provide opportunities for parents, participants, and other members of the community with experience working with youth to be involved in the design and implementation of youth programs. Parents, youth participants, and other

members of the community can get involved in a number of ways, including serving on youth standing committees, if they exist and they are appointed by the Local WDB. They also can get involved by serving as mentors, serving as tutors, and providing input into the design and implementation of other program design elements. Local WDBs also must make opportunities available to successful participants to volunteer to help participants as mentors, tutors, or in other activities.

Subpart D—One-Stop Services to Youth

§ 681.700 What is the connection between the youth program and the one-stop delivery system?

(a) WIOA sec. 121(b)(1)(B)(i) requires that the youth program function as a required one-stop partner and fulfill the roles and responsibilities of a one-stop partner described in WIOA sec. 121(b)(1)(A).

(b) In addition to the provisions of part 678 of this chapter, connections between the youth program and the one-stop delivery system may include those that facilitate:

(1) The coordination and provision of youth activities;

(2) Linkages to the job market and employers;

(3) Access for eligible youth to the information and services required in § 681.460;

(4) Services for non-eligible youth such as basic labor exchange services, other self-service activities such as job searches, career exploration, use of one-stop center resources, and referral as appropriate; and

(5) Other activities described in WIOA sec. 129(b)–(c).

(c) Local WDBs must either colocate WIOA youth program staff at one-stop centers and/or ensure one-stop centers and staff are trained to serve youth and equipped to advise youth to increase youth access to services and connect youth to the program that best aligns with their needs.

§ 681.710 Do Local Workforce Development Boards have the flexibility to offer services to area youth who are not eligible under the youth program through the one-stop centers?

Yes. However, Local WDBs must ensure one-stop centers fund services for non-eligible youth through programs authorized to provide services to such youth. For example, one-stop centers may provide basic labor exchange services under the Wagner-Peyser Act to any youth.

PART 682—STATEWIDE ACTIVITIES UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Subpart A—General Description

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Subpart A—General Description

§ 682.100 What are the statewide employment and training activities under title I of the Workforce Innovation and Opportunity Act?

Statewide employment and training activities include those activities for adults and dislocated workers, as described in WIOA sec. 134(a), and statewide youth activities, as described in the Workforce Innovation and Opportunity Act (WIOA) sec. 129(b). They include both required and allowable activities. In accordance with the requirements of this subpart, the State may develop policies and strategies for use of statewide employment and training funds. Descriptions of these policies and strategies must be included in the State Plan.

§ 682.110 How are statewide employment and training activities funded?

(a) Except for the statewide rapid response activities described in paragraph (c) of this section, statewide employment and training activities are supported by funds reserved by the Governor under WIOA sec. 128(a).

(b) Funds reserved by the Governor for statewide workforce investment activities may be combined and used for any of the activities authorized in WIOA sec. 129(b), 134(a)(2)(B), or 134(a)(3)(A) (which are described in §§ 682.200 and 682.210), regardless of whether the funds were allotted through the youth, adult, or dislocated worker funding streams.

(c) Funds for statewide rapid response activities are reserved under WIOA sec.133(a)(2) and may be used to provide the activities authorized at WIOA sec. 134(a)(2)(A) (which are described in §§ 682.310 through 682.330).

Subpart B—Required and Allowable Statewide Employment and Training Activities

§ 682.200 What are required statewide employment and training activities?

Required statewide employment and training activities are:

(a) Required rapid response activities, as described in § 682.310;

(b) Disseminating by various means, as provided by WIOA sec. 134(a)(2)(B):

(1) The State list of eligible training providers (including those providing non-traditional training services), for adults and dislocated workers and eligible training providers of registered apprenticeship programs;

(2) Information identifying eligible providers of on-the-job training (OJT), customized training, incumbent worker training (see § 680.790 of this chapter), internships, paid or unpaid work experience opportunities (see § 680.180 of this chapter) and transitional jobs (see § 680.190 of this chapter);

(3) Information on effective outreach and partnerships with business;

(4) Information on effective service delivery strategies and promising practices to serve workers and job seekers;

(5) Performance information and information on the cost of attendance, including tuition and fees, consistent with the requirements of §§ 680.490 and 680.530 of this chapter;

(6) A list of eligible providers of youth activities as described in WIOA sec. 123; and

(7) Information of physical and programmatic accessibility for individuals with disabilities;

(c) States must assure that the information listed in paragraphs (b)(1) through (7) of this section is widely available;

(d) Conducting evaluations under WIOA sec. 116(e), consistent with the requirements found under § 682.220;

(e) Providing technical assistance to State entities and agencies, local areas, and one-stop partners in carrying out activities described in the State Plan, including coordination and alignment of data systems used to carry out the requirements of this Act;

(f) Assisting local areas, one-stop operators, one-stop partners, and eligible providers, including development of

staff, including staff training to provide opportunities for individuals with barriers to employment to enter in-demand industry sectors or occupations and nontraditional occupations, and the development of exemplary program activities;

(g) Assisting local areas for carrying out the regional planning and service delivery efforts required under WIOA sec. 106(c);

(h) Assisting local areas by providing information on and support for the effective development, convening, and implementation of industry and sector partnerships;

(i) Providing technical assistance to local areas that fail to meet the adjusted levels of performance agreed to under § 677.210 of this chapter;

(j) Carrying out monitoring and oversight of activities for services to youth, adults, and dislocated workers under WIOA title I, and which may include a review comparing the services provided to male and female youth;

(k) Providing additional assistance to local areas that have a high concentration of eligible youth; and

(l) Operating a fiscal and management accountability information system, based on guidelines established by the Secretary.

§ 682.210 What are allowable statewide employment and training activities?

Allowable statewide employment and training activities may include:

(a) State administration of the adult, dislocated worker and youth workforce investment activities, consistent with the five percent administrative cost limitation at WIOA sec. 134(a)(3)(B) and § 683.205(a)(1) of this chapter;

(b) Developing and implementing innovative programs and strategies designed to meet the needs of all employers (including small employers) in the State, including the programs and strategies referenced in WIOA sec. 134(a)(3)(A)(i);

(c) Developing strategies for serving individuals with barriers to employment, and for coordinating programs and services among one-stop partners;

(d) Development or identification of education and training programs that have the characteristics referenced in WIOA sec. 134(a)(3)(A)(iii);

(e) Implementing programs to increase the number of individuals training for and placed in non-traditional employment;

(f) Conducting research and demonstrations related to meeting the employment and education needs of youth, adults and dislocated workers;

(g) Supporting the development of alternative, evidence-based programs, and other activities that enhance the choices available to eligible youth and which encourage youth to reenter and complete secondary education, enroll in postsecondary education and advanced training, progress through a career pathway, and enter into unsubsidized employment that leads to economic self-sufficiency;

(h) Supporting the provision of career services in the one-stop delivery system in the State as described in § 678.430 of this chapter and WIOA secs. 129(b)(2)(C) and 134(c)(2);

(i) Supporting financial literacy activities as described in § 681.500 of this chapter and WIOA sec. 129(b)(2)(D);

(j) Providing incentive grants to local areas for performance by the local areas on local performance accountability measures;

(k) Providing technical assistance to Local Workforce Development Boards (WDBs), chief elected officials, one-stop operators, one-stop partners, and eligible providers in local areas on the development of exemplary program activities and on the provision of technology to facilitate remote access to services provided through the one-stop delivery system in the State;

(l) Providing technical assistance to local areas that are implementing WIOA Pay-for-Performance contract strategies and conducting evaluations of such strategies. Technical assistance may include providing assistance with data collections, meeting data entry requirements, and identifying level of performance;

(m) Carrying out activities to facilitate remote access to training services provided through the one-stop delivery system;

(n) Activities that include:

(1) Activities to improve coordination of workforce investment activities, with economic development activities; and

(2) Activities to improve coordination of employment and training activities with child support services and activities, cooperative extension programs carried out by the Department of Agriculture, programs carried out by local areas for individuals with disabilities (including the programs identified in WIOA sec. 134(a)(3)(A)(viii)(II)(cc)), adult education and literacy activities including those provided by public libraries, activities in the correction systems to assist ex-offenders in reentering the workforce and financial literacy activities; and

(3) Developing and disseminating workforce and labor market information;

(o) Implementation of promising practices for workers and businesses as described in WIOA sec. 134(a)(3)(A)(x);

(p) Adopting, calculating, or commissioning for approval an economic self-sufficiency standard for the State that specifies the income needs of families, by family size, the number and ages of children in the family, and sub-State geographical considerations;

(q) Developing and disseminating common intake procedures and related items, including registration processes, across core and partner programs; and

(r) Coordinating activities with the child welfare system to facilitate provision of services for children and youth who are eligible for assistance under sec. 477 of the Social Security Act.

§ 682.220 What are States' responsibilities in regard to evaluations?

(a) As required by § 682.200(d), States must use funds reserved by the Governor for statewide activities to conduct evaluations of activities under the WIOA title I core programs in order to promote continuous improvement, research and test innovative services and strategies, and achieve high levels of performance and outcomes.

(b) Evaluations conducted under paragraph (a) of this section must:

(1) Be coordinated with and designed in conjunction with State and Local WDBs and with State agencies responsible for the administration of all core programs;

(2) When appropriate, include analysis of customer feedback and outcome and process measures in the statewide workforce development system;

(3) Use designs that employ the most rigorous analytical and statistical methods that are reasonably feasible, such as the use of control groups; and

(4) To the extent feasible, be coordinated with the evaluations provided for by the Secretary of Labor and the Secretary of Education under WIOA sec. 169 (regarding title I programs and other employment-related programs), WIOA sec. 242(c)(2)(D) (regarding adult education), sec. 12(a)(5), 14, and 107 of the Rehabilitation Act of 1973 (29 U.S.C. 709(a)(5), 711, 727) (applied with respect to programs carried out under title I of that Act (29 U.S.C. 720 *et seq.*)), and the investigations provided by the Secretary of Labor under sec. 10(b) of the Wagner-Peyser Act (29 U.S.C. 49i(b)).

(c) States must annually prepare, submit to the State WDB and Local WDBs in the State, and make available to the public (including by electronic means) reports containing the results, as available, of the evaluations described in paragraph (a) of this section.

(d) States must cooperate, to the extent practicable, in evaluations and related research projects conducted by the Secretaries of Labor and Education under the laws cited in paragraph (b)(4) of this section. Such cooperation must, at a minimum, meet the following requirements:

(1) The timely provision of:

(i) Data, in accordance with appropriate privacy protections established by the Secretary of Labor;

(ii) Responses to surveys;

(iii) Site visits; and

(iv) Data and survey responses from local subgrantees and State and Local WDBs, and assuring that subgrantees and WDBs allow timely site visits;

(2) Encouraging other one-stop partners at local level to cooperate in timely provision of data, survey responses and site visits as listed in paragraphs (d)(1)(i) through (iv) of this section; and

(3) If a State determines that timely cooperation in data provision as described in paragraph (d)(1) of this section is not practicable, the Governor must inform the Secretary in writing and explain the reasons why it is not practicable. In such circumstances, the

State must cooperate with the Department in developing a plan or strategy to mitigate or overcome the problems preventing timely provision of data, survey responses, and site visits.

(e) In fulfilling the requirements under paragraphs (a) through (c) of this section, States are permitted, but not required, to:

(1) Conduct evaluations that jointly examine title I core program activities and activities under other core programs in WIOA titles II–IV, as determined through the processes associated with paragraph (b)(1) of this section;

(2) Conduct any type of evaluation similar to those authorized for, or conducted by, the Department of Labor or the Department of Education under the laws cited in paragraph (b)(4) of this section, including process and outcome studies, pilot and demonstration projects that have an evaluative component, analyses of administrative and programmatic data, impact and benefit-cost analyses, and use of rigorous designs to test the efficacy of various interventions; and

(3) Conduct evaluations over multiple program years, involving multiple phases and such tasks and activities as necessary for an evaluation, such as a literature or evidence review, feasibility study, planning, research, coordination, design, data collection, analysis, and report preparation, clearance, and dissemination.

(f) In funding evaluations conducted under paragraph (a) of this section, States are permitted, but not required to:

(1) Use funds from any WIOA title I–IV core program to conduct evaluations, as determined through the processes associated with paragraph (b)(1) of this section; and

(2) Use or combine funds, consistent with Federal and State law, regulation and guidance, from other public or private sources, to conduct evaluations relating to activities under the WIOA title I–IV core programs. Such projects may include those funded by the Department of Labor and other Federal agencies, among other sources.

Subpart C—Rapid Response Activities

§ 682.300 What is rapid response, and what is its purpose?

(a) Rapid response is described in §§ 682.300 through 682.370, and encompasses the strategies and activities necessary to:

(1) Plan for and respond to as quickly as possible following an event described in § 682.302; and

(2) Deliver services to enable dislocated workers to transition to new employment as quickly as possible.

(b) The purpose of rapid response is to promote economic recovery and vitality by developing an ongoing, comprehensive approach to identifying, planning for, responding to layoffs and dislocations, and preventing or minimizing their impacts on workers, businesses, and communities. A successful rapid response system includes:

(1) Informational and direct reemployment services for workers, including but not limited to information and support for filing unemployment insurance claims, information on the impacts of layoff on health coverage or other benefits, information on and referral to career services, reemployment-focused workshops and services, and training;

(2) Delivery of solutions to address the needs of businesses in transition, provided across the business lifecycle (expansion and contraction), including comprehensive business engagement and layoff aversion strategies and activities designed to prevent or minimize the duration of unemployment;

(3) Convening, brokering, and facilitating the connections, networks and partners to ensure the ability to provide assistance to dislocated workers and their families such as home heating assistance, legal aid, and financial advice; and

(4) Strategic planning, data gathering and analysis designed to anticipate, prepare for, and manage economic change.

§ 682.302 Under what circumstances must rapid response services be delivered?

Rapid response must be delivered when one or more of the following circumstances occur:

(a) Announcement or notification of a permanent closure, regardless of the number of workers affected;

(b) Announcement or notification of a mass layoff as defined in § 682.305;

(c) A mass job dislocation resulting from a natural or other disaster; or

(d) The filing of a Trade Adjustment Assistance (TAA) petition.

§ 682.305 How does the Department define the term "mass layoff" for the purposes of rapid response?

For the purposes of rapid response, the term ''mass layoff'' used throughout this subpart will have occurred when at least one of the following conditions have been met:

(a) A layoff meets the State's definition of mass layoff, as long as the definition does not exceed a minimum threshold of 50 affected workers;

(b) Where a State has not defined a minimum threshold for mass layoff meeting the requirements of paragraph (a) of this section, layoffs affecting 50 or more workers; or

(c) When a Worker Adjustment and Retraining Notification (WARN) Act notice has been filed, regardless of the number of workers affected by the layoff announced.

§ 682.310 Who is responsible for carrying out rapid response activities?

(a) Rapid response activities must be carried out by the State or an entity designated by the State, in conjunction with the Local WDBs, chief elected officials, and other stakeholders, as provided by WIOA secs. 133(a)(2) and 134(a)(2)(A).

(b) States must establish and maintain a rapid response unit to carry out statewide rapid response activities and to oversee rapid response activities undertaken by a designated State entity, Local WDB, or the chief elected officials for affected local areas, as provided under WIOA sec. 134(a)(2)(A)(i)(I).

§ 682.320 What is layoff aversion, and what are appropriate layoff aversion strategies and activities?

(a) Layoff aversion consists of strategies and activities, including those provided in paragraph (b) of this section and §§ 682.330 and 682.340, to prevent or minimize the duration of unemployment resulting from layoffs.

(b) Layoff aversion activities may include:

(1) Providing assistance to employers in managing reductions in force, which may include early identification of firms at risk of layoffs, assessment of the needs of and options for at-risk firms, and the delivery of services to address these needs, as provided by WIOA sec. 134(d)(1)(A)(ix)(II)(cc);

(2) Ongoing engagement, partnership, and relationship-building activities with businesses in the community, in order to create an environment for successful layoff aversion efforts and to enable the provision of assistance to dislocated workers in obtaining reemployment as soon as possible;

(3) Funding feasibility studies to determine if a company's operations may be sustained through a buyout or other means to avoid or minimize layoffs;

(4) Developing, funding, and managing incumbent worker training programs or other worker upskilling approaches as part of a layoff aversion strategy or activity;

(5) Connecting companies to:

(i) Short-time compensation or other programs designed to prevent layoffs or to reemploy dislocated workers quickly, available under Unemployment Insurance programs;

(ii) Employer loan programs for employee skill upgrading; and

(iii) Other Federal, State, and local resources as necessary to address other business needs that cannot be funded with resources provided under this title;

(6) Establishing linkages with economic development activities at the Federal, State, and local levels, including Federal Department of Commerce programs and available State and local business retention and expansion activities;

(7) Partnering or contracting with business-focused organizations to assess risks to companies, propose strategies to address those risks, implement services, and measure impacts of services delivered;

(8) Conducting analyses of the suppliers of an affected company to assess their risks and vulnerabilities from a potential closing or shift in production of their major customer;

(9) Engaging in proactive measures to identify opportunities for potential economic transition and training needs in growing industry sectors or expanding businesses; and

(10) Connecting businesses and workers to short-term, on-the-job, or customized training programs and registered apprenticeships before or after layoff to help facilitate rapid reemployment.

§ 682.330 What rapid response activities are required?

Rapid response activities must include:

(a) Layoff aversion activities as described in § 682.320, as applicable.

(b) Immediate and on-site contact with the employer, representatives of the affected workers, and the local community, including an assessment of and plans to address the:

(1) Layoff plans and schedule of the employer;

(2) Background and probable assistance needs of the affected workers;

(3) Reemployment prospects for workers; and

(4) Available resources to meet the short and long-term assistance needs of the affected workers.

(c) The provision of information and access to unemployment compensation benefits and programs, such as Short-Time Compensation, comprehensive one-stop delivery system services, and employment and training activities, including information on the TAA program (19 U.S.C. 2271 *et seq.*), Pell Grants, the GI Bill, and other resources.

(d) The delivery of other necessary services and resources including workshops and classes, use of worker transition centers, and job fairs, to support reemployment efforts for affected workers.

(e) Partnership with the Local WDB(s) and chief elected official(s) to ensure a coordinated response to the dislocation event and, as needed, obtain access to State or local economic development assistance. Such coordinated response may include the development of an application for a national dislocated worker grant as provided under part 687 of this chapter.

(f) The provision of emergency assistance adapted to the particular layoff or disaster.

(g) As appropriate, developing systems and processes for:

(1) Identifying and gathering information for early warning of potential layoffs or opportunities for layoff aversion;

(2) Analyzing, and acting upon, data and information on dislocations and other economic activity in the State, region, or local area; and

(3) Tracking outcome and performance data and information related to the activities of the rapid response program.

(h) Developing and maintaining partnerships with other appropriate Federal, State and local agencies and officials, employer associations, technical councils, other industry business councils, labor organizations, and other public and private organizations, as applicable, in order to:

(1) Conduct strategic planning activities to develop strategies for addressing dislocation events and ensuring timely access to a broad range of necessary assistance; and

(2) Develop mechanisms for gathering and exchanging information and data relating to potential dislocations, resources available, and the customization of layoff aversion or rapid response activities, to ensure the ability to provide rapid response services as early as possible.

(i) Delivery of services to worker groups for which a petition for Trade Adjustment Assistance has been filed.

(j) The provision of additional assistance, as described in § 682.350, to local areas that experience disasters, mass layoffs, or other dislocation events when such events exceed the capacity of the local area to respond with existing resources as provided under WIOA sec. 134(a)(2)(A)(i)(II).

(k) Provision of guidance and financial assistance as appropriate, in establishing a labor-management committee if voluntarily agreed to by the employee's bargaining representative and management. The committee may devise and oversee an implementation strategy that responds to the reemployment needs of the workers. The assistance to this committee may include:

(1) The provision of training and technical assistance to members of the committee; and

(2) Funding the operating costs of a committee to enable it to provide advice and assistance in carrying out rapid response activities and in the design and delivery of WIOA-authorized services to affected workers.

§ 682.340 May other activities be undertaken as part of rapid response?

(a) Yes, in order to conduct layoff aversion activities, or to prepare for and respond to dislocation events, in addition to the activities required under § 682.330, a State or designated entity may devise rapid response strategies or conduct activities that are intended to minimize the negative impacts of dislocation on workers, businesses, and communities and ensure rapid reemployment for workers affected by layoffs.

(b) When circumstances allow, rapid response may provide guidance and/or financial assistance to establish community transition teams to assist the impacted community in organizing support for dislocated workers and in meeting the basic needs of their families, including heat, shelter, food, clothing and other necessities and services that are beyond the resources and ability of the one-stop delivery system to provide.

§ 682.350 What is meant by "provision of additional assistance" in the Workforce Innovation and Opportunity Act?

As stated in WIOA sec. 133(a)(2), a State may reserve up to 25 percent of its allotted dislocated worker funds for rapid response activities. Once the State has reserved adequate funds for rapid response activities, such as those described in §§ 682.310, 682.320, and 682.330, any of the remaining funds reserved may be provided to local areas that experience increases of unemployment due to natural disasters, mass layoffs or other events, for provision of direct career services to participants if there are not adequate local funds available to assist the dislocated workers. States may wish to establish the policies or procedures governing the provision of additional assistance as described in § 682.340.

§ 682.360 What rapid response, layoff aversion, or other information will States be required to report to the Employment and Training Administration?

(a) Where a WIOA individual record exists for an individual served under programs reporting through the WIOA individual record, States must report information regarding the receipt of services under this subpart for such an individual. This information must be reported in the WIOA individual record.

(b) States must comply with these requirements as explained in guidance issued by the Department of Labor.

§ 682.370 What are the statewide activities for which rapid response funds remaining unobligated after the first program year for which the funds were allotted may be used by the State?

Funds reserved by the Governor for rapid response activities that remain unobligated after the first program year for which such funds were allotted may be used by the Governor to carry out statewide activities under §§ 682.200 and 682.210. Statewide activities for which these funds may be used include prioritizing the planning for and delivery of activities designed to prevent job loss, increasing the rate of reemployment, building relationships with businesses and other stakeholders, building and maintaining early warning networks and systems, and otherwise supporting efforts to allow long-term unemployed workers to return to work.

PART 683—ADMINISTRATIVE PROVISIONS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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Subpart A—Funding and Closeout

§ 683.100 When do Workforce Innovation and Opportunity Act grant funds become available for obligation?

(a) WIOA *title I*. Except as provided in paragraph (b) of this section or in the applicable fiscal year appropriation,

fiscal year appropriations for programs and activities carried out under title I are available for obligation on the basis of a program year. A program year begins on July 1 in the fiscal year for which the appropriation is made and ends on June 30 of the following year.

(b) *Youth funds.* Fiscal year appropriations for a program year's youth activities, authorized under chapter 2, subtitle B, title I of WIOA may be made available for obligation beginning on April 1 of the fiscal year for which the appropriation is made.

(c) *Wagner-Peyser Act employment service.* Fiscal year appropriations for activities authorized under sec. 6 of the Wagner-Peyser Act, 29 U.S.C. 49e, are available for obligation on the basis of a program year. A program year begins July 1 in the fiscal year for which the appropriation is made and ends on June 30 of the following year.

(d) *Discretionary grants.* Discretionary grant funds are available for obligation in accordance with the fiscal year appropriation.

§ 683.105 What award document authorizes the expenditure of funds under title I of the Workforce Innovation and Opportunity Act and the Wagner-Peyser Act?

(a) *Agreement.* All WIOA title I and Wagner-Peyser Act funds are awarded by grant or cooperative agreement, as defined in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards regulations at 2 CFR 200.51 and 200.24 respectively, or contract, as defined in 2 CFR 200.22. All grant or cooperative agreements are awarded by the Grant Officer through negotiation with the recipient (the non-Federal entity). The agreement describes the terms and conditions applicable to the award of WIOA title I and Wagner-Peyser Act funds and will conform to the requirements of 2 CFR 200.210. Contracts are issued by the Contracting Officer in compliance with the Federal Acquisition Regulations.

(b) *Grant funds awarded to States and outlying areas.* The Federal funds allotted to the States and outlying areas each program year in accordance with secs. 127(b) and 132(b) of WIOA will be obligated by grant agreement.

(c) *Native American programs.* Awards of grants, contracts, or cooperative agreements for the WIOA Native American program will be made to eligible entities on a competitive basis every 4 program years for a 4-year period, in accordance with the provisions of sec. 166 of WIOA.

(d) *Migrant and seasonal farmworker programs.* Awards of grants or contracts for the Migrant and Seasonal Farmworker Program will be made to eligible entities on a competitive basis every 4 program years for a 4-year period, in accordance with the provisions of sec. 167 of WIOA.

(e) *Awards for evaluation and research under sec. 169 of WIOA.* (1) Awards of grants, contracts, or cooperative agreements will be made to eligible entities for programs or activities authorized under WIOA sec. 169. These funds are for:

(i) Evaluations;

(ii) Research;

(iii) Studies;

(iv) Multi-State projects; and

(v) Dislocated worker projects.

(2) Awards of grants, contracts, or cooperative agreements under paragraphs (e)(1)(ii) through (iv) of this section in amounts that exceed $100,000 will be awarded on a competitive basis, except that a noncompetitive award may be made in the case of a project that is funded jointly with other public or private sector entities that provide a substantial portion of the assistance under the grant, contract, or cooperative agreement for the project.

(3) Awards of grants, contracts, or cooperative agreements for carrying out projects in paragraphs (e)(1)(ii) through (iv) of this section may not be awarded to the same organization for more than 3 consecutive years unless:

(i) Such grant, contract, or cooperative agreement is competitively reevaluated within such period;

(ii) The initial grant, contract, or cooperative agreement was issued on a non-competitive basis because it was for less than $100,000, and:

(A) The non-competitive continuation is for less than $100,000;

(B) The scope of work is essentially the same as the initial grant, contract, or cooperative agreement;

(C) Progress in meeting performance objectives is satisfactory; and

(D) Other terms and conditions established by the Department have been met; or

(iii) The initial grant, contract, or cooperative agreement was issued on a non-competitive basis because the project was funded jointly with other public or private sector entities that provide a substantial portion of the assistance, and:

(A) The non-competitive continuation maintains a substantial portion of joint funding;

(B) The scope of work is essentially the same as the initial grant, contract, or cooperative agreement;

(C) Progress in meeting performance objectives is satisfactory; and

(D) Other terms and conditions established by the Department have been met.

(4) Entities with recognized expertise in the methods, techniques, and knowledge of workforce investment activities will be provided priority in awarding funds for the projects under paragraphs (e)(1)(ii) through (iv) of this section. The duration of such projects will be specified in the grant, contract, or cooperative agreement.

(5) A peer review process will be used to review and evaluate projects under this paragraph (e) for grants, contracts, or cooperative agreements that exceed $500,000, and to designate exemplary and promising programs.

(f) *Termination.* Each grant, cooperative agreement, or contract terminates as indicated in the terms of the agreement or when the period of performance has expired. The grants and cooperative agreements must be closed in accordance with the closeout provisions at 2 CFR 200.343 and 2 CFR part 2900 as applicable.

§ 683.110 What is the period of performance of Workforce Innovation and Opportunity Act title I and Wagner-Peyser Act funds?

(a) The statutory period of availability for expenditure for WIOA title I grants will be established as the period of performance for such grants unless otherwise provided in the grant agreement or cooperative agreement. All funds must be fully expended by the expiration of the period of performance or they risk losing their availability. Unless otherwise authorized in a grant or cooperative agreement or subsequent modification, recipients must expend funds with the shortest period of availability first.

(b) *Grant funds expended by States.* Funds allotted to States under WIOA secs. 127(b) and 132(b) for any program year are available for expenditure by the State receiving the funds only during that program year and the 2 succeeding program years as identified in § 683.100.

(c) *Grant funds expended by local areas as defined in WIOA sec. 106.* (1)(i) Funds allocated by a State to a local area under WIOA secs. 128(b) and 133(b), for any program year are available for expenditure only during that program year and the succeeding program year;

(ii) *Pay-for-Performance exception.* Funds used to carry out WIOA Pay-for-Performance contract strategies will remain available until expended in accordance with WIOA sec. 189(g)(2)(D).

(2) Funds which are not expended by a local area(s) in the 2-year period described in paragraph (c)(1)(i) of this section, must be returned to the State. Funds so returned are available for expenditure by State and local recipients and subrecipients only during the third program year of availability in accordance with WIOA secs. 128(c) and 132(c). These funds are available for only the following purposes:

(i) For statewide projects; or

(ii) For distribution to local areas which had fully expended their allocation of funds for the same program year within the 2-year period.

(d) *Native American programs.* Funds awarded by the Department under WIOA sec. 166(c) are available for expenditure for the period identified in the grant or contract award document, which will not exceed 4 years.

(e) *Migrant and seasonal farmworker programs.* Funds awarded by the Department under WIOA sec. 167 are available for expenditure for the period identified in the grant award document, which will not exceed 4 years.

(f) *Evaluations and research.* Funds awarded by the Department under

WIOA sec. 169 are available for expenditure for any program or activity authorized under sec. 169 of WIOA and will remain available until expended or as specified in the award document.

(g) *Other programs under title I of WIOA, including secs. 170 and 171, and all other grants, contracts and cooperative agreements.* Funds are available for expenditure for a period of performance identified in the grant or contract agreement.

(h) *Wagner-Peyser Act.* Funds allotted to States for grants under secs. 3 and 15 of the Wagner-Peyser Act for any program year are available for expenditure by the State receiving the funds only during that program year and the 2 succeeding program years. The program year begins on July 1 of the fiscal year for which the appropriation is made.

§ 683.115 What planning information must a State submit in order to receive a formula grant?

Each State seeking financial assistance under subtitle B, chapter 2 (youth) or chapter 3 (adults and dislocated workers), of title I of WIOA, or under the Wagner-Peyser Act must submit a Unified State Plan under sec. 102 of WIOA or a Combined State Plan under WIOA sec. 103. The requirements for the plan content and the plan review process are described in secs. 102 and 103 of WIOA, sec. 8 of Wagner-Peyser Act, and §§ 676.100 through 676.145 of this chapter and §§ 652.211 through 652.214 of this chapter.

§ 683.120 How are Workforce Innovation and Opportunity Act title I formula funds allocated to local areas?

(a) *General.* The Governor must allocate WIOA formula funds allotted for services to youth, adults and dislocated workers in accordance with secs. 128 and 133 of WIOA and this section.

(1) State WDBs must assist Governors in the development of any youth or adult discretionary within-State allocation formulas.

(2) Within-State allocations must be made:

(i) In accordance with the allocation formulas contained in secs. 128(b) and 133(b) of WIOA and in the State Plan;

(ii) After consultation with chief elected officials and Local WDBs in each of the local areas; and

(iii) In accordance with sec. 182(e) of WIOA, available to local areas not later than 30 days after the date funds are made available to the State or 7 days after the date the local plan for the area is approved, whichever is later.

(b) *State reserve.* Of the WIOA formula funds allotted for services to youth, adults and dislocated workers, the Governor must reserve not more than 15 percent of the funds from each of these sources to carry out statewide activities. Funds reserved under this paragraph may be combined and spent on statewide activities under WIOA sec. 129(b) and statewide employment and training activities under WIOA sec. 134(a), for adults and dislocated workers, and youth activities, as described in §§ 682.200 and 682.210 of this chapter, without regard to the funding source of the reserved funds.

(c) *Youth allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary allocation formula described in paragraph (c)(2) of this section, the remainder of youth funds not reserved under paragraph (b) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each local area, compared to the total number of unemployed individuals in all areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each local area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged youth in each local area, compared to the total number of disadvantaged youth in the State except for local areas as described in sec. 107(c)(1)(C) of WIOA where the allotment must be based on the greater of either the number of individuals aged 16 to 21 in families with an income below the low-income level for the area or the number of disadvantaged youth in the area.

(2) *Discretionary youth allocation formula.* In lieu of making the formula allocation described in paragraph (c)(1) of this section, the State may allocate youth funds under a discretionary formula. Under this discretionary formula, the State must allocate a minimum of 70 percent of youth funds not reserved under paragraph (b) of this section on the basis of the formula in paragraph (c)(1) of this section, and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in paragraph (c)(1) of this section) relating to:

(A) Excess youth poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State WDB and approved by the Secretary of Labor as part of the State Plan.

(d) *Adult allocation formula.* (1) Unless the Governor elects to distribute funds in accordance with the discretionary allocation formula described in paragraph (d)(2) of this section, the remainder of adult funds not reserved under paragraph (b) of this section must be allocated:

(i) 33⅓ percent on the basis of the relative number of unemployed individuals in areas of substantial unemployment in each local area, compared to the total number of unemployed individuals in areas of substantial unemployment in the State;

(ii) 33⅓ percent on the basis of the relative excess number of unemployed individuals in each local area, compared to the total excess number of unemployed individuals in the State; and

(iii) 33⅓ percent on the basis of the relative number of disadvantaged adults in each local area, compared to the total number of disadvantaged adults in the State. Except for local areas as described in sec. 107(c)(1)(C) of WIOA where the allotment must be based on the higher of either the number of adults with an income below the low-income level for the area or the number of disadvantaged adults in the area.

(2) *Discretionary adult allocation formula.* In lieu of making the formula allocation described in paragraph (d)(1) of this section, the State may allocate adult funds under a discretionary formula, Under this discretionary formula, the State must allocate a minimum of 70 percent of adult funds not reserved under paragraph (b) of this section on the basis of the formula in paragraph (d)(1), and may allocate up to 30 percent on the basis of a formula that:

(i) Incorporates additional factors (other than the factors described in paragraph (d)(1) of this section) relating to:

(A) Excess poverty in urban, rural and suburban local areas; and

(B) Excess unemployment above the State average in urban, rural and suburban local areas; and

(ii) Was developed by the State WDB and approved by the Secretary of Labor as part of the State Plan.

(e) *Dislocated worker allocation formula.* (1) The remainder of dislocated worker funds not reserved under paragraph (b) of this section must be allocated on the basis of a formula prescribed by the Governor that distributes funds in a manner that addresses the State's dislocated worker needs. Funds so distributed must not be less than 60 percent of the State's formula allotment.

(2) The Governor's dislocated worker formula must use the most appropriate information available to the Governor, including information on:

(i) Insured unemployment data;

(ii) Unemployment concentrations;

(iii) Plant closings and mass layoff data;

(iv) Declining industries data;

(v) Farmer-rancher economic hardship data; and

(vi) Long-term unemployment data.

(3) The Governor may not amend the dislocated worker formula more than once for any program year.

(f) *Rapid response.* (1) Of the WIOA formula funds allotted for services to dislocated workers in sec. 132(b)(2)(B) of WIOA, the Governor must reserve not more than 25 percent of the funds for statewide rapid response activities described in WIOA sec. 134(a)(2)(A) and §§ 682.300 through 682.370 of this chapter.

(2) *Unobligated funds.* Funds reserved by a Governor for rapid response activities under sec. 133(a)(2) of WIOA, and sec. 133(a)(2) of the Workforce Investment Act (as in effect on the day before the date of enactment of WIOA), to carry out sec. 134(a)(2)(A) of WIOA that remain unobligated after the first program year for which the funds were allotted, may be used by the Governor to carry out statewide activities authorized under paragraph (b) of this section and §§ 682.200 and 682.210 of this chapter.

(g) *Special rule.* For the purpose of the formula in paragraphs (c)(1) and (d)(1) of this section, the State must, as appropriate and to the extent practicable, exclude college students and members of the Armed Forces from the determination of the number of disadvantaged youth and disadvantaged adults.

§ 683.125 What minimum funding provisions apply to Workforce Innovation and Opportunity Act adult, dislocated worker, and youth allocations?

(a) For funding authorized by secs. 128(b)(2), 133(b)(2)(A), and 133(b)(2)(B) of WIOA, which are youth, adult, and dislocated worker funds, a local area must not receive an allocation percentage for a fiscal year that is less than 90 percent of the average allocation percentage of the local area for the 2 preceding fiscal years.

(b) The Department's annual fiscal year appropriation provides funding for programs and activities described in paragraph (a) of this section under separate appropriations with various periods of availability. These periods of availability are described in § 683.100 as a program year. A program year for funds allocated under secs. 133(b)(2)(A) and 133(b)(2)(B) of WIOA begins on July 1 in the fiscal year for which the appropriation is made and ends on June 30 of the following year. A program year for funds available under WIOA sec. 128(b)(2) is available from April 1 of the fiscal year in which the appropriation is made and ends on June 30 of the following year. Therefore, when grantees are calculating the minimum funding percentage they must do so on a program year basis.

(c) When a new local area is designated under sec. 106 of WIOA the State must develop a methodology to apply the minimum funding provision specified in paragraph (a) of this section to local area allocations of WIOA youth, adult, and dislocated worker funds.

(d) Amounts necessary to increase allocations to local areas to comply with paragraph (a) of this section must be obtained by ratably reducing the allocations to be made to other local areas.

(e) If the amounts of WIOA funds appropriated in a fiscal year are not sufficient to provide the amount specified in paragraph (a) of this section to all local areas, the amounts allocated to each local area must be ratably reduced.

§ 683.130 Does a Local Workforce Development Board have the authority to transfer funds between the adult employment and training activities allocation and the dislocated worker employment and training activities allocation?

(a) A Local WDB may transfer up to 100 percent of a program year allocation for adult employment and training activities, and up to 100 percent of a program year allocation for dislocated worker employment and training activities between the two programs.

(b) Local WDBs may not transfer funds to or from the youth program.

(c) Before making any transfer described in paragraph (a) of this section, a Local WDB must obtain the Governor's written approval. The Governor's written approval must be based on criteria or factors that the Governor must establish in a written policy, such as the State Unified or Combined Plan or other written policy.

§ 683.135 What reallotment procedures does the Secretary use?

(a) The Secretary determines, during the second quarter of each program year, whether a State has obligated its required level of at least 80 percent of the funds allotted under secs. 127 and 132 of WIOA for programs serving youth, adults, and dislocated workers for the prior program year, as separately determined for each of the three funding streams. The amount to be recaptured from each State for reallotment, if any, is based on State obligations of the funds allotted to each

State under secs. 127 and 132 of WIOA for programs serving youth, adults, or dislocated workers, less any amount reserved (up to five percent at the State level) for the costs of administration. The recapture amount, if any, is separately determined for each funding stream.

(b) The Secretary reallots youth, adult and dislocated worker funds among eligible States in accordance with the provisions of secs. 127(c) and 132(c) of WIOA, respectively. To be eligible to receive a reallotment of youth, adult, or dislocated worker funds under the reallotment procedures, a State must have obligated at least 80 percent of the prior program year's allotment, less any amount reserved for the costs of administration at the State level of youth, adult, or dislocated worker funds. A State's eligibility to receive a reallotment is separately determined for each funding stream.

(c) The term ''obligation'' is defined at 2 CFR 200.71.

(d) Obligations must be reported on the required Department of Labor (the Department) financial form, such as the ETA–9130 form, unless otherwise noted in guidance.

§ 683.140 What reallocation procedures must the Governors use?

(a) The Governor, after consultation with the State WDB, may reallocate youth, adult, and dislocated worker funds among local areas within the State in accordance with the provisions of secs. 128(c) and 133(c) of WIOA. If the Governor chooses to reallocate funds, the provisions in paragraphs (b) and (c) of this section apply.

(b) For the youth, adult and dislocated worker programs, the amount to be recaptured from each local area for purposes of reallocation, if any, must be based on the amount by which the prior year's unobligated balance of allocated funds exceeds 20 percent of that year's allocation for the program, less any amount reserved (up to 10 percent) for the costs of administration. Unobligated balances must be determined based on allocations adjusted for any allowable transfer between funding streams. The amount to be recaptured, if any, must be separately determined for each funding stream. The term ''obligation'' is defined at 2 CFR 200.71.

(c) To be eligible to receive youth, adult or dislocated worker funds under the reallocation procedures, a local area must have obligated at least 80 percent of the prior program year's allocation, less any amount reserved (up to 10 percent) for the costs of administration, for youth, adult, or dislocated worker activities, as separately determined. A local area's eligibility to receive a reallocation must be separately determined for each funding stream.

§ 683.145 What merit review and risk assessment does the Department conduct for Federal financial assistance awards made under Workforce Innovation and Opportunity Act title I, subtitle D?

(a) For competitive awards, the Department will design and execute a merit review process for applications as prescribed under 2 CFR 200.204 when issuing Federal financial assistance awards made under WIOA title I, subtitle D. This process will be described in the applicable funding opportunity announcement.

(b) Prior to issuing a Federal financial assistance award under WIOA title I, subtitle D, the Department will conduct a risk assessment to assess the organization's overall ability to administer Federal funds as required under 2 CFR 200.205. As part of this assessment, the Department may consider any information that has come to its attention and will consider the organization's history with regard to the management of other grants, including Department of Labor grants.

(c) In evaluating risks posed by applicants, the Department will consider the following:

(1) Financial stability;

(2) Quality of management systems and ability to meet the management standards prescribed in this part;

(3) History of performance. The applicant's record in managing Federal awards, if it is a prior recipient of Federal awards, including timeliness of compliance with applicable reporting requirements, conformance to the terms and conditions of previous Federal awards, and if applicable, the extent to which any previously awarded

amounts will be expended prior to future awards;

(4) Reports and findings from audits; and

(5) The applicant's ability to implement effectively statutory, regulatory, or other requirements imposed on non-Federal entities.

§ 683.150 What closeout requirements apply to grants funded with Workforce Innovation and Opportunity Act title I and Wagner-Peyser Act funds?

(a) After the expiration of the period of performance, the Department will closeout the Federal award when it determines that all applicable administrative actions and all required work of the Federal award have been completed by the grant recipient. This section specifies the actions the grant recipient and the Department must take to complete this process.

(1) The grant recipient must submit, no later than 90 calendar days after the end date of the period of performance, all financial, performance, and other reports as required by the terms and conditions of the Federal award.

(2) The Department may approve extensions when requested by the grant recipient.

(b) Unless otherwise noted in the terms and conditions of the award or an extension, grant recipients must comply with 2 CFR 200.343(b) and 2900.15 in regards to closeout.

(c) The Department must make prompt payments to the grant recipient for allowable reimbursable costs under the Federal award being closed out.

(d) The grant recipient must promptly refund any balances of unobligated cash that the Department paid in advance or paid and that is not authorized to be retained by the grant recipient. See Office of Management and Budget Circular A–129, 2 CFR 200.345, and 2 CFR part 2900 for requirements regarding unreturned amounts that become delinquent debts.

(e) Consistent with the terms and conditions of the Federal award, the Department must make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The grant recipient must account for any real and personal property acquired with Federal funds or received from the Federal government in accordance with 2 CFR 200.310 through 200.316, and 200.329.

(g) The Department should complete all closeout actions for Federal awards no later than 1 year after receipt and acceptance of all required final reports.

(h) The closeout of an award does not affect any of the following:

(1) The right of the Department to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the grant recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements as described in 2 CFR part 200, subpart F.

(4) Property management requirements in 2 CFR 200.310 through 200.316.

(5) Records retention as required in 2 CFR 200.333 through 200.337.

(i) After closeout of an award, a relationship created under the award may be modified or ended in whole or in part with the consent of the Department and the grant recipient, provided the responsibilities of the grant recipient referred to in 2 CFR 200.344(a) and 200.310 through 200.316 are considered, and provisions are made for continuing responsibilities of the grant recipient, as appropriate.

(j) Grant recipients that award WIOA funds to subrecipients must institute a timely closeout process after the end of performance to ensure a timely closeout in accordance with 2 CFR 200.343 and 200.344.

Subpart B—Administrative Rules, Costs, and Limitations

§ 683.200 What general fiscal and administrative rules apply to the use of Workforce Innovation and Opportunity Act title I and Wagner-Peyser Act funds?

(a) *Uniform Guidance.* Recipients and subrecipients of a Federal award under title I of WIOA and the Wagner-Peyser Act must follow the Uniform Guidance at 2 CFR parts 200, 215, 225, 230, including any exceptions identified by the Department at 2 CFR part 2900.

(1) Commercial organizations, for-profit entities, and foreign entities that are recipients and subrecipients of a Federal award must adhere to 2 CFR part 200, including any exceptions identified by the Department under 2 CFR part 2900;

(2) Commercial organizations, for-profit entities, and foreign entities that are contractors or subcontractors must adhere to the Federal Acquisition Regulations (FAR), including 48 CFR part 31.

(b) *Allowable costs and cost principles.* (1) Recipients and subrecipients of a Federal award under title I of WIOA and the Wagner-Peyser Act must follow the cost principles at subpart E and appendices III through IX of 2 CFR part 200, including any exceptions identified by the Department at 2 CFR part 2900.

(2) Unless specified in the grant agreement, for those items requiring prior approval in the Uniform Guidance (*e.g.*, selected items of cost, budget realignment), the authority to grant or deny approval is delegated to the Governor for programs funded under sec. 127 or 132 of WIOA or under the Wagner-Peyser Act.

(3) Costs of workforce councils, advisory councils, Native American Employment and Training Councils, and Local WDB committees established under title I of WIOA are allowable.

(c) *Uniform administrative requirements.* (1) Except as provided in paragraphs (c)(3) through (6) of this section, all recipients and subrecipients of a Federal award under title I of WIOA and under the Wagner-Peyser Act must follow 2 CFR part 200, including any exceptions identified by the Department at 2 CFR part 2900.

(2) Unless otherwise specified in the grant agreement, expenditures must be reported on accrual basis.

(3) In accordance with the requirements at 2 CFR 200.400(g), subrecipients may not earn or keep any profit resulting from Federal financial assistance, unless expressly authorized by the terms and conditions of the Federal award.

(4) In addition to the requirements at 2 CFR 200.317 through 200.326 (as appropriate), all procurement contracts between Local WDBs and units of State or local governments must be conducted only on a cost reimbursement basis.

(5) In addition to the requirements at 2 CFR 200.318, which address codes of conduct and conflict of interest the following applies:

(i) A State WDB member, Local WDB member, or WDB standing committee member must neither cast a vote on, nor participate in any decision-making capacity, on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or that member's immediate family.

(ii) Neither membership on the State WDB, the Local WDB, or a WDB standing committee, nor the receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.

(iii) In accordance with the requirements at 2 CFR 200.112, recipients of Federal awards must disclose in writing any potential conflict of interest to the Department. Subrecipients must disclose in writing any potential conflict of interest to the recipient of grant funds.

(6) The addition method, described at 2 CFR 200.307, must be used for all program income earned under title I of WIOA and Wagner-Peyser Act grants. When the cost of generating program income has been charged to the program, the gross amount earned must be added to the program in which it was earned. However, the cost of generating program income must be subtracted from the amount earned to establish the net amount of program income available for use under the grants when these costs have not been charged to the program.

(7) Any excess of revenue over costs incurred for services provided by a governmental or non-profit entity must be included in program income.

(8) Interest income earned on funds received under title I of WIOA and the Wagner-Peyser Act must be included in program income.

(9) On a fee-for-service basis, employers may use local area services, facilities, or equipment funded under title I of WIOA to provide employment and

training activities to incumbent workers:

(i) When the services, facilities, or equipment are not being used by eligible participants;

(ii) If their use does not affect the ability of eligible participants to use the services, facilities, or equipment; and

(iii) If the income generated from such fees is used to carry out programs authorized under this title.

(d) *Government-wide debarment and suspension, and government-wide drug-free workplace requirements.* All WIOA title I and Wagner-Peyser Act grant recipients and subrecipients must comply with the government-wide requirements for debarment and suspension, and the government-wide requirements for a drug-free workplace in accordance with the Drug-Free Workplace Act of 1988, 41 U.S.C. 8103 *et seq.*, and 2 CFR part 182.

(e) *Restrictions on lobbying.* All WIOA title I and Wagner-Peyer grant recipients and subrecipients must comply with the restrictions on lobbying specified in WIOA sec. 195 and codified in the Department regulations at 29 CFR part 93.

(f) *Buy-American.* As stated in sec. 502 of WIOA, all funds authorized in title I of WIOA and the Wagner-Peyser Act must be expended in compliance with secs. 8301 through 8303 of the Buy American Act (41 U.S.C. 8301–8305).

(g) *Nepotism.* (1) No individual may be placed in a WIOA employment activity if a member of that person's immediate family is directly supervised by or directly supervises that individual.

(2) To the extent that an applicable State or local legal requirement regarding nepotism is more restrictive than this provision, such State or local requirement must be followed.

(h) *Mandatory disclosures.* All WIOA title I and Wagner-Peyser Act recipients of Federal awards must disclose as required at 2 CFR 200.113, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in 2 CFR 200.338 (Remedies for noncompliance), including suspension or debarment.

§ 683.205 What administrative cost limitations apply to Workforce Innovation and Opportunity Act title I grants?

(a) *State formula grants.* (1) As part of the 15 percent that a State may reserve for statewide activities, the State may spend up to 5 percent of the amount allotted under secs. 127(b)(1), 132(b)(1), and 132(b)(2) of WIOA for the administrative costs of statewide activities.

(2) Local area expenditures for administrative purposes under WIOA formula grants are limited to no more than 10 percent of the amount allocated to the local area under secs. 128(b) and 133(b) of WIOA.

(3) The 5 percent reserved for statewide administrative costs and the 10 percent reserved for local administrative costs may be used for administrative costs for any of the statewide youth workforce investment activities or statewide employment and training activities under secs. 127(b)(1), 128(b), 132(b), and 133(b) of WIOA.

(4) In a one-stop environment, administrative costs borne by other sources of funds, such as the Wagner-Peyser Act, are not included in the administrative cost limit calculation. Each program's administrative activities are chargeable to its own grant and subject to its own administrative cost limitations.

(5) Costs of negotiating a MOU or infrastructure funding agreement under title I of WIOA are excluded from the administrative cost limitations.

(b) *Discretionary grants.* Limits on administrative costs, if any, for programs operated under subtitle D of title I of WIOA will be identified in the grant or cooperative agreement.

§ 683.210 What audit requirements apply to the use of Workforce Innovation and Opportunity Act title I and Wagner-Peyser Act funds?

All recipients of WIOA title I and Wagner-Peyser Act funds that expend more than the minimum amounts specified in 2 CFR part 200, subpart F, in Federal awards during their fiscal year must have a program specific or single audit conducted in accordance with 2 CFR part 200, subpart F.

(a) *Commercial or for-profit.* Grant recipients and subrecipients of title I and Wagner-Peyser Act funds that are commercial or for-profit entities must adhere to the requirements contained in 2 CFR part 200, subpart F.

(b) *Subrecipients and contractors.* An auditee may simultaneously be a recipient, a subrecipient, and a contractor depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Federal awards expended as a recipient or subrecipient are subject to audit requirements under 2 CFR part 200, subpart F.

(c) *Contractors.* The payments received for goods or services provided as a contractor are not Federal awards. Subrecipient and contractor determinations made under 2 CFR 200.330 must be considered in determining whether payments constitute a Federal award or a payment for goods and services provided as a contractor.

§ 683.215 What Workforce Innovation and Opportunity Act title I functions and activities constitute the costs of administration subject to the administrative cost limitation?

(a) The costs of administration are expenditures incurred by State and Local WDBs, Regions, direct grant recipients, including State grant recipients under subtitle B of title I of WIOA, and recipients of awards under subtitle D of title I, as well as local grant recipients, local grant subrecipients, local fiscal agents and one-stop operators that are associated with those specific functions identified in paragraph (b) of this section and which are not related to the direct provision of workforce investment services, including services to participants and employers. These costs can be both personnel and non-personnel and both direct and indirect.

(b) The costs of administration are the costs associated with performing the following functions:

(1) Performing the following overall general administrative functions and coordination of those functions under title I of WIOA:

(i) Accounting, budgeting, financial and cash management functions;

(ii) Procurement and purchasing functions;

(iii) Property management functions;

(iv) Personnel management functions;

(v) Payroll functions;

(vi) Coordinating the resolution of findings arising from audits, reviews, investigations and incident reports;

(vii) Audit functions;

(viii) General legal services functions;

(ix) Developing systems and procedures, including information systems, required for these administrative functions; and

(x) Fiscal agent responsibilities;

(2) Performing oversight and monitoring responsibilities related to WIOA administrative functions;

(3) Costs of goods and services required for administrative functions of the program, including goods and services such as rental or purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;

(4) Travel costs incurred for official business in carrying out administrative activities; and

(5) Costs of information systems related to administrative functions (for example, personnel, procurement, purchasing, property management, accounting, and payroll systems) including the purchase, systems development and operating costs of such systems.

(c)(1) Awards to subrecipients or contractors that are solely for the performance of administrative functions are classified as administrative costs.

(2) Personnel and related non-personnel costs of staff that perform both administrative functions specified in paragraph (b) of this section and programmatic services or activities must be allocated as administrative or program costs to the benefitting cost objectives/categories.

(3) Specific costs charged to an overhead or indirect cost pool that can be identified directly as a program cost are to be charged as a program cost. Documentation of such charges must be maintained.

(4) Except as provided at paragraph (c)(1) of this section, all costs incurred

for functions and activities of subrecipients, other than those subrecipients listed in paragraph (a) of this section, and contractors are program costs.

(5) Continuous improvement activities are charged to administration or program category based on the purpose or nature of the activity to be improved. Documentation of such charges must be maintained.

(6) Costs of the following information systems including the purchase, systems development, and operational costs (*e.g.*, data entry) are charged to the program category:

(i) Tracking or monitoring of participant and performance information;

(ii) Employment statistics information, including job listing information, job skills information, and demand occupation information;

(iii) Performance and program cost information on eligible training providers, youth activities, and appropriate education activities;

(iv) Local area performance information; and

(v) Information relating to supportive services and unemployment insurance claims for program participants.

(d) Where possible, entities identified in paragraph (a) of this section must make efforts to streamline the services in paragraphs (b)(1) through (5) of this section to reduce administrative costs by minimizing duplication and effectively using information technology to improve services.

§ 683.220 What are the internal controls requirements for recipients and subrecipients of Workforce Innovation and Opportunity Act title I and Wagner-Peyser Act funds?

(a) Recipients and subrecipients of WIOA title I and Wagner-Peyser Act funds must have an internal control structure and written policies in place that provide safeguards to protect personally identifiable information, records, contracts, grant funds, equipment, sensitive information, tangible items, and other information that is readily or easily exchanged in the open market, or that the Department or the recipient or subrecipient considers to be sensitive, consistent with applicable Federal, State and local privacy and confidentiality laws. Internal controls also must include reasonable assurance that the entity is:

(1) Managing the award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award;

(2) Complying with Federal statutes, regulations, and the terms and conditions of the Federal awards;

(3) Evaluating and monitoring the recipient's and subrecipient's compliance with WIOA, regulations and the terms and conditions of Federal awards; and

(4) Taking prompt action when instances of noncompliance are identified.

(b) Internal controls should be in compliance with the guidance in ''Standards for Internal Control in the Federal Government'' issued by the Comptroller General of the United States and the ''Internal Control Integrated Framework'', issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). See 2 CFR 200.303.

§ 683.225 What requirements relate to the enforcement of the Military Selective Service Act?

The requirements relating to the enforcement of the Military Selective Service Act are found at WIOA sec. 189(h).

§ 683.230 Are there special rules that apply to veterans when income is a factor in eligibility determinations?

Yes, under 38 U.S.C. 4213, when past income is an eligibility determinant for Federal employment or training programs, any amounts received as military pay or allowances by any person who served on active duty, and certain other specified benefits must be disregarded for the veteran and for other individuals for whom those amounts would normally be applied in making an eligibility determination. This applies when determining if a person is a ''low-income individual'' for eligibility purposes (for example, in the WIOA youth, or NFJP programs). Also, it applies when income is used as a factor when a local area provides priority of service for ''low-income individuals'' with title I WIOA funds (*see* §§ 680.600 and 680.650 of this chapter). A veteran

must still meet each program's eligibility criteria to receive services under the respective employment and training program.

§ 683.235 May Workforce Innovation and Opportunity Act title I funds be spent for construction?

WIOA title I funds must not be spent on construction, purchase of facilities or buildings, or other capital expenditures for improvements to land or buildings, except with the prior written approval of the Secretary.

§ 683.240 What are the instructions for using real property with Federal equity?

(a) *SESA properties.* Federal equity acquired in real property through grants to States awarded under title III of the Social Security Act or the Wagner-Peyser Act, including State Employment Security Agency (SESA) real property, is transferred to the States that used the grant to acquire such equity.

(1) The portion of any real property that is attributable to the Federal equity transferred under this section must be used to carry out activities authorized under WIOA, title III of the Social Security Act (Unemployment Compensation program), or the Wagner-Peyser Act.

(2) When such real property is no longer needed for the activities described in paragraph (a)(1) of this section, the States must request disposition instructions from the Grant Officer prior to disposition or sale of the property. The portion of the proceeds from the disposition of the real property that is attributable to the Federal equity transferred under this section must be used to carry out activities authorized under WIOA, title III of the Social Security Act, or the Wagner-Peyser Act.

(3) States must not use funds awarded under WIOA, title III of the Social Security Act, or the Wagner-Peyser Act to amortize the costs of real property that is purchased by any State on or after February 15, 2007, the date of enactment of the Revised Continuing Appropriations Resolution, 2007.

(4) Properties occupied by the Wagner-Peyser Act Employment Service must be colocated with one-stop centers.

(b) *Reed Act-funded properties.* Properties with Reed Act equity may be used for the one-stop service delivery system to the extent that the proportionate share of Reed Act equity is less than or equal to the proportionate share of occupancy by the Unemployment Compensation and Wagner-Peyser Act programs in such properties. When such real property is no longer needed for authorized purposes, the State must request disposition instructions from the Grant Officer prior to disposition or sale. The portion of the proceeds from the disposition or sale of the real property that is attributable to the Reed Act equity must be returned to the State's account in the Unemployment Trust Fund (UTF) and used in accordance with Department-issued guidance.

(c) *Job Training Partnership Act and Workforce Investment Act-funded properties.* Real property that was purchased with WIA funds or that was transferred to WIA now is transferred to the WIOA title I programs and must be used for WIOA purposes. When such real property is no longer needed for the activities of WIOA, the recipient or subrecipient must seek instructions from the Grant Officer or State (in the case of a subrecipient) prior to disposition or sale.

§ 683.245 Are employment generating activities, or similar activities, allowable under title I of the Workforce Innovation and Opportunity Act?

(a) Under sec. 181(e) of WIOA, title I funds must not be spent on employment generating activities, investment in revolving loan funds, capitalization of businesses, investment in contract bidding resource centers, economic development activities, or similar activities, unless they are directly related to training for eligible individuals. For purposes of this prohibition, employer outreach and job development activities are directly related to training for eligible individuals.

(b) These employer outreach and job development activities may include:

(1) Contacts with potential employers for the purpose of placement of WIOA participants;

(2) Participation in business associations (such as chambers of commerce); joint labor management committees, labor associations, and resource centers;

(3) WIOA staff participation on economic development boards and commissions, and work with economic development agencies to:

(i) Provide information about WIOA programs;

(ii) Coordinate activities in a region or local area to promote entrepreneurial training and microenterprise services;

(iii) Assist in making informed decisions about community job training needs; and

(iv) Promote the use of first source hiring agreements and enterprise zone vouchering services;

(4) Active participation in local business resource centers (incubators) to provide technical assistance to small businesses and new businesses to reduce the rate of business failure;

(5) Subscriptions to relevant publications;

(6) General dissemination of information on WIOA programs and activities;

(7) The conduct of labor market surveys;

(8) The development of on-the-job training opportunities; and

(9) Other allowable WIOA activities in the private sector.

§ 683.250 What other activities are prohibited under title I of the Workforce Innovation and Opportunity Act?

(a) WIOA title I funds must not be spent on:

(1) The wages of incumbent employees during their participation in economic development activities provided through a statewide workforce development system.

(2) Public service employment, except as specifically authorized under title I of WIOA.

(3) Expenses prohibited under any other Federal, State or local law or regulation.

(4) Subawards or contracts with parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal programs or activities.

(5) Contracts with persons falsely labeling products made in America.

(b) WIOA formula funds available to States and local areas under title I, subtitle B must not be used for foreign travel.

§ 683.255 What are the limitations related to religious activities of title I of the Workforce Innovation and Opportunity Act?

(a) Section 188(a)(3) of WIOA prohibits the use of funds to employ participants to carry out the construction, operation, or maintenance of any part of any facility used for sectarian instruction or as a place for religious worship with the exception of maintenance of facilities that are not primarily used for instruction or worship and are operated by organizations providing services to WIOA participants.

(b) 29 CFR part 2, subpart D, governs the circumstances under which Department support, including WIOA title I financial assistance, may be used to employ or train participants in religious activities. Under that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. That subpart also contains requirements related to equal treatment in Department of Labor programs for religious organizations, and to protecting the religious liberty of Department of Labor social service providers and beneficiaries. (29 CFR part 2, subpart D—Equal Treatment in Department of Labor Programs for Religious Organizations, Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries).

§ 683.260 What prohibitions apply to the use of Workforce Innovation and Opportunity Act title I funds to encourage business relocation?

(a) *Prohibition*. Section 181(d) of WIOA states that funds must not be used or proposed to be used for:

(1) The encouragement or inducement of a business, or part of a business, to relocate from any location in the United States, if the relocation results in any employee losing his or her job at the original location;

(2) Customized training, skill training, on-the-job training, incumbent worker training, transitional employment, or company specific assessments of job applicants for or employees of any business or part of a business that has relocated from any location in the United States, until the company has operated at that location for 120 days, if the relocation has resulted in any employee losing his or her jobs at the original location.

(b) *Pre-award review*. To verify that a business establishment which is new or expanding is not, in fact, relocating employment from another area, standardized pre-award review criteria developed by the State must be completed and documented jointly by the local area and the business establishment as a prerequisite to WIOA assistance.

(1) The review must include names under which the establishment does business, including predecessors and successors in interest; the name, title, and address of the company official certifying the information, and whether WIOA assistance is sought in connection with past or impending job losses at other facilities, including a review of whether WARN notices relating to the employer have been filed.

(2) The review may include consultations with labor organizations and others in the affected local area(s).

§ 683.265 What procedures and sanctions apply to violations of this part?

(a) The Grant Officer will promptly review and take appropriate action on alleged violations of the provisions relating to:

(1) Construction (§ 683.235);

(2) Employment generating activities (§ 683.245);

(3) Other prohibited activities (§ 683.250);

(4) The limitation related to religious activities (§ 683.255); and

(5) The use of WIOA title I funds to encourage business relocation (§ 683.260).

(b) Procedures for the investigation and resolution of the violations are provided under the Grant Officer's resolution process at § 683.440.

(c) Sanctions and remedies are provided for under sec. 184(c) of WIOA for violations of the provisions relating to:

(1) Construction (§ 683.235);

(2) Employment generating activities (§ 683.245);

(3) Other prohibited activities (§ 683.250); and

(4) The limitation related to religious activities (§ 683.255(b)).

(d) Sanctions and remedies are provided for in sec. 181(d)(3) of WIOA for violations of § 683.260, which addresses business relocation.

(e) Violations of § 683.255(a) will be handled in accordance with the Department's nondiscrimination regulations implementing sec. 188 of WIOA, codified at 29 CFR part 38.

§ 683.270 What safeguards are there to ensure that participants in Workforce Innovation and Opportunity Act employment and training activities do not displace other employees?

(a) A participant in a program or activity authorized under title I of WIOA must not displace (including a partial displacement, such as a reduction in the hours of non-overtime work, wages, or employment benefits) any currently employed employee (as of the date of the participation).

(b) A program or activity authorized under title I of WIOA must not impair existing contracts for services or collective bargaining agreements. When a program or activity authorized under title I of WIOA would be inconsistent with a collective bargaining agreement, the appropriate labor organization and employer must provide written concurrence before the program or activity begins.

(c) A participant in a program or activity under title I of WIOA may not be employed in or assigned to a job if:

(1) Any other individual is on layoff from the same or any substantially equivalent job;

(2) The employer has terminated the employment of any regular, unsubsidized employee or otherwise caused an involuntary reduction in its workforce with the intention of filling the vacancy so created with the WIOA participant; or

(3) The job is created in a promotional line that infringes in any way

on the promotional opportunities of currently employed workers as of the date of the participation.

(d) Regular employees and program participants alleging displacement may file a complaint under the applicable grievance procedures found at § 683.600.

§ 683.275 What wage and labor standards apply to participants in activities under title I of the Workforce Innovation and Opportunity Act?

(a) Individuals in on-the-job training or individuals employed in activities under title I of WIOA must be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills. Such rates must be in accordance with applicable law, but may not be less than the higher of the rate specified in sec. 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the applicable State or local minimum wage law.

(b) The reference in paragraph (a) of this section to sec. 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is not applicable for individuals in territorial jurisdictions in which sec. 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) does not apply.

(c) Individuals in on-the-job training or individuals employed in programs and activities under title I of WIOA must be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work.

(d) Allowances, earnings, and payments to individuals participating in programs under title I of WIOA are not considered as income for purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or Federally-assisted program based on need, other than as provided under the Social Security Act (42 U.S.C. 301 *et seq.*).

§ 683.280 What health and safety standards apply to the working conditions of participants in activities under title I of the Workforce Innovation and Opportunity Act?

(a) Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees are equally applicable to working conditions of participants engaged in programs and activities under title I of WIOA.

(b)(1) To the extent that a State workers' compensation law applies, workers' compensation must be provided to participants in programs and activities under title I of WIOA on the same basis as the compensation is provided to other individuals in the State in similar employment.

(2) If a State workers' compensation law applies to a participant in work experience, workers' compensation benefits must be available for injuries suffered by the participant in such work experience. If a State workers' compensation law does not apply to a participant in work experience, insurance coverage must be secured for injuries suffered by the participant in the course of such work experience.

§ 683.285 What are a recipient's obligations to ensure nondiscrimination and equal opportunity, and what are a recipient's obligations with respect to religious activities?

(a)(1) Recipients, as defined in 29 CFR 37.4, must comply with the nondiscrimination and equal opportunity provisions of WIOA sec. 188 and its implementing regulations, codified at 29 CFR part 38. Under that definition, the term ''recipients'' includes State and Local WDBs, one-stop operators, service providers, Job Corps contractors, and subrecipients, as well as other types of individuals and entities.

(2) Nondiscrimination and equal opportunity requirements and procedures, including complaint processing and compliance reviews, are governed by the regulations implementing sec. 188 of WIOA, codified at 29 CFR part 38, and are administered and enforced by the Department of Labor Civil Rights Center.

(3) Financial assistance provided under title I of WIOA may be used to meet a recipient's obligation to provide

physical and programmatic accessibility and reasonable accommodation/modification in regard to the WIOA program, as required by sec. 504 of the Rehabilitation Act of 1973, as amended; the Americans with Disabilities Act of 1990, as amended; sec. 188 of WIOA; and the regulations implementing these statutory provisions.

(4) No person may discriminate against an individual who is a participant in a program or activity that receives funds under title I of WIOA, with respect to the terms and conditions affecting, or rights provided to, the individual, solely because of the status of the individual as a participant.

(5) Participation in programs and activities or receiving funds under title I of WIOA must be available to citizens and nationals of the United States, lawfully admitted permanent resident aliens, refugees, asylees, and parolees, and other immigrants authorized by the Secretary of Homeland Security or the Secretary's designee to work in the United States.

(b)(1) Title 29 CFR part 2, subpart D, governs the circumstances under which recipients may use Department support, including WIOA title I and Wagner-Peyser Act financial assistance, to employ or train participants in religious activities. As explained in that subpart, such assistance may be used for such employment or training only when the assistance is provided indirectly within the meaning of the Establishment Clause of the U.S. Constitution, and not when the assistance is provided directly. As explained in that subpart, assistance provided through an Individual Training Account is generally considered indirect, and other mechanisms also may be considered indirect. *See also* § 683.255 and 29 CFR 37.6(f)(1).

(2) Title 29 CFR part 2, subpart D, also contains requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty for Department of Labor social service providers and beneficiaries. Limitations on the employment of participants under WIOA title I to carry out the construction, operation, or maintenance of any part of any facility used or to be used for religious instruction or as a place of religious worship are described at 29 CFR 37.6(f)(2). *See also* WIOA sec. 188(a)(3).

§ 683.290 Are there salary and bonus restrictions in place for the use of title I of Workforce Innovation and Opportunity Act and Wagner-Peyser Act funds?

(a) No funds available under title I of WIOA or the Wagner-Peyser Act may be used by a recipient or subrecipient of such funds to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of the annual rate of basic pay prescribed for level II of the Executive Schedule under 5 U.S.C. 5313, which can be found at *https://www.opm.gov/*.

(b) In instances where funds awarded under title I of WIOA or the Wagner-Peyser Act pay only a portion of the salary or bonus, the WIOA title I or Wagner-Peyser Act funds may only be charged for the share of the employee's salary or bonus attributable to the work performed on the WIOA title I or Wagner-Peyser Act grant. That portion cannot exceed the proportional Executive level II rate. The restriction applies to the sum of salaries and bonuses charged as either direct costs or indirect costs under title I of WIOA and the Wagner-Peyser Act.

(c) The limitation described in paragraph (a) of this section will not apply to contractors (as defined in 2 CFR 200.23) providing goods and services. In accordance with 2 CFR 200.330, characteristics indicative of contractor are the following:

(1) Provides the goods and services within normal business operations;

(2) Provides similar goods or services to many different purchasers;

(3) Normally operates in a competitive environment;

(4) Provides goods or services that are ancillary to the operation of the Federal program; and

(5) Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

(d) If a State is a recipient of such funds, the State may establish a lower limit than is provided in paragraph (a) of this section for salaries and bonuses of those receiving salaries and bonuses

from a subrecipient of such funds, taking into account factors including the relative cost of living in the State, the compensation levels for comparable State or local government employees, and the size of the organizations that administer the Federal programs involved.

(e) When an individual is working for the same recipient or subrecipient in multiple offices that are funded by title I of WIOA or the Wagner-Peyser Act, the recipient or subrecipient must ensure that the sum of the individual's salary and bonus does not exceed the prescribed limit in paragraph (a) of this section.

§ 683.295 Is earning of profit allowed under the Workforce Innovation and Opportunity Act?

(a)(1) Under secs. 121(d), 122(a) and 134(b) of WIOA, for-profit entities are eligible to be one-stop operators, service providers, and eligible training providers.

(2) Where for-profit entities are one-stop operators, service providers, and eligible training providers, and those entities are recipients of Federal financial assistance, the recipient or subrecipient and the for-profit entity must follow 2 CFR 200.323.

(b) For programs authorized by other sections of WIOA, 2 CFR 200.400(g) prohibits earning and keeping of profit in Federal financial assistance unless expressly authorized by the terms and conditions of the Federal award.

(c) Income earned by a public or private nonprofit entity may be retained by such entity only if such income is used to continue to carry out the program.

Subpart C—Reporting Requirements

§ 683.300 What are the reporting requirements for programs funded under the Workforce Innovation and Opportunity Act?

(a) *General.* All States and other direct grant recipients must report financial, participant, and other performance data in accordance with instructions issued by the Secretary. Reports, records, plans, or any other data required to be submitted or made available must, to the extent practicable, be submitted or made available through electronic means. Reports will not be required to be submitted more frequently than quarterly within a time period specified in the reporting instructions.

(b) *Subrecipient reporting.* (1) For the annual eligible training provider performance reports described in § 677.230 of this chapter and local area performance reports described in § 677.205 of this chapter, the State must require the template developed under WIOA sec. 116(d)(1) to be used.

(2) For financial reports and performance reports other than those described in paragraph (b)(1) of this section, a State or other grant recipient may impose different forms or formats, shorter due dates, and more frequent reporting requirements on subrecipients.

(3) If a State intends to impose different reporting requirements on subrecipients, it must describe those reporting requirements in its State WIOA Plan.

(c) *Financial reports.* (1) Each grant recipient must submit financial reports on a quarterly basis.

(2) Local WDBs will submit quarterly financial reports to the Governor.

(3) Each State will submit to the Secretary a summary of the reports submitted to the Governor pursuant to paragraph (c)(2) of this section.

(4) Reports must include cash on hand, obligations, expenditures, any income or profits earned, including such income or profits earned by subrecipients, indirect costs, recipient share of expenditures and any expenditures incurred (such as stand-in costs) by the recipient that are otherwise allowable except for funding limitations.

(5) Reported expenditures, matching funds, and program income, including any profits earned, must be reported on the accrual basis of accounting and cumulative by fiscal year of appropriation. If the recipient's accounting records are not normally kept on the accrual basis of accounting, the recipient must develop accrual information through an analysis of the documentation on hand.

(d) *Performance reports.* (1) States must submit an annual performance report for each of the core workforce programs administered under WIOA as required by sec. 116(d) of WIOA and in accordance with part 677, subpart A, of this chapter.

(2) For all programs authorized under subtitle D of WIOA, each grant recipient must complete reports on performance indicators or goals specified in its grant agreement.

(e) *Due date.* (1) For the core programs, performance reports are due on the date set forth in guidance.

(2) Financial reports and all performance and data reports not described in paragraph (e)(1) of this section are due no later than 45 days after the end of each quarter unless otherwise specified in reporting instructions. Closeout financial reports are required no later than 90 calendar days after the expiration of a period of performance or period of fund availability (whichever comes first) and/or termination of the grant. If required by the terms and conditions of the grant, closeout performance reports are required no later than 90 calendar days after the expiration of a period of performance or period of fund availability (whichever comes first) and/or termination of the grant.

(f) *Format.* All reports whenever practicable should be collected, transmitted, and stored in open and machine readable formats.

(g) *Systems compatibility.* States and grant recipients will develop strategies for aligning data systems based upon guidelines issued by the Secretary of Labor and the Secretary of Education.

(h) *Additional reporting.* At the Grant Officer's or Secretary's discretion, reporting may be required more frequently of its grant recipients. Such requirement is consistent with 2 CFR parts 200 and 2900.

Subpart D—Oversight and Resolution of Findings

§ 683.400 What are the Federal and State monitoring and oversight responsibilities?

(a) The Secretary is authorized to monitor all recipients and subrecipients of all Federal financial assistance awarded and funds expended under title I of WIOA and the Wagner-Peyser Act to determine compliance with these statutes and Department regulations, and may investigate any matter deemed necessary to determine such compliance. Federal oversight will be conducted primarily at the recipient level.

(b) As funds allow, in each fiscal year, the Secretary also will conduct in-depth reviews in several States, including financial and performance monitoring, to assure that funds are spent in accordance with WIOA and the Wagner-Peyser Act.

(c)(1) Each recipient and subrecipient must monitor grant-supported activities in accordance with 2 CFR part 200.

(2) In the case of grants under secs. 128 and 133 of WIOA, the Governor must develop a State monitoring system that meets the requirements of § 683.410(b). The Governor must monitor Local WDBs and regions annually for compliance with applicable laws and regulations in accordance with the State monitoring system. Monitoring must include an annual review of each local area's compliance with 2 CFR part 200.

(d) Documentation of monitoring, including monitoring reports and audit work papers, conducted under paragraph (c) of this section, along with corrective action plans, must be made available for review upon request of the Secretary, Governor, or a representative of the Federal government authorized to request the information.

§ 683.410 What are the oversight roles and responsibilities of recipients and subrecipients of Federal financial assistance awarded under title I of the Workforce Innovation and Opportunity Act and the Wagner-Peyser Act?

(a) Each recipient and subrecipient of funds under title I of WIOA and under the Wagner-Peyser Act must conduct regular oversight and monitoring of its WIOA and Wagner-Peyser Act program(s) and those of its subrecipients and contractors as required under title I of WIOA and the Wagner-Peyser Act, as well as under 2 CFR part 200, including 2 CFR 200.327, 200.328, 200.330, 200.331, and Department exceptions at 2 CFR part 2900, in order to:

(1) Determine that expenditures have been made against the proper cost categories and within the cost limitations specified in WIOA and the regulations in this part;

(2) Determine whether there is compliance with other provisions of WIOA and the WIOA regulations and other applicable laws and regulations;

(3) Assure compliance with 2 CFR part 200; and

(4) Determine compliance with the nondiscrimination, disability, and equal opportunity requirements of sec. 188 of WIOA, including the Assistive Technology Act of 1998 (29 U.S.C. 3003).

(b) State roles and responsibilities for grants under secs. 128 and 133 of WIOA:

(1) The Governor is responsible for the development of the State monitoring system. The Governor must be able to demonstrate, through a monitoring plan or otherwise, that the State monitoring system meets the requirements of paragraph (b)(2) of this section.

(2) The State monitoring system must:

(i) Provide for annual on-site monitoring reviews of local areas' compliance with 2 CFR part 200, as required by sec. 184(a)(3) of WIOA;

(ii) Ensure that established policies to achieve program performance and outcomes meet the objectives of WIOA and the WIOA regulations;

(iii) Enable the Governor to determine if subrecipients and contractors have demonstrated substantial compliance with WIOA and Wagner-Peyser Act requirements;

(iv) Enable the Governor to determine whether a local plan will be disapproved for failure to make acceptable progress in addressing deficiencies, as required in sec. 108(e) of WIOA; and

(v) Enable the Governor to ensure compliance with the nondiscrimination, disability, and equal opportunity requirements of sec. 188 of WIOA, including the Assistive Technology Act of 1998 (29 U.S.C. 3003).

(3) The State must conduct an annual on-site monitoring review of each local area's compliance with 2 CFR part 200, as required by sec. 184(a)(4) of WIOA.

(4) The Governor must require that prompt corrective action be taken if any substantial violation of standards identified in paragraph (b)(2) or (3) of this section is found.

(5) The Governor must impose the sanctions provided in secs. 184(b)–(c) of WIOA in the event of a subrecipient's failure to take required corrective action required under paragraph (b)(4) of this section.

(6) The Governor may issue additional requirements and instructions to subrecipients on monitoring activities.

(7) The Governor must certify to the Secretary every 2 years that:

(i) The State has implemented 2 CFR part 200;

(ii) The State has monitored local areas to ensure compliance with 2 CFR part 200, including annual certifications and disclosures as outlined in 2 CFR 200.113, Mandatory Disclosures. Failure to do so may result in remedies described under 2 CFR 200.338, including suspension and debarment; and

(iii) The State has taken appropriate corrective action to secure such compliance.

§ 683.420 What procedures apply to the resolution of findings arising from audits, investigations, monitoring, and oversight reviews?

(a) *Resolution of subrecipient-level findings.* (1) The Governor or direct grant recipient is responsible for resolving findings that arise from the monitoring reviews, investigations, other Federal monitoring reviews, and audits (including under 2 CFR part 200) of subrecipients awarded funds through title I of WIOA or the Wagner-Peyser Act.

(i) A State or direct grant recipient must utilize the written monitoring and audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.

(ii) If a State or direct grant recipient does not have such written procedures, it must prescribe standards and procedures to be used for this grant program.

(2) For subrecipients awarded funds through a recipient of grant funds under subtitle D of title I of WIOA, the direct recipient of the grant funds

must have written monitoring and resolution procedures in place that are consistent with 2 CFR part 200.

(b) *Resolution of State and other direct recipient-level findings.* (1) The Secretary is responsible for resolving findings that arise from Federal audits, monitoring reviews, investigations, incident reports, and audits under 2 CFR part 200 for direct recipients of Federal awards under title I of WIOA and the Wagner-Peyser Act, as amended by WIOA title III.

(2) The Secretary will use the Department audit resolution process, consistent with 2 CFR part 200 (and Department modifications at 2 CFR part 2900), and Grant Officer Resolution provisions of § 683.440, as appropriate.

(3) A final determination issued by a Grant Officer under this process may be appealed to the Department of Labor Office of Administrative Law Judges under the procedures at § 683.800.

(c) *Resolution of nondiscrimination findings.* Findings arising from investigations or reviews conducted under nondiscrimination laws will be resolved in accordance with WIOA sec. 188 of WIOA and the Department of Labor nondiscrimination regulations implementing sec. 188 of WIOA, codified at 29 CFR part 38.

§ 683.430 How does the Secretary resolve investigative and monitoring findings?

(a) As a result of an investigation, on-site visit, other monitoring, or an audit (*i.e.*, Single Audit, OIG Audit, GAO Audit, or other audit), the Secretary will notify the direct recipient of the Federal award of the findings of the investigation and give the direct recipient a period of time (not more than 60 days) to comment and to take appropriate corrective actions.

(1) *Adequate resolution.* The Grant Officer in conjunction with the Federal project officer, reviews the complete file of the monitoring review, monitoring report, or final audit report and the recipient's response and actions under paragraph (a) of this section. The Grant Officer's review takes into account the sanction provisions of secs. 184(b)–(c) of WIOA. If the Grant Officer agrees with the recipient's handling of the situation, the Grant Officer so notifies the recipient. This notification constitutes final agency action.

(2) *Inadequate resolution.* If the direct recipient's response and actions to resolve the findings are found to be inadequate, the Grant Officer will begin the Grant Officer resolution process under § 683.440.

(b) Audits from 2 CFR part 200 will be resolved through the Grant Officer resolution process, as discussed in § 683.440.

§ 683.440 What is the Grant Officer resolution process?

(a) *General.* When the Grant Officer is dissatisfied with the a recipient's disposition of an audit or other resolution of findings (including those arising out of site visits, incident reports or compliance reviews), or with the recipient's response to findings resulting from investigations or monitoring reports, the initial and final determination process as set forth in this section is used to resolve the matter.

(b) *Initial determination.* The Grant Officer makes an initial determination on the findings for both those matters where there is agreement and those where there is disagreement with the recipient's resolution, including the allowability of questioned costs or activities. This initial determination is based upon the requirements of WIOA, the Wagner-Peyser Act, and applicable regulations, and the terms and conditions of the grants or other agreements under the award.

(c) *Informal resolution.* Except in an emergency situation, when the Secretary invokes the authority described in sec. 184(e) of WIOA, the Grant Officer may not revoke a recipient's grant in whole or in part, nor institute corrective actions or sanctions, without first providing the recipient with an opportunity to present documentation or arguments to resolve informally those matters in dispute contained in the initial determination. The initial determination must provide for an informal resolution period of at least 60 days from issuance of the initial determination. If the matters are resolved informally, the Grant Officer must issue a final determination under paragraph (d) of this section which notifies

the parties in writing of the nature of the resolution and may close the file.

(d) *Final determination.* (1) Upon completion of the informal resolution process, the Grant Officer provides each party with a written final determination by certified mail, return receipt requested. For audits of recipient-level entities and other recipients which receive WIOA funds directly from the Department, ordinarily, the final determination is issued not later than 180 days from the date that the Office of Inspector General (OIG) issues the final approved audit report to the Employment and Training Administration. For audits of subrecipients conducted by the OIG, ordinarily the final determination is issued not later than 360 days from the date the OIG issues the final approved audit report to ETA.

(2) A final determination under this paragraph (d) must:

(i) Indicate whether efforts to resolve informally matters contained in the initial determination have been unsuccessful;

(ii) List those matters upon which the parties continue to disagree;

(iii) List any modifications to the factual findings and conclusions set forth in the initial determination and the rationale for such modifications;

(iv) Establish a debt, if appropriate;

(v) Require corrective action, when needed;

(vi) Determine liability, method of restitution of funds, and sanctions; and

(vii) Offer an opportunity for a hearing in accordance with § 683.800.

(3) Unless a hearing is requested, a final determination under this paragraph (d) is final agency action and is not subject to further review.

Subpart E—Pay-for-Performance Contract Strategies

§ 683.500 What is a Workforce Innovation and Opportunity Act Pay-for-Performance contract strategy?

(a) A WIOA Pay-for-Performance contract strategy is a specific type of performance-based contract strategy that has four distinct characteristics:

(1) It is a strategy to use WIOA Pay-for-Performance contracts as they are described in § 683.510;

(2) It must include the identification of the workforce development problem and target populations for which a local area will pursue a WIOA Pay-for-Performance contract strategy; the outcomes the local area would hope to achieve through a Pay-for-Performance contract relative to baseline performance; and the acceptable cost to government associated with achieving these outcomes;

(3) It must include a strategy for independently validating the performance outcomes achieved under each contract within the strategy prior to payment occurring; and

(4) It must include a description of how the State or local area will reallocate funds to other activities under the contract strategy in the event a service provider does not achieve performance benchmarks under a WIOA Pay-for-Performance contract.

(b) Prior to the implementation of a WIOA Pay-for-Performance contract strategy, a local area must conduct a feasibility study to determine whether the intervention is suitable for a WIOA Pay-for-Performance contract strategy.

(c) The WIOA Pay-for-Performance contract strategy must be developed in accordance with guidance issued by the Secretary.

§ 683.510 What is a Workforce Innovation and Opportunity Act Pay-for-Performance contract?

(a) *Pay-for-Performance contract.* A WIOA Pay-for-Performance contract is a type of Performance-Based contract.

(b) *Applicability.* WIOA Pay-for-Performance contracts may only be entered into when they are a part of a WIOA Pay-for-Performance contract strategy described in § 683.500.

(c) *Cost-plus a percentage of cost contracts.* Use of cost plus a percentage of cost contracts is prohibited. (2 CFR 200.323.)

(d) *Services provided.* WIOA Pay-for-Performance contracts must be used to provide adult training services described in sec. 134(c)(3) of WIOA or youth activities described in sec. 129(c)(2) of WIOA.

(e) *Structure of payment.* WIOA Pay-for-Performance contracts must specify a fixed amount that will be paid to

the service provider based on the achievement of specified levels of performance on the performance outcomes in sec. 116(b)(2)(A) of WIOA for target populations within a defined timetable. Outcomes must be independently validated, as described in paragraph (j) of this section and § 683.500, prior to disbursement of funds.

(f) *Eligible service providers.* WIOA Pay-for-Performance contracts may be entered into with eligible service providers, which may include local or national community-based organizations or intermediaries, community colleges, or other training providers that are eligible under sec. 122 or 123 of WIOA (as appropriate).

(g) *Target populations.* WIOA Pay-for-Performance contracts must identify target populations as specified by the Local WDB, which may include individuals with barriers to employment.

(h) *Bonus payments.* WIOA Pay-for-Performance contracts may include bonus payments for the contractor based on achievement of specified levels of performance. Bonus payments for achieving outcomes above and beyond those specified in the contract must be used by the service provider to expand capacity to provide effective training.

(i) *Performance reporting.* Performance outcomes achieved under the WIOA Pay-for-Performance contract, measured against the levels of performance specified in the contract, must be tracked by the local area and reported to the State pursuant to WIOA sec. 116(d)(2)(K) and § 677.160 of this chapter.

(j) *Validation.* WIOA Pay-for-Performance contracts must include independent validation of the contractor's achievement of the performance benchmarks specified in the contract. This validation must be based on high-quality, reliable, and verified data.

(k) *Guidance.* The Secretary may issue additional guidance related to use of WIOA Pay-for-Performance contracts.

§ 683.520 What funds can be used to support Workforce Innovation and Opportunity Act Pay-for-Performance contract strategies?

(a) For WIOA Pay-for-Performance contract strategies providing adult and dislocated worker training services, funds allocated under secs. 133(b)(2)–(3) of WIOA can be used. For WIOA Pay-for-Performance contract strategies providing youth activities, funds allocated under WIOA sec. 128(b) can be used.

(b) No more than 10 percent of the total local adult and dislocated worker allocations can be reserved and used on the implementation of WIOA Pay-for-Performance contract strategies for adult training services described in sec. 134(c)(3) of WIOA. No more than 10 percent of the local youth allocation can be reserved and used on the implementation of WIOA Pay-for-Performance contract strategies for youth training services and other activities described in secs. 129(c)(2) of WIOA.

§ 683.530 How long are funds used for Workforce Innovation and Opportunity Act Pay-for-Performance contract strategies available?

Section 189(g)(2)(D) of WIOA authorizes funds used for WIOA Pay-for-Performance contract strategies to be available until expended. Under WIOA sec. 3(47)(C), funds that are obligated but not expended due to a contractor not achieving the levels of performance specified in a WIOA Pay-for-Performance contract may be reallocated for further activities related to WIOA Pay-for-Performance contract strategies only. The Secretary will issue additional guidance related to the funds availability and reallocation.

§ 683.540 What is the State's role in assisting local areas in using Workforce Innovation and Opportunity Act Pay-for-Performance contract strategies?

(a) Using funds from the Governor's Reserve the State may:

(1) Provide technical assistance to local areas including assistance with structuring WIOA Pay-for-Performance contracting strategies, performance data collection, meeting performance data entry requirements, and identifying levels of performance.

(2) Conduct evaluations of local WIOA Pay-for-Performance contracting strategies, if appropriate.

(3) Conduct other activities that comply with limitations on the use of the Governor's Reserve.

(b) Using non-Federal funds, Governors may establish incentives for Local WDBs to implement WIOA Pay-for-Performance contract strategies as described in this subpart.

(c) In the case of a State in which local areas are implementing WIOA Pay-for-Performance contract strategies, the State must:

(1) Collect and report to the Department data on the performance of service providers entering into WIOA Pay-for-Performance contracts, measured against the levels of performance benchmarks specified in the contracts, pursuant to sec. 116(d)(2)(K) of WIOA and § 677.160 of this chapter and in accordance with any additional guidance issued by the Secretary.

(2) Collect and report to the Department State and/or local evaluations of the design and performance of the WIOA Pay-for-Performance contract strategies, and, where possible, the level of satisfaction with the strategies among employers and participants benefitting from the strategies, pursuant to sec. 116(d)(2)(K) of WIOA and § 677.160 of this chapter, and in accordance with any guidance issued by the Secretary.

(3) Monitor local areas' use of WIOA Pay-for-Performance contract strategies to ensure compliance with § 683.500 and the contract specifications in § 683.510, and State procurement policies.

(4) Monitor local areas' expenditures to ensure that no more than 10 percent of a local area's adult and dislocated worker allotments and no more than 10 percent of a local area's youth allotment is reserved and used on WIOA Pay-for-Performance contract strategies.

(d) The Secretary will issue additional guidance on State roles in WIOA Pay-for-Performance contract strategies.

Subpart F—Grievance Procedures, Complaints, and State Appeals Processes

§ 683.600 What local area, State, and direct recipient grievance procedures must be established?

(a) Each local area, State, outlying area, and direct recipient of funds under title I of WIOA, except for Job Corps, must establish and maintain a procedure for participants and other interested parties to file grievances and complaints alleging violations of the requirements of title I of WIOA, according to the requirements of this section. The grievance procedure requirements applicable to Job Corps are set forth at §§ 686.960 and 686.965 of this chapter.

(b) Each local area, State, and direct recipient must:

(1) Provide information about the content of the grievance and complaint procedures required by this section to participants and other interested parties affected by the local workforce development system, including one-stop partners and service providers;

(2) Require that every entity to which it awards title I funds provide the information referred to in paragraph (b)(1) of this section to participants receiving title I-funded services from such entities; and

(3) Must make reasonable efforts to assure that the information referred to in paragraph (b)(1) of this section will be understood by affected participants and other individuals, including youth and those who are limited-English speaking individuals. Such efforts must comply with the language requirements of 29 CFR 37.35 regarding the provision of services and information in languages other than English.

(c) Local area procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the local workforce development system, including one-stop partners and service providers;

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint;

(3) A process which allows an individual alleging a labor standards violation to submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the parties to the grievance so provides; and

(4) An opportunity for a local level appeal to a State entity when:

(i) No decision is reached within 60 days; or

(ii) Either party is dissatisfied with the local hearing decision.

(d) State procedures must provide:

(1) A process for dealing with grievances and complaints from participants and other interested parties affected by the statewide Workforce Investment programs;

(2) A process for resolving appeals made under paragraph (c)(4) of this section;

(3) A process for remanding grievances and complaints related to the local Workforce Innovation and Opportunity Act programs to the local area grievance process; and

(4) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint; and

(5) An opportunity for appeal to the Secretary under the circumstances described in § 683.610(a).

(e) Procedures of direct recipients must provide:

(1) A process for dealing with grievance and complaints from participants and other interested parties affected by the recipient's Workforce Innovation and Opportunity Act programs; and

(2) An opportunity for an informal resolution and a hearing to be completed within 60 days of the filing of the grievance or complaint.

(f) The remedies that may be imposed under local, State, and direct recipient grievance procedures are enumerated at WIOA sec. 181(c)(3).

(g)(1) The provisions of this section on grievance procedures do not apply to discrimination complaints brought under WIOA sec. 188 and/or 29 CFR part 38. Such complaints must be handled in accordance with the procedures set forth in that regulatory part.

(2) Questions about or complaints alleging a violation of the nondiscrimination provisions of WIOA sec. 188 may be directed or mailed to the Director, Civil Rights Center, U.S. Department of Labor, Room N4123, 200 Constitution Avenue NW., Washington, DC 20210, for processing.

(h) Nothing in this subpart precludes a grievant or complainant from pursuing a remedy authorized under another Federal, State, or local law.

§ 683.610 What processes does the Secretary use to review grievances and complaints of Workforce Innovation and Opportunity Act title I recipients?

(a) The Secretary investigates allegations arising through the grievance procedures described in § 683.600 when:

(1) A decision on a grievance or complaint under § 683.600(d) has not been reached within 60 days of receipt of the grievance or complaint or within 60 days of receipt of the request for appeal of a local level grievance and either party appeals to the Secretary; or

(2) A decision on a grievance or complaint under § 683.600(d) has been reached and the party to which such decision is adverse appeals to the Secretary.

(b) The Secretary must make a final decision on an appeal under paragraph (a) of this section no later than 120 days after receiving the appeal.

(c) Appeals made under paragraph (a)(2) of this section must be filed within 60 days of the receipt of the decision being appealed. Appeals made under paragraph (a)(1) of this section must be filed within 120 days of the filing of the grievance with the State, or the filing of the appeal of a local grievance with the State. All appeals must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the appropriate ETA Regional Administrator and the opposing party.

(d) Except for complaints arising under WIOA sec. 184(f) or sec. 188, grievances or complaints made directly to the Secretary will be referred to the appropriate State or local area for resolution in accordance with this section, unless the Department notifies the parties that the Department of Labor will investigate the grievance under the procedures at § 683.430. Discrimination complaints brought under WIOA sec. 184(f) or sec. 188 or 29 CFR part 38 will be referred to the Director of the Civil Rights Center.

(e) Complaints and grievances from participants receiving services under the Wagner-Peyser Act will follow the

procedures outlined at part 658 of this chapter.

§ 683.620 How are complaints and reports of criminal fraud and abuse addressed under the Workforce Innovation and Opportunity Act?

(a) Information and complaints involving criminal fraud, waste, abuse or other criminal activity must be reported immediately through the Department's Incident Reporting System to the Department of Labor Office of Inspector General, Office of Investigations, Room S5514, 200 Constitution Avenue NW., Washington, DC 20210, or to the corresponding Regional Inspector General for Investigations, with a copy simultaneously provided to the Employment and Training Administration. The Hotline number is 1–800–347–3756. The Web site is *http://www.oig.dol.gov/contact.htm*.

(b) Complaints of a non-criminal nature may be handled under the procedures set forth in § 683.600 or through the Department's Incident Reporting System.

§ 683.630 What additional appeal processes or systems must a State have for the Workforce Innovation and Opportunity Act program?

(a) Non-designation of local areas:

(1) The State must establish, and include in its State Plan, due process procedures which provide expeditious appeal to the State WDB for a unit of general local government (including a combination of such units) or grant recipient that requests, but is not granted, initial or subsequent designation of an area as a local area under WIOA sec. 106(b)(2) or 106(b)(3) and § 679.250 of this chapter.

(2) These procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) If the appeal to the State WDB does not result in designation, the appellant may request review by the Secretary under § 683.640.

(b) Denial or termination of eligibility as a training provider:

(1) A State must establish procedures which allow providers of training services the opportunity to appeal:

(i) Denial of eligibility by a Local WDB or the designated State agency under WIOA sec. 122(b), 122(c), or 122(d).

(ii) Termination of eligibility or other action by a Local WDB or State agency under WIOA sec. 122(f); or

(iii) Denial of eligibility as a provider of on-the-job training (OJT) or customized training by a one-stop operator under WIOA sec. 122(h).

(2) Such procedures must provide an opportunity for a hearing and prescribe appropriate time limits to ensure prompt resolution of the appeal.

(3) A decision under this State appeal process may not be appealed to the Secretary.

(c) Testing and sanctioning for use of controlled substances.

(1) A State must establish due process procedures, in accordance with WIOA sec. 181(f), which provide expeditious appeal for:

(i) Participants in programs under title I, subtitle B of WIOA subject to testing for use of controlled substances, imposed under a State policy established under WIOA sec. 181(f)(1); and

(ii) Participants in programs under title I, subtitle B of WIOA who are sanctioned, in accordance with WIOA sec. 181(f)(2), after testing positive for the use of controlled substances, under the policy described in paragraph (c)(1)(i) of this section.

(2) A decision under this State appeal process may not be appealed to the Secretary.

§ 683.640 What procedures apply to the appeals of non-designation of local areas?

(a) A unit of general local government (including a combination of such units) or grant recipient whose appeal of the denial of a request for initial or subsequent designation as a local area to the State WDB has not resulted in such designation, may appeal the State WDB's denial to the Secretary.

(b) Appeals made under paragraph (a) of this section must be filed no later than 30 days after receipt of written notification of the denial from the State WDB, and must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, 200 Constitution Ave.

NW., Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the State WDB.

(c) The appellant must establish that it was not accorded procedural rights under the appeal process set forth in the State Plan, or establish that it meets the requirements for designation in WIOA sec. 106(b)(2) or 106(b)(3) and § 679.250 of this chapter.

(d) If the Secretary determines that the appellant has met its burden of establishing that it was not accorded procedural rights under the appeal process set forth in the State Plan, or that it meets the requirements for designation in WIOA sec. 106(b)(2) or 106(b)(3) and § 679.250 of this chapter, the Secretary may require that the area be designated as a local area. In making this determination, the Secretary may consider any comments submitted by the State WDB in response to the appeal made under paragraph (a) of this section.

(e) The Secretary must issue a written decision to the Governor and the appellant.

§ 683.650 What procedures apply to the appeals of the Governor's imposition of sanctions for substantial violations or performance failures by a local area?

(a) A local area which has been found in substantial violation of WIOA title I, and has received notice from the Governor that either all or part of the local plan will be revoked or that a reorganization will occur, may appeal such sanctions to the Secretary under WIOA sec. 184(b). The appeal must be filed no later than 30 days after receipt of written notification of the revoked plan or imposed reorganization.

(b) The sanctions described in paragraph (a) of this section do not become effective until:

(1) The time for appeal has expired; or

(2) The Secretary has issued the decision described in paragraph (e) of this section.

(c) A local area which has failed to meet local performance indicators for 3 consecutive program years, and has received the Governor's notice of intent to impose a reorganization plan, may appeal to the Governor to rescind or revise such plan, in accordance with § 677.225 of this chapter.

(d) Appeals to the Secretary made under paragraph (a) of this section must be submitted by certified mail, return receipt requested, to the Secretary, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210, Attention: ASET. A copy of the appeal must be simultaneously provided to the Governor.

(e) The Secretary will notify the Governor and the appellant in writing of the Secretary's decision under paragraph (a) of this section within 45 days after receipt of the appeal. In making this determination, the Secretary may consider any comments submitted by the Governor in response to the appeals.

Subpart G—Sanctions, Corrective Actions, and Waiver of Liability

§ 683.700 When can the Secretary impose sanctions and corrective actions on recipients and subrecipients of title I Workforce Innovation and Opportunity Act funds?

(a) *Applicability*. (1) Except for actions under WIOA secs. 116 and 188(a) or 29 CFR parts 31, 32, 35, and 38 and 49 CFR part 25, the Grant Officer must use the procedures outlined in § 683.440 before imposing a sanction on, or requiring corrective action by, recipients of funds under title I of WIOA.

(2) To impose a sanction or corrective action for a violation of WIOA sec. 188(a) the Department will use the procedures set forth in 29 CFR part 38.

(3) To impose a sanction or corrective action for a violation of WIOA sec. 116 the Department will use the procedures set forth in part 677 of this chapter.

(b) *States*. When a Grant Officer determines that the Governor has not fulfilled its requirements under 2 CFR part 200, an audit, or a monitoring compliance review set forth at sec. 184(a)(4) of WIOA and § 683.410, or has not taken corrective action to remedy a violation as required by WIOA secs. 184(a)(5) and 184(b)(1), the Grant Officer must require the Governor to impose the necessary corrective actions set forth at WIOA secs. 184(a)(5) and 184(b)(1), or may require repayment of funds under WIOA sec. 184(c). If the

Secretary determines it is necessary to protect the funds or ensure the proper operation of a program or activity, the Secretary may immediately suspend or terminate financial assistance in accordance with WIOA sec. 184(e).

(c) *Local areas.* If the Governor fails to promptly take the actions specified in WIOA sec. 184(b)(1) when it determines that a local area has failed to comply with the requirements described in § 683.720(a), and that the local area has not taken the necessary corrective action, the Grant Officer may impose such actions directly against the local area.

(d) *Direct grant recipients.* When the Grant Officer determines that a direct grant recipient of subtitle D of title I of WIOA has not taken corrective action to remedy a substantial violation as the result of noncompliance with 2 CFR part 200, the Grant Officer may impose sanctions against the grant recipient.

(e) *Subrecipients.* The Grant Officer may impose a sanction directly against a subrecipient, as authorized in WIOA sec. 184(d)(3) and 2 CFR 200.338. In such a case, the Grant Officer will inform the direct grant recipient of the action.

§ 683.710 Who is responsible for funds provided under title I of the Workforce Innovation and Opportunity Act and the Wagner-Peyser Act?

(a) The recipient of the funds is responsible for all funds under its grant(s) awarded under WIOA title I and the Wagner-Peyser Act.

(b)(1) The local government's chief elected official(s) in a local area is liable for any misuse of the WIOA grant funds allocated to the local area under WIOA secs. 128 and 133, unless the chief elected official(s) reaches an agreement with the Governor to bear such liability.

(2) When a local workforce area or region is composed of more than one unit of general local government, the liability of the individual jurisdictions must be specified in a written agreement between the chief elected officials.

(3) When there is a change in the chief elected official(s), the Local WDB is required to inform the new chief elected official(s), in a timely manner, of their responsibilities and liabilities as well as the need to review and update any written agreements among the chief elected official(s).

(4) The use of a fiscal agent does not relieve the chief elected official, or Governor if designated under paragraph (b)(1) of this section, of responsibility for any misuse of grant funds allocated to the local area under WIOA secs. 128 and 133.

§ 683.720 What actions are required to address the failure of a local area to comply with the applicable uniform administrative provisions?

(a) If, as part of the annual on-site monitoring of local areas, the Governor determines that a local area is not in compliance with 2 CFR part 200, including the failure to make the required disclosures in accordance with 2 CFR 200.113 or the failure to disclose all violations of Federal criminal law involving fraud, bribery or gratuity violations, the Governor must:

(1) Require corrective action to secure prompt compliance; and

(2) Impose the sanctions provided for at WIOA sec. 184(b) if the Governor finds that the local area has failed to take timely corrective action.

(b) An action by the Governor to impose a sanction against a local area, in accordance with this section, may be appealed to the Secretary in accordance with § 683.650.

(c)(1) If the Secretary finds that the Governor has failed to monitor and certify compliance of local areas with the administrative requirements under WIOA sec. 184(a), or that the Governor has failed to take the actions promptly required upon a determination under paragraph (a) of this section, the Secretary must take the action described in § 683.700(b).

(2) If the Governor fails to take the corrective actions required by the Secretary under paragraph (c)(1) of this section, the Secretary may immediately suspend or terminate financial assistance under WIOA sec. 184(e).

§ 683.730 When can the Secretary waive the imposition of sanctions?

(a)(1) A recipient of title I funds may request that the Secretary waive the imposition of sanctions authorized under WIOA sec. 184.

(2) A Grant officer may approve the waiver described in paragraph (a)(1) of this section if the grant officer finds that the recipient has demonstrated substantial compliance with the requirements of WIOA sec. 184(d)(2).

(b)(1) When the debt for which a waiver request was established in a non-Federal resolution proceeding, the resolution report must accompany the waiver request.

(2) When the waiver request is made during the ETA Grant Officer resolution process, the request must be made during the informal resolution period described in § 683.440(c).

(c) A waiver of the recipient's liability must be considered by the Grant Officer only when:

(1) The misexpenditure of WIOA funds occurred at a subrecipient's level;

(2) The misexpenditure was not due to willful disregard of the requirements of title I of WIOA, gross negligence, failure to observe accepted standards of administration, and did not constitute fraud or failure to make the required disclosures in accordance with 2 CFR 200.113 addressing all violations of Federal criminal law involving fraud, bribery or gratuity violations (2 CFR part 180 and 31 U.S.C. 3321)

(3) If fraud did exist, was perpetrated against the recipient/subrecipients, and:

(i) The recipient/subrecipients discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(ii) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(4) The recipient has issued a final determination which disallows the misexpenditure, the recipient's appeal process has been exhausted, and a debt has been established; and

(5) The recipient provides documentation to demonstrate that it has substantially complied with the requirements of WIOA sec. 184(d)(2) and this section.

(d) The recipient will not be released from liability for misspent funds under the determination required by WIOA sec. 184(d) unless the Grant Officer determines that further collection action, either by the recipient or subrecipient(s), would be inappropriate or would prove futile.

§ 683.740 What is the procedure to handle a recipient of title I Workforce Innovation and Opportunity Act funds' request for advance approval of contemplated corrective actions?

(a) The recipient may request advance approval from the Grant Officer for contemplated corrective actions, including debt collection actions, which the recipient plans to initiate or to forego. The recipient's request must include a description and an assessment of all actions taken to collect the misspent funds.

(b) Based on the recipient's request, the Grant Officer may determine that the recipient may forego certain debt collection actions against a subrecipient when:

(1) The subrecipient meets the criteria set forth in WIOA sec. 184(d)(2);

(2) The misexpenditure of funds:

(i) Was not made by that subrecipient but by an entity that received WIOA funds from that subrecipient;

(ii) Was not a violation of WIOA sec. 184(d)(1), did not constitute fraud, or failure to disclose, in a timely manner, all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award; or

(iii) If fraud did exist:

(A) It was perpetrated against the subrecipient;

(B) The subrecipient discovered, investigated, reported, and cooperated in any prosecution of the perpetrator of the fraud; and

(C) After aggressive debt collection action, it has been documented that further attempts at debt collection from the perpetrator of the fraud would be inappropriate or futile;

(3) A determination which disallows the misexpenditure and establishes a debt has been issued at the appropriate level; and,

(4) Further debt collection action by that subrecipient or the recipient would be either inappropriate or futile.

§ 683.750 What procedure must be used for administering the offset/deduction provisions of the Workforce Innovation and Opportunity Act?

(a)(1) For misexpenditures by direct recipients of title I and Wagner-Peyser Act formula funds the Grant Officer may determine that a debt, or a portion thereof, may be offset against amounts that are allotted to the recipient. Recipients must submit a written request for an offset to the Grant Officer. Generally, the Grant Officer will apply the offset against amounts that are available at the recipient level for administrative costs.

(2) The Grant Officer may approve an offset request, under paragraph (a)(1) of this section, if the misexpenditures were not due to willful disregard of the requirements of WIOA and regulations, fraud, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure.

(b) For subrecipient misexpenditures that were not due to willful disregard of the requirements of WIOA and regulations, fraud, gross negligence, failure to observe accepted standards of administration or a pattern of misexpenditure, if the Grant Officer has required the State to repay or offset such amount, the State may deduct an amount equal to the misexpenditure from the subrecipient's allocation of the program year after the determination was made. Deductions are to be made from funds reserved for the administrative costs of the local programs involved, as appropriate.

(c) If offset is granted, the debt will not be fully satisfied until the Grant Officer reduces amounts allotted to the recipient by the amount of the misexpenditure.

(d) For recipients of funds under title I and Wagner-Peyser Act funds, a direct recipient may not make a deduction under paragraph (b) of this section until the State has taken appropriate corrective action to ensure full compliance within the local area with regard to appropriate expenditure of WIOA funds.

Subpart H—Administrative Adjudication and Judicial Review

§ 683.800 What actions of the Department may be appealed to the Office of Administrative Law Judges?

(a) An applicant for financial assistance under title I of WIOA who is dissatisfied by a determination not to award Federal financial assistance, in whole or in part, to such applicant; or a recipient, subrecipient, or a contractor against which the Grant Officer has directly imposed a sanction or corrective action under sec. 184 of WIOA, including a sanction against a State under part 677 of this chapter, may appeal to the U.S. Department of Labor, Office of Administrative Law Judges (OALJ) within 21 days of receipt of the final determination.

(b) Failure to request a hearing within 21 days of receipt of the final determination constitutes a waiver of the right to a hearing.

(c) A request for a hearing under this subpart must specifically state those issues or findings in the final determination upon which review is requested. Issues or findings in the final determination not specified for review, or the entire final determination when no hearing has been requested within the 21 days, are considered resolved and not subject to further review. Only alleged violations of WIOA, its regulations, the grant or other agreement under WIOA raised in the final determination and the request for hearing are subject to review.

(d) A request for a hearing must be transmitted by certified mail, return receipt requested, to the Chief Administrative Law Judge, U.S. Department of Labor, Suite 400, 800 K Street NW., Washington, DC 20001, with one copy to the Departmental official who issued the determination.

(e) The procedures in this subpart apply in the case of a complainant who has engaged in the alternative dispute resolution process set forth in § 683.840, if neither a settlement was reached nor a decision issued within the 60 days, except that the request for hearing before the OALJ must be filed within 15 days of the conclusion of the 60-day period provided in § 683.840. In addition to including the final determination upon

which review is requested, the complainant must include a copy of any Stipulation of Facts and a brief summary of proceedings.

§ 683.810 What rules of procedure apply to hearings conducted under this subpart?

(a) *Rules of practice and procedure.* The rules of practice and procedure promulgated by the OALJ at subpart A of 29 CFR part 18, govern the conduct of hearings under this subpart. However, a request for hearing under this subpart is not considered a complaint to which the filing of an answer by the Department or a Department agency or official is required. Technical rules of evidence will not apply to hearings conducted pursuant to this part. However, rules or principles designed to assure production of the most credible evidence available and to subject testimony to cross-examination will apply.

(b) *Prehearing procedures.* In all cases, the Administrative Law Judge (ALJ) should encourage the use of prehearing procedures to simplify and clarify facts and issues.

(c) *Subpoenas.* Subpoenas necessary to secure the attendance of witnesses and the production of documents or other items at hearings must be obtained from the ALJ and must be issued under the authority contained in WIOA sec. 183(c), incorporating 15 U.S.C. 49.

(d) *Timely submission of evidence.* The ALJ must not permit the introduction at the hearing of any documentation if it has not been made available for review by the other parties to the proceeding either at the time ordered for any prehearing conference, or, in the absence of such an order, at least 3 weeks prior to the hearing date.

(e) *Burden of production.* The Grant Officer has the burden of production to support her or his decision. This burden is satisfied once the Grant Officer prepares and files an administrative file in support of the decision which must be made part of the record. Thereafter, the party or parties seeking to overturn the Grant Officer's decision has the burden of persuasion.

§ 683.820 What authority does the Administrative Law Judge have in ordering relief as an outcome of an administrative hearing?

(a) In ordering relief the ALJ has the full authority of the Secretary under WIOA, except as described in paragraph (b) of this section.

(b) In grant selection appeals of awards funded under WIOA title I, subtitle D:

(1) If the Administrative Law Judge rules, under § 683.800, that the appealing organization should have been selected for an award, the matter must be remanded to the Grant Officer. The Grant Officer must, within 10 working days, determine whether the organization continues to meet the requirements of the applicable solicitation, whether the funds which are the subject of the ALJ's decision will be awarded to the organization, and the timing of the award. In making this determination, the Grant Officer must take into account disruption to participants, disruption to grantees, and the operational needs of the program.

(2) If the Administrative Law Judge rules that additional application review is required, the Grant Officer must implement that review and, if a new organization is selected, follow the steps laid out in paragraph (b)(1) of this section to determine whether the grant funds will be awarded to that organization.

(3) In the event that the Grant Officer determines that the funds will not be awarded to the appealing organization for the reasons discussed in paragraph (b)(1) of this section, an organization which does not have an approved Negotiated Indirect Cost Rate Agreement will be awarded its reasonable application preparation costs.

(4) If funds are awarded to the appealing organization, the Grant Officer will notify the current grantee within 10 days. In addition, the appealing organization is not entitled to the full grant amount but only will receive the funds remaining in the grant that have not been obligated by the current grantee through its operation of the grant and its subsequent closeout.

(5) In the event that an organization, other than the appealing organization,

is adversely effected by the Grant Officer's determination upon completion of the additional application review under paragraph (b)(2) of this section, that organization may appeal that decision to the Office of Administrative Law Judges by following the procedures set forth in § 683.800.

(6) Any organization selected and/or funded under WIOA title I, subtitle D, is subject to having its award removed if an ALJ decision so orders. As part of this process, the Grant Officer will provide instructions on transition and closeout to both the newly selected grantee and to the grantee whose position is affected or which is being removed. All awardees must agree to the provisions of this paragraph (b) as a condition of accepting a grant award.

§ 683.830 When will the Administrative Law Judge issue a decision?

(a) The ALJ should render a written decision not later than 90 days after the closing of the record.

(b) The decision of the ALJ constitutes final agency action unless, within 20 days of the decision, a party dissatisfied with the ALJ's decision has filed a petition for review with the Administrative Review Board (ARB) (established under Secretary's Order No. 02–2012), specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically raised in the petition is deemed to have been waived. A copy of the petition for review also must be sent to the opposing party and if an applicant or recipient, to the Grant Officer and the Grant Officer's Counsel at the time of filing. Unless the ARB, within 30 days of the filing of the petition for review, notifies the parties that the case has been accepted for review, the decision of the ALJ constitutes final agency action. Any case accepted by the ARB must be decided within 180 days of acceptance. If not so decided, the decision of the ALJ constitutes final agency action.

§ 683.840 Is there an alternative dispute resolution process that may be used in place of an Office of Administrative Law Judges hearing?

(a) The parties to a complaint which has been filed according to the requirements of § 683.800 may choose to waive their rights to an administrative hearing before the OALJ. Instead, they may choose to transfer the settlement of their dispute to an individual acceptable to all parties who will conduct an informal review of the stipulated facts and render a decision in accordance with applicable law. A written decision must be issued within 60 days after submission of the matter for informal review.

(b) The waiver of the right to request a hearing before the OALJ described in paragraph (a) of this section will automatically be revoked if a settlement has not been reached or a written decision has not been issued within the 60 days provided in paragraph (a) of this section.

(c) The decision rendered under this informal review process will be treated as a final decision of an Administrative Law Judge under WIOA sec. 186(b).

§ 683.850 Is there judicial review of a final order of the Secretary issued under WIOA?

(a) Any party to a proceeding which resulted in a Secretary's final order under WIOA sec. 186 in which the Secretary awards, declines to award, or only conditionally awards financial assistance or with respect to a corrective action or sanction imposed under WIOA sec. 184 may obtain a review in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days of the issuance of the Secretary's final order in accordance with WIOA sec. 187.

(b) The court has jurisdiction to make and enter a decree affirming, modifying, or setting aside the order of the Secretary, in whole or in part.

(c) No objection to the Secretary's order may be considered by the court unless the objection was specifically urged, in a timely manner, before the Secretary. The review is limited to questions of law, and the findings of fact of the Secretary are conclusive if supported by substantial evidence.

(d) The judgment of the court is final, subject to certiorari review by the United States Supreme Court.

PART 684—INDIAN AND NATIVE AMERICAN PROGRAMS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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Sec.
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Subpart A—Purposes and Policies

§684.100 What is the purpose of the programs established to serve Indians and Native Americans under the Workforce Innovation and Opportunity Act?

(a) The purpose of WIOA Indian and Native American (INA) programs in sec. 166 is to support employment and training activities for INAs in order to:

(1) Develop more fully the academic, occupational, and literacy skills of such individuals;

(2) Make such individuals more competitive in the workforce and to equip them with entrepreneurial skills necessary for successful self-employment; and

(3) Promote the economic and social development of INA communities in accordance with the goals and values of such communities.

(b) The principal means of accomplishing these purposes is to enable tribes and Native American organizations to provide employment and training services to INAs and their communities. Services should be provided in a culturally appropriate manner, consistent with the principles of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 *et seq.*).

§684.110 How must Indian and Native American programs be administered?

(a) INA programs will be administered to maximize the Federal commitment to support the growth and development of INAs and their communities as determined by representatives of such communities.

(b) In administering these programs, the Department will follow the Congressional declaration of policy set forth in the Indian Self-Determination and Education Assistance Act, at 25 U.S.C. 450a, as well as the Department of Labor's ''American Indian and Alaska Native Policies.''

(c) The regulations in this part are not intended to abrogate the trust responsibilities of the Federal government to Federally recognized tribes in any way.

(d) The Department will administer INA programs through a single organizational unit and consistent with the

requirements in sec. 166(i) of WIOA. The Division of Indian and Native American Programs (DINAP) within the Employment and Training Administration (ETA) is designated as this single organizational unit as required by sec. 166(i)(1) of WIOA.

(e) The Department will establish and maintain administrative procedures for the selection, administration, monitoring, and evaluation of INA employment and training programs authorized under this Act.

§ 684.120 What obligation does the Department have to consult with the Indian and Native American grantee community in developing rules, regulations, and standards of accountability for Indian and Native American programs?

The Department's primary consultation vehicle for INA programs is the Native American Employment and Training Council. In addition, the Department will consult with the INA program grantee community in developing policies for the INA programs, actively seeking and considering the views of INA program grantees prior to establishing INA program policies and regulations. The Department will follow the Department of Labor's tribal consultation policy and Executive Order 13175 of November 6, 2000.

§ 684.130 What definitions apply to terms used in this part?

In addition to the definitions found in secs. 3 and 166 of WIOA, and § 675.300 of this chapter, the following definitions apply:

Alaska Native-Controlled Organization means an organization whose governing board is comprised of 51 percent or more of individuals who are Alaska Native as defined in secs. 3(b) and 3(r) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(b), (r)).

Carry-in means the total amount of funds unobligated by a grantee at the end of a program year. If the amount of funds unobligated by a grantee at the end of a program year is more than 20 percent of the grantee's ''total funds available'' for that program year, such excess amount is considered ''excess carry-in.''

DINAP means the Division of Indian and Native American Programs within the Employment and Training Administration of the U.S. Department of Labor.

Governing body means a body of representatives who are duly elected, appointed by duly elected officials, or selected according to traditional tribal means. A governing body must have the authority to provide services to and to enter into grants on behalf of the organization that selected or designated it.

Grant Officer means a U.S. Department of Labor official authorized to obligate Federal funds.

High-poverty area means a Census tract, a set of contiguous Census tracts, an American Indian Reservation, Oklahoma Tribal Statistical Area, Alaska Native Village Statistical Area, or Alaska Native Regional Corporation Area, Native Hawaiian Homeland Area or county where the poverty rate for the INA population is at least 25 percent of the total INA population of such area using the most recent ACS 5-Year data. Alternatively, high-poverty also can mean, a Census tract, a set of contiguous Census tracts, an American Indian Reservation, Oklahoma Tribal Statistical Area, Alaska Native Village Statistical Area, or Alaska Native Regional Corporation Area, Native Hawaiian Homeland Area or county where the poverty rate for the total population is at least 25 percent of such area using the most recent ACS 5-Year data. INA program grantees may use either definition when determining if a Census tract is a high-poverty area.

INA program grantee means an entity which is formally selected under subpart B of this part to operate an INA program and which has a grant agreement.

Incumbent grantee means an entity that is currently receiving a grant under sec. 166 of WIOA.

Indian and Native American or INA means, for the purpose of this part, an individual that is an American Indian, Native American, Native Hawaiian, or Alaska Native.

Indian-Controlled Organization means an organization whose governing board is comprised of 51 percent or more individuals who are members of one or

more Federally recognized tribes. Incumbent grantees who were receiving INA funding as of October 18, 2016 and met the 51 percent threshold with the inclusion of members of ''State recognized tribes'' continue to be eligible for WIOA sec. 166 funds as an Indian-Controlled Organization, as long as they have been continuously funded under WIOA as recipients of INA program grantees since October 18, 2016. Tribal Colleges and Universities meet the definition of Indian-Controlled Organization for the purposes of this regulation.

Native Hawaiian-Controlled Organization means an organization whose governing board is comprised of 51 percent or more individuals who are Native Hawaiian as defined in sec. 7207 of the Native Hawaiian Education Act (20 U.S.C. 7517).

Total funds available means all funds that a grantee had ''available'' at the beginning of a program year.

Underemployed means an individual who is working part-time but desires full-time employment, or who is working in employment not commensurate with the individual's demonstrated level of educational and/or skill achievement.

Subpart B—Service Delivery Systems Applicable to Section 166 Programs

§ 684.200 What are the requirements to apply for a Workforce Innovation and Opportunity Act grant?

(a) To be eligible to apply for a WIOA, sec. 166 grant, an entity must have legal status as a government or as an agency of a government, private non-profit corporation, or a consortium whose members all qualify as one of these entities.

(b) A new entity (which is not an incumbent grantee) must have a population within the designated geographic service area which would receive at least $100,000 under the funding formula found at § 684.270(b), including any amounts received for supplemental youth services under the funding formula at § 684.440(a).

(c) Incumbent grantees which do not meet this dollar threshold and were receiving INA funding of less than $100,000 as of October 18, 2016 will be grandfathered into the program and are eligible to be awarded less than $100,000 so long as the grantees have continuously received less than $100,000 since October 18, 2016.

(d) The Department will make an exception to the $100,000 minimum for applicants that apply for WIOA funding through Public Law 102–477, the Indian, Employment, Training, and Related Services demonstration program, if all resources to be consolidated under the Public Law 102–477 plan total at least $100,000, with at least $20,000 derived from sec. 166 funds. However, incumbent Public Law 102–477 grantees that were receiving INA funding of less than $20,000 as of October 18, 2016 will be grandfathered into the program and are eligible to be awarded less than $20,000 so long as the grantees have continuously received less than $20,000 since October 18, 2016.

(e) To be eligible to apply as a consortium, each member of the consortium must meet the requirements of paragraph (a) of this section and must:

(1) Be in close proximity to one another, but may operate in more than one State;

(2) Have an administrative unit legally authorized to run the program and to commit the other members to contracts, grants, and other legally-binding agreements; and

(3) Be jointly and individually responsible for the actions and obligations of the consortium, including debts.

(f) Entities eligible under paragraph (a)(1) of this section are:

(1) Federally recognized Indian tribes;

(2) Tribal organizations, as defined in 25 U.S.C. 450b;

(3) Alaska Native-controlled organizations;

(4) Native Hawaiian-controlled organizations;

(5) Indian-controlled organizations serving INAs; and

(6) A consortium of eligible entities which meets the legal requirements for a consortium described in paragraph (b) of this section.

(g) State-recognized tribal organizations that meet the definition of an Indian-controlled organization are eligible to apply for WIOA sec. 166 grant

funds. State-recognized tribes that do not meet this definition but were grantees under WIA as of July 1, 2015 will be grandfathered into WIOA as Indian-controlled organizations provided they meet the definition of Indian-controlled organization in § 684.130.

§ 684.210 What priority for awarding grants is given to eligible organizations?

(a) Federally recognized Indian tribes, Alaska Native entities, or a consortium of such entities will have priority to receive grants under this part for those geographic service areas in which they have legal jurisdiction, such as an Indian reservation, Oklahoma Tribal Service Area (OTSA), or Alaska Native Village Service Area (ANVSA).

(b) If the Department decides not to make an award to an Indian tribe or Alaska Native entity that has legal jurisdiction over a service area, it will consult with such tribe or Alaska Native entity that has jurisdiction before selecting another entity to provide services for such areas.

(c) The priority described in paragraphs (a) and (b) of this section does not apply to service areas outside the legal jurisdiction of an Indian tribe or Alaska Native entity.

§ 684.220 What is the process for applying for a Workforce Innovation and Opportunity Act grant?

(a) Entities seeking a WIOA sec. 166 grant, including incumbent grantees, will be provided an opportunity to apply for a WIOA sec. 166 grant every 4 years through a competitive grant process.

(b) As part of the competitive application process, applicants will be required to submit a 4-year plan as described at § 684.710. The requirement to submit a 4-year plan does not apply to entities that have been granted approval to transfer their WIOA funds to the Department of the Interior pursuant to Public Law 102–477.

§ 684.230 What appeal rights are available to entities that are denied a grant award?

Any entity that is denied a grant award for which it applied in whole or in part may appeal the denial to the Office of the Administrative Law Judges using the procedures at § 683.800 of this chapter or the alternative dispute resolution procedures at § 683.840 of this chapter. The Grant Officer will provide an entity whose request for a grant award was denied, in whole or in part, with a copy of the appeal procedures.

§ 684.240 Are there any other ways in which an entity may be awarded a Workforce Innovation and Opportunity Act grant?

Yes. For areas that would otherwise go unserved, the Grant Officer may designate an entity, which has not submitted a competitive application, but which meets the qualifications for a grant award, to serve the particular geographic area. Under such circumstances, DINAP will seek the views of INA leaders in the community that would otherwise go unserved before making the decision to designate the entity that would serve the community. DINAP will inform the Grant Officer of the INA leaders' views. The Grant Officer will accommodate views of INA leaders in such areas to the extent possible.

§ 684.250 Can an Indian and Native American grantee's grant award be terminated?

(a) Yes, the Grant Officer can terminate a grantee's award for cause, or the Secretary or another Department of Labor official confirmed by the Senate can terminate a grantee's award in emergency circumstances where termination is necessary to protect the integrity of Federal funds or ensure the proper operation of the program under sec. 184(e) of WIOA.

(b) The Grant Officer may terminate a grantee's award for cause only if there is a substantial or persistent violation of the requirements in WIOA or the WIOA regulations. The grantee must be provided with written notice 60 days before termination, stating the specific reasons why termination is proposed. The appeal procedures at § 683.800 of this chapter apply.

§ 684.260 Does the Department have to award a grant for every part of the country?

No, if there are no entities meeting the requirements for a grant award in a particular area, or willing to serve that area, the Department will not award funds for that service area. The funds that otherwise would have been allocated to that area under § 684.270 will be distributed to other INA program grantees, or used for other program purposes such as technical assistance and training (TAT). Unawarded funds used for TAT are in addition to, and not subject to the limitations on, amounts reserved under § 684.270(e). Areas which are unserved by the INA program may be restored during a subsequent grant award cycle, when and if a current grantee or other eligible entity applies for a grant award to serve that area.

§ 684.270 How are Workforce Innovation and Opportunity Act funds allocated to Indian and Native American program grantees?

(a) Except for reserved funds described in paragraph (e) of this section and funds used for other program purposes under § 684.260, all funds available for WIOA sec. 166(d)(2)(A)(i) comprehensive workforce investment services program at the beginning of a program year will be allocated to INA program grantees for the geographic service area(s) awarded to them through the grant competition.

(b) Each INA program grantee will receive the sum of the funds calculated using the following formula:

(1) One-quarter of the funds available will be allocated on the basis of the number of unemployed American Indian, Alaska Native, and Native Hawaiian individuals in the grantee's geographic service area(s) compared to all such unemployed persons in the United States.

(2) Three-quarters of the funds available will be allocated on the basis of the number of American Indian, Alaska Native, and Native Hawaiian individuals in poverty in the grantee's geographic service area(s) as compared to all such persons in poverty in the United States.

(3) The data and definitions used to implement these formulas are provided by the U.S. Bureau of the Census.

(c) In years immediately following the use of new data in the formula described in paragraph (b) of this section, based upon criteria to be described in the Funding Opportunity Announcement (FOA), the Department may utilize a hold harmless factor to reduce the disruption in grantee services which would otherwise result from changes in funding levels. This factor will be determined in consultation with the grantee community and the Native American Employment and Training Council.

(d) The Department may reallocate funds from one INA program grantee to another if a grantee is unable to serve its area for any reason, such as audit or debt problems, criminal activity, internal (political) strife, failure to adhere to or meet grant terms and conditions, or lack of ability or interest. If a grantee has excess carry-in for a program year, the Department also may readjust the awards granted under the funding formula so that an amount that equals the previous program year's carry-in will be allocated to another INA program grantee(s).

(e) The Department may reserve up to one percent of the funds appropriated under WIOA sec. 166(d)(2)(A)(i) for any program year for TAT purposes. It will consult with the Native American Employment and Training Council in planning how the TAT funds will be used, designating activities to meet the unique needs of the INA communities served by the INA program. INA program grantees also will have access to resources available to other Department programs to the extent permitted under other law.

Subpart C—Services to Customers

§ 684.300 Who is eligible to receive services under the Indian and Native American program?

(a) A person is eligible to receive services under the INA program if that person is:

(1) An Indian, as determined by a policy of the INA program grantee. The

grantee's definition must at least include anyone who is a member of a Federally-recognized tribe; or

(2) An Alaska Native, as defined in WIOA sec. 166(b)(1); or

(3) A Native Hawaiian, as defined in WIOA sec. 166(b)(3).

(b) The person also must be any one of the following:

(1) Unemployed; or

(2) Underemployed, as defined in § 684.130; or

(3) A low-income individual, as defined in sec. 3(36) of WIOA; or

(4) The recipient of a bona fide lay-off notice which has taken effect in the last 6 months or will take effect in the following 6-month period, who is unlikely to return to a previous industry or occupation, and who is in need of retraining for either employment with another employer or for job retention with the current employer; or

(5) An individual who is employed, but is determined by the grantee to be in need of employment and training services to obtain or retain employment that allows for self-sufficiency.

(c) If applicable, male applicants also must register or be registered for the Selective Service.

§ 684.310 What are Indian and Native American program grantee allowable activities?

(a) Generally, INA program grantees must make efforts to provide employment and training opportunities to eligible individuals (as described in § 684.300) who can benefit from, and who are most in need of, such opportunities. In addition, INA program grantees must make efforts to develop programs that contribute to occupational development, upward mobility, development of new careers, and opportunities for nontraditional employment.

(b) Allowable activities for INA program grantees are any services consistent with the purposes of this part that are necessary to meet the needs of INAs preparing to enter, reenter, or retain unsubsidized employment leading to self-sufficiency.

(c) Examples of career services, which may be delivered in partnership with the one-stop delivery system, are described in sec. 134(c)(2) of WIOA and § 678.430 of this chapter.

(d) Follow-up services, including counseling and supportive services for up to 12 months after the date of exit to assist participants in obtaining and retaining employment.

(e) Training services include the activities described in WIOA sec. 134(c)(3)(D).

(f) Allowable activities specifically designed for youth, as listed in sec. 129 of WIOA, include:

(1) Tutoring, study skills training, instruction, and evidence-based dropout prevention and recovery strategies that lead to completion of the requirements for a secondary school diploma or its recognized equivalent (including a recognized certificate of attendance or similar document for individuals with disabilities) or for a recognized postsecondary credential;

(2) Alternative secondary school services, or dropout recovery services, as appropriate;

(3) Paid and unpaid work experiences that have as a component academic and occupational education, which may include:

(i) Summer employment opportunities and other employment opportunities available throughout the school year;

(ii) Pre-apprenticeship programs;

(iii) Internships and job shadowing; and

(iv) On-the-job training opportunities;

(4) Occupational skill training, which must include priority consideration for training programs that lead to recognized postsecondary credentials that are aligned with in-demand industry sectors or occupations in the local area involved;

(5) Education offered concurrently with and in the same context as workforce preparation activities and training for a specific occupation or occupational cluster;

(6) Leadership development opportunities, which may include community service and peer-centered activities encouraging responsibility and other positive social and civic behaviors, as appropriate;

(7) Supportive services as defined in WIOA sec. 3(59);

(8) Adult mentoring for the period of participation and a subsequent period, for a total of not less than 12 months;

(9) Follow-up services for not less than 12 months after the completion of participation, as appropriate;

(10) Comprehensive guidance and counseling, which may include drug and alcohol abuse counseling and referral, as appropriate;

(11) Financial literacy education;

(12) Entrepreneurial skills training;

(13) Services that provide labor market and employment information about in-demand industry sectors or occupations available in the local area, such as career awareness, career counseling, and career exploration services; and

(14) Activities that help youth prepare for and transition to postsecondary education and training.

(g) In addition, allowable activities include job development and employment outreach, including:

(1) Support of the Tribal Employment Rights Office (TERO) program;

(2) Negotiation with employers to encourage them to train and hire participants;

(3) Establishment of linkages with other service providers to aid program participants;

(4) Establishment of management training programs to support tribal administration or enterprises; and

(5) Establishment of linkages with remedial education, such as adult basic education, basic literacy training, and training programs for limited English proficient (LEP) individuals, as necessary.

(h) Participants may be enrolled in more than one activity at a time and may be sequentially enrolled in multiple activities.

(i) Services may be provided to a participant in any sequence based on the particular needs of the participant.

§ 684.320 Are there any restrictions on allowable activities?

(a) Training services must be directly linked to an in-demand industry sector or occupation in the service area, or in another area to which a participant receiving such services is willing to relocate.

(b) INA program grantees must provide on-the-job training (OJT) services consistent with the definition provided in WIOA sec. 3(44) and other limitations in WIOA. Individuals in OJT must:

(1) Be compensated at the same rates, including periodic increases, as trainees or employees who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and

(2) Be provided benefits and working conditions at the same level and to the same extent as other trainees or employees working a similar length of time and doing the same type of work.

(c) In addition, OJT contracts under this title must not be entered into with employers who have:

(1) Received payments under previous contracts under WIOA or the Workforce Investment Act of 1998 and have exhibited a pattern of failing to provide OJT participants with continued, long-term employment as regular employees with wages and employment benefits (including health benefits) and working conditions at the same level and to the same extent as other employees working a similar length of time and doing the same type of work; or

(2) Have exhibited a pattern of violating paragraphs (b)(1) and/or (2) of this section.

(d) INA program grantees are prohibited from using funds to encourage the relocation of a business, as described in WIOA sec. 181(d) and § 683.260 of this chapter.

(e) INA program grantees must only use WIOA funds for activities that are in addition to those that would otherwise be available to the INA population in the area in the absence of such funds.

(f) INA program grantees must not spend funds on activities that displace currently employed individuals, impair existing contracts for services, or in any way affect union organizing.

(g) Under § 683.255 of this chapter, sectarian activities involving WIOA financial assistance or participants are limited in accordance with the provisions of sec. 188(a)(3) of WIOA.

§ 684.330 What is the role of Indian and Native American program grantees in the one-stop delivery system?

(a) In those local areas where an INA program grantee conducts field operations or provides substantial services, the INA program grantee is a required partner in the local one-stop delivery system and is subject to the provisions relating to such partners described in part 678 of this chapter. Consistent with those provisions, a Memorandum of Understanding (MOU) between the INA program grantee and the Local Workforce Development Board (WDB) over the operation of the one-stop center(s) in the Local WDB's workforce development area also must be executed. Where the Local WDB is an alternative entity under § 679.150 of this chapter, the INA program grantee must negotiate with the alternative entity on the terms of its MOU and the scope of its on-going role in the local workforce development system, as specified in §§ 678.420 and 678.500 through 678.510 of this chapter. In local areas with a large concentration of potentially eligible INA participants, which are in an INA program grantee's service area but in which the grantee does not conduct operations or provide substantial services, the INA program grantee should encourage such individuals to participate in the one-stop delivery system in that area in order to receive WIOA services.

(b) At a minimum, the MOU must contain the provisions listed in WIOA sec. 121(c) and:

(1) The exchange of information on the services available and accessible through the one-stop delivery system and the INA program;

(2) As necessary to provide referrals and case management services, the exchange of information on INA participants in the one-stop delivery system and the INA program; and

(3) Arrangements for the funding of services provided by the one-stop(s), consistent with the requirements that no expenditures may be made with INA program funds for individuals who are not eligible or for services not authorized under this part.

(c) Where the INA program grantee has failed to enter into a MOU with the Local WDB, the INA program grantee must describe in its 4-year plan the good-faith efforts made in order to negotiate an MOU with the Local WDB.

(d) Pursuant to WIOA sec. 121(h)(2)(D)(iv), INA program grantees will not be subject to the funding of the one-stop infrastructure unless otherwise agreed upon in the MOU under subpart C of part 678 of this chapter.

§ 684.340 What policies govern payments to participants, including wages, training allowances or stipends, or direct payments for supportive services?

(a) INA program grantees may pay training allowances or stipends to participants for their successful participation in and completion of education or training services (except such allowance may not be provided to participants in OJT). Allowances or stipends may not exceed the Federal or State minimum wage, whichever is higher.

(b) INA program grantees may not pay a participant in a training activity when the person fails to participate without good cause.

(c) If a participant in a WIOA-funded activity, including participants in OJT, is involved in an employer-employee relationship, that participant must be paid wages and fringe benefits at the same rates as trainees or employees who have similar training, experience and skills and which are not less than the higher of the applicable Federal, State, or local minimum wage.

(d) In accordance with the policy described in the 4-year plan submitted as part of the competitive process, INA program grantees may pay incentive bonuses to participants who meet or exceed individual employability or training goals established in writing in the individual employment plan.

(e) INA program grantees must comply with other restrictions listed in WIOA secs. 181 through 195, which apply to all programs funded under title I of WIOA, including the provisions on labor standards in WIOA sec. 181(b).

§ 684.350 What will the Department do to strengthen the capacity of Indian and Native American program grantees to deliver effective services?

The Department will provide appropriate TAT, as necessary, to INA program grantees. This TAT will assist INA program grantees to improve program performance and improve the quality of services to the target population(s), as resources permit.

Subpart D—Supplemental Youth Services

§ 684.400 What is the purpose of the supplemental youth services program?

The purpose of this program is to provide supplemental employment and training and related services to low-income INA youth on or near Indian reservations and in Oklahoma, Alaska, or Hawaii.

§ 684.410 What entities are eligible to receive supplemental youth services funding?

Entities eligible to receive supplemental youth services funding are limited to: Those tribal, Alaska Native, Native Hawaiian and Oklahoma tribal grantees funded under WIOA sec. 166(d)(2)(A)(i) or other grantees serving those areas, and entities serving the populations specified in § 684.400 that received funding under sec. 166(d)(2)(A)(ii) of the Workforce Investment Act.

§ 684.420 What are the planning requirements for receiving supplemental youth services funding?

Applicants eligible to apply for supplemental youth funding must describe the supplemental youth services they intend to provide in the 4-year plan that they will submit as part of the competitive application process. The information on youth services will be incorporated into the overall 4-year plan, which is more fully described in §§ 684.700 and 684.710, and is required for both adult and youth funds. As indicated in § 684.710(c), additional planning information required for applicants requesting supplemental youth funding will be provided in the FOA. The Department envisions that the strategy for youth funds will not be extensive; however, grantees will be required to provide the number of youth it plans to serve and projected performance outcomes. The Department also supports youth activities that preserve INA culture and will support strategies that promote INA values.

§ 684.430 What individuals are eligible to receive supplemental youth services?

(a) Participants in supplemental youth services activities must be:

(1) American Indian, Alaska Native or Native Hawaiian as determined by the INA program grantee according to § 684.300(a);

(2) Between the age of 14 and 24; and

(3) A low-income individual as defined at WIOA sec. 3(36) except up to five percent of the participants during a program year in an INA youth program may not be low-income individuals provided they meet the eligibility requirements of paragraphs (a)(1) and (2) of this section.

(b) For the purpose of this section, the term ''low-income,'' used with respect to an individual, also includes a youth living in a high-poverty area.

§ 684.440 How is funding for supplemental youth services determined?

(a) Supplemental youth funding will be allocated to eligible INA program grantees on the basis of the relative number of INA youth between the ages of 14 and 24 living in poverty in the grantee's geographic service area compared to the number of INA youth between the ages of 14 and 24 living in poverty in all eligible geographic service areas. The Department reserves the right to redefine the supplemental youth funding stream in future program years, in consultation with the Native American Employment and Training Council, as program experience warrants and as appropriate data become available.

(b) The data used to implement this formula are provided by the U.S. Bureau of the Census.

(c) The hold harmless factor described in § 684.270(c) also applies to supplemental youth services funding. This factor also will be determined in

consultation with the grantee community and the Native American Employment and Training Council.

(d) The reallocation provisions of § 684.270(d) also apply to supplemental youth services funding.

(e) Any supplemental youth services funds not allotted to a grantee or refused by a grantee may be used for the purposes outlined in § 684.270(e), as described in § 684.260. Any such funds are in addition to, and not subject to the limitations on, amounts reserved under § 684.270(e).

§ 684.450 How will supplemental youth services be provided?

(a) INA program grantees may offer supplemental services to youth throughout the school year, during the summer vacation, and/or during other breaks during the school year at their discretion.

(b) The Department encourages INA program grantees to work with local educational agencies to provide academic credit for youth activities whenever possible.

(c) INA program grantees may provide participating youth with the activities referenced in § 684.310(e).

§ 684.460 What performance indicators are applicable to the supplemental youth services program?

(a) Pursuant to WIOA secs. 166(e)(5) and 166(h), the performance indicators at WIOA sec. 116(b)(2)(A)(ii) apply to the INA youth program, which must include:

(1) The percentage of program participants who are in education or training activities, or in unsubsidized employment, during the second quarter after exit from the program;

(2) The percentage of program participants who are in education or training activities, or in unsubsidized employment, during the fourth quarter after exit from the program;

(3) The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(4) The percentage of program participants who obtain a recognized postsecondary credential, or a secondary school diploma or its recognized equivalent (subject to WIOA sec. 116(b)(2)(A)(iii)) during participation in or within 1 year after exit from the program;

(5) The percentage of program participants who, during a program year, are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains toward such a credential or employment; and

(6) The indicators of effectiveness in serving employers established under WIOA sec. 116(b)(2)(A)(iv).

(b) In addition to the performance indicators in paragraphs (a)(1) through (6) of this section, the Secretary, in consultation with the Native American Employment and Training Council, must develop a set of performance indicators and standards that is in addition to the primary indicators of performance that are applicable to the INA program under this section.

Subpart E—Services to Communities

§ 684.500 What services may Indian and Native American grantees provide to or for employers under the Workforce Innovation and Opportunity Act?

(a) INA program grantees may provide a variety of services to employers in their areas. These services may include:

(1) Workforce planning which involves the recruitment of current or potential program participants, including job restructuring services;

(2) Recruitment and assessment of potential employees, with priority given to potential employees who are or who might become eligible for program services;

(3) Pre-employment training;

(4) Customized training;

(5) OJT;

(6) Post-employment services, including training and support services to encourage job retention and upgrading;

(7) Work experience for public or private sector work sites; and

(8) Other innovative forms of worksite training.

(b) In addition to the services listed in paragraph (a) of this section, other

grantee-determined services (as described in the grantee's 4-year plan), which are intended to assist eligible participants to obtain or retain employment also may be provided to or for employers.

§ 684.510 What services may Indian and Native American grantees provide to the community at large under the Workforce Innovation and Opportunity Act?

(a) INA program grantees may provide services to the INA communities in their service areas by engaging in program development and service delivery activities which:

(1) Strengthen the capacity of Indian-controlled institutions to provide education and work-based learning services to INA youth and adults, whether directly or through other INA institutions such as tribal colleges;

(2) Increase the community's capacity to deliver supportive services, such as child care, transportation, housing, health, and similar services needed by clients to obtain and retain employment;

(3) Use program participants engaged in education, training, work experience, or similar activities to further the economic and social development of INA communities in accordance with the goals and values of those communities; and

(4) Engage in other community-building activities described in the INA program grantee's 4-year plan.

(b) INA program grantees should develop their 4-year plan in conjunction with, and in support of, strategic tribal planning and community development goals.

§ 684.520 Must Indian and Native American program grantees give preference to Indian and Native American entities in the selection of contractors or service providers?

Yes, INA program grantees must give as much preference as possible to Indian organizations and to Indian-owned economic enterprises, as defined in sec. 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452), when awarding any contract or subgrant.

§ 684.530 What rules govern the issuance of contracts and/or subgrants?

In general, INA program grantees must follow the rules of Uniform Administrative Requirements, Cost Principles, & Audit Requirements for Federal Awards when awarding contracts and/or subgrants under WIOA sec. 166. These requirements are codified at 2 CFR part 200, subpart E (and Department modifications at 2 CFR part 2900), and covered in WIOA regulations at § 683.200 of this chapter. These rules do not apply to OJT contract awards.

Subpart F—Accountability for Services and Expenditures

§ 684.600 To whom is the Indian and Native American program grantee accountable for the provision of services and the expenditure of Indian and Native American funds?

(a) The INA program grantee is responsible to the INA community to be served by INA funds.

(b) The INA program grantee also is responsible to the Department of Labor, which is charged by law with ensuring that all WIOA funds are expended:

(1) According to applicable laws and regulations;

(2) For the benefit of the identified INA client group; and

(3) For the purposes approved in the grantee's plan and signed grant document.

§ 684.610 How is this accountability documented and fulfilled?

(a) Each INA program grantee must establish its own internal policies and procedures to ensure accountability to the INA program grantee's governing body, as the representative of the INA community(ies) served by the INA program. At a minimum, these policies and procedures must provide a system for governing body review and oversight of program plans and measures and standards for program performance.

(b) Accountability to the Department is accomplished in part through on-site program reviews (monitoring), which strengthen the INA program grantee's capability to deliver effective services

and protect the integrity of Federal funds.

(c) In addition to audit information, as described at § 684.860 and program reviews, accountability to the Department is documented and fulfilled by the submission of quarterly financial and program reports, and compliance with the terms and conditions of the grant award.

§ 684.620 What performance indicators are in place for the Indian and Native American program?

(a) Pursuant to WIOA secs. 166(e)(5) and 166(h), the performance indicators at WIOA sec. 116(b)(2)(A)(i) apply to the INA program which must include:

(1) The percentage of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(2) The percentage of program participants who are in unsubsidized employment during the fourth quarter after exit from the program;

(3) The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(4) The percentage of program participants who obtain a recognized postsecondary credential, or a secondary school diploma or its recognized equivalent (subject to WIOA sec. 116(b)(2)(A)(iii)) during participation in or within 1 year after exit from the program;

(5) The percentage of program participants who, during a program year, are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains toward such a credential or employment; and

(6) The indicators of effectiveness in serving employers established under WIOA sec. 116(b)(2)(A)(iv).

(b) In addition to the performance indicators at WIOA sec. 116(b)(2)(A)(i), the Department, in consultation with the Native American Employment and Training Council, must develop a set of performance indicators and standards that are applicable to the INA program.

§ 684.630 What are the requirements for preventing fraud and abuse under the WIOA?

(a) INA program grantees must establish such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursal of, and accounting for, Federal funds. Such procedures must ensure that all financial transactions are conducted and records maintained in accordance with generally accepted accounting principles.

(b) Each INA program grantee must have rules to prevent conflict of interest by its governing body. These conflict of interest rules must include a rule prohibiting any member of any governing body or council associated with the INA program grantee from voting on any matter which would provide a direct financial benefit to that member, or to a member of his or her immediate family, in accordance with § 683.200(c)(5)(iii) of this chapter and 2 CFR parts 200 and 2900.

(c) Officers or agents of the INA program grantee must not solicit or personally accept gratuities, favors, or anything of monetary value from any actual or potential contractor, subgrantee, vendor, or participant. This rule also must apply to officers or agents of the grantee's contractors and/or subgrantees. This prohibition does not apply to:

(1) Any rebate, discount, or similar incentive provided by a vendor to its customers as a regular feature of its business; and

(2) Items of nominal monetary value distributed consistent with the cultural practices of the INA community served by the grantee.

(d) No person who selects program participants or authorizes the services provided to them may select or authorize services to any participant who is such a person's spouse, parent, sibling, or child unless:

(1)(i) The participant involved is a low-income individual; or

(ii) The community in which the participant resides has a population of less than 1,000 INAs combined; and

(2) The INA program grantee has adopted and implemented the policy described in the 4-year plan to prevent favoritism on behalf of such relatives.

(e) INA program grantees are subject to the provisions of 41 U.S.C. 8702 relating to kickbacks.

(f) No assistance provided under WIOA may involve political activities.

(g) INA program grantees must comply with the restrictions on lobbying activities pursuant to sec. 195 of WIOA and the restrictions on lobbying codified in the Department regulations at 29 CFR part 93.

(h) The provisions of 18 U.S.C. 665 and 666 prohibiting embezzlement apply to programs under WIOA.

(i) Recipients of financial assistance under WIOA sec. 166 are prohibited from discriminatory practices as outlined at WIOA sec. 188, and the regulations implementing WIA sec. 188, at 29 CFR part 38. However, this does not affect the legal requirement that all INA participants be INAs. Also, INA program grantees are not obligated to serve populations outside the geographic boundaries for which they receive funds. However, INA program grantees are not precluded from serving eligible individuals outside their geographic boundaries if the INA program grantee chooses to do so.

§ 684.640 What grievance systems must an Indian and Native American program grantee provide?

INA program grantees must establish grievance procedures consistent with the requirements of WIOA sec. 181(c) and § 683.600 of this chapter.

§ 684.650 Can Indian and Native American grantees exclude segments of the eligible population?

(a) No, INA program grantees cannot exclude segments of the eligible population except as otherwise provided in this part. INA program grantees must document in their 4-year plan that a system is in place to afford all members of the eligible population within the service area for which the grantee was designated an equitable opportunity to receive WIOA services and activities.

(b) Nothing in this section restricts the ability of INA program grantees to target subgroups of the eligible population (for example, the disabled, substance abusers, TANF recipients, or similar categories), as outlined in an approved 4-year plan. However, it is unlawful to target services to subgroups on grounds prohibited by WIOA sec. 188 and 29 CFR part 38, including tribal affiliation (which is considered national origin). Outreach efforts, on the other hand, may be targeted to any subgroups.

Subpart G—Section 166 Planning/Funding Process

§ 684.700 What is the process for submitting a 4-year plan?

Every 4 years, INA program grantees must submit a 4-year strategy for meeting the needs of INAs in accordance with WIOA sec. 166(e). This plan will be part of, and incorporated with, the 4-year competitive process described in WIOA sec. 166(c) and § 684.220. Accordingly, specific requirements for the submission of a 4-year plan will be provided in a FOA and will include the information described at § 684.710.

§ 684.710 What information must be included in the 4-year plans as part of the competitive application?

(a) The 4-year plan, which will be submitted as part of the competitive process, must include the information required at WIOA secs. 166(e)(2)–(5) which are:

(1) The population to be served;

(2) The education and employment needs of the population to be served and the manner in which the activities to be provided will strengthen the ability of the individuals served to obtain or retain unsubsidized employment leading to self-sufficiency;

(3) A description of the activities to be provided and the manner in which such activities are to be integrated with other appropriate activities; and

(4) A description of the performance indicators and expected levels of performance.

(b) The 4-year plan also must include any additional information requested in the FOA.

(c) INA program grantees receiving supplemental youth funds will be required to provide additional information (at a minimum the number of youth it plans to serve and the projected performance outcomes) in the 4-year plan that describes a strategy for

serving low-income, INA youth. Additional information required for supplemental youth funding will be identified in the FOA.

§ 684.720 When must the 4-year plan be submitted?

The 4-year plans will be submitted as part of the competitive FOA process described at § 684.220. Accordingly, the due date for the submission of the 4-year plan will be specified in the FOA.

§ 684.730 How will the Department review and approve such plans?

(a) It is the Department's intent to approve a grantee's 4-year strategic plan before the date on which funds for the program become available unless:

(1) The planning documents do not contain the information specified in the regulations in this part and/or the FOA; or

(2) The services which the INA program grantee proposes are not permitted under WIOA or applicable regulations.

(b) After competitive grant selections have been made, the DINAP office will assist INA program grantees in resolving any outstanding issues with the 4-year plan. However, the Department may delay funding to grantees until all issues have been resolved. If the issues with the application of an incumbent grantee cannot be solved, the Department will reallocate funds from the grantee to other grantees that have an approved 4-year plan. The Grant Officer may delay executing a grant agreement and obligating funds to an entity selected through the competitive process until all the required documents—including the 4-year plan—are in place and satisfactory.

(c) The Department may approve a portion of the plan and disapprove other portions.

(d) The grantee also has the right to appeal a nonselection decision or a decision by the Department to deny or reallocate funds based on unresolved issues with the applicant's application or 4-year plan. Such an appeal would go to the Office of the Administrative Law Judges under procedures at § 683.800 or § 683.840 of this chapter in the case of a nonelection.

§ 684.740 Under what circumstances can the Department or the Indian and Native American grantee modify the terms of the grantee's plan(s)?

(a) The Department may unilaterally modify the INA program grantee's plan to add funds or, if required by Congressional action, to reduce the amount of funds available for expenditure.

(b) The INA program grantee may request approval to modify its plan to add, expand, delete, or diminish any service allowable under the regulations in this part. The INA program grantee may modify its plan without our approval, unless the modification reduces the total number of participants to be served annually under the grantee's program by a number which exceeds 25 percent of the participants previously proposed to be served, or by 25 participants, whichever is larger.

Subpart H—Administrative Requirements

§ 684.800 What systems must an Indian and Native American program grantee have in place to administer an Indian and Native American program?

(a) Each INA program grantee must have a written system describing the procedures the grantee uses for:

(1) The hiring and management of personnel paid with program funds;

(2) The acquisition and management of property purchased with program funds;

(3) Financial management practices;

(4) A participant grievance system which meets the requirements in sec. 181(c) of WIOA and § 683.600 of this chapter; and

(5) A participant records system.

(b) Participant records systems must include:

(1) A written or computerized record containing all the information used to determine the person's eligibility to receive program services;

(2) The participant's signature certifying that all the eligibility information he or she provided is true to the best of his/her knowledge; and

(3) The information necessary to comply with all program reporting requirements.

§ 684.810 What types of costs are allowable expenditures under the Indian and Native American program?

Rules relating to allowable costs under WIOA are covered in §§ 683.200 through 683.215 of this chapter.

§ 684.820 What rules apply to administrative costs under the Indian and Native American program?

The definition and treatment of administrative costs are covered in §§ 683.205(b) and 683.215 of this chapter.

§ 684.830 Does the Workforce Innovation and Opportunity Act administrative cost limit for States and local areas apply to WIOA grants?

No, under § 683.205(b) of this chapter, limits on administrative costs for sec. 166 grants will be negotiated with the grantee and identified in the grant award document.

§ 684.840 How must Indian and Native American program grantees classify costs?

Cost classification is covered in the WIOA regulations at §§ 683.200 through 683.215 of this chapter. For purposes of the INA program, program costs also include costs associated with other activities such as TERO, and supportive services, as defined in WIOA sec. 3(59).

§ 684.850 What cost principles apply to Indian and Native American funds?

The cost principles at 2 CFR part 200, subpart E, Uniform Administrative Requirements, Cost Principles, & Audit Requirements for Federal Awards, and the Department's modifications to 2 CFR part 200, subpart E, at 2 CFR part 2900, apply to INA program grantees.

§ 684.860 What audit requirements apply to Indian and Native American grants?

(a) WIOA sec. 166 grantees must follow the audit requirements at 2 CFR part 200, subpart F, Uniform Administrative Requirements, Cost Principles, & Audit Requirements for Federal Awards, and the Department's modifications to 2 CFR part 200 at 2 CFR part 2900.

(b) Grants made and contracts and cooperative agreements entered into under sec. 166 of WIOA are subject to the requirements of chapter 75 of subtitle V of title 31, United States Code, and charging of costs under this section are subject to appropriate circulars issued by the Office of Management and Budget and to 2 CFR part 200 and the Department's modifications to 2 CFR part 200 at 2 CFR part 2900.

§ 684.870 What is "program income" and how is it regulated in the Indian and Native American program?

(a) Program income is regulated by WIOA sec. 194(7)(A), §§ 683.200(c)(6) through (8) and 683.300(c)(5) of this chapter, and the applicable rules in 2 CFR parts 200 and 2900.

(b) For grants made under this part, program income does not include income generated by the work of a work experience participant in an enterprise, including an enterprise owned by an INA entity, whether in the public or private sector.

(c) Program income does not include income generated by the work of an OJT participant in an establishment under paragraph (b) of this section.

Subpart I—Miscellaneous Program Provisions

§ 684.900 Does the Workforce Innovation and Opportunity Act provide regulatory and/or statutory waiver authority?

Yes, WIOA sec. 166(i)(3) permits waivers of any statutory or regulatory requirement of title I of WIOA that are inconsistent with the specific needs of the INA program grantee (except for the areas cited in § 684.920). Such waivers may include those necessary to facilitate WIOA support of long-term community development goals.

§ 684.910 What information is required in a waiver request?

(a) To request a waiver, an INA program grantee must submit a waiver request indicating how the waiver will improve the grantee's WIOA program activities. The waiver process will be generally consistent with, but not identical to, the waiver requirements under sec. 189(i)(3)(B) of WIOA. INA program grantees may submit a waiver request as part of the 4-year strategic plan.

(b) A waiver may be requested at the beginning of a 4-year grant award cycle or anytime during a 4-year award cycle. However, all waivers expire at the end of the 4-year award cycle. INA program grantees seeking to continue an existing waiver in a new 4-year grant cycle must submit a new waiver request in accordance with paragraph (a) of this section.

§ 684.920 What provisions of law or regulations may not be waived?

Requirements relating to:

(a) Wage and labor standards;

(b) Worker rights;

(c) Participation and protection of workers and participants;

(d) Grievance procedures;

(e) Judicial review; and

(f) Non-discrimination may not be waived.

§ 684.930 May Indian and Native American program grantees combine or consolidate their employment and training funds?

Yes. INA program grantees may consolidate their employment and training funds under WIOA with assistance received from related programs in accordance with the provisions of the Public Law 102–477, the Indian Employment, Training, and Related Services Demonstration Act of 1992, as amended by Public Law 106–568, the Omnibus Indian Advancement Act of 2000 (25 U.S.C. 3401 *et seq.*). WIOA funds consolidated under Public Law 102–477 are administered by Department of the Interior (DOI). Accordingly, the administrative oversight for funds transferred to DOI, including the reporting of financial expenditures and program outcomes are the responsibility of DOI. However, the Department must review the initial 477 plan and ensure that all Departmental programmatic and financial obligations have been met before WIOA funds are approved to be transferred to DOI and consolidated with other related programs. The initial plan must meet the statutory requirements of WIOA. After approval of the initial plan, all subsequent plans that are renewed or updated from the initial plan may be approved by DOI without further review by the Department.

§ 684.940 What is the role of the Native American Employment and Training Council?

The Native American Employment and Training Council is a body composed of representatives of the grantee community which advises the Secretary on the operation and administration of the INA employment and training program. WIOA sec. 166(i)(4) continues the Council essentially as it is currently constituted. The Department continues to support the Council.

§ 684.950 Does the Workforce Innovation and Opportunity Act provide any additional assistance to unique populations in Alaska and Hawaii?

Yes. Notwithstanding any other provision of law, the Secretary is authorized to award grants, on a competitive basis, to entities with demonstrated experience and expertise in developing and implementing programs for the unique populations who reside in Alaska or Hawaii, including public and private nonprofit organizations, tribal organizations, American Indian tribal colleges or universities, institutions of higher education, or consortia of such organizations or institutions, to improve job training and workforce investment activities for such unique populations.

PART 685—NATIONAL FARMWORKER JOBS PROGRAM UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

Subpart A—Purpose and Definitions

Sec.

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Subpart A—Purpose and Definitions

§ 685.100 What is the purpose of the National Farmworker Jobs Program and the other services and activities established under the Workforce Innovation and Opportunity Act?

The purpose of the NFJP and the other services and activities established under WIOA sec. 167 is to strengthen the ability of eligible migrant and seasonal farmworkers (MSFWs) and their dependents to obtain or retain unsubsidized employment, stabilize their unsubsidized employment and achieve economic self-sufficiency, including upgraded employment in agriculture. This part provides the regulatory requirements applicable to the expenditure of WIOA secs. 167 and 127(a)(1) funds for such programs, services, and activities.

§ 685.110 What definitions apply to this program?

In addition to the definitions found in § 675.300 of this chapter, the following definitions apply to programs under this part:

Allowances means direct payments made to participants during their enrollment to enable them to participate in the career services described in WIOA sec. 134(c)(2)(A)(xii) or training services as appropriate.

Dependent means an individual who:

(1) Was claimed as a dependent on the eligible MSFW's Federal income tax return for the previous year; or

(2) Is the spouse of the eligible MSFW; or

(3) If not claimed as a dependent for Federal income tax purposes, is able to establish:

(i) A relationship as the eligible MSFW's;

(A) Child, grandchild, great grandchild, including legally adopted children;

(B) Stepchild;

(C) Brother, sister, half-brother, half-sister, stepbrother, or stepsister;

(D) Parent, grandparent, or other direct ancestor but not foster parent;

(E) Foster child;

(F) Stepfather or stepmother;

(G) Uncle or aunt;

(H) Niece or nephew;

(I) Father-in-law, mother-in-law, son-in-law; or

(J) Daughter-in-law, brother-in-law, or sister-in-law; and

(ii) The receipt of over half of his/her total support from the eligible MSFW's family during the eligibility determination period.

Eligibility determination period means any consecutive 12-month period within the 24-month period immediately preceding the date of application for the MSFW program by the applicant MSFW.

Eligible migrant farmworker means an eligible seasonal farmworker as defined in WIOA sec. 167(i)(3) whose agricultural labor requires travel to a job site such that the farmworker is unable to return to a permanent place of residence within the same day; and dependents of the migrant farmworker, as described in WIOA sec. 167(i)(2).

Eligible migrant and seasonal farmworker means an eligible migrant farmworker or an eligible seasonal farmworker, also referred to in this regulation as an ''*eligible MSFW*,'' as defined in WIOA sec. 167(i).

Eligible MSFW youth means an eligible MSFW aged 14–24 who is individually eligible or is a dependent of an eligible MSFW. The term *eligible MSFW youth* is a subset of the term *eligible MSFW* defined in this section.

Eligible seasonal farmworker means a low-income individual who for 12 consecutive months out of the 24 months prior to application for the program involved, has been primarily employed in agricultural or fish farming labor that is characterized by chronic unemployment or underemployment; and faces multiple barriers to economic self-sufficiency; and dependents of the seasonal farmworker as described in WIOA sec. 167(i)(3).

Emergency assistance is a form of ''related assistance'' and means assistance provided by grantees that addresses immediate needs of eligible MSFWs and their dependents. An applicant's self-certification is accepted as sufficient documentation of eligibility for emergency assistance.

Family, for the purpose of reporting housing assistance grantee indicators of performance as described in in § 685.400, means the eligible MSFW(s) and all the individuals identified under the definition of *dependent* in this section who are living together in one physical residence.

Farmwork means work while employed in the occupations described in § 651.10 of this chapter.

Grantee means an entity to which the Department directly awards a WIOA grant to carry out programs to serve eligible MSFWs in a service area, with funds made available under WIOA sec. 167 or 127(a)(1).

Housing assistance means housing services which contribute to safe and sanitary temporary and permanent housing constructed, supplied, or maintained with NFJP funding.

Lower living standard income level means the income level as defined in WIOA sec. 3(36)(B).

Low-income individual means an individual as defined in WIOA sec. 3(36)(A).

MOU means Memorandum of Understanding.

National Farmworker Jobs Program (NFJP) is the Department of Labor-administered workforce investment program for eligible MSFWs established by WIOA sec. 167 as a required partner of the one-stop delivery system and includes both career services and training grants, and housing grants.

Recognized postsecondary credential means a credential as defined in WIOA sec. 3(52).

Related assistance means short-term forms of direct assistance designed to assist eligible MSFWs retain or stabilize their agricultural employment. Examples of related assistance may include, but are not limited to, services such as transportation assistance or providing work clothing.

Self-certification means an eligible MSFW's signed attestation that the information he/she submits to demonstrate eligibility for the NFJP is true and accurate.

Service area means the geographical jurisdiction, which may be comprised of one or more designated State or sub-State areas, in which a WIOA sec. 167 grantee is designated to operate.

Supportive services means the services defined in WIOA sec. 3(59).

Technical assistance means the guidance provided to grantees and grantee staff by the Department to improve the quality of the program and the delivery of program services to eligible MSFWs.

§ 685.120 How does the Department administer the National Farmworker Jobs Program?

The Department's Employment and Training Administration (ETA) administers NFJP activities required under WIOA sec. 167 for eligible MSFWs. As described in § 685.210, the Department designates grantees using procedures consistent with standard Federal government competitive procedures.

§ 685.130 How does the Department assist grantees to serve eligible migrant and seasonal farmworkers?

The Department provides guidance, administrative support, technical assistance, and training to grantees for the purposes of program implementation, and program performance management to enhance services and promote continuous improvement in the employment outcomes of eligible MSFWs.

§ 685.140 What Workforce Innovation and Opportunity Act (WIOA) regulations apply to the programs authorized under WIOA?

The regulations that apply to programs authorized under WIOA sec. 167 include but are not limited to:

(a) The regulations found in this part;

(b) The general administrative requirements found in part 683 of this chapter, including the regulations concerning Complaints, Investigations and Hearings found at part 683, subparts D through H, of this chapter, which cover programs under WIOA sec. 167;

(c) Uniform Guidance at 2 CFR part 200 and the Department's exceptions at 2 CFR part 2900 pursuant to the effective dates in 2 CFR parts 200 and 2900;

(d) The regulations on partnership responsibilities contained in parts 679 (Statewide and Local Governance) and 678 (the One-Stop System) of this chapter; and

(e) The Department's regulations at 29 CFR part 38, which implement the nondiscrimination provisions of WIOA sec. 188.

Subpart B—The Service Delivery System for the National Farmworker Jobs Program

§ 685.200 Who is eligible to receive a National Farmworker Jobs Program grant?

To be eligible to receive a grant under this section, an entity must have:

(a) An understanding of the problems of eligible MSFWs;

(b) A familiarity with the agricultural industries and the labor market needs of the proposed service area; and

(c) The ability to demonstrate a capacity to administer and deliver effectively a diversified program of workforce investment activities, including youth workforce investment activities, and related assistance for eligible MSFWs.

§ 685.210 How does an eligible entity become a grantee?

To become a grantee and receive a grant under this subpart, an applicant must respond to a Funding Opportunity Announcement (FOA). Under the FOA, grantees will be selected using standard Federal government competitive procedures. The entity's proposal must include a program plan, which is a 4-year strategy for meeting the needs of eligible MSFWs in the proposed service area, and a description of the entities experience working with the broader workforce delivery system. Unless specified otherwise in the FOA, grantees may serve eligible MSFWs, including eligible MSFW youth, under the grant. An applicant whose application for funding as a grantee under this section is denied in whole or in part may request an administrative review under § 683.800 of this chapter.

§ 685.220 What is the role of the grantee in the one-stop delivery system?

In those local areas where the grantee operates its NFJP as described in its grant agreement, the grantee is a required one-stop partner, and is subject to the provisions relating to such partners described in part 678 of this chapter. Consistent with those provisions, the grantee and Local Workforce Development Board (WDB) must develop and enter into an MOU which meets the requirements of § 678.500 of this chapter, and which sets forth their respective responsibilities for providing access to the full range of NFJP services through the one-stop delivery system to eligible MSFWs.

§ 685.230 Can a grantee's designation be terminated?

Yes, a grantee's designation may be terminated by the Department for cause:

(a) In emergency circumstances when such action is necessary to protect the integrity of Federal funds or to ensure the proper operation of the program. Any grantee so terminated will be provided with written notice and an opportunity for a hearing within 30 days after the termination; or

(b) By the Department's Grant Officer, if the recipient materially fails to comply with the terms and conditions of the award. In such a case, the Grant Officer will follow the administrative regulations at § 683.440 of this chapter.

§ 685.240 How does the Department use funds appropriated under the Workforce Innovation and Opportunity Act for the National Farmworker Jobs Program?

At least 99 percent of the funds appropriated each year for WIOA sec. 167 activities must be allocated to service areas, based on the distribution of the eligible MSFW population determined under a formula established by the Secretary. The Department will award grants pursuant to § 685.210 for the provision of services to eligible MSFWs within each service area. The Department will use a percentage of the funds allocated for State service areas for housing grants, specified in a FOA issued by the Department. The Department will use up to one percent of the appropriated funds for discretionary purposes, such as technical assistance to eligible entities and other activities prescribed by the Secretary.

Subpart C—The National Farmworker Jobs Program Services to Eligible Migrant and Seasonal Farmworkers

§ 685.300 What are the general responsibilities of grantees?

(a) The Department awards career services and training grants and housing grants through the FOA process described in § 685.210. Career services and training grantees are responsible for providing appropriate career services, training, and related assistance to eligible MSFWs. Housing grantees are responsible for providing housing assistance to eligible MSFWs.

(b) Grantees will provide these services in accordance with the service delivery strategy meeting the requirements of § 685.310 and as described in their approved program plan described in § 685.420. These services must reflect the needs of the MSFW population in the service area and include the services that are necessary to achieve each participant's employment goals or housing needs.

(c) Grantees are responsible for coordinating services, particularly outreach to MSFWs, with the State Workforce Agency as defined in § 651.10 of this chapter and the State's Monitor Advocate.

(d) Grantees are responsible for fulfilling the responsibilities of one-stop partners described in § 678.420 of this chapter.

§ 685.310 What are the basic components of a National Farmworker Jobs Program service delivery strategy?

The NFJP service delivery strategy must include:

(a) A customer-focused case management approach;

(b) The provision of workforce investment activities to eligible MSFWs which include career services and training, as described in WIOA secs. 167(d) and 134, and part 680 of this chapter;

(c) The provision of youth workforce investment activities described in WIOA sec. 129 and part 681 of this chapter may be provided to eligible MSFW youth;

(d) The arrangements under the MOUs with the applicable Local WDBs for the delivery of the services available through the one-stop delivery system to MSFWs; and

(e) Related assistance services.

§ 685.320 Who is eligible to receive services under the National Farmworker Jobs Program?

Eligible migrant farmworkers (including eligible MSFW youth) and eligible seasonal farmworkers (including eligible MSFW youth) as defined in § 685.110 are eligible for services funded by the NFJP.

§ 685.330 How are services delivered to eligible migrant and seasonal farmworkers?

To ensure that all services are focused on the customer's needs, services are provided through a case-management approach emphasizing customer choice and may include: Appropriate career services and training; related assistance, which includes emergency assistance; and supportive services, which includes allowance payments. The basic services and delivery of case-management activities are further described in §§ 685.340 through 685.390.

§ 685.340 What career services may grantees provide to eligible migrant and seasonal farmworkers?

(a) Grantees may provide the career services described in WIOA secs. 167(d) and 134(c)(2), and part 680 of this chapter to eligible MSFWs.

(b) Grantees may provide other services identified in the approved program plan.

(c) The delivery of career services to eligible MSFWs by the grantee and through the one-stop delivery system must be discussed in the required MOU between the Local WDB and the grantee.

§ 685.350 What training services may grantees provide to eligible migrant and seasonal farmworkers?

(a) Grantees may provide the training activities described in WIOA secs. 167(d) and 134(c)(3)(D), and part 680 of this chapter to eligible MSFWs. These activities include, but are not limited to, occupational-skills training and on-the-job training (OJT). Eligible MSFWs are not required to receive career services prior to receiving training services.

(1) When providing OJT services NFJP grantees may reimburse employers for the extraordinary costs of training by up to 50 percent of the wage rate of the participant for OJT.

(2) Grantees also may increase the OJT reimbursement rate up to 75 percent of the wage rate of a participant under certain conditions, provided that such reimbursement is being provided consistent with the reimbursement rates used under WIOA sec. 134(c)(3)(H)(i) for the local area(s) in which the grantee operates its program.

(b) Training services must be directly linked to an in-demand industry sector or occupation in the service area, or in another area to which an eligible MSFW receiving such services is willing to relocate.

(c) Training activities must encourage the attainment of recognized post-secondary credentials as defined in § 685.110 when appropriate for an eligible MSFW.

§ 685.360 What housing services may grantees provide to eligible migrant and seasonal farmworkers?

(a) Housing grantees must provide housing services to eligible MSFWs.

(b) Career services and training grantees may provide housing services to eligible MSFWs as described in their program plan.

(c) Housing services may include the following:

(1) Permanent housing that is owner-occupied, or occupied on a permanent, year-round basis (notwithstanding ownership) as the eligible MSFW's primary residence to which he/she returns at the end of the work or training day.

(i) Types of permanent housing may include rental units, single family homes, duplexes, and other multi-family structures, dormitories, group homes, and other housing types that provide short-term, seasonal, or year-round housing opportunities in permanent structures. Modular structures, manufactured housing, or mobile units placed on permanent foundations and supplied with appropriate utilities, and other infrastructure also are considered permanent housing.

(ii) Permanent housing services include but are not limited to: Investments in development services, project management, and resource development to secure acquisition, construction/renovation and operating funds, property management services, and program management. New construction, purchase of existing structures, and rehabilitation of existing structures, as well as the infrastructure, utilities, and other improvements necessary to complete or maintain those structures also may be considered part of managing permanent housing.

(2) Temporary housing that is not owner-occupied and is used by MSFWs whose employment requires occasional travel outside their normal commuting area.

(i) Types of temporary housing may include: Housing units intended for temporary occupancy located in permanent structures, such as rental units in an apartment complex or in mobile structures that provide short-term, seasonal housing opportunities; temporary structures that may be moved from site to site, dismantled and re-erected when needed for farmworker occupancy, closed during the off-season, or handled through other similar arrangements; off-farm housing operated independently of employer interest in, or control of, the housing; or on-farm housing located on property owned by an agricultural employer and operated by an entity such as an agricultural employer or a nonprofit organization; and other housing types that provide short-term, seasonal, or temporary housing opportunities in temporary structures.

(ii) Temporary housing services include but are not limited to: Managing temporary housing which may involve property management of temporary housing facilities, case management, and referral services, and emergency housing payments, including vouchers and cash payments for rent/lease and utilities.

(d) Permanent housing developed with NFJP funds must be promoted and made widely available to eligible MSFWs, but occupancy is not restricted to eligible MSFWs. Temporary housing services must only be provided to eligible MSFWs.

(e) Except as provided in paragraph (f) of this section, NFJP funds used for housing assistance must ensure the provision of safe and sanitary temporary and permanent housing that meets the Federal housing standards at part 654 of this chapter (ETA housing for farmworkers) or 29 CFR 1910.10 (OSHA housing standards).

(f) When NFJP grantees provide temporary housing assistance that allows the participant to select the housing, including vouchers and cash payments for rent, lease, and utilities, NFJP grantees are not required to ensure that such housing meets the Federal housing standards at part 654 of this chapter or 29 CFR 1910.10.

§ 685.370 What services may grantees provide to eligible migrant and seasonal farmworkers youth participants aged 14–24?

(a) Based on an evaluation and assessment of the needs of eligible MSFW youth, grantees may provide activities and services that include but are not limited to:

(1) Career services and training as described in §§ 685.340 and 685.350;

(2) Youth workforce investment activities specified in WIOA sec. 129;

(3) Life skills activities which may include self- and interpersonal skills development;

(4) Community service projects; and

(5) Other activities and services that conform to the use of funds for youth activities described in part 681 of this chapter.

(b) Grantees may provide these services to any eligible MSFW youth, regardless of the participant's eligibility for WIOA title I youth activities as described in WIOA sec. 129(a).

§ 685.380 What related assistance services may be provided to eligible migrant and seasonal farmworkers?

Related assistance may include short-term direct services and activities. Examples include emergency assistance, as defined in § 685.110, and those activities identified in WIOA sec. 167(d), such as: English language and literacy instruction; pesticide and worker safety training; housing (including permanent housing), as described in § 685.360 and as provided in the approved program plan; and school dropout prevention and recovery activities. Related assistance may be provided to eligible MSFWs not enrolled in career services, youth services, or training services.

§ 685.390 When may eligible migrant and seasonal farmworkers receive related assistance?

Eligible MSFWs may receive related assistance services when the grantee identifies and documents the need for the related assistance, which may include a statement by the eligible MSFW.

Subpart D—Performance Accountability, Planning, and Waiver Provisions

§ 685.400 What are the indicators of performance that apply to the National Farmworker Jobs Program?

(a) For grantees providing career services and training, the Department will use the indicators of performance common to the adult and youth programs, described in WIOA sec. 116(b)(2)(A).

(b) For grantees providing career services and training, the Department will reach agreement with individual grantees on the levels of performance for each of the primary indicators of performance, taking into account economic conditions, characteristics of the individuals served, and other appropriate factors, and using, to the extent practicable, the statistical adjustment model under WIOA sec. 116(b)(3)(A)(viii). Once agreement on the levels of performance for each of the primary indicators of performance is reached with individual grantees, the Department will incorporate the adjusted levels of performance in the grant plan. For the purposes of performance reporting, eligible MSFWs who receive any career services, youth services, training, or certain related assistance are considered participants as defined in § 677.150 of this chapter and must be included in performance calculations for the indicators of performance. Eligible MSFWs who receive only those services identified in § 677.150(a)(3)(ii) or (iii) of this chapter are not included in performance calculations for the indicators of performance described in WIOA sec. 116(b)(2)(A).

(c) For grantees providing housing services only, grantees will use the total number of eligible MSFWs served and the total number of eligible MSFW families served as indicators of performance. Additionally, grantees providing permanent housing development activities will use the total number of individuals served and the total number of families served as indicators of performance.

(d) The Department may develop additional performance indicators with appropriate levels of performance for evaluating programs that serve eligible MSFWs and which reflect the State service area economy, local demographics of eligible MSFWs, and other appropriate factors. If additional performance indicators are developed, the levels of performance for these additional indicators must be negotiated with the grantee and included in the approved program plan.

(e) Grantees may develop additional performance indicators and include them in the program plan or in periodic performance reports.

§ 685.410 What planning documents must a grantee submit?

Each grantee receiving WIOA sec. 167 program funds must submit to the Department a comprehensive program plan and a projection of participant services and expenditures in accordance with instructions issued by the Secretary.

§ 685.420 What information is required in the grantee program plan?

A grantee's 4-year program plan must describe:

(a) The service area that the applicant proposes to serve;

(b) The population to be served and the education and employment needs of the MSFW population to be served;

(c) The manner in which proposed services to eligible MSFWs will strengthen their ability to obtain or retain unsubsidized employment or stabilize their unsubsidized employment, including upgraded employment in agriculture;

(d) The related assistance and supportive services to be provided and the manner in which such assistance and services are to be integrated and coordinated with other appropriate services;

(e) The performance accountability measures that will be used to assess the performance of the entity in carrying out the NFJP program activities, including the expected levels of performance for the primary indicators of performance described in § 685.400;

(f) The availability and accessibility of local resources, such as supportive services, services provided through one-stop delivery systems, and education and training activities, and how the resources can be made available to the population to be served;

(g) The plan for providing services including strategies and systems for outreach, career planning, assessment, and delivery through one-stop delivery systems;

(h) The methods the grantee will use to target its services on specific segments of the eligible population, as appropriate; and

(i) Such other information as required by the Secretary in instructions issued under § 685.410.

§ 685.430 Under what circumstances are the terms of the grantee's program plan modified by the grantee or the Department?

(a) Plans must be modified to reflect the funding level for each year of the grant. The Department will provide instructions annually on when to submit modifications for each year of funding, which will generally be no later than June 1 prior to the start of the subsequent year of the grant cycle.

(b) The grantee must submit a request to the Department for any proposed modifications to its plan to add, delete, expand, or reduce any part of the program plan or allowable activities. The Department will consider the cost principles, uniform administrative requirements, and terms and conditions of award when reviewing modifications to program plans.

(c) If the grantee is approved for a regulatory waiver under §§ 685.460 and 685.470, the grantee must submit a modification of its grant plan to reflect the effect of the waiver.

§ 685.440 How are costs classified under the National Farmworker Jobs Program?

(a) Costs are classified as follows:

(1) Administrative costs, as defined in § 683.215 of this chapter; and

(2) Program costs, which are all other costs not defined as administrative.

(b) Program costs must be classified and reported in the following categories:

(1) Related assistance (including emergency assistance);

(2) Supportive services; and

(3) All other program services.

§ 685.450 What is the Workforce Innovation and Opportunity Act administrative cost limit for National Farmworker Jobs Program grants?

Under § 683.205(b) of this chapter, limits on administrative costs for programs operated under subtitle D of WIOA title I will be identified in the

grant or contract award document. Administrative costs will not exceed 15 percent of total grantee funding.

§ 685.460 Are there regulatory and/or statutory waiver provisions that apply to the National Farmworker Jobs Program?

(a) The statutory waiver provision at WIOA sec. 189(i) and discussed in § 679.600 of this chapter does not apply to any NFJP grant under WIOA sec. 167.

(b) Grantees may request waiver of any regulatory provisions only when such regulatory provisions are:

(1) Not required by WIOA;

(2) Not related to wage and labor standards, non-displacement protection, worker rights, participation and protection of workers and participants, and eligibility of participants, grievance procedures, judicial review, nondiscrimination, allocation of funds, procedures for review and approval of plans; and

(3) Not related to the basic purposes of WIOA, described in § 675.100 of this chapter.

§ 685.470 How can grantees request a waiver?

To request a waiver, a grantee must submit to the Department a waiver plan that:

(a) Describes the goals of the waiver, the expected programmatic outcomes, and how the waiver will improve the provision of program activities;

(b) Is consistent with any guidelines the Department establishes;

(c) Describes the data that will be collected to track the impact of the waiver; and

(d) Includes a modified program plan reflecting the effect of the requested waiver.

Subpart E—Supplemental Youth Workforce Investment Activity Funding Under the Workforce Innovation and Opportunity Act

§ 685.500 What is supplemental youth workforce investment activity funding?

Pursuant to WIOA sec. 127(a)(1), if Congress appropriates more than $925 million for WIOA youth workforce investment activities in a fiscal year, 4 percent of the excess amount must be used by the Department to provide workforce investment activities for eligible MSFW youth under WIOA sec. 167.

§ 685.510 What requirements apply to grants funded by the Workforce Innovation and Opportunity Act?

The requirements in subparts A through D of this part apply to grants funded by WIOA sec. 127(a)(1), except that grants described in this subpart must be used only for workforce investment activities for eligible MSFW youth, as described in § 685.370 and WIOA sec. 167(d) (including related assistance and supportive services).

§ 685.520 What is the application process for obtaining a grant funded by the Workforce Innovation and Opportunity Act?

The Department will issue a separate FOA for grants funded by WIOA sec. 127(a)(1). The selection will be made in accordance with the procedures described in § 685.210, except that the Department reserves the right to provide priority to applicants that are WIOA sec. 167 grantees.

§ 685.530 What planning documents are required for grants funded by the Workforce Innovation and Opportunity Act?

The required planning documents will be described in the FOA.

§ 685.540 How are funds allocated to grants funded by the Workforce Innovation and Opportunity Act?

The allocation of funds will be based on the comparative merits of the applications, in accordance with criteria set forth in the FOA.

§ 685.550 Who is eligible to receive services through grants funded by the Workforce Innovation and Opportunity Act?

Eligible MSFW youth as defined in § 685.110 are eligible to receive services through grants funded by WIOA sec. 127(a)(1).

PART 686—THE JOB CORPS UNDER TITLE I OF THE WORKFORCE INNOVATION AND OPPORTUNITY ACT

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Subpart A—Scope and Purpose

§686.100 What is the scope of this part?

The regulations in this part outline the requirements that apply to the Job Corps program. More detailed policies and procedures are contained in a Policy and Requirements Handbook issued by the Secretary. Throughout this part, ''instructions (procedures) issued by the Secretary'' and similar references refer to the Policy and Requirements Handbook and other Job Corps directives.

§ 686.110 What is the Job Corps program?

Job Corps is a national program that operates in partnership with States and communities, Local Workforce Development Boards (WDBs), Youth Standing Committees where established, one-stop centers and partners, and other youth programs to provide academic, career and technical education, service-learning, and social opportunities primarily in a residential setting, for low-income young people. The objective of Job Corps is to support responsible citizenship and provide young people with the skills they need to lead to successful careers that will result in economic self-sufficiency and opportunities for advancement in in-demand industry sectors or occupations or the Armed Forces, or to enrollment in postsecondary education.

§ 686.120 What definitions apply to this part?

The following definitions apply to this part:

Absent Without Official Leave (AWOL) means an adverse enrollment status to which a student is assigned based on extended, unapproved absence from his/her assigned center or off-center place of duty. Students do not earn Job Corps allowances while in AWOL status.

Applicable Local WDB means a Local WDB that:

(1) Works with a Job Corps center and provides information on local employment opportunities and the job skills and credentials needed to obtain the opportunities; and

(2) Serves communities in which the graduates of the Job Corps seek employment.

Applicable one-stop center means a one-stop center that provides career transition services, such as referral, assessment, recruitment, and placement, to support the purposes of the Job Corps.

Capital improvement means any modification, addition, restoration or other improvement:

(1) Which increases the usefulness, productivity, or serviceable life of an existing site, facility, building, structure, or major item of equipment;

(2) Which is classified for accounting purposes as a ''fixed asset;'' and

(3) The cost of which increases the recorded value of the existing building, site, facility, structure, or major item of equipment and is subject to depreciation.

Career technical training means career and technical education and training.

Career transition service provider means an organization acting under a contract or other agreement with Job Corps to provide career transition services for graduates and, to the extent possible, for former students.

Civilian Conservation Center (CCC) means a center operated on public land under an agreement between the Department of Labor (the Department) and the Department of Agriculture, which provides, in addition to other training and assistance, programs of work-based learning to conserve, develop, or manage public natural resources or public recreational areas or to develop community projects in the public interest.

Contract center means a Job Corps center operated under a contract with the Department.

Contracting officer means an official authorized to enter into contracts or agreements on behalf of the Department.

Enrollee means an individual who has voluntarily applied for, been selected for, and enrolled in the Job Corps program, and remains with the program, but has not yet become a graduate. Enrollees also are referred to as ''students'' in this part.

Enrollment means the process by which an individual formally becomes a student in the Job Corps program.

Former enrollee means an individual who has voluntarily applied for, been selected for, and enrolled in the Job Corps program, but left the program prior to becoming a graduate.

Graduate means an individual who has voluntarily applied for, been selected for, and enrolled in the Job Corps program and who, as a result of participation in the program, has received a secondary school diploma or recognized equivalent, or has completed the requirements of a career

technical training program that prepares individuals for employment leading to economic self-sufficiency or entrance into postsecondary education or training.

Individual with a disability means an individual with a disability as defined in sec. 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

Interagency agreement means a formal agreement between the Department and another Federal agency administering and operating centers. The agreement establishes procedures for the funding, administration, operation, and review of those centers as well as the resolution of any disputes.

Job Corps means the Job Corps program established within the Department of Labor and described in sec. 143 of the Workforce Innovation and Opportunity Act (WIOA).

Job Corps center means a facility and an organizational entity, including all of its parts, providing Job Corps training and designated as a Job Corps center, as described in sec. 147 of WIOA.

Job Corps Director means the chief official of the Job Corps or a person authorized to act for the Job Corps Director.

Low-income individual means an individual who meets the definition in WIOA sec. 3(36).

National Office means the national office of Job Corps.

National training contractor means a labor union, union-affiliated organization, business organization, association, or a combination of such organizations, which has a contract with the national office to provide career technical training, career transition services, or other services.

Operational support services means activities or services required to support the operation of Job Corps, including:

(1) Outreach and admissions services;

(2) Contracted career technical training and off-center training;

(3) Career transition services;

(4) Continued services for graduates;

(5) Certain health services; and

(6) Miscellaneous logistical and technical support.

Operator means a Federal, State or local agency, or a contractor selected under this subtitle to operate a Job Corps center under an agreement or contract with the Department.

Outreach and admissions provider means an organization that performs recruitment services, including outreach activities, and screens and enrolls youth under a contract or other agreement with Job Corps.

Participant, as used in this part, includes both graduates and enrollees and former enrollees that have completed their career preparation period. It also includes all enrollees and former enrollees who have remained in the program for at least 60 days.

Placement means student employment, entry into the Armed Forces, or enrollment in other training or education programs following separation from Job Corps.

Regional appeal board means the board designated by the Regional Director to consider student appeals of disciplinary discharges.

Regional Director means the chief Job Corps official of a regional office or a person authorized to act for the Regional Director.

Regional office means a regional office of Job Corps.

Regional Solicitor means the chief official of a regional office of the Department of Labor Office of the Solicitor, or a person authorized to act for the Regional Solicitor.

Separation means the action by which an individual ceases to be a student in the Job Corps program, either voluntarily or involuntarily.

Service provider means an entity selected under this subtitle to provide operational support services described in this subtitle to a Job Corps center.

Student means an individual enrolled in the Job Corps.

Unauthorized goods means:

(1) Firearms and ammunition;

(2) Explosives and incendiaries;

(3) Knives;

(4) Homemade weapons;

(5) All other weapons and instruments used primarily to inflict personal injury;

(6) Stolen property;

(7) Drugs, including alcohol, marijuana, depressants, stimulants, hallucinogens, tranquilizers, and drug paraphernalia except for drugs and/or

paraphernalia that are prescribed for medical reasons; and

(8) Any other goods prohibited by the Secretary, center director, or center operator in a student handbook.

Subpart B—Site Selection and Protection and Maintenance of Facilities

§ 686.200 How are Job Corps center locations and sizes determined?

(a) The Secretary must approve the location and size of all Job Corps centers based on established criteria and procedures.

(b) The Secretary establishes procedures for making decisions concerning the establishment, relocation, expansion, or closing of contract centers.

§ 686.210 How are center facility improvements and new construction handled?

The Secretary establishes procedures for requesting, approving, and initiating capital improvements and new construction on Job Corps centers.

§ 686.220 Who is responsible for the protection and maintenance of center facilities?

(a) The Secretary establishes procedures for the protection and maintenance of contract center facilities owned or leased by the Department of Labor, that are consistent with the current Federal Property Management Regulations.

(b) The U.S. Department of Agriculture, when operating Civilian Conservation Centers (CCC) on public land, is responsible for the protection and maintenance of CCC facilities.

(c) The Secretary issues procedures for conducting periodic facility surveys of centers to determine their condition and to identify needs such as correction of safety and health deficiencies, rehabilitation, and/or new construction.

Subpart C—Funding and Selection of Center Operators and Service Providers

§ 686.300 What entities are eligible to receive funds to operate centers and provide training and operational support services?

(a) *Center operators.* Entities eligible to receive funds under this subpart to operate centers include:

(1) Federal, State, and local agencies;

(2) Private organizations, including for-profit and non-profit corporations;

(3) Indian tribes and organizations; and

(4) Area career and technical education or residential career and technical schools.

(b) *Service providers.* Entities eligible to receive funds to provide outreach and admissions, career transition services and other operational support services are local or other entities with the necessary capacity to provide activities described in this part to a Job Corps center, including:

(1) Applicable one-stop centers and partners;

(2) Organizations that have a demonstrated record of effectiveness in serving at-risk youth and placing them into employment, including community action agencies; business organizations, including private for-profit and non-profit corporations; and labor organizations; and

(3) Child welfare agencies that are responsible for children and youth eligible for benefits and services under sec. 477 of the Social Security Act (42 U.S.C. 677).

§ 686.310 How are entities selected to receive funding to operate centers?

(a) The Secretary selects eligible entities to operate contract centers on a competitive basis in accordance with applicable statutes and regulations. In selecting an entity, ETA issues requests for proposals (RFPs) for the operation of all contract centers according to the Federal Acquisition Regulation (48 CFR chapter 1) and Department of Labor Acquisition Regulation (48 CFR chapter 29). ETA develops RFPs for center operators in consultation with the Governor, the center workforce council (if established), and

the Local WDB for the workforce development area in which the center is located.

(b) The RFP for each contract center describes uniform specifications and standards, as well as specifications and requirements that are unique to the operation of the specific center.

(c) The contracting officer selects and funds Job Corps contract center operators on the basis of an evaluation of the proposals received using criteria established by the Secretary, and set forth in the RFP. The criteria include the following:

(1) The offeror's ability to coordinate the activities carried out through the Job Corps center with activities carried out under the appropriate State and local workforce investment plans;

(2) The offeror's ability to offer career technical training that has been proposed by the workforce council and the degree to which the training reflects employment opportunities in the local areas in which most of the enrollees intend to seek employment;

(3) The degree to which the offeror demonstrates relationships with the surrounding communities, including employers, labor organizations, State WDBs, Local WDBs, applicable one-stop centers, and the State and region in which the center is located;

(4) The offeror's past performance, if any, relating to operating or providing activities to a Job Corps center, including information regarding the offeror in any reports developed by the Office of the Inspector General of the Department of Labor and the offeror's demonstrated effectiveness in assisting individuals in achieving the indicators of performance for eligible youth described in sec. 116(b)(2)(A)(ii) of WIOA, listed in § 686.1010; and

(5) The offeror's ability to demonstrate a record of successfully assisting at-risk youth to connect to the workforce, including providing them with intensive academics and career technical training.

(d) In order to be eligible to operate a Job Corps center, the offeror also must submit the following information at such time and in such manner as required by the Secretary:

(1) A description of the program activities that will be offered at the center and how the academics and career technical training reflect State and local employment opportunities, including opportunities in in-demand industry sectors and occupations recommended by the workforce council;

(2) A description of the counseling, career transition, and support activities that will be offered at the center, including a description of the strategies and procedures the offeror will use to place graduates into unsubsidized employment or education leading to a recognized postsecondary credential upon completion of the program;

(3) A description of the offeror's demonstrated record of effectiveness in placing at-risk youth into employment and postsecondary education, including past performance of operating a Job Corps center and as appropriate, the entity's demonstrated effectiveness in assisting individuals in achieving the indicators of performance for eligible youth described in sec. 116(b)(2)(A)(ii) of WIOA, listed in § 686.1010;

(4) A description of the relationships that the offeror has developed with State WDBs, Local WDBs, applicable one-stop centers, employers, labor organizations, State and local educational agencies, and the surrounding communities in which the center is located;

(5) A description of the offeror's ability to coordinate the activities carried out through the Job Corps center with activities carried out under the appropriate State Plan and local plans;

(6) A description of the strong fiscal controls the offeror has in place to ensure proper accounting of Federal funds and compliance with the Financial Management Information System established by the Secretary under sec. 159(a) of WIOA;

(7) A description of the steps to be taken to control costs in accordance with the Financial Management Information System established by the Secretary;

(8) A detailed budget of the activities that will be supported using Federal funds provided under this part and non-Federal resources;

(9) An assurance the offeror is licensed to operate in the State in which the center is located;

(10) An assurance that the offeror will comply with basic health and safety codes, including required disciplinary measures and Job Corps' Zero Tolerance Policy; and

(11) Any other information on additional selection factors required by the Secretary.

§ 686.320 What if a current center operator is deemed to be an operator of a high-performing center?

(a) If an offeror meets the requirements as an operator of a high-performing center as applied to a particular Job Corps center, that operator will be allowed to compete in any competitive selection process carried out for an award to operate that center.

(b) An offeror is considered to be an operator of a high-performing center if the Job Corps center operated by the offeror:

(1) Is ranked among the top 20 percent of Job Corps centers for the most recent preceding program year according to the rankings calculated under § 686.1060; and

(2) Meets the expected levels of performance established under § 686.1050 with respect to each of the primary indicators of performance for Job Corps centers:

(i) For the period of the most recent preceding 3 program years for which information is available at the time the determination is made, achieved an average of 100 percent, or higher, of the expected level of performance for the indicator; and

(ii) For the most recent preceding program year for which information is available at the time the determination is made, achieved 100 percent, or higher, of the expected level of performance established for the indicator.

(c) If any of the program years described in paragraphs (b)(2)(i) and (ii) of this section precedes the implementation of the establishment of the expected levels of performance under § 686.1050 and the application of the primary indicators of performance for Job Corps centers identified in § 686.1010, an entity is considered an operator of a high-performing center during that period if the Job Corps center operated by the entity:

(1) Meets the requirements of paragraph (b)(2) of this section with respect to such preceding program years using the performance of the Job Corps center regarding the national goals or targets established by the Office of the Job Corps under the previous performance accountability system for—

(i) The 6-month follow-up placement rate of graduates in employment, the military, education, or training;

(ii) The 12-month follow-up placement rate of graduates in employment, the military, education, or training;

(iii) The 6-month follow-up average weekly earnings of graduates;

(iv) The rate of attainment of secondary school diplomas or their recognized equivalent;

(v) The rate of attainment of completion certificates for career technical training;

(vi) Average literacy gains; and

(vii) Average numeracy gains; or

(2) Is ranked among the top five percent of Job Corps centers for the most recent preceding program year according to the rankings calculated under § 686.1060.

§ 686.330 What is the length of an agreement entered into by the Secretary for operation of a Job Corps center and what are the conditions for renewal of such an agreement?

(a) Agreements are for not more than a 2-year period. The Secretary may exercise any contractual option to renew the agreement in 1-year increments for not more than 3 additional years.

(b) The Secretary will establish procedures for evaluating the option to renew an agreement that includes: An assessment of the factors described in paragraph (c) of this section; a review of contract performance and financial reporting compliance; a review of the program management and performance data described in §§ 686.1000 and 686.1010; an assessment of whether the center is on a performance improvement plan as described § 686.1070 and if so, whether the center is making measureable progress in completing the actions described in the plan; and an evaluation of the factors described in paragraph (d) of this section.

(c) The Secretary only will renew the agreement of an entity to operate a Job Corps center if the entity:

(1) Has a satisfactory record of integrity and business ethics;

(2) Has adequate financial resources to perform the agreement;

(3) Has the necessary organization, experience, accounting and operational controls, and technical skills; and

(4) Is otherwise qualified and eligible under applicable laws and regulations, including that the contractor is not under suspension or debarred from eligibility for Federal contractors.

(d) The Secretary will not renew an agreement for an entity to operate a Job Corps center for any additional 1-year period if, for both of the 2 most recent preceding program years for which information is available at the time the determination is made, or if a second program year is not available, the preceding year for which information is available, such center:

(1) Has been ranked in the lowest 10 percent of Job Corps centers according to the rankings calculated under § 686.1060; and

(2) Failed to achieve an average of 50 percent or higher of the expected level of performance established under § 686.1050 with respect to each of the primary indicators of performance for eligible youth described in sec. 116(b)(2)(A)(ii) of WIOA, listed in § 686.1010.

(e)(1) Information will be considered to be available for a program year for purposes of paragraph (d) of this section if for each of the primary indicators of performance, all of the students included in the cohort being measured either began their participation under the current center operator or, if they began their participation under the previous center operator, were on center for at least 6 months under the current operator. If an operator assumes operation of a center that meets the criteria under paragraphs (d)(1) and (2) of this section, the first contractual option year will not be denied based on the application of paragraph (d) of this section provided that the operator otherwise meets the requirements for renewal described in paragraphs (a) through (c) of this section.

(2) If complete information for any of the indicators of performance described in paragraph (d)(2) of this section is not available for either of the 2 program years described in paragraph (d) of this section, the Secretary will review partial program year data from the most recent program year for those indicators, if at least two quarters of data are available, when making the determination required under paragraph (d)(2) of this section.

(f) If any of the program years described in paragraph (d) of this section precede the implementation of the establishment of the expected levels of performance under § 686.1050 and the application of the primary indicators of performance for Job Corps centers described in § 686.1010, the evaluation described in paragraph (d) of this section will be based on whether in its operation of the center the entity:

(1) Is ranked among the lowest 10 percent of Job Corps centers for the most recent preceding program year according to the ranking calculated under § 686.1060; and

(2) Meets the requirement of paragraph (d)(2) of this section with respect to such preceding program years using the performance of the Job Corps center regarding the national goals or targets established by the Office of the Job Corps under the previous performance accountability system for—

(i) The 6-month follow-up placement rate of graduates in employment, the military, education, or training;

(ii) The 12-month follow-up placement rate of graduates in employment, the military, education, or training;

(iii) The 6-month follow-up average weekly earnings of graduates;

(iv) The rate of attainment of secondary school diplomas or their recognized equivalent;

(v) The rate of attainment of completion certificates for career technical training;

(vi) Average literacy gains; and

(vii) Average numeracy gains.

(g) The Secretary can exercise an option to renew the agreement with an entity notwithstanding the requirements in paragraph (d) of this section for no more than 2 additional years if the Secretary determines that a renewal would be in the best interest of the Job Corps program, taking into account factors including:

(1) Significant improvements in program performance in carrying out a performance improvement plan;

(2) That the performance is due to circumstances beyond the control of the entity, such as an emergency or disaster;

(3) A significant disruption in the operations of the center, including in the ability to continue to provide services to students, or significant increase in the cost of such operations; or

(4) A significant disruption in the procurement process with respect to carrying out a competition for the selection of a center operator.

(h) If the Secretary does make an exception and exercises the option to renew per paragraph (g) of this section, the Secretary will provide a detailed explanation of the rationale for exercising the option to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.

§ 686.340 How are entities selected to receive funding to provide outreach and admission, career transition and other operations support services?

(a) The Secretary selects eligible entities to provide outreach and admission, career transition, and operational services on a competitive basis in accordance with applicable statutes and regulations. In selecting an entity, ETA issues requests for proposals (RFP) for operational support services according to the Federal Acquisition Regulation (48 CFR chapter 1) and Department of Labor Acquisition Regulation (48 CFR chapter 29). ETA develops RFPs for operational support services in consultation with the Governor, the center workforce council (if established), and the Local WDB for the workforce development area in which the center is located.

(b) The RFP for each support service contract describes uniform specifications and standards, as well as specifications and requirements that are unique to the specific required operational support services.

(c) The contracting officer selects and funds operational support service contracts on the basis of an evaluation of the proposals received using criteria established by the Secretary and set forth in the RFP. The criteria may include the following, as applicable:

(1) The ability of the offeror to coordinate the activities carried out in relation to the Job Corps center with related activities carried out under the appropriate State Plan and local plans;

(2) The ability of the entity to offer career technical training that has been proposed by the workforce council and the degree to which the training reflects employment opportunities in the local areas in which most of the students intend to seek employment;

(3) The degree to which the offeror demonstrates relationships with the surrounding communities, including employers, labor organizations, State WDBs, Local WDBs, applicable one-stop centers, and the State and region in which the services are provided;

(4) The offeror's past performance, if any, relating to providing services to a Job Corps center, including information regarding the offeror in any reports developed by the Office of the Inspector General of the Department of Labor and the offeror's demonstrated effectiveness in assisting individuals in achieving the indicators of performance for eligible youth described in sec. 116(b)(2)(A)(ii) of WIOA, listed in § 686.1010;

(5) The offeror's ability to demonstrate a record of successfully assisting at-risk youth to connect to the workforce; and

(6) Any other information on additional selection factors required by the Secretary.

§ 686.350 What conditions apply to the operation of a Civilian Conservation Center?

(a) The Secretary of Labor may enter into an agreement with the Secretary of Agriculture to operate Job Corps centers located on public land, which are called Civilian Conservation Centers (CCCs). Located primarily in rural areas, in addition to academics, career technical training, and workforce preparation skills training, CCCs provide programs of work experience to conserve, develop, or manage public natural resources or public recreational areas or to develop community projects in the public interest.

(b) When the Secretary of Labor enters into an agreement with the Secretary of Agriculture for the funding, establishment, and operation of CCCs, provisions are included to ensure that the Department of Agriculture complies with the regulations under this part.

(c) Enrollees in CCCs may provide assistance in addressing national, State, and local disasters, consistent with current child labor laws. The Secretary of Agriculture must ensure that enrollees are properly trained, equipped, supervised, and dispatched consistent with the standards for the conservation and rehabilitation of wildlife established under the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).

(d) The Secretary of Agriculture must designate a Job Corps National Liaison to support the agreement between the Departments of Labor and Agriculture to operate CCCs.

(e) The Secretary of Labor, in consultation with the Secretary of Agriculture, may select an entity to operate a CCC in accordance with the requirements of § 686.310 if the Secretary of Labor determines appropriate.

(f) The Secretary of Labor has the discretion to close CCCs if the Secretary determines appropriate.

§ 686.360 What are the requirements for award of contracts and payments to Federal agencies?

(a) The requirements of the Federal Property and Administrative Services Act of 1949, as amended; the Federal Grant and Cooperative Agreement Act of 1977; the Federal Acquisition Regulation (48 CFR chapter 1); and the Department of Labor Acquisition Regulation (48 CFR chapter 29) apply to the award of contracts and to payments to Federal agencies.

(b) Job Corps funding of Federal agencies that operate CCCs are made by a transfer of obligational authority from the Department to the respective operating agency.

Subpart D—Recruitment, Eligibility, Screening, Selection and Assignment, and Enrollment

§ 686.400 Who is eligible to participate in the Job Corps program?

(a) To be eligible to participate in the Job Corps, an individual must be:

(1) At least 16 and not more than 24 years of age at the time of enrollment, except that:

(i) The Job Corps Director may waive the maximum age limitation described in paragraph (a)(1) of this section, and the requirement in paragraph (a)(1)(ii) of this section for an individual with a disability if he or she is otherwise eligible according to the requirements listed in this section and § 686.410; and

(ii) Not more than 20 percent of individuals enrolled nationwide may be individuals who are aged 22 to 24 years old;

(2) A low-income individual;

(3) An individual who is facing one or more of the following barriers to education and employment:

(i) Is basic skills deficient, as defined in WIOA sec. 3;

(ii) Is a school dropout;

(iii) Is homeless as defined in sec. 41403(6) of the Violence Against Women Act of 1994 (42 U.S.C. 14043e-2(6)); is a homeless child or youth, as defined in sec. 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)); or is a runaway, an individual in foster care; or an individual who was in foster care and has aged out of the foster care system.

(iv) Is a parent; or

(v) Requires additional education, career technical training, or workforce preparation skills in order to obtain and retain employment that leads to economic self-sufficiency; and

(4) Meets the requirements of § 686.420, if applicable.

(b) Notwithstanding paragraph (a)(2) of this section, a veteran is eligible to become an enrollee if the individual:

(1) Meets the requirements of paragraphs (a)(1) and (3) of this section; and

(2) Does not meet the requirement of paragraph (a)(2) of this section because the military income earned by the individual within the 6-month period prior to the individual's application for

Job Corps prevents the individual from meeting that requirement.

§ 686.410 Are there additional factors which are considered in selecting an eligible applicant for enrollment?

Yes, in accordance with procedures issued by the Secretary, an eligible applicant may be selected for enrollment only if:

(a) A determination is made, based on information relating to the background, needs, and interests of the applicant, that the applicant's educational and career and technical needs can best be met through the Job Corps program;

(b) A determination is made that there is a reasonable expectation the applicant can participate successfully in group situations and activities, and is not likely to engage in actions that would potentially:

(1) Prevent other students from receiving the benefit of the program;

(2) Be incompatible with the maintenance of sound discipline; or

(3) Impede satisfactory relationships between the center to which the student is assigned and surrounding local communities;

(c) The applicant is made aware of the center's rules, what the consequences are for failure to observe the rules, and agrees to comply with such rules, as described in procedures issued by the Secretary;

(d) The applicant has not been convicted of a felony consisting of murder, child abuse, or a crime involving rape or sexual assault. Other than these felony convictions, no one will be denied enrollment in Job Corps solely on the basis of contact with the criminal justice system. All applicants must submit to a background check conducted according to procedures established by the Secretary and in accordance with applicable State and local laws. If the background check finds that the applicant is on probation, parole, under a suspended sentence, or under the supervision of any agency as a result of court action or institutionalization, the court or appropriate supervising agency may certify in writing that it will approve of the applicant's participation in Job Corps, and provide full release from its supervision, and that the applicant's participation and release does not violate applicable laws and regulations; and

(e) Suitable arrangements are made for the care of any dependent children for the proposed period of enrollment.

§ 686.420 Are there any special requirements for enrollment related to the Military Selective Service Act?

(a) Yes, each male applicant 18 years of age or older must present evidence that he has complied with sec. 3 of the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*) if required; and

(b) When a male student turns 18 years of age, he must submit evidence to the center that he has complied with the requirements of the Military Selective Service Act (50 U.S.C. App. 451 *et seq.*).

§ 686.430 What entities conduct outreach and admissions activities for the Job Corps program?

The Secretary makes arrangements with outreach and admissions providers to perform Job Corps recruitment, screening and admissions functions according to standards and procedures issued by the Secretary. Entities eligible to receive funds to provide outreach and admissions services are identified in § 686.300.

§ 686.440 What are the responsibilities of outreach and admissions providers?

(a) Outreach and admissions agencies are responsible for:

(1) Developing outreach and referral sources;

(2) Actively seeking out potential applicants;

(3) Conducting personal interviews with all applicants to identify their needs and eligibility status; and

(4) Identifying youth who are interested and likely Job Corps participants.

(b) Outreach and admissions providers are responsible for completing all Job Corps application forms and determining whether applicants meet the eligibility and selection criteria for participation in Job Corps as provided in §§ 686.400 and 686.410.

(c) The Secretary may decide that determinations with regard to one or more of the eligibility criteria will be made by the National Director or his or her designee.

§ 686.450 How are applicants who meet eligibility and selection criteria assigned to centers?

(a) Each applicant who meets the application and selection requirements of §§ 686.400 and 686.410 is assigned to a center based on an assignment plan developed by the Secretary in consultation with the operators of Job Corps centers. The assignment plan identifies a target for the maximum percentage of students at each center who come from the State or region nearest the center, and the regions surrounding the center. The assignment plan is based on an analysis of the following non-exclusive list of factors that will be analyzed in consultation with center operators:

(1) The number of eligible individuals in the State and region where the center is located and the regions surrounding where the center is located;

(2) The demand for enrollment in Job Corps in the State and region where the center is located and in surrounding regions;

(3) The size and enrollment level of the center, including the education, training, and supportive services provided through the center; and

(4) The performance of the Job Corps center relating to the expected levels of performance for indicators described in WIOA sec. 159(c)(1), and whether any actions have been taken with respect to the center under secs. 159(f)(2) and 159(f)(3) of WIOA.

(b) Eligible applicants are assigned to the center that offers the type of career technical training selected by the individual, and among the centers that offer such career technical training, is closest to the home of the individual. The Secretary may waive this requirement if:

(1) The enrollee would be unduly delayed in participating in the Job Corps program because the closest center is operating at full capacity; or

(2) The parent or guardian of the enrollee requests assignment of the enrollee to another Job Corps center due to circumstances in the community that would impair prospects for successful completion by the enrollee.

(c) If a parent or guardian objects to the assignment of a student under the age of 18 to a center other than the center closest to home that offers the desired career technical training, the Secretary must not make such an assignment.

§ 686.460 What restrictions are there on the assignment of eligible applicants for nonresidential enrollment in Job Corps?

No more than 20 percent of students enrolled in Job Corps nationwide may be nonresidential students.

§ 686.470 May an individual who is determined to be ineligible or an individual who is denied enrollment appeal that decision?

(a) A person who is determined to be ineligible to participate in Job Corps under § 686.400 or a person who is not selected for enrollment under § 686.410 may appeal the determination to the outreach and admissions agency within 60 days of the determination. The appeal will be resolved according to the procedures in §§ 686.960 and 686.965. If the appeal is denied by the outreach/admissions contractor or the center, the person may appeal the decision in writing to the Regional Director within 60 days of the date of the denial. The Regional Director will decide within 60 days whether to reverse or approve the appealed decision. The decision by the Regional Director is the Department's final decision.

(b) If an applicant believes that he or she has been determined ineligible or not selected for enrollment based upon a factor prohibited by sec. 188 of WIOA, the individual may proceed under the applicable Department nondiscrimination regulations implementing WIOA sec. 188 at 29 CFR part 38.

(c) An applicant who is determined to be ineligible or a person who is denied enrollment must be referred to the appropriate one-stop center or other local service provider.

§ 686.480 At what point is an applicant considered to be enrolled in Job Corps?

(a) To be considered enrolled as a Job Corps student, an applicant selected for enrollment must physically arrive at the assigned Job Corps center on the appointed date. However, applicants selected for enrollment who arrive at their assigned centers by government furnished transportation are considered to be enrolled on their dates of departure by such transportation.

(b) Center operators must document the enrollment of new students according to procedures issued by the Secretary.

§ 686.490 How long may a student be enrolled in Job Corps?

(a) Except as provided in paragraph (b) of this section, a student may remain enrolled in Job Corps for no more than 2 years.

(b)(1) An extension of a student's enrollment may be authorized in special cases according to procedures issued by the Secretary;

(2) A student's enrollment in an advanced career training program may be extended in order to complete the program for a period not to exceed 1 year;

(3) An extension of a student's enrollment may be authorized in the case of a student with a disability who would reasonably be expected to meet the standards for a Job Corps graduate if allowed to participate in the Job Corps for not more than 1 additional year; and

(4) An enrollment extension may be granted to a student who participates in national service, as authorized by a Civilian Conservation Center, for the amount of time equal to the period of national service.

Subpart E—Program Activities and Center Operations

§ 686.500 What services must Job Corps centers provide?

(a) Job Corps centers must provide an intensive, well-organized, and fully supervised program including:

(1) Educational activities, including:

(i) Career technical training;

(ii) Academic instruction;

(iii) Employability and skills training; and

(iv) Independent learning and living skills development.

(2) Work-based learning and experience;

(3) Residential support services; and

(4) Other services as required by the Secretary.

(b) In addition, centers must provide students with access to the career services described in secs. 134(c)(2)(A)(i)–(xi) of WIOA.

§ 686.505 What types of training must Job Corps centers provide?

(a) Job Corps centers must provide students with a career technical training program that is:

(1) Aligned with industry-recognized standards and credentials and with program guidance; and

(2) Linked to employment opportunities in in-demand industry sectors and occupations both in the area in which the center is located and, if practicable, in the area the student plans to reside after graduation.

(b) Each center must provide education programs, including: An English language acquisition program, high school diploma or high school equivalency certification program, and academic skills training necessary for students to master skills in their chosen career technical training programs.

(c) Each center must provide programs for students to learn and practice employability and independent learning and living skills including: job search and career development, interpersonal relations, driver's education, study and critical thinking skills, financial literacy and other skills specified in program guidance.

(d) All Job Corps training programs must be based on industry and academic skills standards leading to recognized industry and academic credentials, applying evidence-based instructional approaches, and resulting in:

(1) Students' employment in unsubsidized, in-demand jobs with the potential for advancement opportunities;

(2) Enrollment in advanced education and training programs or apprenticeships, including registered apprenticeship; or

(3) Enlistment in the Armed Services.

(e) Specific career technical training programs offered by individual centers must be approved by the Regional Director according to policies issued by the Secretary.

(f) Center workforce councils described in § 686.810 must review appropriate labor market information, identify in-demand industry sectors and employment opportunities in local areas where students will look for employment, determine the skills and education necessary for those jobs, and as appropriate, recommend changes in the center's career technical training program to the Secretary.

(g) Each center must implement a system to evaluate and track the progress and achievements of each student at regular intervals.

(h) Each center must develop a training plan that must be available for review and approval by the appropriate Regional Director.

§ 686.510 Are entities other than Job Corps center operators permitted to provide academic and career technical training?

(a) The Secretary may arrange for the career technical and academic education of Job Corps students through local public or private educational agencies, career and technical educational institutions or technical institutes, or other providers such as business, union or union-affiliated organizations with demonstrated effectiveness, as long as the entity can provide education and training substantially equivalent in cost and quality to that which the Secretary could provide through other means.

(b) Entities providing these services will be selected in accordance with the requirements of § 686.310.

§ 686.515 What are advanced career training programs?

(a) The Secretary may arrange for programs of advanced career training (ACT) for selected students, which may be provided through the eligible training providers identified in WIOA sec. 122 in which the students continue to participate in the Job Corps program for a period not to exceed 1 year in addition to the period of participation to which these students would otherwise be limited.

(b) Students participating in an ACT program are eligible to receive:

(1) All of the benefits provided to a residential Job Corps student; or

(2) A monthly stipend equal to the average value of the benefits described in paragraph (b)(1) of this section.

(c) Any operator may enroll more students than otherwise authorized by the Secretary in an ACT program if, in accordance with standards developed by the Secretary, the operator demonstrates:

(1) Participants in such a program have achieved a satisfactory rate of completion and placement in training-related jobs; and

(2) For the most recently preceding 2 program years, the operator has, on average, met or exceeded the expected levels of performance under WIOA sec. 159(c)(1) for each of the primary indicators described in WIOA sec. 116(b)(2)(A)(ii), listed in § 686.1010.

§ 686.520 What responsibilities do the center operators have in managing work-based learning?

(a) The center operator must emphasize and implement work-based learning programs for students through center program activities, including career and technical skills training, and through arrangements with employers. Work-based learning must be under actual working conditions and must be designed to enhance the employability, responsibility, and confidence of the students. Work-based learning usually occurs in tandem with students' career technical training.

(b) The center operator must ensure that students are assigned only to workplaces that meet the safety standards described in § 686.920.

§ 686.525 Are students permitted to hold jobs other than work-based learning opportunities?

Yes, a center operator may authorize a student to participate in gainful leisure time employment, as long as the employment does not interfere with required scheduled activities.

§ 686.530 What residential support services must Job Corps center operators provide?

Job Corps center operators must provide the following services according to procedures issued by the Secretary:

(a) A center-wide quality living and learning environment that supports the overall training program and includes a safe, secure, clean and attractive physical and social environment, 7 days a week, 24 hours a day;

(b) An ongoing, structured personal counseling program for students provided by qualified staff;

(c) A quality, safe and clean food service, to provide nutritious meals for students;

(d) Medical services, through provision or coordination of a wellness program which includes access to basic medical, dental and mental health services, as described in the Policy and Requirements Handbook, for all students from the date of enrollment until separation from the Job Corps program;

(e) A recreation/avocational program that meets the needs of all students;

(f) A student leadership program and an elected student government; and

(g) A student welfare association for the benefit of all students that is funded by non-appropriated funds that come from sources such as snack bars, vending machines, disciplinary fines, donations, and other fundraising activities, and is run by an elected student government, with the help of a staff advisor.

§ 686.535 Are Job Corps centers required to maintain a student accountability system?

Yes, each Job Corps center must establish and implement an effective system to account for and document the daily whereabouts, participation, and status of students during their Job Corps enrollment. The system must enable center staff to detect and respond to instances of unauthorized or unexplained student absence. Each center must operate its student accountability system according to requirements and procedures issued by the Secretary.

§ 686.540 Are Job Corps centers required to establish behavior management systems?

(a) Yes, each Job Corps center must establish and maintain its own student incentives system to encourage and reward students' accomplishments.

(b) The Job Corps center must establish and maintain a behavior management system, based on a behavior management plan, according to standards of conduct and procedures established by the Secretary. The behavior management plan must be approved by the Job Corps regional office and reviewed annually. The behavior management system must include a zero tolerance policy for violence and drugs as described in § 686.545. All criminal incidents will be promptly reported to local law enforcement.

§ 686.545 What is Job Corps' zero tolerance policy?

(a) All center operators must comply with Job Corps' zero tolerance policy as established by the Secretary. Job Corps has a zero tolerance policy for infractions including but not limited to:

(1) Acts of violence, as defined by the Secretary;

(2) Use, sale, or possession of a controlled substance, as defined at 21 U.S.C. 802;

(3) Abuse of alcohol;

(4) Possession of unauthorized goods; or

(5) Other illegal or disruptive activity.

(b) As part of this policy, all students must be tested for drugs as a condition of participation.

(c) The zero tolerance policy specifies the offenses that result in the separation of students from the Job Corps. The center director is expressly responsible for determining when there is a violation of this policy.

§ 686.550 How does Job Corps ensure that students receive due process in disciplinary actions?

The center operator must ensure that all students receive due process in disciplinary proceedings according to procedures developed by the Secretary. These procedures must include center fact-finding and behavior review

boards, a code of sanctions under which the penalty of separation from Job Corps might be imposed, and procedures for students to submit an appeal to a Job Corps regional appeal board following a center's decision to discharge involuntarily the student from Job Corps.

§ 686.555 What responsibilities do Job Corps centers have in assisting students with child care needs?

(a) Job Corps centers are responsible for coordinating with outreach and admissions agencies to assist applicants, whenever feasible, with making arrangements for child care. Prior to enrollment, a program applicant with dependent children who provides primary or custodial care must certify that suitable arrangements for child care have been established for the proposed period of enrollment.

(b) Child development programs may be located at Job Corps centers with the approval of the Secretary.

§ 686.560 What are the center's responsibilities in ensuring that students' religious rights are respected?

(a) Centers must ensure that a student has the right to worship or not worship as he or she chooses.

(b) Students who believe their religious rights have been violated may file complaints under the procedures set forth in 29 CFR part 38.

(c) Requirements related to equal treatment of religious organizations in Department of Labor programs, and to protection of religious liberty of Department of Labor social service providers and beneficiaries, are found at subpart D of 29 CFR part 2. *See also* §§ 683.255 and 683.285 of this chapter; 29 CFR part 38.

§ 686.565 Is Job Corps authorized to conduct pilot and demonstration projects?

Yes, the Secretary may undertake experimental, research and demonstration projects related to the Job Corps program according to WIOA sec. 156(a), provided that such projects are developed, approved, and conducted in accordance with policies and procedures developed by the Secretary.

Subpart F—Student Support

§ 686.600 Are students provided with government-paid transportation to and from Job Corps centers?

Yes, Job Corps provides for the transportation of students between their homes and centers as described in policies and procedures issued by the Secretary.

§ 686.610 When are students authorized to take leaves of absence from their Job Corps centers?

(a) Job Corps students are eligible for annual leaves, emergency leaves and other types of leaves of absence from their assigned centers according to criteria and requirements issued by the Secretary. Additionally, enrollees in Civilian Conservation Centers may take leave to provide assistance in addressing national, State, and local disasters, consistent with current laws and regulations, including child labor laws and regulations.

(b) Center operators and other service providers must account for student leave according to procedures issued by the Secretary.

§ 686.620 Are Job Corps students eligible to receive cash allowances and performance bonuses?

(a) Yes, according to criteria and rates established by the Secretary, Job Corps students receive cash living allowances, performance bonuses, and allotments for care of dependents. Graduates receive post-separation transition allowances according to § 686.750.

(b) In the event of a student's death, any amount due under this section is paid according to the provisions of 5 U.S.C. 5582 governing issues such as designation of beneficiary, order of precedence, and related matters.

§ 686.630 Are student allowances subject to Federal payroll taxes?

Yes, Job Corps student allowances are subject to Federal payroll tax withholding and social security taxes. Job Corps students are considered to be Federal employees for purposes of Federal payroll taxes.

§ 686.640 Are students provided with clothing?

Yes, Job Corps students are provided cash clothing allowances and/or articles of clothing, including safety clothing, when needed for their participation in Job Corps and their successful entry into the work force. Center operators and other service providers must issue clothing and clothing assistance to students according to rates, criteria, and procedures issued by the Secretary.

Subpart G—Career Transition and Graduate Services

§ 686.700 What are a Job Corps center's responsibilities in preparing students for career transition services?

Job Corps centers must assess and counsel students to determine their competencies, capabilities, and readiness for career transition services.

§ 686.710 What career transition services are provided for Job Corps enrollees?

Job Corps career transition services focus on placing program graduates in:

(a) Full-time jobs that are related to their career technical training and career pathway that lead to economic self-sufficiency;

(b) Postsecondary education;

(c) Advanced training programs, including registered apprenticeship programs; or

(d) The Armed Forces.

§ 686.720 Who provides career transition services?

The one-stop delivery system must be used to the maximum extent practicable in placing graduates and former enrollees in jobs. Multiple other resources also may provide post-program services, including but not limited to Job Corps career transition service providers under a contract or other agreement with the Department of Labor, and State vocational rehabilitation agencies for individuals with disabilities.

§ 686.730 What are the responsibilities of career transition service providers?

(a) Career transition service providers are responsible for:

(1) Contacting graduates;

(2) Assisting them in improving skills in resume preparation, interviewing techniques and job search strategies;

(3) Identifying job leads or educational and training opportunities through coordination with Local WDBs, one-stop operators and partners, employers, unions and industry organizations;

(4) Placing graduates in jobs, registered apprenticeship, the Armed Forces, or postsecondary education or training, or referring former students for additional services in their local communities as appropriate; and

(5) Providing placement services for former enrollees according to procedures issued by the Secretary.

(b) Career transition service providers must record and submit all Job Corps placement information according to procedures established by the Secretary.

§ 686.740 What services are provided for program graduates?

According to procedures issued by the Secretary, career transition and support services must be provided to program graduates for up to 12 months after graduation.

§ 686.750 Are graduates provided with transition allowances?

Yes, graduates receive post-separation transition allowances according to policies and procedures established by the Secretary. Transition allowances are incentive-based to reflect a graduate's attainment of academic credentials and those associated with career technical training such as industry-recognized credentials.

§ 686.760 What services are provided to former enrollees?

(a) Up to 3 months of employment services, including career services offered through a one-stop center, may be provided to former enrollees.

(b) According to procedures issued by the Secretary, other career transition

services as determined appropriate may be provided to former enrollees.

Subpart H—Community Connections

§686.800 How do Job Corps centers and service providers become involved in their local communities?

(a) The director of each Job Corps center must ensure the establishment and development of mutually beneficial business and community relationships and networks. Establishing and developing networks includes relationships with:

(1) Local and distant employers;

(2) Applicable one-stop centers and Local WDBs:

(3) Entities offering apprenticeship opportunities, including registered apprenticeships, and youth programs;

(4) Labor-management organizations and local labor organizations;

(5) Employers and contractors that support national training programs and initiatives; and

(6) Community-based organizations, non-profit organizations, and intermediaries providing workforce development-related services.

(b) Each Job Corps center also must establish and develop relationships with members of the community in which it is located. Members of the community must be informed of the projects of the Job Corps center and changes in the rules, procedures, or activities of the center that may affect the community. Events of mutual interest to the community and the Job Corps center must be planned to create and maintain community relations and community support.

§686.810 What is the makeup of a workforce council and what are its responsibilities?

(a) Each Job Corps center must establish a workforce council, according to procedures established by the Secretary. The workforce council must include:

(1) Non-governmental and private sector employers;

(2) Representatives of labor organizations (where present) and of employees;

(3) Job Corps enrollees and graduates; and

(4) In the case of a single-State local area, the workforce council must include a representative of the State WDB constituted under §679.110 of this chapter.

(b) A majority of the council members must be business owners, chief executives or chief operating officers of nongovernmental employers or other private sector employers, or their designees, who have substantial management, hiring or policy responsibility and who represent businesses with employment opportunities in the local area and the areas in which students will seek employment.

(c) The workforce council may include, or otherwise provide for consultation with, employers from outside the local area who are likely to hire a significant number of enrollees from the Job Corps center.

(d) The workforce council must:

(1) Work with all applicable Local WDBs and review labor market information to determine and provide recommendations to the Secretary regarding the center's career technical training offerings, including identification of emerging occupations suitable for training;

(2) Review all relevant labor market information, including related information in the State Plan or the local plan, to:

(i) Recommend in-demand industry sectors or occupations in the area in which the center operates;

(ii) Determine employment opportunities in the areas in which enrollees intend to seek employment;

(iii) Determine the skills and education necessary to obtain the identified employment; and

(iv) Recommend to the Secretary the type of career technical training that must be implemented at the center to enable enrollees to obtain the employment opportunities identified; and

(3) Meet at least once every 6 months to reevaluate the labor market information, and other relevant information, to determine and recommend to the Secretary any necessary changes in the career technical training provided at the center.

§ 686.820 How will Job Corps coordinate with other agencies?

(a) The Secretary issues guidelines for the national office, regional offices, Job Corps centers and operational support providers to use in developing and maintaining cooperative relationships with other agencies and institutions, including law enforcement, educational institutions, communities, and other employment and training programs and agencies.

(b) The Secretary develops polices and requirements to ensure linkages with the one-stop delivery system to the greatest extent practicable, as well as with other Federal, State, and local programs, and youth programs funded under title I of WIOA. These linkages enhance services to youth who face multiple barriers to employment and must include, where appropriate:

(1) Referrals of applicants and students;

(2) Participant assessment;

(3) Pre-employment and work maturity skills training;

(4) Work-based learning;

(5) Job search, occupational, and basic skills training; and

(6) Provision of continued services for graduates.

(c) Job Corps is identified as a required one-stop partner. Wherever practicable, Job Corps centers and operational support contractors must establish cooperative relationships and partnerships with one-stop centers and other one-stop partners, Local WDBs, and other programs for youth.

Subpart I—Administrative and Management Provisions

§ 686.900 Are damages caused by the acts or omissions of students eligible for payment under the Federal Tort Claims Act?

Yes, students are considered Federal employees for purposes of the FTCA. (28 U.S.C. 2671 *et seq.*) Claims for such damage must be filed pursuant to the procedures found in 29 CFR part 15, subpart D.

§ 686.905 Are loss and damages that occur to persons or personal property of students at Job Corps centers eligible for reimbursement?

Yes, the Job Corps may pay students for valid claims under the procedures found in 29 CFR part 15, subpart D.

§ 686.910 If a student is injured in the performance of duty as a Job Corps student, what benefits may the student receive?

(a) Job Corps students are considered Federal employees for purposes of the Federal Employees' Compensation Act (FECA) as specified in sec. 157(a)(3) of WIOA. (29 U.S.C. 2897(a)(3))

(b) Job Corps students may be entitled to benefits under FECA as provided by 5 U.S.C. 8143 for injuries occurring in the performance of duty.

(c) Job Corps students must meet the same eligibility tests for FECA benefits that apply to all other Federal employees. The requirements for FECA benefits may be found at 5 U.S.C. 8101, *et seq.* and part 10 of this title. The Department of Labor's Office of Workers' Compensation Programs (OWCP) administers the FECA program; all FECA determinations are within the exclusive authority of the OWCP, subject to appeal to the Employees' Compensation Appeals Board.

(d) Whenever a student is injured, develops an occupationally related illness, or dies while in the performance of duty, the procedures of the OWCP, at part 10 of this title, must be followed. To assist OWCP in determining FECA eligibility, a thorough investigation of the circumstances and a medical evaluation must be completed and required forms must be timely filed by the center operator with the Department's OWCP. Additional information regarding Job Corps FECA claims may be found in OWCP's regulations and procedures available on the Department's Web site located at *https://www.dol.gov/*.

§ 686.915 When is a Job Corps student considered to be in the performance of duty?

(a) Performance of duty is a determination that must be made by the OWCP under FECA, and is based on the

individual circumstances in each claim.

(b) In general, residential students may be considered to be in the ''performance of duty'' when:

(1) They are on center under the supervision and control of Job Corps officials;

(2) They are engaged in any authorized Job Corps activity;

(3) They are in authorized travel status; or

(4) They are engaged in any authorized offsite activity.

(c) Non-resident students are generally considered to be ''in performance of duty'' as Federal employees when they are engaged in any authorized Job Corps activity, from the time they arrive at any scheduled center activity until they leave the activity. The standard rules governing coverage of Federal employees during travel to and from work apply. These rules are described in guidance issued by the Secretary.

(d) Students are generally considered to be not in the performance of duty when:

(1) They are Absent Without Leave (AWOL);

(2) They are at home, whether on pass or on leave;

(3) They are engaged in an unauthorized offsite activity; or

(4) They are injured or ill due to their own willful misconduct, intent to cause injury or death to oneself or another, or through intoxication or illegal use of drugs.

§ 686.920 How are students protected from unsafe or unhealthy situations?

(a) The Secretary establishes procedures to ensure that students are not required or permitted to work, be trained, reside in, or receive services in buildings or surroundings or under conditions that are unsanitary or hazardous. Whenever students are employed or in training for jobs, they must be assigned only to jobs or training which observe applicable Federal, State and local health and safety standards.

(b) The Secretary develops procedures to ensure compliance with applicable Department of Labor Occupational Safety and Health Administration regulations and Wage and Hour Division regulations.

§ 686.925 What are the requirements for criminal law enforcement jurisdiction on center property?

(a) All Job Corps property which would otherwise be under exclusive Federal legislative jurisdiction is considered under concurrent jurisdiction with the appropriate State and locality with respect to criminal law enforcement. Concurrent jurisdiction extends to all portions of the property, including housing and recreational facilities, in addition to the portions of the property used for education and training activities.

(b) Centers located on property under concurrent Federal-State jurisdiction must establish agreements with Federal, State and local law enforcement agencies to enforce criminal laws.

(c) The Secretary develops procedures to ensure that any searches of a student's person, personal area, or belongings for unauthorized goods follow applicable right-to-privacy laws.

§ 686.930 Are Job Corps operators and service providers authorized to pay State or local taxes on gross receipts?

(a) A private for-profit or a non-profit Job Corps service provider is not liable, directly or indirectly, to any State or subdivision for any gross receipts taxes, business privilege taxes measured by gross receipts, or any similar taxes in connection with any payments made to or by such service provider for operating a center or other Job Corps program or activity. The service provider is not liable to any State or subdivision to collect or pay any sales, excise, use, or similar tax imposed upon the sale to or use by such deliverer of any property, service, or other item in connection with the operation of a center or other Job Corps program or activity.

(b) If a State or local authority compels a center operator or other service provider to pay such taxes, the center operator or service provider may pay the taxes with Federal funds, but must document and report the State or local requirement according to procedures issued by the Secretary.

§ 686.935 What are the financial management responsibilities of Job Corps center operators and other service providers?

(a) Center operators and other service providers must manage Job Corps funds using financial management information systems that meet the specifications and requirements of the Secretary.

(b) These financial management systems must:

(1) Provide accurate, complete, and current disclosures of the costs of their Job Corps activities;

(2) Ensure that expenditures of funds are necessary, reasonable, allocable, and allowable in accordance with applicable cost principles;

(3) Use account structures specified by the Secretary;

(4) Ensure the ability to comply with cost reporting requirements and procedures issued by the Secretary; and

(5) Maintain sufficient cost data for effective planning, monitoring, and evaluation of program activities and for determining the allowability of reported costs.

§ 686.940 Are center operators and service providers subject to Federal audits?

(a) Yes, Center operators and service providers are subject to Federal audits.

(b) The Secretary arranges for the survey, audit, or evaluation of each Job Corps center and service provider at least once every 3 years, by Federal auditors or independent public accountants. The Secretary may arrange for more frequent audits.

(c) Center operators and other service providers are responsible for giving full cooperation and access to books, documents, papers and records to duly appointed Federal auditors and evaluators.

§ 686.945 What are the procedures for management of student records?

The Secretary issues guidelines for a system for maintaining records for each student during enrollment and for disposition of such records after separation.

§ 686.950 What procedures apply to disclosure of information about Job Corps students and program activities?

(a) The Secretary develops procedures to respond to requests for information or records or other necessary disclosures pertaining to students.

(b) Department disclosure of Job Corps information must be handled according to the Freedom of Information Act and according to Department regulations at 29 CFR part 70.

(c) Job Corps contractors are not ''agencies'' for Freedom of Information Act purposes. Therefore, their records are not subject to disclosure under the Freedom of Information Act or 29 CFR part 70.

(d) The regulations at 29 CFR part 71 apply to a system of records covered by the Privacy Act of 1974 maintained by the Department or to a similar system maintained by a contractor, such as a screening agency, contract center operator, or career transition service provider on behalf of the Job Corps.

§ 686.955 What are the reporting requirements for center operators and operational support service providers?

The Secretary establishes procedures to ensure the timely and complete reporting of necessary financial and program information to maintain accountability. Center operators and operational support service providers are responsible for the accuracy and integrity of all reports and data they provide.

§ 686.960 What procedures are available to resolve complaints and disputes?

(a) Each Job Corps center operator and service provider must establish and maintain a grievance procedure for filing complaints and resolving disputes from applicants, students and/or other interested parties about its programs and activities. A hearing on each complaint or dispute must be conducted within 30 days of the filing of the complaint or dispute. A decision on the complaint must be made by the center operator or service provider, as appropriate, within 60 days after the filing of

the complaint, and a copy of the decision must be immediately served, by first-class mail, on the complainant and any other party to the complaint. Except for complaints under § 686.470 or complaints alleging fraud or other criminal activity, complaints may be filed within 1 year of the occurrence that led to the complaint.

(b) The procedure established under paragraph (a) of this section must include procedures to process complaints alleging violations of sec. 188 of WIOA, consistent with Department nondiscrimination regulations implementing sec. 188 of WIOA at 29 CFR part 38 and § 686.985.

§ 686.965 How does Job Corps ensure that complaints or disputes are resolved in a timely fashion?

(a) If a complaint is not resolved by the center operator or service provider in the time frames described in § 686.960, the person making the complaint may request that the Regional Director determine whether reasonable cause exists to believe that WIOA or regulations for this part of WIOA have been violated. The request must be filed with the Regional Director within 60 days from the date that the center operator or service provider should have issued the decision.

(b) Following the receipt of a request for review under paragraph (a) of this section, the Regional Director must determine within 60 days whether there has been a violation of WIOA or the WIOA regulations. If the Regional Director determines that there has been a violation of WIOA or WIOA regulations, (s)he may direct the operator or service provider to remedy the violation or direct the service provider to issue a decision to resolve the dispute according to the service provider's grievance procedures. If the service provider does not comply with the Regional Director's decision within 30 days, the Regional Director may impose a sanction on the center operator or service provider for violating WIOA or WIOA regulations, and/or for failing to issue a decision. Decisions imposing sanctions upon a center operator or service provider may be appealed to the Department of Labor Office of Administrative Law Judges under § 683.800 or § 683.840 of this chapter.

§ 686.970 How does Job Corps ensure that centers or other service providers comply with the Workforce Innovation and Opportunity Act and the WIOA regulations?

(a) If the Department receives a complaint or has reason to believe that a center or other service provider is failing to comply with the requirements of WIOA or WIOA regulations, the Regional Director must investigate the allegation and determine within 90 days after receiving the complaint or otherwise learning of the alleged violation, whether such allegation or complaint is true.

(b) As a result of such a determination, the Regional Director may:

(1) Direct the center operator or service provider to handle a complaint through the grievance procedures established under § 686.960; or

(2) Investigate and determine whether the center operator or service provider is in compliance with WIOA and WIOA regulations. If the Regional Director determines that the center or service provider is not in compliance with WIOA or WIOA regulations, the Regional Director may take action to resolve the complaint under § 686.965(b), or will report the incident to the Department of Labor Office of the Inspector General, as described in § 683.620 of this chapter.

§ 686.975 How does Job Corps ensure that contract disputes will be resolved?

A dispute between the Department and a Job Corps contractor will be handled according to the Contract Disputes Act and applicable regulations.

§ 686.980 How does Job Corps resolve disputes between the U.S. Department of Labor and the U.S. Department of Agriculture regarding the operation of Job Corps centers?

Disputes between the U.S. Department of Labor and the U.S. Department of Agriculture regarding operating a center will be handled according to the interagency agreement between the two agencies.

§ 686.985 What Department of Labor equal opportunity and nondiscrimination regulations apply to Job Corps?

Nondiscrimination requirements, procedures, complaint processing, and compliance reviews are governed by, as applicable, provisions of the following Department of Labor regulations:

(a) Regulations implementing sec. 188 of WIOA for programs receiving Federal financial assistance under WIOA found at 29 CFR part 38;

(b) Title 29 CFR part 33 for programs conducted by the Department of Labor; and

(c) Title 41 CFR chapter 60 for entities that have a Federal government contract.

Subpart J—Performance

§ 686.1000 How is the performance of the Job Corps program assessed?

(a) The performance of the Job Corps program as a whole, and the performance of individual centers, outreach and admissions providers, and career transition service providers, is assessed in accordance with the regulations in this part and procedures and standards issued by the Secretary, through a national performance management system, including the Outcome Measurement System (OMS).

(b) The national performance management system will include measures that reflect the primary indicators of performance described in § 686.1010, the information needed to complete the Annual Report described in § 686.1040, and any other information the Secretary determines is necessary to manage and evaluate the effectiveness of the Job Corps program. The Secretary will issue annual guidance describing the performance management system and outcome measurement system.

(c) Annual performance assessments based on the measures described in paragraph (b) of this section are done for each center operator and other service providers, including outreach and admissions providers and career transition providers.

§ 686.1010 What are the primary indicators of performance for Job Corps centers and the Job Corps program?

The primary indicators of performance for eligible youth are described in sec. 116(b)(2)(A)(ii) of WIOA. They are:

(a) The percentage of program participants who are in education or training activities, or in unsubsidized employment, during the second quarter after exit from the program;

(b) The percentage of program participants who are in education or training activities, or in unsubsidized employment, during the fourth quarter after exit from the program;

(c) The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(d) The percentage of program participants who obtain a recognized postsecondary credential, or a secondary school diploma or its recognized equivalent during participation in or within 1 year after exit from the program. Program participants who obtain a secondary school diploma or its recognized equivalent will be included in the percentage only if they also have obtained or retained employment, or are in an education or training program leading to a recognized postsecondary credential, within 1 year after exit from the program;

(e) The percentage of program participants who, during a program year, are in an education or training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains toward such a credential or employment; and

(f) The indicators of effectiveness in serving employers established by the Secretaries of Education and Labor, pursuant to sec. 116(b)(2)(A)(iv) of WIOA.

§ 686.1020 What are the indicators of performance for Job Corps outreach and admissions providers?

The Secretary establishes performance indicators for outreach and admission service providers serving the Job Corps program. They include, but are not limited to:

(a) The number of enrollees recruited, compared to the established goals for such recruitment, and the number of enrollees who remain committed to the program for 90 days after enrollment;

(b) The percentage and number of former enrollees, including the number dismissed under the zero tolerance policy described in sec. 152(b) of WIOA and § 686.545;

(c) The maximum attainable percent of enrollees at the Job Corps center that reside in the State in which the center is located, and the maximum attainable percentage of enrollees at the Job Corps center that reside in the State in which the center is located and in surrounding regions, as compared to the percentage targets established by the Secretary for the center for each of those measures;

(d) The cost per enrollee, calculated by comparing the number of enrollees at the center in a program year to the total budget for such center in the same program year; and

(e) Additional indicators of performance, as necessary.

§ 686.1030 What are the indicators of performance for Job Corps career transition service providers?

The Secretary establishes performance indicators for career transition service providers serving the Job Corps program. These include, but are not limited to, the following:

(a) The primary indicators of performance for eligible youth in WIOA sec. 116(b)(2)(A)(ii), as listed in § 686.1010;

(b) The number of graduates who entered the Armed Forces;

(c) The number of graduates who entered registered apprenticeship programs;

(d) The number of graduates who entered unsubsidized employment related to the career technical training received through the Job Corps program;

(e) The number of graduates who entered unsubsidized employment not related to the education and training received through the Job Corps program;

(f) The percentage and number of graduates who enter postsecondary education;

(g) The average wage of graduates who entered unsubsidized employment:

(1) On the first day of such employment; and

(2) On the day that is 6 months after such first day; and

(h) Additional indicators of performance, as necessary.

§ 686.1040 What information will be collected for use in the Annual Report?

The Secretary will collect and submit in the Annual Report described in sec. 159(c)(4) of WIOA, which will include the following information on each Job Corps center, and the Job Corps program as a whole:

(a) Information on the performance, based on the performance indicators described § 686.1010, as compared to the expected level of performance established under § 686.1050 for each performance indicator;

(b) Information on the performance of outreach service providers and career transition service providers on the performance indicators established under §§ 686.1020 and 686.1030, as compared to the expected levels of performance established under § 686.1050 for each of those indicators;

(c) The number of enrollees served;

(d) Demographic information on the enrollees served, including age, race, gender, and education and income level;

(e) The number of graduates of a Job Corps center;

(f) The number of graduates who entered the Armed Forces;

(g) The number of graduates who entered registered apprenticeship programs;

(h) The number of graduates who received a regular secondary school diploma;

(i) The number of graduates who received a State recognized equivalent of a secondary school diploma;

(j) The number of graduates who entered unsubsidized employment related to the career technical training received through the Job Corps program and the number who entered unsubsidized employment not related to the education and training received;

(k) The percentage and number of former enrollees, including the number

dismissed under the zero tolerance policy described in § 686.545;

(l) The percentage and number of graduates who enter postsecondary education;

(m) The average wage of graduates who enter unsubsidized employment:

(1) On the first day of such employment; and

(2) On the day that is 6 months after such first day;

(n) The maximum attainable percent of enrollees at a Job Corps center that reside in the State in which the center is located, and the maximum attainable percentage of enrollees at a Job Corps center that reside in the State in which the center is located and in surrounding regions, as compared to the percentage targets established by the Secretary for the center for each of those measures;

(o) The cost per enrollee, which is calculated by comparing the number of enrollees at the center in a program year to the total budget for such center in the same program year;

(p) The cost per graduate, which is calculated by comparing the number of graduates of the center in a program year compared to the total budget for such center in the same program year;

(q) Information regarding the state of Job Corps buildings and facilities, including a review of requested construction, rehabilitation, and acquisition projects, by each Job Corps center, and a review of new facilities under construction;

(r) Available information regarding the national and community service activities of enrollees, particularly those enrollees at Civilian Conservation Centers; and

(s) Any additional information required by the Secretary.

§ 686.1050 How are the expected levels of performance for Job Corps centers, outreach and admissions providers and career transition service providers established?

(a) The Secretary establishes expected levels of performance for Job Corps centers, outreach and admissions providers and career transition service providers and the Job Corps program relating to each of the primary indicators of performance described in §§ 686.1010, 686.1020, and 686.1030.

(b) As described in § 686.1000, the Secretary will issue annual guidance describing the national performance management system and outcomes measurement system, which will communicate the expected levels of performance for each primary indicator of performance for each center, and each indicator of performance for each outreach and admission provider, and for each career transition service provider. Such guidance also will describe how the expected levels of performance were calculated.

§ 686.1060 How are center rankings established?

(a) The Secretary calculates annual rankings of center performance based on the performance management system described in § 686.1000 as part of the annual performance assessment described in § 686.1000(c).

(b) The Secretary will issue annual guidance that communicates the methodology for calculating the performance rankings for the year.

§ 686.1070 How and when will the Secretary use performance improvement plans?

(a) The Secretary establishes standards and procedures for developing and implementing performance improvement plans.

(1) The Secretary will develop and implement a performance improvement plan for a center when that center fails to meet the expected levels of performance described in § 686.1050.

(i) The Secretary will consider a center to have failed to meet the expected level of performance if the center:

(A) Is ranked among the lowest 10 percent of Job Corps centers for the most recent preceding program year according to the rankings calculated under § 686.1060; and

(B) The center fails to achieve an average of 90 percent of the expected level of performance for all of the primary indicators.

(ii) For any program year that precedes the implementation of the establishment of the expected levels of performance under § 686.1050 and the application of the primary indicators of performance for Job Corps centers identified in § 686.1010, the Secretary will consider a center to have failed to meet the expected levels of performance if the center:

(A) Is ranked among the lowest 10 percent of Job Corps centers for the most recent preceding program year according to the rankings calculated under § 686.1060; and

(B) The center's composite OMS score for the program year is 88 percent or less of the year's OMS national average.

(2) The Secretary also may develop and implement additional performance improvement plans, which will require improvements for a Job Corps center that fails to meet criteria established by the Secretary other than the expected levels of performance.

(b) A performance improvement plan will require action be taken to correct identified performance issues within 1 year of the implementation of the plan, and it will identify criteria that must be met for the center to complete the performance improvement plan.

(1) The center operator must implement the actions outlined in the performance improvement plan.

(2) If the center fails to take the steps outlined in the performance improvement plan or fails to meet the criteria established to complete the performance improvement plan after 1 year, the center will be considered to have failed to improve performance under a performance improvement plan detailed in paragraph (a) of this section.

(i) Such a center will remain on a performance improvement plan and the Secretary will take action as described in paragraph (c) of this section.

(ii) If a Civilian Conservation Center fails to meet expected levels of performance relating to the primary indicators of performance specified in § 686.1010, or fails to improve performance under a performance improvement plan detailed in paragraph (a) of this section after 3 program years, the Secretary, in consultation with the Secretary of Agriculture, must select an entity to operate the Civilian Conservation Center on a competitive basis, in accordance with the requirements of § 686.310.

(c) Under a performance improvement plan, the Secretary may take the following actions, as necessary:

(1) Providing technical assistance to the center;

(2) Changing the management staff of a center;

(3) Changing the career technical training offered at the center;

(4) Replacing the operator of the center;

(5) Reducing the capacity of the center;

(6) Relocating the center; or

(7) Closing the center in accordance with the criteria established under § 686.200(b).

PART 687—NATIONAL DISLOCATED WORKER GRANTS

Sec.
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687.110 What are major economic dislocations or other events which may qualify for a National Dislocated Worker Grant?
687.120 Who is eligible to apply for National Dislocated Worker Grants?
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687.140 What activities are applicants expected to conduct before a National Dislocated Worker Grant application is submitted?
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687.180 What are the allowable activities under National Dislocated Worker Grants?
687.190 How do statutory and regulatory waivers apply to National Dislocated Worker Grants?
687.200 What are the program and administrative requirements that apply to National Dislocated Worker Grants?

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§ 687.100 What are the types and purposes of National Dislocated Worker Grants under the Workforce Innovation and Opportunity Act?

There are two types and purposes of National Dislocated Worker Grants (DWGs) under sec. 170 of WIOA: Employment Recovery DWGs and Disaster Recovery DWGs.

(a) Employment Recovery DWGs provide employment and training activities for dislocated workers and other eligible populations. They are intended to expand service capacity temporarily at the State and local levels, by providing time-limited funding assistance in response to major economic dislocations or other events that affect the U.S. workforce that cannot be accommodated with WIOA formula funds or other relevant existing resources.

(b) Disaster Recovery DWGs allow for the creation of disaster relief employment to assist with clean-up and recovery efforts from emergencies or major disasters and the provision of employment and training activities, in accordance with § 687.180(b).

§ 687.110 What are major economic dislocations or other events which may qualify for a National Dislocated Worker Grant?

(a) Qualifying events for Employment Recovery DWGs include:

(1) Plant closures or mass layoffs affecting 50 or more workers from one employer in the same area;

(2) Closures and realignments of military installations;

(3) Plant closures or layoffs that have significantly increased the total number of unemployed individuals in a community;

(4) Situations where higher-than-average demand for employment and training activities for dislocated members of the Armed Forces, dislocated spouses of members of the Armed Forces on active duty (as defined in 10 U.S.C. 101(d)(1)), or members of the Armed Forces described in § 687.170(a)(1)(iii), exceeds State and local resources for providing such activities; and

(5) Other events, as determined by the Secretary.

(b) Qualifying events for Disaster Recovery DWGs include:

(1) Emergencies or major disasters, as defined in paragraphs (1) and (2), respectively, of sec. 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(1) and (2)) which have been declared eligible for public assistance by the Federal Emergency Management Agency (FEMA);

(2) An emergency or disaster situation of national significance, natural or man-made, that could result in a potentially large loss of employment, as declared or otherwise recognized and issued in writing by the chief official of a Federal Agency with jurisdiction over the Federal response to the emergency or disaster situation; and

(3) Situations where a substantial number of workers from a State, tribal area, or outlying area in which an emergency or disaster has occurred relocate to another State, tribal area, or outlying area.

§ 687.120 Who is eligible to apply for National Dislocated Worker Grants?

(a) For Employment Recovery DWGs, the following entities are eligible to apply:

(1) States or outlying areas, or a consortium of States;

(2) Local Workforce Development Boards (WDBs), or a consortium of WDBs;

(3) An entity described in sec. 166(c) of WIOA (relating to Indian and Native American programs);

(4) Other entities determined to be appropriate by the Governor of the State or outlying area involved; and

(5) Other entities that demonstrate to the Secretary the capability to respond effectively to circumstances relating to particular dislocations.

(b) For Disaster Recovery DWGs, the following entities are eligible to apply:

(1) States;

(2) Outlying areas; and

(3) Indian tribal governments as defined by the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(6)).

§ 687.130 When must applications for National Dislocated Worker Grants be submitted to the Department?

(a) Applications for Employment Recovery DWGs may be submitted at any time during the year and must be submitted to respond to eligible events as soon as possible when:

(1) The applicant receives a notification of a mass layoff or a closure as a result of a Worker Adjustment and Retraining Notification (WARN) Act notice, a general announcement, or some other means, or in the case of applications to address situations described in § 687.110(a)(4), when higher-than-average demand for employment and training activities for those members of the Armed Forces and military spouses exceeds State and local resources for providing such activities;

(2) Worker need and interest in services has been determined through Rapid Response, or other means, and is sufficient to justify the need for a DWG; and

(3) A determination has been made, in collaboration with the applicable local area, that State and local formula funds are inadequate to provide the level of services needed by the affected workers.

(b) Applications for Disaster Recovery DWGs to respond to an emergency or major disaster must be submitted as soon as possible when:

(1) As described in § 687.110(b)(1), FEMA has declared that the affected area is eligible for public assistance;

(2) A situation as described in § 687.110(b)(2) occurs. The applications must indicate the applicable Federal agency declaration, describe the impact on the local and/or State economy, and describe the proposed activities; or

(3) A situation as described in § 687.110(b)(3) occurs, and interest in services has been determined and is sufficient to justify the need for a DWG.

§ 687.140 What activities are applicants expected to conduct before a National Dislocated Worker Grant Application is submitted?

Prior to submitting an application for DWG funds, applicants must:

(a) For Employment Recovery DWGs:

(1) Collect information to identify the needs and interests of the affected workers through rapid response activities (described in § 682.330 of this chapter), or other means;

(2) Provide appropriate services to eligible workers including other rapid response activities, based on information gathered as described in paragraph (a)(1) of this section; and

(3) Coordinate with the Local WDB and chief elected official(s) of the local area(s) in which the proposed DWG project is to operate.

(b) For Disaster DWGs:

(1) Conduct a preliminary assessment of the clean-up and humanitarian needs of the affected areas;

(2) Reasonably ascertain that there is a sufficient population of eligible individuals to conduct the planned work; and

(3) Coordinate with the Local WDB and chief elected official(s) of the local area(s) in which the proposed project is to operate.

§ 687.150 What are the requirements for submitting applications for National Dislocated Worker Grants?

The Department will publish guidance on the requirements for submitting applications for DWGs. Requirements may vary depending on the DWG. A project implementation plan must be submitted after receiving the DWG award, unless otherwise specified.

§ 687.160 What is the timeframe for the Department to issue decisions on National Dislocated Worker Grant applications?

The Department will issue a final decision on a DWG application within 45 calendar days of receipt of an application that meets the requirements of this part. Applicants are encouraged to review their DWG application submissions carefully and consult with the appropriate Employment and Training Administration Regional Office to ensure their applications meet the requirements established in this part and those that may be set forth in guidance.

§ 687.170 Who is eligible to be served under National Dislocated Worker Grants?

(a) For Employment Recovery DWGs:

(1) In order to receive employment and training activities, an individual must be:

(i) A dislocated worker within the meaning of sec. 3(15) of WIOA;

(ii) A person who is either:

(A) A civilian employee of the Department of Defense or the Department of Energy employed at a military installation that is being closed or will undergo realignment within 24 months after the date of determination of eligibility; or

(B) An individual employed in a nonmanagerial position with a Department of Defense contractor determined by the Secretary of Defense to be at risk of termination from employment as a result of reductions in defense expenditures and whose employer is converting from defense to non-defense applications in order to prevent worker layoffs; or

(iii) A member of the Armed Forces who:

(A) Was on active duty or full-time National Guard duty;

(B) Is involuntarily separated from active duty or full-time National Guard duty (as defined in 10 U.S.C. 1141), or is separated from active duty or full-time National Guard duty pursuant to a special separation benefits program under 10 U.S.C. 1174a, or the voluntary separation incentive program under 10 U.S.C. 1175;

(C) Is not entitled to retired or retained pay incident to the separation described in paragraph (a)(1)(iii)(B) of this section; and

(D) Applies for employment and training assistance under this part before the end of the 180-day period beginning on the date of the separation described in paragraph (a)(1)(iii)(B) of this section.

(iv) For Employment Recovery DWGs awarded for situations described in § 687.110(a)(4), a person who is:

(A) A dislocated member of the Armed Forces or member of the Armed Forces described in paragraph (a)(1)(iii) of this section; or

(B) The dislocated spouse of a member of the Armed Forces on active duty (as defined in 10 U.S.C. 101(d)(1)).

(2) [Reserved]

(b) For Disaster Recovery DWGs:

(1) In order to be eligible to receive disaster relief employment under sec. 170(b)(1)(B)(i) of WIOA, an individual must be:

(i) A dislocated worker;

(ii) A long-term unemployed individual;

(iii) An individual who is temporarily or permanently laid off as a consequence of the emergency or disaster; or

(iv) An individual who is self-employed and becomes unemployed or significantly underemployed as a result of the emergency or disaster.

(2) In order to be eligible to receive employment and training activities and in rare instances, disaster relief employment under sec. 170(b)(1)(B)(ii) of WIOA, an individual must have relocated or evacuated from an area as a result of a disaster that has been declared or otherwise recognized, and be:

(i) A dislocated worker;

(ii) A long-term unemployed individual;

(iii) An individual who is temporarily or permanently laid off as a consequence of the emergency or disaster; or

(iv) An individual who is self-employed and becomes unemployed or significantly underemployed as a result of the emergency or disaster.

(c) For Disaster Recovery DWG funds, individuals described in paragraph (b)(2) of this section are eligible to receive services provided with DWG funds in the State, tribal area, or outlying area in which the disaster occurred or the State, tribal area, or outlying area to which they have relocated. In certain cases determined by the Secretary, individuals described in paragraph (b)(2) of this section are eligible to receive services in both the State, tribal area, or outlying area in which the disaster occurred and the State, tribal area, or outlying area to which they have relocated.

§ 687.180 What are the allowable activities under National Dislocated Worker Grants?

(a) For Employment Recovery DWGs:

(1) Employment and training assistance, including those activities authorized at secs. 134(c) through (d) and 170(b)(1) of WIOA. The services to be

provided in a particular project are negotiated between the Department and the grantee, taking into account the needs of the target population covered by the grant, and may be changed through grant modifications, if necessary.

(2) DWGs may provide for supportive services, including needs-related payments (subject to the restrictions in sec. 134(d)(3) of WIOA, where applicable, and the terms and conditions of the grant) to help workers who require such assistance to participate in the activities provided for in the grant. Generally, the terms of a grant must be consistent with local policies governing such financial assistance under its formula funds (including the payment levels and duration of payments). The terms of the grant agreement may diverge from established local policies, in the following instances:

(i) If unemployed dislocated workers served by the project are not able to meet the 13 or 8 weeks enrollment in training requirement established by sec. 134(d)(3)(B) of WIOA because of the lack of formula or DWG funds in the State or local area at the time of the dislocation, such individuals may be eligible for needs-related payments if they are enrolled in training by the end of the 6th week following the date of the DWG award; or

(ii) Under other circumstances as specified in guidance governing DWG application requirements.

(b) For Disaster DWGs: Funds provided under sec. 170(b)(1)(B) of WIOA can support a different array of activities, depending on the circumstances surrounding the situation for which the grant was awarded:

(1) For DWGs serving individuals in an emergency or disaster area declared eligible for public assistance by FEMA, disaster relief employment is authorized to support projects that provide food, clothing, shelter, and other humanitarian assistance for emergency and disaster victims, and projects regarding demolition, cleaning, repair, renovation, and reconstruction of damaged and destroyed structures, facilities, and lands located within the disaster area and in offshore areas related to the emergency or disaster in coordination with the Administrator of FEMA. Employment and training activities also may be provided, as appropriate. An individual's disaster relief employment is limited to 12 months or less for work related to recovery from a single emergency or disaster. The Secretary may extend an individual's disaster relief employment for up to an additional 12 months, if it is requested and sufficiently justified by an entity described in § 687.120(b).

(2) For DWGs serving individuals who have relocated from an emergency or disaster area, only employment and training activities will be authorized, except where disaster relief employment is appropriate.

(3) For DWGs awarded to States for events that have designations from Federal agencies (other than FEMA) that recognize an emergency or disaster situation as one of national significance that could result in a potentially large loss of employment, disaster relief employment and/or employment and training activities may be authorized, depending on the circumstances associated with the specific event.

(c) Disaster Recovery DWG funds may be expended through public and private agencies and organizations engaged in the activities described in this paragraph (b) of this section.

§ 687.190 How do statutory and regulatory waivers apply to National Dislocated Worker Grants?

(a) For DWGs, utilization of statutory or regulatory waivers is limited to waivers already approved by the Department under sec. 189(i) of WIOA, separate from the DWG process. WIOA sec. 189(i) gives the Department the authority to waive provisions under subtitles A, B, and/or E of WIOA; requirements of DWGs in WIOA subtitle D cannot and will not be waived.

(b) A grant application must include a description of the approved waiver and request that the waiver be applied to the DWG. The Department will consider such requests as part of the overall DWG application review and decision process; however, applicants may not use this process to request new waivers.

(c) If during the operation of a DWG, the grantee wishes to utilize a statutory or regulatory waiver that the Department has already approved under sec. 189(i), but it was not included in the grantee's original DWG application, the grantee must submit a grant modification that describes the waiver and requests application of the waiver to the DWG. Grantees may not use this process to request new waivers.

§ 687.200 What are the program and administrative requirements that apply to National Dislocated Worker Grants?

(a) Unless otherwise authorized in a DWG agreement, the financial and administrative rules contained in part 683 of this chapter apply to awards under this part.

(b) Exceptions include:

(1) Funds provided in response to a disaster may be used for temporary job creation in areas declared eligible for public assistance by FEMA, and, in some instances, areas impacted by an emergency or disaster situation of national significance, as provided in § 687.110(b)(2), and subject to the limitations of sec. 170(d) of WIOA, this part, and any guidance issued by the Department;

(2) Per sec. 170(d)(4) of WIOA, in extremely limited instances, as determined by the Secretary or the Secretary's designee, any Disaster Recovery DWG funds that are available for expenditure under any grant awarded under this part may be used for additional disasters or situations of national significance experienced by an entity described in § 687.120(b) in the same program year the funds were awarded;

(3) DWG funds may be used to pay an appropriate level of administrative costs based on the design and complexity of the project. The Department will negotiate administrative costs with the applicant as part of the application review and grant award and modification processes. Administrative cost limits will be calculated against the amount of the grant awarded;

(4) The period of availability for expenditure of funds under a DWG is specified in the grant agreement;

(5) The Department may establish supplemental reporting, monitoring, and oversight requirements for DWGs. The requirements will be identified in the grant application instructions or the grant document; and

(6) The Department may negotiate and fund projects under terms other than those specified in this part where it can be clearly demonstrated that such adjustments will achieve a greater positive benefit for the workers and/or communities being assisted.

PART 688—PROVISIONS GOVERNING THE YOUTHBUILD PROGRAM

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Subpart A—Purpose and Definitions

§ 688.100 What is YouthBuild?

(a) YouthBuild is a workforce development program that provides employment, education, leadership development, and training opportunities to disadvantaged and low-income youth between the ages of 16 and 24, most of whom are secondary school drop outs and are either a member of a low-income family, a foster care youth, a youth who is homeless, an offender, a youth with a disability, a child of an incarcerated parent, or a migrant youth.

(b) Program participants receive education services that may lead to either a high school diploma or its State-recognized equivalent. Further, they receive occupational skills training and are encouraged to pursue postsecondary education or additional training, including registered apprenticeship and pre-apprenticeship programs. The program is designed to create a skilled workforce either in the construction industry, through the rehabilitation and construction of housing for homeless and low-income individuals and families, as well as public facilities, or in other in-demand industries or occupations. The program also benefits the larger community because it provides increased access to affordable housing.

§ 688.110 What are the purposes of the YouthBuild program?

The overarching goal of the YouthBuild program is to provide disadvantaged and low-income youth the opportunity to obtain education and employment skills in local in-demand jobs to achieve economic self-sufficiency. Additionally, the YouthBuild program has as goals to:

(a) Enable disadvantaged youth to obtain the education and employment skills necessary to achieve economic self-sufficiency through employment in in-demand occupations and pursuit of postsecondary education and training opportunities;

(b) Provide disadvantaged youth with opportunities for meaningful work and service to their communities;

(c) Foster the development of employment and leadership skills and commitment to community development among youth in low-income communities;

(d) Expand the supply of permanent affordable housing for homeless individuals and families, homeless youth, and low-income families by utilizing the talents of disadvantaged youth. The program seeks to increase the number of affordable and transitional housing units available to decrease the rate of homelessness in communities with YouthBuild programs; and

(e) Improve the quality and energy efficiency of community and other non-profit and public facilities, including those that are used to serve homeless and low-income families.

§ 688.120 What definitions apply to this part?

In addition to the definitions at sec. 3 of the Workforce Innovation and Opportunity Act (WIOA) and § 675.300 of this chapter, the following definitions apply:

Adjusted income means, with respect to a family, the amount (as determined by the Housing Development Agency) of the income of the members of the family residing in a dwelling unit or the persons on a lease, after any income exclusions as follows:

(1) *Mandatory exclusions.* In determining adjusted income, a Housing Development Agency must exclude from the annual income of a family the following amounts:

(i) *Elderly and disabled families.* $400 for any elderly or disabled family.

(ii) *Medical expenses.* The amount by which three percent of the annual family income is exceeded by the sum of:

(A) Unreimbursed medical expenses of any elderly family or disabled family;

(B) Unreimbursed medical expenses of any family that is not covered under paragraph (1)(ii)(A) of this definition, except that this paragraph (1)(ii)(B) only applies to the extent approved in appropriation Acts; and

(C) Unreimbursed reasonable attendant care and auxiliary apparatus expenses for each handicapped member of the family, to the extent necessary to enable any member of such family (including such handicapped member) to be employed.

(iii) *Child care expenses.* Any reasonable child care expenses necessary to enable a member of the family to be employed or to further his or her education.

(iv) *Minors, students, and persons with disabilities.* $480 for each member of the family residing in the household (other than the head of the household or his or her spouse) who is less than 18 years of age or is attending school or vocational training on a full-time basis, or who is 18 years of age or older and is a person with disabilities.

(v) *Child support payments.* Any payment made by a member of the family for the support and maintenance of any child who does not reside in the household, except that the amount excluded under this clause may not exceed $480 for each child for whom such payment is made; except that this clause only applies to the extent approved in appropriations Acts.

(vi) *Spousal support expenses.* Any payment made by a member of the family for the support and maintenance of any spouse or former spouse who does not reside in the household, except that the amount excluded under this clause must not exceed the lesser of the amount that such family member has a legal obligation to pay, or $550 for each individual for whom such payment is made; except that this clause only applies to the extent approved in appropriations Acts.

(vii) *Earned income of minors.* The amount of any earned income of a member of the family who is not:

(A) 18 years of age or older; and

(B) The head of the household (or the spouse of the head of the household).

(2) *Permissive exclusions for public housing.* In determining adjusted income, a Housing Development Agency may, at the discretion of the agency, establish exclusions from the annual income of a family residing in a public housing dwelling unit. Such exclusions may include the following amounts:

(i) *Excessive travel expenses.* Excessive travel expenses in an amount not to exceed $25 per family per week, for employment or education-related travel.

(ii) *Earned income.* An amount of any earned income of the family, established at the discretion of the Housing Development Agency, which may be based on:

(A) All earned income of the family,

(B) The amount earned by particular members of the family;

(C) The amount earned by families having certain characteristics; or

(D) The amount earned by families or members during certain periods or from certain sources.

(iii) *Others.* Such other amounts for other purposes, as the Housing Development Agency may establish.

Applicant means an eligible entity that has submitted an application under § 688.210.

Basic skills deficient means an individual:

(1) Who is a youth, and who has English reading, writing, or computing skills at or below the eighth grade level on a generally accepted standardized test; or

(2) Who is a youth or adult, and who is unable to compute or solve problems, or read, write, or speak English, at a level necessary to function on the job, in the individual's family, or in society.

Community or other public facility means those facilities which are either privately owned by non-profit organizations, including faith-based and community-based organizations, and publicly used for the benefit of the community, or publicly owned and publicly used for the benefit of the community.

Construction Plus means the inclusion of occupational skills training for YouthBuild participants in in-demand occupations other than construction.

Eligible entity means a public or private non-profit agency or organization (including a consortium of such agencies or organizations), including:

(1) A community-based organization;

(2) A faith-based organization;

(3) An entity carrying out activities under this title, such as a Local Workforce Development Board (WDB);

(4) A community action agency;

(5) A State or local Housing Development Agency;

(6) An Indian tribe or other agency primarily serving Indians;

(7) A community development corporation;

(8) A State or local youth service or conservation corps; and

(9) Any other entity eligible to provide education or employment training under a Federal program (other than the program carried out under this section).

English language learner, when used with respect to a participant, means an eligible individual who has limited ability in reading, writing, speaking, or comprehending the English language, and:

(1) Whose native language is a language other than English; or

(2) Who lives in a family or community environment where a language other than English is the dominant language.

Exit, as used in § 688.400, has the same meaning as in § 677.150(c) of this chapter.

Follow-up services include:

(1) The leadership development and supportive service activities listed in §§ 681.520 and 681.570 of this chapter;

(2) Regular contact with a youth participant's employer, including assistance in addressing work-related problems that arise;

(3) Assistance in securing better paying jobs, career development, and further education;

(4) Work-related peer support groups;

(5) Adult mentoring; and

(6) Services necessary to ensure the success of youth participants in employment and/or postsecondary education.

Homeless child or youth means an individual who lacks a fixed, regular, and adequate nighttime residence and includes a child or youth who:

(1) Is sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason;

(2) Is living in a motel, hotel, trailer park, or campground due to the lack of alternative adequate accommodations;

(3) Is living in an emergency or transitional shelter, is abandoned in a hospital, or is awaiting foster care placement;

(4) Has a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;

(5) Is living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; or

(6) Is a migratory child living in circumstances described in this definition.

Homeless individual means an individual who lacks a fixed, regular, and adequate nighttime residence and includes an individual who:

(1) Is sharing the housing of other persons due to loss of housing, economic hardship, or similar reason;

(2) Is living in a motel, hotel, trailer park, or campground due to the lack of alternative adequate accommodations;

(3) Is living in an emergency or transitional shelter;

(4) Is abandoned in a hospital, or is awaiting foster care placement;

(5) Has a primary nighttime residence that is a public or private place not designed for or ordinarily used as regular sleeping accommodation for human beings; or

(6) Is a migratory child living in circumstances described in this definition.

Housing Development Agency means any agency of a Federal, State or local government, or any private non-profit organization, that is engaged in providing housing for homeless individuals or low-income families.

Income, as defined in the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(2)), means income is from all sources of each member of the household, as determined in accordance with the criteria prescribed by the Secretary of Labor, in consultation with the Secretary of Agriculture, except that any amounts not actually received by the family and any amounts which would be eligible for exclusion under sec. 1382b(a)(7) of the United States Housing Act of 1937, may not be considered as income under this definition.

In-Demand Industry Sector or Occupation means:

(1) An industry sector that has a substantial current or potential impact (including through jobs that lead to economic self-sufficiency and opportunities for advancement) on the State, regional, or local economy, as appropriate, and that contributes to the growth or stability of other supporting business, or the growth of other industry sectors; or

(2) An occupation that currently has or is projected to have a number of positions (including positions that lead to economic self-sufficiency and opportunities for advancement) in an industry sector so as to have a significant impact on the State, regional, or local economy, as appropriate.

Indian, as defined in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b), means a person who is a member of an Indian tribe.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Individual with a disability means an individual with a disability as defined in sec. 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).

Low-income family means a family whose income does not exceed 80 percent of the median income for the area unless the Secretary determines that a higher or lower ceiling is warranted. This definition includes families consisting of one person as defined by 42 U.S.C. 1437a(b)(3).

Migrant youth means a youth, or a youth who is the dependent of someone who, during the previous 12 months, has:

(1) Worked at least 25 days in agricultural labor that is characterized by chronic unemployment or underemployment;

(2) Made at least $800 from agricultural labor that is characterized by chronic unemployment or underemployment, if at least 50 percent of his or her income came from such agricultural labor;

(3) Was employed at least 50 percent of his or her total employment in agricultural labor that is characterized by chronic unemployment or underemployment; or

(4) Was employed in agricultural labor that requires travel to a jobsite such that the farmworker is unable to

return to a permanent place of residence within the same day.

Needs-based payments means additional payments beyond regular stipends for program participation that are based on defined needs that enable a youth to participate in the program.

Occupational skills training means an organized program of study that provides specific vocational skills that lead to proficiency in performing actual tasks and technical functions required by certain occupational fields at entry, intermediate, or advanced levels. Occupational skills training includes training programs that lead to recognized postsecondary credentials that align with in-demand industry sectors or occupations in the local area. Such training must:

(1) Be outcome-oriented and focused on an occupational goal specified in the individual service strategy;

(2) Be of sufficient duration to impart the skills needed to meet the occupational goal; and

(3) Result in attainment of a recognized postsecondary credential.

Offender means an adult or juvenile who:

(1) Is or has been subject to any stage of the criminal justice process, and who may benefit from WIOA services; or

(2) Requires assistance in overcoming artificial barriers to employment resulting from a record of arrest or conviction.

Participant means an individual who has been determined eligible to participate in the YouthBuild program, and who enrolls in the program and receives services or training described in § 688.320.

Pre-apprenticeship, as defined in § 681.480 of this chapter, means a program designed to prepare individuals to enter and succeed in an apprenticeship program registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act''; 50 Stat. 664, chapter 663; 29 U.S.C. 50 *et seq.*) (referred to in this part as a ''registered apprenticeship'' or ''registered apprenticeship program'') and includes the following elements:

(1) Training and curriculum that aligns with the skill needs of employers in the economy of the State or region involved;

(2) Access to educational and career counseling and other supportive services, directly or indirectly;

(3) Hands-on, meaningful learning activities that are connected to education and training activities, such as exploring career options, and understanding how the skills acquired through coursework can be applied toward a future career;

(4) Opportunities to attain at least one industry-recognized credential; and

(5) A partnership with one or more registered apprenticeship programs that assists in placing individuals who complete the pre-apprenticeship program in a registered apprenticeship program.

(6) YouthBuild programs that receive funding under this part are considered pre-apprenticeship programs under this definition.

Recognized postsecondary credential means a credential consisting of an industry-recognized certificate or certification, a certificate of completion of a registered apprenticeship, a license recognized by the State involved or Federal government, or an associate or baccalaureate degree.

Registered apprenticeship program means an apprenticeship program that:

(1) Is registered under the Act of August 16, 1937 (commonly known as the ''National Apprenticeship Act'' (50 Stat. 664; 20 U.S.C. 50 *et seq.*)); and

(2) Meets such other criteria as the Secretary may establish.

School dropout means an individual who no longer attends any school and who has not received a secondary school diploma or its State-recognized equivalent.

Secondary school means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12.

Section 3 means a program described in sec. 3 of the Housing and Urban Development Act of 1968, as amended by the Housing and Community Development Act of 1992.

Supportive services for youth, as defined in § 681.570 of this chapter, are

services that enable an individual to participate in WIOA activities. These services include, but are not limited to, the following:

(1) Linkages to community services;

(2) Assistance with transportation;

(3) Assistance with child care and dependent care;

(4) Referrals to child support;

(5) Assistance with housing;

(6) Needs-related payments;

(7) Assistance with educational testing;

(8) Reasonable accommodations for youth with disabilities;

(9) Referrals to health care;

(10) Assistance with uniforms or other appropriate work attire and work-related tools, including such items as eyeglasses and protective eye gear;

(11) Assistance with books, fees, school supplies, and other necessary items for students enrolled in postsecondary education classes; and

(12) Payments and fees for employment and training-related applications, tests, and certifications.

Transitional housing means housing provided to ease the movement of individuals and families experiencing homelessness to permanent housing within 24 months or such longer period.

YouthBuild program means any program that receives assistance under this part and provides disadvantaged youth with opportunities for employment, education, leadership development, service to the community, and training through the rehabilitation (which, for purposes of this part, includes energy efficiency enhancements) or construction of housing for homeless individuals and low-income families, and public facilities.

Youth in foster care, as defined in § 681.210 of this chapter, means an individual in foster care or who has aged out of the foster care system or who has attained 16 years of age and left foster care for kinship, guardianship, or adoption; or a child eligible for assistance under sec. 477 of the Social Security Act (42 U.S.C. 677), or in an out-of-home placement.

Subpart B—Funding and Grant Applications

§ 688.200 How are YouthBuild grants funded and administered?

The Secretary uses funds authorized for appropriation under WIOA sec. 171(i) to administer YouthBuild as a national program under title I, subtitle D of WIOA. YouthBuild grants are awarded to eligible entities, as defined in § 688.120, through the competitive selection process described in § 688.210.

§ 688.210 How does an eligible entity apply for grant funds to operate a YouthBuild program?

The Secretary announces the availability of grant funds through a Funding Opportunity Announcement (FOA). The FOA contains instructions for what the Department requires in the grant application, describes eligibility requirements, the rating criteria that the Department will use in reviewing grant applications, and special reporting requirements to operate a YouthBuild project. The FOA, along with the requisite forms needed to apply for grant funds, can be found at *http://www.doleta.gov/grants/find_grants.cfm.*

§ 688.220 How are eligible entities selected to receive grant funds?

In order to receive funds under the YouthBuild program, an eligible entity must meet selection criteria established by the Secretary which include:

(a) The qualifications or potential capabilities of an applicant;

(b) An applicant's potential to develop a successful YouthBuild program;

(c) The need for an applicant's proposed program, as determined by the degree of economic distress of the community from which participants would be recruited (measured by indicators such as poverty, youth unemployment, and the number of individuals who have dropped out of secondary school) and of the community in which the housing and community and public facilities proposed to be rehabilitated or constructed are located (measured by indicators such as incidence of homelessness, shortage of affordable housing, and poverty);

(d) The commitment of an applicant to provide skills training, leadership development, counseling and case management, and education to participants;

(e) The focus of a proposed program on preparing youth for local in-demand sectors or occupations, or postsecondary education and training opportunities;

(f) The extent of an applicant's coordination of activities to be carried out through the proposed program with:

(1) Local WDBs, one-stop center operators, and one-stop partners participating in the operation of the one-stop delivery system involved, or the extent of the applicant's good faith efforts, as determined by the Secretary, in achieving such coordination;

(2) Public education, criminal justice, housing and community development, national service, or postsecondary education or other systems that relate to the goals of the proposed program; and

(3) Employers in the local area;

(g) The extent to which a proposed program provides for inclusion of tenants who were previously homeless individuals or families in the rental of housing provided through the program;

(h) The commitment of additional resources to the proposed program (in addition to the funds made available through the grant) by:

(1) An applicant;

(2) Recipients of other Federal, State, or local housing and community development assistance who will sponsor any part of the rehabilitation, construction, operation and maintenance, or other housing and community development activities undertaken as part of the proposed program; or

(3) Entities carrying out other Federal, State, or local activities or activities conducted by Indian tribes, including vocational education programs, adult and language instruction educational programs, and job training using funds provided under WIOA;

(i) An applicant's ability to enter partnerships with:

(1) Education and training providers including:

(i) The kindergarten through twelfth grade educational system;

(ii) Adult education programs;

(iii) Community and technical colleges;

(iv) Four-year colleges and universities;

(v) Registered apprenticeship programs; and

(vi) Other training entities;

(2) Employers, including professional organizations and associations. An applicant will be evaluated on the extent to which employers participate in:

(i) Defining the program strategy and goals;

(ii) Identifying needed skills and competencies;

(iii) Designing training approaches and curricula;

(iv) Contributing financial support; and

(v) Hiring qualified YouthBuild graduates;

(3) The workforce development system which may include:

(i) State and Local WDBs;

(ii) State workforce agencies; and

(iii) One-stop centers and their partner programs;

(4) The juvenile and adult justice systems, and the extent to which they provide:

(i) Support and guidance for YouthBuild participants with court involvement;

(ii) Assistance in the reporting of recidivism rates among YouthBuild participants; and

(iii) Referrals of eligible participants through diversion or reentry from incarceration;

(5) Faith-based and community organizations, and the extent to which they provide a variety of grant services such as:

(i) Case management;

(ii) Mentoring;

(iii) English as a Second Language courses; and

(iv) Other comprehensive supportive services, when appropriate;

(j) The applicant's potential to serve different regions, including rural areas and States that may not have previously received grants for YouthBuild programs; and

(k) Such other factors as the Secretary determines to be appropriate for purposes of evaluating an applicant's potential to carry out the proposed

program in an effective and efficient manner.

(l) The weight to be given to these factors will be described in a FOA issued under § 688.210.

§ 688.230 What are the minimum requirements to apply for YouthBuild funds?

At minimum, applications for YouthBuild funds must include the following elements:

(a) Labor market information for the relevant labor market area, including both current data (as of the date of submission of the application) and projections on career opportunities in construction and in-demand industry sectors or occupations;

(b) A request for the grant, specifying the amount of the grant requested and its proposed uses;

(c) A description of the applicant and a statement of its qualifications, including a description of the applicant's relationship with Local WDBs, one-stop operators, employers, local unions, entities carrying out registered apprenticeship programs, other community groups, and the applicant's past experience with rehabilitation or construction of housing or public facilities (including experience with programs through the U.S. Department of Housing and Urban Development (HUD) under sec. 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u)), and with youth education and employment training programs);

(d) A description of the proposed site for the proposed program;

(e) A description of the educational and job training activities, work opportunities, postsecondary education and training opportunities, and other services that will be provided to participants, and how those activities, opportunities, and services will prepare youth for employment in in-demand industry sectors or occupations in the labor market area described in paragraph (a) of this section;

(1) A description of the proposed activities to be undertaken under the grant related to rehabilitation or construction, and, in the case of an applicant requesting approval from the Secretary to carry out additional activities related to in-demand industry sectors or occupations, a description of such additional activities.

(2) The anticipated schedule for carrying out all activities proposed under paragraph (f) of this section;

(f) A description of the manner in which eligible youth will be recruited and selected as participants, including a description of arrangements that will be made with Local WDBs, one-stop operators, faith and community-based organizations, State education agencies or local education agencies (including agencies of Indian tribes), public assistance agencies, the courts of jurisdictions, agencies that serve youth who are homeless individuals (including those that operate shelters), foster care agencies, and other appropriate public and private agencies;

(g) A description of the special outreach efforts that will be undertaken to recruit eligible young women (including young women with dependent children) as participants;

(h) A description of the specific role of employers in the proposed program, such as their role in developing the proposed program and assisting in service provision and placement activities;

(i) A description of how the proposed program will be coordinated with other Federal, State, and local activities conducted by Indian tribes, such as workforce investment activities, career and technical education and training programs, adult and language instruction educational programs, activities conducted by public schools, activities conducted by community colleges, national service programs, and other job training provided with funds available under WIOA, in particular how programs will coordinate with local Workforce Development funds outlined in WIOA sec. 129(c)(2);

(j) Assurances that there will be a sufficient number of adequately trained supervisory personnel in the proposed program;

(k) A description of the level of performance to be achieved with respect to primary indicators of performance for eligible youth as described in § 688.410;

(l) The organization's past performance under a grant issued by the Secretary to operate a YouthBuild program;

(m) A description of the applicant's relationship with local building trade unions regarding their involvement in training to be provided through the proposed program, the relationship of the proposed program to established registered apprenticeship programs and employers, the ability of the applicant to grant an industry-recognized certificate or certification through the program, and the quality of the program leading to the certificate or certification;

(n) A description of activities that will be undertaken to develop leadership skills of participants;

(o) A detailed budget and description of the system of fiscal controls, and auditing and accounting procedures, that will be used to ensure fiscal soundness for the proposed program;

(p) A description of the commitments for any additional resources (in addition to funds made available through the grant) to be made available to the proposed program from:

(1) The applicant;

(2) Recipients of other Federal, State, or local housing and community development assistance that will sponsor any part of the rehabilitation or construction, operation or maintenance, or other housing and community development activities undertaken as part of the proposed program; or

(3) Entities carrying out other Federal, State or local activities conducted by Indian tribes, including career and technical education and training programs, and job training provided with funds under WIOA;

(q) Information identifying and describing of, the financing proposed for any:

(1) Rehabilitation of the property involved;

(2) Acquisition of the property; or

(3) Construction of the property;

(r) Information identifying and describing of, the entity that will manage and operate the property;

(s) Information identifying and describing of, the data collection systems to be used;

(t) A certification, by a public official responsible for the housing strategy for the State or unit of general local government within which the proposed program is located, that the proposed program is consistent with the housing strategy;

(u) A certification that the applicant will comply with requirements of the Fair Housing Act (42 U.S.C. 3601 *et seq.*) and will affirmatively further fair housing; and

(v) Any additional requirements that the Secretary determines are appropriate.

§ 688.240 How are eligible entities notified of approval for grant funds?

The Secretary will, to the extent practicable, notify each eligible entity applying for funds no later than 5 months from the date the application is received, whether the application is approved or disapproved. In the event additional funds become available, the Employment and Training Administration (ETA) reserves the right to use such funds to select additional grantees from applications submitted in response to a FOA.

Subpart C—Program Requirements

§ 688.300 Who is an eligible participant?

(a) *Eligibility criteria.* Except as provided in paragraph (b) of this section, an individual is eligible to participate in a YouthBuild program if the individual is:

(1) Not less than age 16 and not more than age 24 on the date of enrollment;

(2) A school dropout or an individual who has dropped out of school and has subsequently reenrolled; and

(3) Is one or more of the following:

(i) A member of a low-income family;

(ii) A youth in foster care;

(iii) An offender;

(iv) A youth who is an individual with a disability;

(v) The child of a current or formerly incarcerated parent; or

(vi) A migrant youth.

(b) *Exceptions.* Not more than 25 percent of the participants in a program, under this section, may be individuals who do not meet the requirements of paragraph (a)(2) or (3) of this section, if such individuals:

(1) Are basic skills deficient, as defined in § 688.120, despite attainment of

a secondary school diploma or its recognized State equivalent (including recognized certificates of attendance or similar documents for individuals with disabilities); or

(2) Have been referred by a local secondary school for participation in a YouthBuild program leading to the attainment of a secondary school diploma if such referral is to a YouthBuild program offering a secondary school diploma.

§ 688.310 Are there special rules that apply to veterans?

Special rules for determining income for veterans are found in § 683.230 of this chapter and for the priority of service provisions for qualified persons are found in 20 CFR part 1010. Those special rules apply to covered persons who are eligible to participate in the YouthBuild program.

§ 688.320 What eligible activities may be funded under the YouthBuild program?

Grantees may provide one or more of the following education and workforce investment and other activities to YouthBuild participants:

(a) Eligible education and workforce activities including:

(1) Work experience and skills training (coordinated, to the maximum extent feasible, with registered apprenticeship programs), including:

(i) Supervision and training for participants in the rehabilitation or construction of housing, including residential housing for homeless individuals or low-income families, or transitional housing for homeless individuals and in additional in-demand industry sectors or occupations in the region in which the program operates (as approved by the Secretary);

(ii) Supervision and training for participants in the rehabilitation or construction of community and other public facilities, except that not more than 15 percent of grant funds-appropriated to carry out this section may be used for this activity; and

(iii) Supervision and training for participants in in-demand industry sectors or occupations in the region in which the program operates, if such activity is approved by the Secretary;

(2) Occupational skills training;

(3) Other paid and unpaid work experiences, including internships and job shadowing;

(4) Services and activities designed to meet the educational needs of participants, including:

(i) Basic skills instruction and remedial education;

(ii) Language instruction educational programs for participants who are English language learners;

(iii) Secondary education services and activities, including tutoring, study skills training, and school dropout prevention and recovery activities, designed to lead to the attainment of a secondary school diploma or its recognized equivalent (including recognized certificates of attendance or similar documents for individuals with disabilities);

(iv) Counseling and assistance in obtaining postsecondary education and required financial aid; and

(v) Alternative secondary school services;

(5) Counseling services and related activities, such as comprehensive guidance and counseling on drug and alcohol abuse, referrals to mental health services, and referrals to victim services;

(6) Activities designed to develop employment and leadership skills, which may include community service and peer-centered activities encouraging responsibility, interpersonal skills, and other positive social behaviors, and activities related to youth policy committees that participate in decision-making related to the program;

(7)(i) Supportive services and needs-based payments necessary to enable individuals to participate in the program and to assist individuals, for a period of time not to exceed 12 months after the completion of training, in obtaining or retaining employment or applying for and transitioning to postsecondary education or training;

(ii) To provide needs-based payments, a grantee must have a written policy which:

(A) Establishes participant eligibility for such payments;

(B) Establishes the amounts to be provided;

(C) Describes the required documentation and criteria for payments; and

(D) Applies consistently to all program participants; and

(8) Job search and assistance;

(b) Payment of the administrative costs of the applicant, including recruitment and selection of participants, except that not more than 10 percent of the amount awarded under § 688.210 may be used for such costs;

(c) Adult mentoring;

(d) Provision of wages, stipends, or benefits to participants in the program;

(e) Ongoing training and technical assistance that is related to developing and carrying out the program; and

(f) Follow-up services.

§ 688.330 What level of training qualifies a construction project as a qualifying work site under the YouthBuild program?

At a minimum, in order to qualify as a work site for the purposes of the YouthBuild program, a work site must:

(a) Provide participants with the opportunity to have hands-on training and experience in two or more modules, each within a different skill area, in a construction skills training program that offers an industry-recognized credential;

(b) Be built or renovated for low-income individuals or families;

(c) Have a restrictive covenant in place that only allows for rental or resale to low-income participants as required by § 688.730; and

(d) Adhere to the allowable construction and other capital asset costs applicable to the YouthBuild program.

§ 688.340 What timeframes apply to participation?

An eligible individual selected for participation in the program must be offered full-time participation in the program for not less than 6 months and not more than 24 months.

§ 688.350 What timeframes must be devoted to education and workforce investment or other activities?

YouthBuild grantees must structure programs so that participants in the program are offered:

(a) Education and related services and activities designed to meet educational needs, such as those specified in § 688.320(a)(4) through (7), during at least 50 percent of the time during which they participate in the program; and

(b) Workforce and skills development activities, such as those specified in § 688.320(a)(1) through (3), during at least 40 percent of the time during which they participate in the program.

(c) The remaining 10 percent of the time of participation may be used for the activities described in paragraphs (a) and (b) of this section and/or for leadership development and community service activities.

§ 688.360 What timeframes apply to follow-up services?

Grantees must provide follow-up services to all YouthBuild participants for a period of 12 months after a participant successfully exits a YouthBuild program.

§ 688.370 What are the requirements for exit from the YouthBuild program?

At a minimum, to be a successful exit, the Department of Labor requires that:

(a) Participants receive hands-on construction training or hands-on training in another industry or occupation, in the case of Construction Plus grantees; and

(b) Participants meet the exit policies established by the grantee.

(1) Such policies must describe the program outcomes and/or individual goals that must be met by each participant in order to successfully complete the program; and

(2) Grantees must apply the policies consistently to determine when a successful exit has occurred.

§ 688.380 What is the role of the YouthBuild grantee in the one-stop delivery system?

In those local areas where the grantee operates its YouthBuild program, the grantee is a required partner of the local one-stop delivery system and is subject to the provisions relating to such partners described in part 678 of this chapter.

Subpart D—Performance Indicators

§ 688.400 What are the performance indicators for YouthBuild grants?

The performance indicators for YouthBuild grants include:

(a) The percentage of program participants who are in education and training activities, or in unsubsidized employment, during the second quarter after exit from the program;

(b) The percentage of program participants who are in education or training activities, or in unsubsidized employment, during the fourth quarter after exit from the program;

(c) The median earnings of program participants who are in unsubsidized employment during the second quarter after exit from the program;

(d) The percentage of program participants who obtain a recognized postsecondary credential or secondary school diploma or its recognized equivalent (and for those achieving the secondary diploma or its recognized equivalent, such participants also have obtained or retained employment or are in an education or training program leading to a recognized postsecondary credential within 1 year after exit from the program);

(e) The percentage of program participants who, during a program year, are in an education and training program that leads to a recognized postsecondary credential or employment and who are achieving measurable skill gains toward such a credential or employment;

(f) The indicator of effectiveness in serving employers described at § 677.155(c)(6) of this chapter; and

(g) Other indicators of performance as may be required by the Secretary.

§ 688.410 What are the required levels of performance for the performance indicators?

(a) The Secretary must annually establish expected levels of performance for YouthBuild programs relating to each of the primary indicators of performance. The expected levels of performance for each of the performance indicators are national standards that are provided in separately issued guidance. Short-term or other performance indicators will be provided in separately issued guidance or as part of the FOA or grant agreement. Performance level expectations will be based on available YouthBuild data and data from similar WIOA youth programs and may change from one grant competition to another. The expected national levels of performance will take into account the extent to which the levels promote continuous improvement in performance.

(b) The levels of performance established will at a minimum:

(1) Be expressed in an objective, quantifiable, and measurable form; and

(2) Indicate continuous improvement in performance.

§ 688.420 What are the reporting requirements for YouthBuild grantees?

Each grantee must provide such reports as are required by the Secretary in separately issued guidance, including:

(a) The quarterly performance report;

(b) The quarterly narrative progress report;

(c) The financial report; and

(d) Such other reports as may be required by the grant agreement.

§ 688.430 What are the due dates for quarterly reporting?

(a) Quarterly reports are due no later than 45 days after the end of the reporting quarter, unless otherwise specified in the reporting guidance issued under § 688.420; and

(b) A final financial report is required 90 days after the expiration of a funding period or the termination of grant support.

Subpart E—Administrative Rules, Costs, and Limitations

§ 688.500 What administrative regulations apply to the YouthBuild program?

Each YouthBuild grantee must comply with the following:

(a) The regulations found in this part;

(b) The general administrative requirements found in part 683 of this chapter, except those that apply only to the WIOA title I, subtitle B program

and those that have been modified by this section;

(c) The Department's regulations on government-wide requirements, which include:

(1) The regulations codifying the Office of Management and Budget's (OMB) government-wide grants requirements at 2 CFR parts 200 and 2900, as applicable;

(2) The Department's regulations at 29 CFR part 38, which implement the nondiscrimination provisions of WIOA sec. 188;

(3) The Department's regulations at 29 CFR parts 93, 94, and 98 relating to restrictions on lobbying, drug free workplace, and debarment and suspension; and

(4) The audit requirements of the Office of Management and Budget at 2 CFR parts 200 and 2900, as applicable; and

(d) Relevant State and local educational standards.

§ 688.510 How may grantees provide services under the YouthBuild program?

Each recipient of a grant under the YouthBuild program may provide the services and activities described in these regulations either directly or through subgrants, contracts, or other arrangements with local educational agencies, postsecondary educational institutions, State or local housing development agencies, other public agencies, including agencies of Indian tribes, or private organizations.

§ 688.520 What cost limits apply to the use of YouthBuild program funds?

(a) Administrative costs for programs operated under YouthBuild are limited to 10 percent of the grant award. The definition of administrative costs can be found in § 683.215 of this chapter.

(b) The cost of supervision and training for participants involved in the rehabilitation or construction of community and other public facilities is limited to no more than 15 percent of the grant award.

§ 688.530 What are the cost-sharing or matching requirements of the YouthBuild program?

(a) In addition to the rules described in paragraphs (b) through (f) of this section, the cost-sharing or matching requirements applicable to a YouthBuild grant will be addressed in the grant agreement.

(b) The value of construction materials used in the YouthBuild program is an allowable cost for the purposes of the required non-Federal share or match.

(c) The value of land acquired for the YouthBuild program is not an allowable cost-sharing or match.

(d) Federal funds may not be used as cost-sharing or match resources except as provided by Federal law.

(e) The value of buildings acquired for the YouthBuild program is an allowable match, provided that the following conditions apply:

(1) The purchase cost of buildings used solely for training purposes is allowable; and

(2) For buildings used for training and other purposes, the allowable amount is determined based on the proportionate share of the purchase price related to direct training activities.

(f) Grantees must follow the requirements of Uniform Guidance at 2 CFR parts 200 and 2900 in the accounting, valuation, and reporting of the required non-Federal share.

§ 688.540 What are considered to be leveraged funds?

(a) Leveraged funds may be used to support allowable YouthBuild program activities and consist of payments made for allowable costs funded by both non-YouthBuild Federal, and non-Federal, resources which include:

(1) Costs which meet the criteria for cost-sharing or match in § 688.530 and are in excess of the amount of cost-sharing or match resources required;

(2) Costs which would meet the criteria in § 688.530 except that they are paid for with other Federal resources; and

(3) Costs which benefit the grant program and are otherwise allowable under the cost principles but are not allowable under the grant because of some statutory, regulatory, or grant

provision, whether paid for with Federal or non-Federal resources.

(b) The use of leveraged funds must be reported in accordance with Departmental instructions.

§ 688.550 How are the costs associated with real property treated in the YouthBuild program?

(a) As provided in paragraphs (b) and (c) of this section, the costs of the following activities associated with real property are allowable solely for the purpose of training YouthBuild participants:

(1) Rehabilitation of existing structures for use by homeless individuals and families or low-income families or for use as transitional housing;

(2) Construction of buildings for use by homeless individuals and families or low-income families or for use as transitional housing; and

(3) Construction or rehabilitation of community or other public facilities, except, as provided in § 688.520(b), only 15 percent of the grant award is allowable for such construction and rehabilitation.

(b) The costs for acquisition of buildings that are used for activities described in paragraph (a) of this section are allowable with prior grant officer approval and only under the following conditions:

(1) The purchase cost of buildings used solely for training purposes is allowable; and

(2) For buildings used for training and other purposes, the allowable amount is determined based on the proportionate share of the purchase cost related to direct training.

(c) The following costs are allowable to the extent allocable to training YouthBuild participants in the construction and rehabilitation activities specified in paragraph (a) of this section:

(1) Trainees' tools and clothing including personal protective equipment (PPE);

(2) On-site trainee supervisors;

(3) Construction management;

(4) Relocation of buildings; and

(5) Clearance and demolition.

(d) Architectural fees, or a proportionate share thereof, are allowable when such fees can be related to items such as architectural plans or blueprints on which participants will be trained.

(e) The following costs are unallowable:

(1) The costs of acquisition of land; and

(2) Brokerage fees.

§ 688.560 What participant costs are allowable under the YouthBuild program?

Allowable participant costs include:

(a) The costs of payments to participants engaged in eligible work-related YouthBuild activities;

(b) The costs of payments provided to participants engaged in non-work-related YouthBuild activities;

(c) The costs of needs-based payments;

(d) The costs of supportive services; and

(e) The costs of providing additional benefits to participants or individuals who have exited the program and are receiving follow-up services, which may include:

(1) Tuition assistance for obtaining college education credits;

(2) Scholarships to a registered apprenticeship or technical education program; and

(3) Employer- or Government-sponsored health programs.

§ 688.570 Does the Department allow incentive payments in the YouthBuild program?

(a) Grantees are permitted to provide incentive payments to youth participants for recognition and achievement directly tied to training activities and work experiences. Grantees must tie the incentive payments to the goals of the specific grant program and outline such goals in writing prior to starting the program that makes incentive payments.

(b) Prior to providing incentive payments, the organization must have written policies and procedures in place governing the awarding of incentives, and the incentives provided under the grant must align with these organizational policies.

(c) All incentive payments must comply with the requirements in Uniform Guidance at 2 CFR part 200.

§ 688.580 What effect do payments to YouthBuild participants have on eligibility for other Federal needs-based benefits?

Under § 683.275(d) of this chapter, the Department does not consider allowances, earnings, and payments to individuals participating in programs under title I of WIOA as income for purposes of determining eligibility for and the amount of income transfer and in-kind aid furnished under any Federal or Federally-assisted program based on need other than as provided under the Social Security Act (42 U.S.C. 301).

§ 688.590 What program income requirements apply under the YouthBuild program?

(a) Except as provided in paragraph (b) of this section, program income requirements, as specified in the applicable Uniform Administrative Requirements at 2 CFR parts 200 and 2900, apply to YouthBuild grants.

(b) Revenue from the sale of buildings rehabilitated or constructed under the YouthBuild program to homeless individuals and families and low-income families is not considered program income. Grantees are encouraged to use that revenue for the long-term sustainability of the YouthBuild program.

§ 688.600 Are YouthBuild programs subject to the Davis-Bacon Act labor standards?

(a) YouthBuild programs and grantees are subject to Davis-Bacon labor standards requirements under the circumstances set forth in paragraph (b) of this section. In those instances where a grantee is subject to Davis-Bacon requirements, the grantee must follow applicable requirements in the Department's regulations at 29 CFR parts 1, 3, and 5, including the requirements contained in the Davis-Bacon contract provisions set forth in 29 CFR 5.5.

(b) YouthBuild participants are subject to Davis-Bacon Act labor standards when they perform Davis-Bacon-covered laborer or mechanic work, defined at 29 CFR 5.2(m), on Federal or Federally-assisted projects that are subject to the Davis-Bacon Act labor standards. The Davis-Bacon prevailing wage requirements apply to hours worked on the site of the work.

(c) YouthBuild participants who are not registered and participating in a training program approved by the ETA must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.

§ 688.610 What are the recordkeeping requirements for YouthBuild programs?

(a) Grantees must follow the recordkeeping requirements specified in the Uniform Administrative Requirements, at 29 CFR 95.53 and 97.42, as appropriate.

(b) Grantees must maintain such additional records related to the use of buildings constructed or rehabilitated with YouthBuild funds as specified in the grant agreement or in the Department's guidance.

Subpart F—Additional Requirements

§ 688.700 What are the safety requirements for the YouthBuild program?

(a) YouthBuild Grantees must comply with § 683.280 of this chapter, which applies Federal and State health and safety standards to the working conditions under WIOA-funded projects and programs. These health and safety standards include ''hazardous orders'' governing child labor at 29 CFR part 570.

(b) YouthBuild grantees are required to:

(1) Provide comprehensive safety training for youth working on YouthBuild construction projects;

(2) Have written, jobsite-specific safety plans overseen by an on-site supervisor with authority to enforce safety procedures;

(3) Provide necessary personal protective equipment to youth working on YouthBuild projects; and

(4) Submit required injury incident reports.

§ 688.710 What are the reporting requirements for youth safety?

YouthBuild grantees must ensure that YouthBuild program sites comply

with the Occupational Safety and Health Administration's (OSHA) reporting requirements in 29 CFR part 1904. A YouthBuild grantee is responsible for sending a copy of OSHA's injury incident report form to the ETA within 7 days of any reportable injury suffered by a YouthBuild participant. The injury incident report form is available from OSHA and can be downloaded at *http://www.osha.gov/recordkeeping/RKforms.html*. Reportable injuries include those that result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness.

§ 688.720 What environmental protection laws apply to the YouthBuild program?

YouthBuild program grantees are required, where applicable, to comply with all environmental protection statutes and regulations.

§ 688.730 What requirements apply to YouthBuild housing?

(a) YouthBuild grantees must ensure that all residential housing units which are constructed or rehabilitated using YouthBuild funds must be available solely for:

(1) Sale to homeless individuals and families or low-income families;

(2) Rental by homeless individuals and families or low-income families;

(3) Use as transitional or permanent housing for the purpose of assisting in the movement of homeless individuals and families to independent living. In the case of transitional housing, the unit(s) must be occupied no more than 24 months by the same individual(s); or

(4) Rehabilitation of homes for low-income homeowners.

(b) For rentals of residential units located on the property which are constructed or rehabilitated using YouthBuild funds:

(1) The property must maintain at least a 90 percent level of occupancy for low-income families. The income test will be conducted only at the time of entry for each available unit or rehabilitation of occupant-owned home. If the grantee cannot find a qualifying tenant to lease the unit, the unit may be leased to a family whose income is above the income threshold to qualify as a low-income family but below the median income for the area. Leases for tenants with higher incomes will be limited to not more than 2 years. The leases provided to tenants with higher incomes are not subject to the termination clause that is described in paragraph (b)(2) of this section.

(2) The property owner must not terminate the tenancy or refuse to renew the lease of a tenant occupying a residential rental housing unit constructed or rehabilitated using YouthBuild funds except for serious or repeated violations of the terms and conditions of the lease, for violation of applicable Federal, State, or local laws, or for good cause. Any termination or refusal to renew the lease must be preceded by not less than a 30-day written notice to the tenant specifying the grounds for the action. The property owner may waive the written notice requirement for termination in dangerous or egregious situations involving the tenant.

(c) All transitional or permanent housing for homeless individuals or families or low-income families must be safe and sanitary. The housing must meet all applicable State and local housing codes and licensing requirements in the jurisdiction in which the housing is located.

(d) For sales or rentals of residential housing units constructed or rehabilitated using YouthBuild funds, YouthBuild grantees must ensure that owners of the property record a restrictive covenant at the time that an occupancy permit is issued against such property which includes the use restrictions set forth in paragraphs (a), (b), and (c) of this section and incorporates the following definitions at § 688.120: Homeless individual, Low-income family, and Transitional housing. The term of the restrictive covenant must be at least 5 years from the time of the issuance of the occupancy permit, unless a time period of more than 5 years has been established by the grantee. The Department advises that any additional stipulations imposed by a grantee or property owner be clearly stated in the covenant.

(e) Any conveyance document prepared in the 5-year period of the restrictive covenant must inform the

buyer of the property that all residential housing units constructed or rehabilitated using YouthBuild funds are subject to the restrictions set forth in paragraphs (a) through (d) of this section.

PARTS 689–699 [RESERVED]

CHAPTER VI—OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR

SUBCHAPTER A—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES

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SUBCHAPTER A—LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES

PART 700 [RESERVED]

PART 701—GENERAL; ADMINISTERING AGENCY; DEFINITIONS AND USE OF TERMS

RULES IN THIS SUBCHAPTER

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701.102 Organization of this subchapter.

OFFICE OF WORKMEN'S COMPENSATION PROGRAMS

701.201 Office of Workers' Compensation Programs.
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DEFINITIONS AND USE OF TERMS

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COVERAGE UNDER STATE COMPENSATION PROGRAMS

701.401 Coverage under State compensation programs.

SPECIAL RULES FOR THE RECREATIONAL VESSEL EXCLUSION FROM THE DEFINITION OF ''EMPLOYEE''

701.501 What is a recreational vessel?
701.502 What types of work may exclude a recreational-vessel worker from the definition of ''employee''?
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701.504 When does the recreational vessel exclusion in the American Recovery and Reinvestment Act of 2009 apply?
701.505 May an employer stop paying benefits awarded before February 17, 2009 if the employee would now fall within the exclusion?

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SOURCE: 38 FR 26860, Sept. 26, 1973, unless otherwise noted.

RULES IN THIS SUBCHAPTER

§ 701.101 Scope of this subchapter and subchapter B.

(a) This subchapter contains the regulations governing the administration of the Longshore and Harbor Workers' Compensation Act, as amended (LHWCA), 33 U.S.C. 901 *et seq.*, except activities, pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary of Labor for Occupational Safety and Health. It also contains the regulations governing the administration of the direct extensions of the LHWCA: the Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.;* the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331; and the Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 *et seq.*

(b) The regulations in this subchapter also apply to claims filed under the District of Columbia Workmen's Compensation Act (DCCA), 36 D.C. Code 501 *et seq.* That law applies to all claims for injuries or deaths based on employment events that occurred prior to July 26, 1982, the effective date of the District of Columbia Workers' Compensation Act, as amended (D.C. Code 32–1501 *et seq.*).

(c) The regulations governing the administration of the Black Lung Benefits Program are in subchapter B of this chapter.

[70 FR 43232, July 26, 2005]

§ 701.102 Organization of this subchapter.

Part 701 provides a general description of the regulations in this subchapter; sets forth information regarding the persons and agencies within the Department of Labor authorized by the Secretary of Labor to administer the Longshore and Harbor Workers' Compensation Act, its extensions and the regulations in this subchapter; and defines and clarifies use of specific terms in the several parts of this subchapter. Part 702 of this subchapter contains the general administrative regulations governing claims filed under the LHWCA. Part 703 of this subchapter

contains the regulations governing insurance carrier authorizations, insurance carrier security deposits, self-insurer authorizations, and certificates of compliance with the insurance regulations, as required by sections 32 and 37 of the LHWCA (33 U.S.C. 932, 937). Because the extensions of the LHWCA (*see* § 701.101) incorporate by reference nearly all the provisions of the LHWCA, the regulations in parts 701, 702 and 703 also apply to the administration of the extensions (DBA, DCCA, OCSLA, and NFIA), unless otherwise noted. Part 704 of this subchapter contains the exceptions to the general applicability of parts 702 and 703 for the DBA, the DCCA, the OCSLA, and the NFIA.

[70 FR 43232, July 26, 2005]

OFFICE OF WORKERS' COMPENSATION PROGRAMS

§ 701.201 Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs is responsible for administering the LHWCA and its extensions.

[75 FR 63380, Oct. 15, 2010]

§§ 701.202–701.203 [Reserved]

DEFINITIONS AND USE OF TERMS

§ 701.301 What do certain terms in this subchapter mean?

(a) As used in this subchapter, except where the context clearly indicates otherwise:

(1) *Act* or *LHWCA* means the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. 901 *et seq.*), and includes the provisions of any statutory extension of such Act (*see* § 701.101(a) and (b)) pursuant to which compensation on account of an injury is sought.

(2) *Secretary* means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(3)–(4) [Reserved]

(5) *Office of Workers' Compensation Programs* or *OWCP* or *the Office* means the Office of Workers' Compensation Programs, referred to in § 701.201. The term *Office of Workmen's Compensation Programs* shall have the same meaning as *Office of Workers' Compensation Programs* (*see* 20 CFR 1.6(b)).

(6) *Director* means the Director of OWCP, or his or her authorized representative.

(7) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized to perform functions with respect to the processing and determination of claims for compensation under the LHWCA and its extensions as provided therein and under this subchapter. The term District Director is substituted for the term *Deputy Commissioner* used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

(8) *Administrative Law Judge* means a person appointed as provided in 5 U.S.C. 3105 and subpart B of 5 CFR part 930, who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for compensation arising under the LHWCA and its extensions.

(9) *Chief Administrative Law Judge* means the Chief Judge of the Office of Administrative Law Judges, United States Department of Labor, whose office is at the location set forth in 29 CFR 18.3(a).

(10) *Board or Benefits Review Board* means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as amended and constituted and functioning pursuant to the provisions of chapter VII of this title and Secretary of Labor's Order No. 38–72 (38 FR 90), whose office is at the location set forth in 20 CFR 802.204.

(11) *Department* means the United States Department of Labor.

(12) *Employer* includes any employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions to pay and secure compensation as provided therein.

(13) *Carrier* means an insurance carrier or self-insurer meeting the requirements of section 32 of the LHWCA as amended and of this subchapter with respect to authorization to provide insurance fulfilling the obligation of an

employer to secure the payment of compensation due his employees under the LHWCA as amended or a statutory extension thereof.

(14) The terms *wages*, *national average weekly wage*, *injury*, *disability*, *death*, and *compensation* shall have the meanings set forth in section 2 of the LHWCA.

(15) *Claimant* includes any person claiming compensation or benefits under the provisions of the LHWCA as amended or a statutory extension thereof on account of the injury or death of an employee.

(b) The definitions contained in paragraph (a) of this section shall not be considered to derogate from any definitions or delimitations of terms in the LHWCA as amended or any of its statutory extensions in any case where such statutory definitions or delimitations would be applicable.

(c) As used in this subchapter, the singular includes plural and the masculine includes the feminine.

[38 FR 26860, Sept. 26, 1973, as amended at 42 FR 3848, Jan. 21, 1977; 50 FR 391, Jan. 3, 1985; 51 FR 4281, Feb. 3, 1986; 55 FR 28606, July 12, 1990; 70 FR 43233, July 26, 2005; 76 FR 82127, Dec. 30, 2011; 77 FR 37286, June 21, 2012]

§ 701.302 Who is an employee?

(a) *Employee* means any person engaged in maritime employment, including:

(1) Any longshore worker or other person engaged in longshoring operations;

(2) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker; and

(3) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions;

(b) The term does not include:

(1) A master or member of a crew of any vessel; or

(2) Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

(c) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:

(1) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);

(2) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;

(3) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;

(4) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a covered employer, provided they are not performing work normally performed by employees of the covered employer;

(5) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species; or

(6) Individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel. For purposes of this paragraph, the special rules set forth at §§ 701.501 through 701.505 apply.

[76 FR 82127, Dec. 30, 2011]

COVERAGE UNDER STATE COMPENSATION PROGRAMS

§ 701.401 Coverage under state compensation programs.

(a) Exclusions from the definition of ''employee'' under § 701.301(a)(12), and the employees of small vessel facilities

otherwise covered which are exempted from coverage under § 702.171, are dependent upon coverage under a state workers' compensation program. For these purposes, a worker or dependent must first claim compensation under the appropriate state program and receive a final decision on the merits of the claim, denying coverage, before any claim may be filed under this Act.

(b) The intent of the Act is that state law will apply to those categories of employees if it otherwise would. Accordingly, not withstanding any contrary state law, claims by any of the categories of workers excluded under § 701.301 or 702.171 must be made to and processed by the state and a merit decision denying coverage on jurisdictional grounds must be made before coverage or benefits under the Act may be sought.

(c) The time for filing notice and claim under the Act (see subpart B of part 702) does not begin to run for purposes of claims by those workers or dependents described in § 701.301(a)(12) and § 702.171, until a final adverse decision denying coverage under a state compensation act is received.

[50 FR 392, Jan. 3, 1985]

SPECIAL RULES FOR THE RECREATIONAL VESSEL EXCLUSION FROM THE DEFINITION OF ''EMPLOYEE''

§ 701.501 What is a recreational vessel?

(a) *Recreational vessel* means a vessel—

(1) Being manufactured or operated primarily for pleasure; or

(2) Leased, rented, or chartered to another for the latter's pleasure.

(b) In applying the definition in paragraph (a) of this section, the following rules apply:

(1) A vessel being *manufactured* or *built*, or being repaired under warranty by its manufacturer or builder, is a *recreational vessel* if the vessel appears intended, based on its design and construction, to be for ultimate recreational uses. The manufacturer or builder bears the burden of establishing that a vessel is recreational under this standard.

(2) A vessel being *repaired, dismantled for repair*, or *dismantled at the end of its life* is not a *recreational vessel* if the vessel had been operating, around the time of its repair or dismantling, in one or more of the following categories on more than an infrequent basis—

(A) ''Passenger vessel'' as defined by 46 U.S.C. 2101(22);

(B) ''Small passenger vessel'' as defined by 46 U.S.C. 2101(35);

(C) ''Uninspected passenger vessel'' as defined by 46 U.S.C. 2101(42);

(D) Vessel routinely engaged in ''commercial service'' as defined by 46 U.S.C. 2101(5); or

(E) Vessel that routinely carries ''passengers for hire'' as defined by 46 U.S.C. 2101(21a).

(3) Notwithstanding paragraph (b)(2) of this section, a vessel will be deemed recreational if it is a *public vessel, i.e.*, a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, at the time of repair, dismantling for repair, or dismantling, provided that such vessel shares elements of design and construction with traditional recreational vessels and is not normally engaged in a military, commercial or traditionally commercial undertaking.

(c) All subsequent amendments to the statutes referenced in paragraph (b)(2) of this section and the regulations implementing those provisions in Title 46 of the Code of Federal Regulations will apply when determining whether a vessel is recreational.

[76 FR 82128, Dec. 30, 2011]

§ 701.502 What types of work may exclude a recreational-vessel worker from the definition of "employee"?

(a) An individual who works on recreational vessels may be excluded from the definition of ''employee'' when:

(1) The individual's date of injury is before February 17, 2009, the injury is covered under a State workers' compensation law, and the individual is employed to:

(i) Build any recreational vessel under sixty-five feet in length; or

(ii) Repair any recreational vessel under sixty-five feet in length; or

(iii) Dismantle any recreational vessel under sixty-five feet in length.

(2) The individual's date of injury is on or after February 17, 2009, the injury

is covered under a State workers' compensation law, and the individual is employed to:

(i) Build any recreational vessel under sixty-five feet in length; or

(ii) Repair any recreational vessel; or

(iii) Dismantle any recreational vessel to repair it.

(b) In applying paragraph (a) of this section, the following principles apply:

(1) ''Length'' means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement must be from end to end over the deck, excluding sheer. Bow sprits, bumpkins, rudders, outboard motor brackets, handles, and other similar fittings, attachments, and extensions are not included in the measurement.

(2) ''Repair'' means any repair of a vessel including installations, painting and maintenance work. Repair does not include alterations or conversions that render the vessel a non-recreational vessel under § 701.501. For example, a worker who installs equipment on a private yacht to convert it to a passenger-carrying whale-watching vessel is not employed to ''repair'' a recreational vessel. Repair also does not include alterations or conversions that render a non-recreational vessel recreational under § 701.501.

(3) ''Dismantle'' means dismantling any part of a vessel to complete a repair but does not include dismantling any part of a vessel to complete alterations or conversions that render the vessel a non-recreational vessel under § 701.501, or render the vessel recreational under § 701.501, or, if the date of injury is on or after February 17, 2009, to scrap or dispose of the vessel at the end of the vessel's life.

[76 FR 82128, Dec. 30, 2011]

§ 701.503 Did the American Recovery and Reinvestment Act of 2009 amend the recreational vessel exclusion?

Yes. The amended exclusion was effective February 17, 2009, the effective date of the American Recovery and Reinvestment Act of 2009.

[76 FR 82128, Dec. 30, 2011]

§ 701.504 When does the recreational vessel exclusion in the American Recovery and Reinvestment Act of 2009 apply?

(a) *Date of injury*. Whether the amended version applies depends on the date of the injury for which compensation is claimed. The following rules apply to determining the date of injury:

(1) *Traumatic injury*. If the individual claims compensation for a traumatic injury, the date of injury is the date the employee suffered harm. For example, if the individual injures an arm or leg in the course of his or her employment, the date of injury is the date on which the individual was hurt.

(2) *Occupational disease or infection*. Occupational illnesses and infections generally involve delayed onset of symptoms following exposure to a harmful workplace substance or condition. If the individual claims compensation for an occupational illness or infection, the date of injury is the date the individual was exposed to the substance or condition.

(3) *Hearing loss*. If the individual claims compensation for hearing loss, the date of injury is the date the individual was exposed to harmful workplace noise or other stimulus that is capable of causing hearing loss.

(4) *Death-benefit claims*. If the individual claims compensation for an employee's death, the date of injury is the date of the workplace event or incident that caused, hastened, or contributed to the death.

(5) *Cumulative trauma*. If the individual claims compensation for cumulative trauma, in which multiple traumas contribute to an overall medical condition, such as a neck condition resulting from repetitive motion, the date of injury is any date on which a workplace trauma worsened the individual's condition. A workplace event will not be deemed a contributing trauma if a corresponding worsening of the condition is due solely to its natural progression, rather than the workplace event.

(b) If the date of injury is before February 17, 2009, the individual's entitlement is governed by section 2(3)(F) as it existed prior to the 2009 amendment.

(c) If the date of injury is on or after February 17, 2009, the individual's entitlement is governed by the 2009 amendment to section 2(3)(F).

[76 FR 82128, Dec. 30, 2011]

§ 701.505 May an employer stop paying benefits awarded before February 17, 2009 if the employee would now fall within the exclusion?

No. If an individual was awarded compensation for an injury occurring before February 17, 2009, the employer must still pay all benefits awarded, including disability compensation and medical benefits, even if the employee would be excluded from coverage under the amended exclusion.

[76 FR 82129, Dec. 30, 2011]

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AUTHORITY: 5 U.S.C. 301, and 8171 *et seq.;* 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1333; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec.701; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

SOURCE: 38 FR 26861, Sept. 26, 1973, unless otherwise noted.

Subpart A—General Provisions

ADMINISTRATION

§ 702.101 Exchange of documents and information.

(a) Except as otherwise required by the regulations in this subchapter, all documents and information sent to OWCP under this subchapter must be submitted—

(1) In hard copy by postal mail, commercial delivery service (such as Federal Express or United Parcel Service), or hand delivery;

(2) Electronically through an OWCP-authorized system; or

(3) As otherwise allowed by OWCP.

(b) Except as otherwise required by the regulations in this subchapter, all documents and information sent under this subchapter by OWCP to parties and their representatives or from any party or representative to another party or representative must be sent—

(1) In hard copy by postal mail, commercial delivery service (such as Federal Express or United Parcel Service), or hand delivery;

(2) Electronically by a reliable electronic method if the receiving party or representative agrees in writing to receive documents and information by that method; or

(3) Electronically through an OWCP-authorized system that provides service of documents on the parties and their representatives.

(c) Reliable electronic methods for delivering documents include, but are not limited to, email, facsimile and web portal.

(d) Any party or representative may revoke his or her agreement to receive documents and information electronically by giving written notice to OWCP, the party, or the representative with whom he or she had agreed to receive documents and information electronically, as appropriate.

(e) The provisions in paragraphs (a) through (d) of this section apply when parties are directed by the regulations in this subchapter to: Advise; apply; approve; authorize; demand; file; forward; furnish; give; give notice; inform; issue; make; notice, notify; provide; publish; receive; recommend; refer; release; report; request; respond; return; send; serve; service; submit; or transmit.

(f) Any reference in this subchapter to an application, copy, filing, form, letter, written notice, or written request includes both hard-copy and electronic documents.

(g) Any requirement in this subchapter that a document or information be submitted in writing, or that it be signed, executed, or certified does not preclude its submission or exchange electronically.

(h) Any reference in this subchapter to transmitting information to an entity's address may include that entity's electronic address or electronic portal.

(i) Any requirement in this subchapter that a document or information—

(1) Be sent to a specific district director means that the document or information should be sent to the physical or electronic address provided by OWCP for that district director; and

(2) Be filed by a district director in his or her office means that the document or information may be filed in a physical or electronic location specified by OWCP for that district director.

[80 FR 12928, Mar. 12, 2015]

§ 702.102 Establishment and modification of compensation districts, establishment of suboffices and jurisdictional areas.

(a) The Director has, pursuant to section 39(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 939(b), established compensation districts as required for improved administration or as otherwise determined by the Director (see 51 FR 4282, Feb. 3, 1986). The boundaries of the compensation districts may be modified at any time, and the Director will notify all interested parties directly of the modifications.

(b) As administrative exigencies from time to time may require, the Director may, by administrative order, establish special areas outside the continental United States, Alaska, and Hawaii, or change or modify any areas so established, notwithstanding their inclusion within an established compensation district. Such areas will be designated ''jurisdictional areas.'' The Director will also designate which of his district directors will be in charge thereof.

(c) To further aid in the efficient administration of the OWCP, the Director may from time to time establish suboffices within compensation districts or jurisdictional areas, and will designate a person to be in charge thereof.

[80 FR 12928, Mar. 12, 2015]

§ 702.103 Effect of establishment of suboffices and jurisdictional areas.

Whenever the Director establishes a suboffice or jurisdictional area, those reports, records, or other documents with respect to processing of claims that are required to be filed with the district director of the compensation district in which the injury or death occurred, may instead be required to be filed with the suboffice, or office established for the jurisdictional area.

[80 FR 12928, Mar. 12, 2015

§ 702.104 Transfer of individual case file.

(a) At any time after a claim is filed, the district director having jurisdiction thereof may, with the prior or subsequent approval of the Director, transfer such case to the district director in another compensation district for the purpose of making an investigation, ordering medical examinations, or taking such other action as may be necessary or appropriate to further develop the claim. If, after filing a claim, the claimant moves to another compensation district, the district director may, upon request by the claimant or the employer and with the approval of the Director, transfer the case to such other compensation district.

(b) The district director making the transfer may by letter or memorandum to the district director to whom the case is transferred give advice, comments, suggestions, or directions if appropriate to the particular case. All interested parties will be advised of the transfer.

[42 FR 45301, Sept. 9, 1977, as amended at 80 FR 12928, Mar. 12, 2015]

§ 702.105 Use of the title District Director in place of Deputy Commissioner.

Wherever the statute refers to Deputy Commissioner, these regulations have substituted the term District Director. The substitution is purely an administrative one, and in no way effects the authority of or the powers granted and responsibilities imposed by the statute on that position.

[55 FR 28606, July 12, 1990]

RECORDS

§ 702.111 Employer's records.

Every employer shall maintain adequate records of injury sustained by employees while in his employ, and which shall also contain information of disease, other impairments or disabilities, or death relating to said injury. Such records shall be available for inspection by the OWCP or by any State authority. Records required by this section shall be retained by the employer for three years following the date of injury; this applies to records for lost-time and no-lost-time injuries.

(Approved by the Office of Management and Budget under control number 1215–0160)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[38 FR 26861, Sept. 26, 1973, as amended at 47 FR 145, Jan. 5, 1982; 50 FR 393, Jan. 3, 1985]

§ 702.112 Records of the OWCP.

All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director shall be the official custodian of those records maintained by the OWCP at its national office, and the district director shall be the official custodian of those records maintained at the headquarters office in each compensation district.

§ 702.113 Inspection of records of the OWCP.

Any party in interest may be permitted to examine the record of the case in which he is interested. The official custodian of the record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR part 70). The original record in any such case shall not be removed from the office of the custodian for such inspection. The custodian may, in his discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508.

§ 702.114 Copying of records of OWCP.

Any party in interest may request copies of records he has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR part 70).

FORMS

§ 702.121 Forms.

The Director may from time to time prescribe, and require the use of, forms for the reporting of any information required to be reported by the regulations in this subchapter, or by the Act or any of its extensions.

REPRESENTATION

§ 702.131 Representation of parties in interest.

(a) Claimants, employers and insurance carriers may be represented in any proceeding under the Act by an attorney or other person previously authorized in writing by such claimant, employer or carrier to so act.

(b) The Secretary shall annually publish a list of individuals who are disqualified from representing claimants under the Act. Individuals on this list are not authorized to represent claimants under the Act subject to the provision of section 31(b)(2)(C) of the Act, 33 U.S.C. 931(b)(2)(C), and they shall not have their representation fee approved as provided in section 28(e), 33 U.S.C. 928(e).

(c) Individuals shall be included on the list mentioned in (b) if the Secretary determines, after proceedings under §§ 702.432(b) through 702.434, that such individual:

(1) Has been convicted (without regard to pending appeal) of any crime in connection with the representation of a claimant under this Act or any workers' compensation statute;

(2) Has engaged in fraud in connection with the presentation of a claim under this or any workers' compensation statute, including, but not limited to, knowingly making false representations, concealing or attempting to conceal material facts with respect to a claim, or soliciting or otherwise procuring false testimony;

(3) Has been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct which are similar in nature to those which would be grounds for disqualification under this section; or

(4) Has accepted fees for representing claimants under the Act which were not approved, or which were in excess of the amount approved pursuant to section 28 of the Act, 33 U.S.C. 928.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 394, Jan. 3, 1985]

§ 702.132 Fees for services.

(a) Any person seeking a fee for services performed on behalf of a claimant with respect to claims filed under the Act shall make application therefor to the district director, administrative law judge, Board, or court, as the case may be, before whom the services were performed (See 33 U.S.C. 928(c)). The application shall be filed and serviced upon the other parties within the time limits specified by such district director, administrative law judge, Board, or court. The application shall be supported by a complete statement of the extent and character of the necessary work done, described with particularity as to the professional status (e.g., attorney, paralegal, law clerk, or other person assisting an attorney) of each person performing such work, the normal billing rate for each such person, and the hours devoted by each such person to each category of work. Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. No contract pertaining to the amount of a fee shall be recognized.

(b) No fee shall be approved for a representative whose name appears on the Secretary's list of disqualified representatives under § 702.131(b).

(c) Where fees are included in a settlement agreement submitted under § 702.241, *et seq.* approval of that agreement shall be deemed approval of attorney fees for purposes of this subsection for work performed before the Administrative Law Judge or district director approving the settlement.

[50 FR 394, Jan. 3, 1985]

§ 702.133 Unapproved fees; solicitation of claimants; penalties.

Under the provisions of section 28(e) of the Act, 33 U.S.C. 928(e), any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved under § 702.132, or who makes it a business to solicit employment for an attorney, or for himself in respect of any claim under the Act, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than 1 year, or by both fine and imprisonment.

§ 702.134 Payment of claimant's attorney's fees in disputed claims.

(a) If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the district director of a claim for compensation having been filed, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the person, administrative body or court before whom the service was performed, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final (Act, section 28(a)).

(b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to § 702.231 and section 14 (a) and (b) of this Act, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the district director, administrative law judge, or Board shall set the matter for an informal conference and following such conference the district director, administrative law judge, or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuses to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the district director, as authorized by section 7(e) of the Act and § 702.408, and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier (see Act, section 28(b)).

§ 702.135 Payment of claimant's witness fees and mileage in disputed claims.

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses

shall not in any respect affect or diminish the compensation payable under this Act (see Act, section 28 (d)).

INFORMATION AND ASSISTANCE FOR CLAIMANTS

§ 702.136 Requests for information and assistance.

(a) *General assistance.* The Director shall, upon request, provide persons covered by the Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim.

(b) *Legal assistance to claimants.* The Secretary may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his designee at any time prior to or during which the claim is being processed and shall be furnished without charge to the claimant. Legal representation of the claimant in adjudicatory proceedings may be furnished in cases in which the Secretary's interest in the case is not adverse to that of the claimant.

(c) *Other assistance.* The district directors and their staff, as designees of the Director, shall promptly and fully comply with the request of a claimant receiving compensation for information about, and assistance in obtaining, medical, manpower, and vocational rehabilitation services (see also subparts D and E of this part).

COMMUTATION OF PAYMENTS AND SPECIAL FUND

§ 702.142 Commutation of payments; aliens not residents or about to become nonresidents.

(a) Pursuant to section 9(g) of the Act, 33 U.S.C. 909(g), compensation paid to aliens not residents, or about to become nonresidents, of the United States or Canada shall be in the same amount as provided for residents except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of injury, and except that the Director, OWCP, may, at his option, or upon the application of the insurance carrier he shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Director.

(b) Applications for commutation under this section shall be made in writing to the district director having jurisdiction, and forwarded by the district director to the Director, for final action.

(c) Applications for commutations shall be made effective, if approved by the Director, on the date received by the district director, or on a later date if shown to be appropriate on the application.

(d) Commutations shall not be made with respect to a person journeying abroad for a visit who has previously declared an intention to return and has stated a time for returning, nor shall any commutation be made except upon the basis of a compensation order fixing the right of the beneficiary to compensation.

[50 FR 394, Jan. 3, 1985]

§ 702.143 Establishment of special fund.

Congress, by section 44 of the Act, 33 U.S.C. 944, established in the U.S. Treasury a special fund, to be administered by the Secretary. The Treasurer of the United States is the custodian of such fund, and all monies and securities in such fund shall be held in trust by the Treasurer and shall not be money or property of the United States. The Treasurer shall make disbursements from such funds only upon the order of the Director, OWCP, as delegatee of the Secretary. The Act requires that the Treasurer give bond, in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States, conditioned upon the faithful performance of his duty as custodian of such fund.

§ 702.144 Purpose of the special fund.

This special fund was established to give effect to a congressional policy determination that, under certain circumstances, the employer of a particular employee should not be required to bear the entire burden of paying for the compensation benefits due that employee under the Act. Instead, a substantial portion of such burden should be borne by the industry generally. Section 702.145 describes this special circumstance under which the particular employer is relieved of some of his burden. Section 702.146 describes the manner and circumstances of the input into the fund.

§ 702.145 Use of the special fund.

(a) *Under section 10 of the Act.* This section provides for initial and subsequent annual adjustments in compensation and continuing payments to beneficiaries in cases of permanent total disability or death which commenced or occurred prior to enactment of the 1972 Amendments to this Act (Pub. L. 92–576, approved Oct. 27, 1972). At the discretion of the Director, such payments may be paid directly by him to eligible beneficiaries as the obligation accrues, one-half from the special fund and one-half from appropriations, or he may require insurance carriers or self-insured employers already making payments to such beneficiaries to pay such additional compensation as the amended Act requires. In the latter case such carriers and self-insurers shall be reimbursed by the Director for such additional amounts paid, in the proportion of one-half the amount from the special fund and one-half the amount from appropriations. To obtain reimbursement, the carriers and self-insurers shall submit claims for payments made by them during previous periods at intervals of not less than 6 months. A form has been prescribed for such purpose and shall be used. No administrative claims service expense incurred by the carrier or self-insurer shall be included in the claim and no such expense shall be allowed. The amounts reimbursed to such carrier or self-insurer shall be limited to amounts actually due and previously paid to beneficiaries.

(b) Under section 8(f) of the Act (Second Injuries). In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of injury. If, following an injury falling within the provisions of section 8(c)(1)–(20), the employee with the pre-existing permanent partial disability becomes permanently and totally disabled after the second injury, but such total disability is found not to be due solely to his second injury, the employer (or carrier) shall be liable for compensation as provided by the provisions of section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20) or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases of a second injury causing permanent total disability (or death), wherein it is found that such disability (or death) is not due solely to the second injury, and wherein the employee had a pre-existing permanent partial disability, the employer (or carrier) shall first pay compensation under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any is payable thereunder, and shall then pay 104 weeks compensation for such total disability or death, and none otherwise. If the second injury results in permanent partial disability, and if such disability is compensable under section 8(c)(1)–(20) of the Act, 33 U.S.C. 908(c)(1)–(20), but the disability so compensable did not result solely from such second injury, and the disability so compensable is materially and substantially greater than that which would have resulted from the second injury alone, then the employer (or carrier) shall only be liable for the amount of compensation provided for in section 8(c)(1)–(20) that is attributable to such second injury, or for 104 weeks, whichever is greater. However, if the injury is a loss of hearing covered by section 8(c)(13), 33 U.S.C. 908(c)(13), the liability shall be the lesser of these periods. In all other cases wherein the employee is permanently

and partially disabled following a second injury, and wherein such disability is not attributable solely to that second injury, and wherein such disability is materially and substantially greater than that which would have resulted from the second injury alone, and wherein such disability following the second injury is not compensable under section 8(c)(1)–(20) of the Act, then the employer (or carrier) shall be liable for such compensation as may be appropriate under section 8(b) or (e) of the Act, 33 U.S.C. 908(b) or (e), if any, to be followed by a payment of compensation for 104 weeks, and none other. The term ''compensation'' herein means money benefits only, and does not include medical benefits. The procedure for determining the extent of the employer's (or carrier's) liability under this paragraph shall be as provided for in the adjudication of claims in subpart C of this part 702. Thereafter, upon cessation of payments which the employer is required to make under this paragraph, if any additional compensation is payable in the case, the district director shall forward such case to the Director for consideration of an award to the person or persons entitled thereto out of the special fund. Any such award from the special fund shall be by order of the Director or Acting Director.

(c) *Under sections 8(g) and 39(c)(2) of the Act.* These sections, 33 U.S.C. 908(g) and 939(c)(2), respectively, provide for vocational rehabilitation of disabled employees, and authorize, under appropriate circumstances, a maintenance allowance for the employee (not to exceed $25 a week) in additional to other compensation benefits otherwise payable for his injury-related disability. Awards under these sections are made from the special fund upon order of the Director or his designee. The district directors may be required to make investigations with respect to any case and forward to the Director their recommendations as to the propriety and need for such maintenance.

(d) *Under section 39(c)(2) of the Act.* In addition to the maintenance allowance for the employee discussed in paragraph (c) of this section, the Director is further authorized to use the fund in such amounts as may be necessary to procure the vocational training services.

(e) *Under section 7(e) of the Act.* This provision, 33 U.S.C. 907(e), authorizes payment by the Director from the special fund for special medical examinations, *i.e.*, those obtained from impartial specialists to resolve disputes, when such special examinations are deemed necessary under that statutory provision. The Director has the discretionary power, however, to charge the cost of such examination to the insurance carrier or self-insured employer.

(f) *Under section 18(b) of the Act.* This section, 33 U.S.C. 918(b), provides a source for payment of compensation benefits in cases where the employer is insolvent, or other circumstances preclude the payment of benefits due in any case. In such situations, the district director shall forward the case to the Director for consideration of an award from the special fund, together with evidence with respect to the employer's insolvency or other reasons for nonpayment of benefits due. Benefits, as herein used, means medical care or supplies within the meaning of section 7 of the Act, 33 U.S.C. 907, and subpart D of this part 702, as well as monetary benefits. Upon receipt of the case, the Director shall promptly determine whether an award from the special fund is appropriate and advisable in the case, having due regard for all other current commitments from the special fund. If such an award is made, the employer shall be liable for the repayment into the fund of the amounts paid therefrom, as provided in 33 U.S.C. 918(b).

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1215–0065. The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 1215–0073)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984; 51 FR 4282, Feb. 3, 1986]

§ 702.146 Source of the special fund.

(a) All amounts collected as fines and penalties under the several provisions

of the Act shall be paid into the special fund (33 U.S.C. 44(c)(3)).

(b) Whenever an employee dies under circumstances creating a liability on an employer to pay death benefits to the employee's beneficiaries, and whenever there are no such beneficiaries entitled to such payments, the employer shall pay $5,000 into the special fund (Act, section 44(c)(1)). In such cases, the compensation order entered in the case shall specifically find that there is such liability and that there are no beneficiaries entitled to death benefits, and shall order payment by the employer into the fund. Compensation orders shall be made and filed in accordance with the regulations in subpart C of this part 702, except that for this purpose the district director settling the case under § 702.315 shall formalize the memorandum of conference in a compensation order, and shall file such order as provided for in § 702.349.

(c) The Director annually shall assess an amount against insurance carriers and self-insured employers authorized under the Act and part 703 of this subchapter to replenish the fund. That total amount to be charged all carriers and self-insurers to be assessed shall be based upon an estimate of the probable expenses of the fund during the calendar year. The assessment against each carrier and self-insurer shall be based upon (1) the ratio of the amount each paid during the prior calendar year for compensation in relation to the amount all such carriers of self-insurers paid during that period for compensation, and (2) the ratio of the amount of payments made by the special fund for all cases being paid under section 8(f) of the Act, 33 U.S.C. 908(f), during the preceding calendar year which are attributable to the carrier or self-insurer in relation to the total of such payments during such year attributable to all carriers and self-insurers. The resulting sum of the percentages from paragraphs (c) (1) and (2) of this section will be divided by two, and the resulting percentage multiplied by the probable expenses of the fund. The Director may, in his or her discretion, condition continuance or renewal of authorization under part 703 upon prompt payment of the assessment. However, no action suspending or revoking such authorization shall be taken without affording such carrier or self-insurer a hearing before the Director or his/her designee.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985; 51 FR 4282, Feb. 3, 1986]

§ 702.147 Enforcement of special fund provisions.

(a) As provided in section 44(d)(1) of the Act, 33 U.S.C. 944(d)(1), for the purpose of making rules, regulations, and determinations under the special fund provisions in section 44 and for providing enforcement thereof, the Director may investigate and gather appropriate data from each carrier and self-insured employer, and may enter and inspect such places and records (and make such transcriptions of records), question such employees, and investigate such facts, conditions, practices, or other matters as he may deem necessary or appropriate. The Director may require the employer to have audits performed of claims activity relating to this Act. The Director may also require detailed reports of payments made under the Act, and of estimated future liabilities under the Act, from any or all carriers of self-insurers. The Director may require that such reports be certified and verified in whatever manner is considered appropriate.

(b) Pursuant to section 44(d)(3) of the Act, 33 U.S.C. 944(d)(3), for the purpose of any hearing or investigation related to determinations or the enforcement of the provisions of section 44 with respect to the special fund, the provisions of 15 U.S.C. 49 and 50 as amended (the Federal Trade Commission Act provisions relating to attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Director, OWCP, as the Secretary's delegatee.

(c) Civil penalties and unpaid assessments shall be collected by civil suits brought by and in the name of the Secretary.

(Approved by the Office of Management and Budget under control number 1215–0160)

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 395, Jan. 3, 1985]

§ 702.148 Insurance carriers' and self-insured employers' responsibilities.

(a) Each carrier and self-insured employer shall make, keep, and preserve such records, and make such reports and provide such additional information as the Director prescribes or orders, which he considers necessary or appropriate to effectively carry out his responsibilities.

(b) Consistent with their greater direct liability stemming from the amended assessment formula, employers and insurance carriers are given the authority to monitor their claims in the special fund as outlined in paragraph (c) of this section. For purposes of monitoring these claims, employers and insurance carriers remain parties in interest to the claim and are allowed access to all records relating to the claim. Similarly, employers and insurance carriers can initiate proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits. It is intended that employers and insurance carriers have neither a greater nor a lesser responsibility in this new role that they not have with regard to cases that remain their sole liability. (See § 702.373(d).)

(c) An employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information pursuant to section 8(j) of the Act, 33 U.S.C. 908(j) (See § 702.285) periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case.

(Approved by the Office of Management and Budget under control number 1215–0118)

(Pub. L. No. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*))

[38 FR 26861, Sept. 26, 1973, as amended at 47 FR 145, Jan. 5, 1982; 50 FR 395, Jan. 3, 1985]

LIENS ON COMPENSATION

§ 702.161 Liens against assets of insurance carriers and employers.

Where payments have been made from the special fund pursuant to section 18(b) of the Act, 33 U.S.C. 918(b) and § 704.145(f) the Secretary of Labor shall, for the benefit of the fund, be subrogated to all the rights of the person receiving such payments. The Secretary may institute proceedings under either section 18 or 21(d) of the Act, 33 U.S.C. 918 or 921(d), or both, to recover the amount expended by the fund or so much as in the judgement of the Secretary is possible, or the Secretary may settle or compromise any such claim.

[50 FR 395, Jan. 3, 1985]

§ 702.162 Liens on compensation authorized under special circumstances.

(a) Pursuant to section 17 of the Act, 33 U.S.C. 917, when a trust fund which complies with section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c) [LMRA], established pursuant to a collective bargaining agreement in effect between an employer and an employee entitled to compensation under this Act, has paid disability benefits to an employee which the employee is legally obligated to repay by reason of his entitlement to compensation under this Act, a lien shall be authorized on such compensation in favor of the trust fund for the amount of such payments.

(b)(1) An application for such a lien shall be filed on behalf of the trust fund with the district director for the compensation district where the claim for compensation has been filed, 20 CFR 702.101. Such application shall include a certified statement by an authorized official of the trust fund that:

(i) The trust fund is entitled to a lien in its favor by reason of its payment of disability payments to a claimant-employee (including his name therein);

(ii) The trust fund was created pursuant to a collective bargaining agreement covering the claimant-employee;

(iii) The trust fund complies with section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c);

(iv) The trust agreement contains a subrogation provision entitling the fund to reimbursement for disability benefits paid to the claimant-employee who is entitled to compensation under the Longshoremen's Act;

(2) The statement shall also state the amount paid to the named claimant-employee and whether such disability benefit payments are continuing to be paid.

(3) If the claimant has signed a statement acknowledging receipt of disability benefits from the trust fund and/or a statement recognizing the trust fund's entitlement to a lien against compensation payments which may be received under the Longshoremen's and Harbor Worker's Compensation Act as a result of his present claim and for which the fund is providing disability payments, such statement(s) shall also be included with or attached to the application.

(c) Upon receipt of this application, the district director shall, within a reasonable time, notify the claimant, the employer and/or its compensation insurance carrier that the request for a lien has been filed and each shall be provided with a copy of the application. If the claimant disputes the right of the trust fund to the lien or the amount stated, if any, he shall, within 30 days after receipt of the application or such other longer period as the district director may set, notify the district director and he shall be given an opportunity to challenge the right of the trust fund to, or the amount of, the asserted lien; notice to either the employer or its compensation insurance carrier shall constitute notice to both of them.

(d) If the claim for compensation benefits is resolved without a formal hearing and if there is no dispute over the amount of the lien or the right of the trust fund to the lien, the district director may order and impose the lien and he shall notify all parties of the amount of the lien and manner in which it is to be paid.

(e) If the claimant's claim for compensation cannot be resolved informally, the district director shall transfer the case to the Office of the Chief Administrative Law Judge for a formal hearing, pursuant to section 19(d) of the Act, 33 U.S.C. 919(d), and 20 CFR 702.317. The district director shall also submit therewith the application for the lien and all documents relating thereto.

(f) If the administrative law judge issues a compensation order in favor of the claimant, such order shall establish a lien in favor of the trust fund if it is determined that the trust fund has satisfied all of the requirements of the Act and regulations.

(g) If the claim for compensation is not in dispute, but there is a dispute as to the right of the trust fund to a lien, or the amount of the lien, the district director shall transfer the matter together with all documents relating thereto to the Office of the Chief Administrative Law Judge for a formal hearing pursuant to section 19(d) of the Act, 33 U.S.C. 919(d), and 20 CFR 702.317.

(h) In the event that either the district director or the administrative law judge is not satisfied that the trust fund qualifies for a lien under section 17, the district director or administrative law judge may require further evidence including but not limited to the production of the collective bargaining agreement, trust agreement or portions thereof.

(i) Before any such lien is approved, if the trust fund has provided continued disability payments after the application for a lien has been filed, the trust fund shall submit a further certified statement showing the total amount paid to the claimant as disability payments. The claimant shall likewise be given an opportunity to contest the amount alleged in this subsequent statement.

(j) In approving a lien on compensation, the district director or administrative law judge shall not order an initial payment to the trust fund in excess of the amount of the past due compensation. The remaining amount to which the trust fund is entitled shall thereafter be deducted from the affected employee's subsequent compensation payments and paid to the trust fund, but any such payment to the trust fund shall not exceed 10 percent of the claimant-employee's biweekly compensation payments.

(Approved by the Office of Management and Budget under control number 1215–0160)

[42 FR 45301, Sept. 9, 1977, as amended at 50 FR 395, Jan. 3, 1985; 51 FR 4282, Feb. 3, 1986]

CERTIFICATION OF EXEMPTION

§ 702.171 Certification of exemption, general.

An employer may apply to the Director or his/her designee to certify a particular facility as one engaged in the building, repairing or dismantling of exclusively small vessels, as defined. Once certified, injuries sustained at that facility would not be covered under the Act except for injuries which occur over the navigable waters of the United States including any adjoining pier, wharf, dock, facility over land for launching vessels or for hauling, lifting or drydocking vessels. A facility otherwise covered under the Act remains covered until certification of exemption is issued; a certification will be granted only upon submission of a complete application (described in § 702.174), and only for as long as a facility meets the requirements detailed in section 3(d) of the Act, 33 U.S.C. 903(d). This exemption from coverage is not intended to be used by employers whose facilities from time to time may temporarily meet the criteria for qualification but only for facilities which work on exclusively small vessels, as defined.

[50 FR 396, Jan. 3, 1985]

§ 702.172 Certification; definitions.

For purposes of §§ 702.171 through 702.175 dealing with certification of small vessel facilities, the following definitions are applicable.

(a)(1) ''Small vessel'' means only those vessels described in section 3(d)(3) of the Act, 33 U.S.C. 903(d)(3), that is:

(i) A commercial barge which is under 900 lightship displacement tons (long); or

(ii) A commercial tugboat, towboat, crewboat, supply boat, fishing vessel or other work vessel which is under 1,600 tons gross.

(2) For these purposes: (i) One gross ton equals 100 cubic feet, as measured by the current formula contained in the Act of May 6, 1894 as amended through 1974 (46 U.S.C. 77); (ii) one long ton equals 2,240 lbs; and (iii) ''Commercial'' as it applies to ''vessel'' means any vessel engaged in commerce but does not include military vessels or Coast Guard vessels.

(b) ''Federal Maritime Subsidy'' means the construction differential subsidy (CDS) or operating differential subsidy under the Merchant Marine Act of 1936 (46 U.S.C. 1101 *et seq.*).

(c) *facility* means an operation of an employer at a particular contiguous geographic location.

[51 FR 4283, Feb. 3, 1986]

§ 702.173 Exemptions; requirements, limitations.

(a) Injuries at a facility otherwise covered by the Act are exempted only upon certification that the facility is: (1) Engaged in the building, repairing or dismantling of exclusively small commercial vessels; and (2) does not receive a Federal maritime subsidy.

(b) The exemption does not apply to: (1) Injuries at any facility which occur over the navigable waters of the United States or upon any adjoining pier, wharf, dock, facility over land for launching vessels or for hauling, lifting or drydocking vessels; or (2) where the employee at such facility is not subject to a State workers' compensation law.

[50 FR 396, Jan. 3, 1985]

§ 702.174 Exemptions; necessary information.

(a) *Application.* Before any facility is exempt from coverage under the Act, the facility must apply for and receive a certificate of exemption from the Director or his/her designee. The application must be made by the owner of the facility; where the owner is a partnership it must be made by a partner and where a corporation by an officer of the corporation or the manager in charge of the facility for which an exemption is sought. The information submitted must include the following:

(1) Name, location, physical description and a site plan or aerial photograph of the facility for which an exemption is sought.

(2) Description of the nature of the business.

(3) An affidavit (signed by a partner if the facility is owned by a partnership or an officer if owned by a corporation) vertifying and/or acknowledging that:

(i) the facility is, as of the date of the application, engaged in the business of building, repairing or dismantling exclusively small commercial vessels and that it does not then nor foreseeably will it engage in the building, repairing or dismantling of other than small vessels.

(ii) The facility does not receive any Federal maritime subsidy.

(iii) The signator has the duty to immediately inform the district director of any change in these or other conditions likely to result in a termination of an exemption.

(iv) the employer has secured appropriate compensation liability under a State workers' compensation law.

(v) Any false, relevant statements relating to the application or the failure to notify the district director of any changes in circumstances likely to result in termination of the exemption will be grounds for revocation of the exemption certificate and will subject the employer to all provisions of the Act, including all duties, responsibilities and penalties, retroactive to the date of application or date of change in circumstances, as appropriate.

(b) *Action by the Director*. The Director or his/her designee must review the application within thirty (30) days of its receipt.

(1) Where the application is complete and shows that all requirements under § 702.173 are met, the Director must promptly notify the employer that certification has been approved and will be effective on the date specified. The employer is required to post notice of the exemption at a conspicuous location.

(2) Where the application is incomplete or does not substantiate that all requirements of section 3(d) of the Act, 33 U.S.C. 903(d), have been met, or evidence shows the facility is not eligible for exemption, the Director must promptly notify the employer by issuing a letter which details the reasons for the deficiency or the rejection. The employer/applicant may reapply for certification, correcting deficiencies and/or responding to the reasons for the Director's denial. The Director or his/her designee must issue a new decision within a reasonable time of reapplication following denial. Such action will be the final administrative review and is not appealable to the Administrative Law Judge or the Benefits Review Board.

(c) The Director or another designated individual at any time has the right to enter on and inspect any facility seeking exemption for purposes of verifying information provided on the application form.

(d) *Action by the employer*. Immediately upon receipt of the certificate of exemption from coverage under the Act the employer must post:

(1) A general notice in a conspicuous place that the Act does not cover injuries sustained at the facility in question, the basis of the exemption, the effective date of the exemption and grounds for termination of the exemption.

(2) A notice, where applicable, at the entrances to all areas to which the exemption does not apply.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 396, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986; 80 FR 12928, Mar. 12, 2015]

§ 702.175 Effect of work on excluded vessels; reinstatement of certification.

(a) When a vessel other than a small commercial vessel, as defined in § 702.172, enters a facility which has been certified as exempt from coverage, the exemption shall automatically terminate as of the date such a vessel enters the facility. The exemption shall also terminate on the date a contract for a Federal maritime subsidy is entered into, and, in the situation where the facility undertakes to build a vessel other than a small vessel, when the construction first takes on the characteristics of a vessel, *i.e.*, when the keel is laid. All duties, obligations and requirements imposed by the Act, including the duty to secure compensation liability as required by sections 4 and 32 of the Act, 33 U.S.C. 904 and 932, and to keep records and forward reports, are effective immediately. The employer shall notify the Director or his/her designee immediately where this occurs.

(b) Where an exemption certification is terminated because of circumstances described in (a), the employer may

apply for reinstatement of the exemption once the event resulting in termination of the exemption ends. The reapplication shall consist of a reaffirmation of the nature of the business, an explanation of the circumstances leading to the termination of exemption, and an affidavit by the appropriate person affirming that the circumstances prompting the termination no longer exists nor will they reoccur in the forseeable future and that the facility is engaged in building, repairing or dismantling exclusively small vessels. The Director or the Director's designee shall respond to the complete reapplication within ten working days of receipt.

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

Subpart B—Claims Procedures

EMPLOYER'S REPORTS

§ 702.201 Reports from employers of employee's injury or death.

(a) Within 10 days from the date of an employee's injury or death, or 10 days from the date an employer has knowledge of an employee's injury or death, including any disease or death proximately caused by the employment, the employer shall furnish a report thereof to the district director for the compensation district in which the injury or death occurred, and shall thereafter furnish such additional or supplemental reports as the district director may request.

(b) No report shall be filed unless the injury causes the employee to lose one or more shifts from work. However, the employer shall keep a record containing the information specified in § 702.202. Compliance with the current OSHA injury record keeping requirements at 29 CFR part 1904 will satisfy the record keeping requirements of this section for no lost time injuries.

(Approved by the Office of Management and Budget under control number 1215–0160)

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 397, Jan. 3, 1985; 51 FR 4283, Feb. 3, 1986]

§ 702.202 Employer's report; form and contents.

The employer's report of an employee's injury or death shall be in writing and on a form prescribed by the Director for this purpose, and shall contain:

(a) The name, address and business of the employer;

(b) The name, address, occupation and Social Security Number (SSN) of the employee;

(c) The cause, nature, and other relevant circumstances of the injury or death;

(d) The year, month, day, and hour when, and the particular locality where, the injury or death occurred;

(e) Such other information as the Director may require.

(Approved by the Office of Management and Budget under control numbers 1215–0031 and 1215–0063)

[58 FR 68032, Dec. 23, 1993]

§ 702.203 Employer's report; how given.

(a) The employer must file its report of injury with the district director.

(b) If the employer sends its report of injury by U.S. postal mail or commercial delivery service, the report will be considered filed on the date that the employer mails the document or gives it to the commercial delivery service. If the employer sends its report of injury by a permissible electronic method, the report will be considered filed on the date that the employer completes all steps necessary for the transmission.

[80 FR 12929, Mar. 12, 2015]

§ 702.204 Employer's report; penalty for failure to furnish and or falsifying.

Any employer, insurance carrier, or self-insured employer who knowingly and willfully fails or refuses to send any report required by § 702.201, or who knowingly or willfully makes a false statement or misrepresentation in any report, shall be subject to a civil penalty not to exceed $22,957 for each such failure, refusal, false statement, or misrepresentation for which penalties are assessed after January 13, 2017. The district director has the authority and

responsibility for assessing a civil penalty under this section.

[81 FR 43449, July 1, 2016, as amended at 82 FR 5380, Jan. 18, 2017]

§ 702.205 Employer's report; effect of failure to report upon time limitations.

Where the employer, or agent in charge of the business, or carrier has been given notice or has knowledge of an employee's injury or death, and fails, neglects, or refuses to file a report thereof as required by § 702.201, the time limitations provisions with respect to the filing of claims for compensation for disability or death (33 U.S.C. 913(a), and see § 702.221) shall not begin to run until such report shall have been furnished as required herein.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 397, Jan. 3, 1985]

NOTICE

§ 702.211 Notice of employee's injury or death; designation of responsible official.

(a) In order to claim compensation under the Act, an employee or claimant must first give notice of the fact of an injury or death to the employer and also may give notice to the district director for the compensation district in which the injury or death occurred. Notice to the employer must be given to that individual whom the employer has designated to receive such notices. If no individual has been so designated notice may be given to: (1) The first line supervisor (including foreman, hatchboss or timekeeper), local plant manager or personnel office official; (2) to any partner if the employer is a partnership; or (3) if the employer is a corporation, to any authorized agent, to an officer or to the person in charge of the business at the place where the injury occurred. In the case of a retired employee, the employee/claimant may submit the notice to any of the above persons, whether or not the employer has designated an official to receive such notice.

(b) In order to facilitate the filing of notices, each employer shall designate at least one individual responsible for receiving notices of injury or death; this requirement applies to all employers. The designation shall be by position and the employer shall provide the name and/or position, exact location and telephone number of the individual to all employees by the appropriate method described below.

(1) *Type of individual.* Designees must be a first line supervisor (including a foreman, hatchboss or timekeeper), local plant manager, personnel office official, company nurse or other individual traditionally entrusted with this duty, who is located full-time on the premises of the covered facility. The employer must designate at least one individual at each place of employment or one individual for each work crew where there is no fixed place of employment (in that case, the designation should always be the same position for all work crews).

(2) *How designated.* The name and/or title, the location and telephone number of the individual who is selected by the employer to receive all notices shall be given to the district director for the compensation district in which the facility is located; posting on the worksite in a conspicuous place shall fulfill this requirement. A redesignation shall be effected by a change in posting.

(3) *Publication.* Every employer shall post the name and/or position, the exact location and telephone number of the designated official. The posting shall be part of the general posting requirement, done on a form prescribed by the Director, and placed in a conspicuous location. Posting must be done at each worksite.

(4) *Effect of failure to designate.* Where an employer fails to properly designate and to properly publish the name and/or position of the individual authorized to receive notices of injury or death, such failure shall constitute satisfactory reasons for excusing the employee/claimant's failure to give notice as authorized by section 12(d)(3)(ii) of the Act, 33 U.S.C. 912(d)(3)(ii).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

§ 702.212 Notice; when given; when given for certain occupational diseases.

(a) For other than occupational diseases described in (b), the employee must give notice within thirty (30) days of the date of the injury or death. For this purpose the date of injury or death is:

(1) The day on which a traumatic injury occurs;

(2) The date on which the employee or claimant is or by the exercise of reasonable diligence or by reason of medical advice, should have been aware of a relationship between the injury or death and the employment; or

(3) In the case of claims for loss of hearing, the date the employee receives an audiogram, with the accompanying report which indicates the employee has suffered a loss of hearing that is related to his or her employment. (See § 702.441).

(b) In the case of an occupational disease which does not immediately result in disability or death, notice must be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been aware, of the relationship between the employment, the disease and the death or disability. For purposes of these occupational diseases, therefore, the notice period does not begin to run until the employee is disabled, or in the case of a retired employee, until a permanent impairment exists.

(c) For purposes of workers whose coverage under this Act is dependent on denial of coverage under a State compensation program, as described in § 701.401, the time limitations set forth above do not begin to run until a final decision denying State coverage is issued under the State compensation act.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 397, Jan. 3, 1985, as amended at 51 FR 4283, Feb. 3, 1986]

§ 702.213 Notice; by whom given.

Notice shall be given by the injured employee or someone on his behalf, or in the case of death, by the deceased employee's beneficiary or someone on his behalf.

[38 FR 26861, Sept. 26, 1973. Redesignated at 50 FR 397, Jan. 3, 1985]

§ 702.214 Notice; form and content.

Notice shall be in writing on a form prescribed by the Director for this purpose; such form shall be made available to the employee or beneficiary by the employer. The notice shall be signed by the person authorized to give notice, and shall contain the name, address and Social Security Number (SSN) of the employee and, in death cases, also the SSN of the person seeking survivor benefits, and a statement of the time, place, nature and cause of the injury or death.

[58 FR 68032, Dec. 23, 1993]

§ 702.215 Notice; how given.

Notice must be effected by delivering it to the individual designated to receive such notices at the physical or electronic address designated by the employer. Notice may be given to the district director by submitting a copy of the form supplied by OWCP to the district director, or orally in person or by telephone.

[80 FR 12929, Mar. 12, 2015]

§ 702.216 Effect of failure to give notice.

Failure to give timely notice to the employer's designated official shall not bar any claim for compensation if: (a) The employer, carrier, or designated official had actual knowledge of the injury or death; or (b) the district director or ALJ determines the employer or carrier has not been prejudiced: or (c) the district director excuses failure to file notice. For purposes of this subsection, actual knowledge shall be deemed to exist if the employee's immediate supervisor was aware of the injury and/or in the case of a hearing loss, where the employer has furnished to the employee an audiogram and report which indicates a loss of hearing. Failure to give notice shall be excused by the district director if: a) Notice,

while not given to the designated official, was given to an official of the employer or carrier, and no prejudice resulted; or b) for some other satisfactory reason, notice could not be given. Failure to properly designate and post the individual so designated shall be considered a satisfactory reason. In any event, such defense to a claim must be raised by the employer/carrier at the first hearing on the claim.

[51 FR 4283, Feb. 3, 1986]

§ 702.217 Penalty for false statement, misrepresentation.

(a) Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

(b) Any person including, but not limited to, an employer, its duly authorized agent or an employee of an insurance carrier, who knowingly and willingly makes a false statement or representation for the purpose of reducing, denying or terminating benefits to an injured employee, or his dependents pursuant to section 9, 33 U.S.C. 909, if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or both.

[50 FR 398, Jan. 3, 1985]

CLAIMS

§ 702.221 Claims for compensation; time limitations.

(a) Claims for compensation for disability or death shall be in writing and filed with the district director for the compensation district in which the injury or death occurred. The Social Security Number (SSN) of the injured employee and, in cases of death, the SSN of the person seeking survivor benefits shall also be set forth on each claim. Claims may be filed anytime after the seventh day of disability or anytime following the death of the employee. Except as provided below, the right to compensation is barred unless a claim is filed within one year of the injury or death, or (where payment is made without an award) within one year of the date on which the last compensation payment was made.

(b) In the case of a hearing loss claim, the time for filing a claim does not begin to run until the employee receives an audiogram with the accompanying report which indicates the employee has sustained a hearing loss that is related to his or her employment. (See § 702.441).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 398, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986; 58 FR 68032, Dec. 23, 1993]

§ 702.222 Claims; exceptions to time limitations.

(a) Where a person entitled to compensation under the Act is mentally incompetent or a minor, the time limitation provision of § 702.221 shall not apply to a mentally incompetent person so long as such person has no guardian or other authorized representative, but § 702.221 shall be applicable from the date of appointment of such guardian or other representative. In the case of minor who has no guardian before he or she becomes of age, time begins to run from the date he or she becomes of age.

(b) Where a person brings a suit at law or in admiralty to recover damages in respect of an injury or death, or files a claim under a State workers' compensation act because such person is excluded from this Act's coverage by reason of section 2(3) or 3(d) of the Act (33 U.S.C. 902(3) or 903(d)), and recovery is denied because the person was an employee and defendant was an employer within the meaning of the Act, and such employer had secured compensation to such employee under the Act, the time limitation in § 702.221 shall not begin to run until the date of termination of such suit or proceeding.

(c) Notwithstanding the provisions in paragraph (a) of this section, where the claim is one based on disability or death due to an occupational disease which does not immediately result in death or disability, it must be filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice, should have been

aware of the relationship between the employment, the disease and the death or disability, or within one year of the date of last payment of compensation, whichever is later. For purposes of occupational disease, therefore, the time limitation for filing a claim does not begin to run until the employee is disabled, or in the case of a retired employee, where a permanent impairment exists.

(d) The time limitations set forth above do not apply to claims filed under section 49 of the Act, 33 U.S.C. 949.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 398, Jan. 3, 1985]

§ 702.223 Claims; time limitations; time to object.

Notwithstanding the requirements of § 702.221, failure to file a claim within the period prescribed in such section shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

[38 FR 26861, Sept. 26, 1973. Redesignated and amended at 50 FR 397, Jan. 3, 1985]

§ 702.224 Claims; notification of employer of filing by employee.

Within 10 days after the filing of a claim for compensation for injury or death under the Act, the district director must give written notice thereof to the employer or carrier.

[80 FR 12929, Mar. 12, 2015]

§ 702.225 Withdrawal of a claim.

(a) *Before adjudication of claim.* A claimant (or an individual who is authorized to execute a claim on his behalf) may withdraw his previously filed claim: *Provided*, That:

(1) He files with the district director with whom the claim was filed a written request stating the reasons for withdrawal;

(2) The claimant is alive at the time his request for withdrawal is filed;

(3) The district director approves the request for withdrawal as being for a proper purpose and in the claimant's best interest; and

(4) The request for withdrawal is filed, on or before the date the OWCP makes a determination on the claim.

(b) *After adjudication of claim.* A claim for benefits may be withdrawn by a written request filed after the date the OWCP makes a determination on the claim: *Provided*, That:

(1) The conditions enumerated in paragraphs (a) (1) through (3) of this section are met; and

(2) There is repayment of the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of the Office that repayment of any such amount is assured.

(c) *Effect of withdrawal of claim.* Where a request for withdrawal of a claim is filed and such request for withdrawal is approved, such withdrawal shall be without prejudice to the filing of another claim, subject to the time limitation provisions of section 13 of the Act and of the regulations in this part.

[38 FR 26861, Sept. 26, 1973. Redesignated at 50 FR 397, Jan. 3, 1985]

NONCONTROVERTED CLAIMS

§ 702.231 Noncontroverted claims; payment of compensation without an award.

Unless the employer controverts its liability to pay compensation under this Act, the employer or insurance carrier shall pay periodically, promptly and directly to the person entitled thereto benefits prescribed by the Act. For this purpose, where the employer furnishes to an employee a copy of an audiogram with a report thereon, which indicates the employee has sustained a hearing loss causally related to factors of that employment, the employer or insurance carrier shall pay appropriate compensation or at that time controvert the liability to pay compensation under this Act.

[50 FR 399, Jan. 3, 1985]

§ 702.232 Payments without an award; when; how paid.

The first installment of compensation shall become due by the fourteenth (14th) day after the employer has been notified, through the designated official or by any other means

described in § 702.211 *et seq.*, or has actual knowledge of the injury or death. All compensation due on that fourteenth (14th) day shall be paid then and appropriate compensation due thereafter must be paid in semi-monthly installments, unless the district director determines otherwise.

[50 FR 399, Jan. 3, 1985]

§ 702.233 Penalty for failure to pay without an award.

If any installment of compensation payable without an award is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to 10 per centum thereof which shall be paid at the same time as, but in addition to, such installment unless the employer files notice of controversion in accordance with § 702.261, or unless such nonpayment is excused by the district director after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

§ 702.234 Report by employer of commencement and suspension of payments.

Immediately upon making the first payment of compensation, and upon the suspension of payments once begun, the employer must notify the district director who is administering the claim of the commencement or suspension of payments, as the case may be.

[80 FR 12929, Mar. 12, 2015]

§ 702.235 Report by employer of final payment of compensation.

(a) Within 16 days after the final payment of compensation has been made, the employer, the insurance carrier, or where the employer is self-insured, the employer shall notify the district director on a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name and address of the person(s) to whom payments were made, the date of the injury or death and the name of the injured or deceased employee, and the inclusive dates during which compensation was paid.

(b) A ''final payment of compensation'' for the purpose of applying the penalty provision of § 702.236 shall be deemed any one of the following:

(1) The last payment of compensation made in accordance with a compensation order awarding disability or death benefits, issued by either a district director or an administrative law judge;

(2) The payment of an agreed settlement approved under section 8(i) (A) or (B), of the Act, 33 U.S.C. 908(i);

(3) The last payment made pursuant to an agreement reached by the parties through informal proceedings;

(4) Any other payment of compensation which anticipates no further payments under the Act.

(Approved by the Office of Management and Budget under control number 1215–0024)

(Pub. L. No. 96–511)

[42 FR 45302, Sept. 9, 1977, as amended at 49 FR 18294, Apr. 30, 1984; 50 FR 399, Jan. 3, 1985]

§ 702.236 Penalty for failure to report termination of payments.

Any employer failing to notify the district director that the final payment of compensation has been made as required by § 702.235 shall be assessed a civil penalty in the amount of $279 for any violation for which penalties are assessed after January 13, 2017. The district director has the authority and responsibility for assessing a civil penalty under this section.

[81 FR 43449, July 1, 2016, as amended at 82 FR 5380, Jan. 18, 2017]

AGREED SETTLEMENTS

§ 702.241 Definitions and supplementary information.

(a) As used hereinafter, the term *adjudicator* shall mean district director or administrative law judge (ALJ).

(b) If a settlement application is submitted to an adjudicator and the case is pending at the Office of Administrative Law Judges, the Benefits Review Board, or any Federal circuit court of appeals, the parties may request that the case be remanded to the adjudicator for consideration of the application. The thirty day period as described in paragraph (f) of this section begins

when the remanded case is received by the adjudicator.

(c) If a settlement application is first submitted to an ALJ, the thirty day period mentioned in paragraph (f) of this section does not begin until five days before the date the formal hearing is set. This rule does not preclude the parties from submitting the application at any other time such as (1) after the case is referred for hearing, (2) at the hearing, or (3) after the hearing but before the ALJ issues a decision and order. Where a case is pending before the ALJ but not set for a hearing, the parties may request the case be remanded to the district director for consideration of the settlement.

(d) A settlement agreement between parties represented by counsel, which is deemed approved when not disapproved within thirty days, as described in paragraph (f) of this section, shall be considered to have been filed in the office of the district director on the thirtieth day for purposes of sections 14 and 21 of the Act, 33 U.S.C. 914 and 921.

(e) A fee for representation which is included in an agreement that is approved in the manner described in paragraph (d) of this section, shall also be considered approved within the meaning of section 28(e) of the Act, 33 U.S.C. 928(e).

(f) The thirty day period for consideration of a settlement agreement shall be calculated from the day after receipt unless the parties are advised otherwise by the adjudicator. (See § 702.243(b)). If the last day of this period is a holiday or occurs during a weekend, the next business day shall be considered the thirtieth day.

(g) An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

(h) For purposes of this section and § 702.243 the term *counsel* means any attorney admitted to the bar of any State, territory or the District of Columbia.

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986]

§ 702.242 Information necessary for a complete settlement application.

(a) The settlement application shall be a self-sufficient document which can be evaluated without further reference to the administrative file. The application shall be in the form of a stipulation signed by all parties and shall contain a brief summary of the facts of the case to include: a description of the incident, a description of the nature of the injury to include the degree of impairment and/or disability, a description of the medical care rendered to date of settlement, and a summary of compensation paid and the compensation rate or, where benefits have not been paid, the claimant's average weekly wage.

(b) The settlement application shall contain the following:

(1) A full description of the terms of the settlement which clearly indicates, where appropriate, the amounts to be paid for compensation, medical benefits, survivor benefits and representative's fees which shall be itemized as required by § 702.132.

(2) The reason for the settlement, and the issues which are in dispute, if any.

(3) The claimant's date of birth and, in death claims, the names and birth dates of all dependents.

(4) Information on whether or not the claimant is working or is capable of working. This should include, but not be limited to, a description of the claimant's educational background and work history, as well as other factors which could impact, either favorably or unfavorably, on future employability.

(5) A current medical report which fully describes any injury related impairment as well as any unrelated conditions. This report shall indicate whether maximum medical improvement has been reached and whether further disability or medical treatment is anticipated. If the claimant has already reached maximum medical improvement, a medical report prepared at the time the employee's condition stabilized will satisfy the requirement for a current medical report. A medical

report need not be submitted with agreements to settle survivor benefits unless the circumstances warrant it.

(6) A statement explaining how the settlement amount is considered adequate.

(7) If the settlement application covers medical benefits an itemization of the amount paid for medical expenses by year for the three years prior to the date of the application. An estimate of the claimant's need for future medical treatment as well as an estimate of the cost of such medical treatment shall also be submitted which indicates the inflation factor and/or the discount rate used, if any. The adjudicator may waive these requirements for good cause.

(8) Information on any collateral source available for the payment of medical expenses.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986]

§ 702.243 Settlement application; how submitted, how approved, how disapproved, criteria.

(a) When the parties to a claim for compensation, including survivor benefits and medical benefits, agree to a settlement they must submit a complete application to the adjudicator. The application must contain all the information outlined in § 702.242 and must be sent by certified mail with return receipt requested, commercial delivery service with tracking capability that provides reliable proof of delivery to the adjudicator, or electronically through an OWCP-authorized system. Failure to submit a complete application will toll the thirty day period mentioned in section 8(i) of the Act, 33 U.S.C. 908(i), until a complete application is received.

(b) The adjudicator must consider the settlement application within thirty days and either approve or disapprove the application. The liability of an employer/insurance carrier is not discharged until the settlement is specifically approved by a compensation order issued by the adjudicator. However, if the parties are represented by counsel, the settlement will be deemed approved unless specifically disapproved within thirty days after receipt of a complete application. This thirty day period does not begin until all the information described in § 702.242 has been submitted. The adjudicator will examine the settlement application within thirty days and must immediately serve on all parties notice of any deficiency. This notice must also indicate that the thirty day period will not commence until the deficiency is corrected.

(c) If the adjudicator disapproves a settlement application, the adjudicator must serve on all parties a written statement or order containing the reasons for disapproval. This statement must be served within thirty days of receipt of a complete application (as described in § 702.242) if the parties are represented by counsel. If the disapproval was made by a district director, any party to the settlement may request a hearing before an ALJ as provided in sections 8 and 19 of the Act, 33 U.S.C. 908 and 919, or an amended application may be submitted to the district director. If, following the hearing, the ALJ disapproves the settlement, the parties may: (1) Submit a new application, (2) file an appeal with the Benefits Review Board as provided in section 21 of the Act, 33 U.S.C. 921, or (3) proceed with a hearing on the merits of the claim. If the application is initially disapproved by an ALJ, the parties may (1) submit a new application or (2) proceed with a hearing on the merits of the claim.

(d) The parties may submit a settlement application solely for compensation, or solely for medical benefits or for compensation and medical benefits combined.

(e) If either portion of a combined compensation and medical benefits settlement application is disapproved the entire application is disapproved unless the parties indicate on the face of the application that they agree to settle either portion independently.

(f) When presented with a settlement, the adjudicator must review the application and determine whether, considering all of the circumstances, including, where appropriate, the probability of success if the case were formally litigated, the amount is adequate. The criteria for determining the adequacy

of the settlement application will include, but not be limited to:

(1) The claimant's age, education and work history;

(2) The degree of the claimant's disability or impairment;

(3) The availability of the type of work the claimant can do;

(4) The cost and necessity of future medical treatment (where the settlement includes medical benefits).

(g) In cases being paid pursuant to a final compensation order, where no substantive issues are in dispute, a settlement amount which does not equal the present value of future compensation payments commuted, computed at the discount rate specified below, must be considered inadequate unless the parties to the settlement show that the amount is adequate. The probability of the death of the beneficiary before the expiration of the period during which he or she is entitled to compensation will be determined according to the most current United States Life Table, as developed by the United States Department of Health and Human Services, which will be updated from time to time. The discount rate will be equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 weeks U.S. Treasury Bills settled immediately prior to the date of the submission of the settlement application.

[50 FR 399, Jan. 3, 1985, as amended at 51 FR 4284, Feb. 3, 1986; 60 FR 51348, Oct. 2, 1995; 80 FR 12929, Mar. 12, 2015]

CONTROVERTED CLAIMS

§ 702.251 Employer's controversion of the right to compensation.

Where the employer controverts the right to compensation after notice or knowledge of the injury or death, or after receipt of a written claim, he must give notice thereof, stating the reasons for controverting the right to compensation, using the form prescribed by the Director. Such notice, or answer to the claim, must be filed with the district director within 14 days from the date the employer receives notice or has knowledge of the injury or death. A copy of the notice must also be given to the claimant.

[80 FR 12929, Mar. 12, 2015]

§ 702.252 Action by district director upon receipt of notice of controversion.

Upon receiving the employer's notice of controversion, the district director shall forthwith commence proceedings for the adjudication of the claim in accordance with the procedures set forth in subpart C of this part.

CONTESTED CLAIMS

§ 702.261 Claimant's contest of actions taken by employer or carrier with respect to the claim.

Where the claimant contests an action by the employer or carrier reducing, suspending, or terminating benefits, including medical care, he should immediately notify the office of the district director who is administering the claim and set forth the facts pertinent to his complaint.

[80 FR 12929, Mar. 12, 2015]

§ 702.262 Action by district director upon receipt of notice of contest.

Upon receipt of the claimant's notice of contest, the district director shall forthwith commence proceedings for adjudication of the claim in accordance with the procedures set forth in subpart C of this part.

DISCRIMINATION

§ 702.271 Discrimination; against employees who bring proceedings, prohibition and penalty.

(a)(1) No employer or its duly authorized agent may discharge or in any manner discriminate against an employee as to his/her employment because that employee: (i) Has claimed or attempted to claim compensation under this Act; or (ii) has testified or is about to testify in a proceeding under this Act. To discharge or refuse to employ a person who has been adjudicated to have filed a fraudulent claim for compensation or otherwise made a false statement or misrepresentation under section 31(a)(1) of the Act, 33 U.S.C. 931(a)(1), is not a violation of this section.

(2) Any employer who violates this section, and has penalties assessed for such violation after January 13, 2017, shall be liable for a penalty of not less than $2,296 or more than $11,478 to be paid (by the employer alone, and not by a carrier) to the district director for deposit in the special fund described in section 44 of the Act, 33 U.S.C. 944; and shall restore the employee to his or her employment along with all wages lost due to the discrimination unless the employee has ceased to be qualified to perform the duties of employment.

(b) When a district director receives a complaint from an employee alleging discrimination as defined under section 49, he or she shall notify the employer, and within five working days, initiate specific inquiry to determine all the facts and circumstances pertaining thereto. This may be accomplished by interviewing the employee, employer representatives and other parties who may have information about the matter. Interviews may be conducted by written correspondence, telephone or personal interview.

(c) If circumstances warrant, the district director may also conduct an informal conference on the issue as described in §§ 702.312 through 702.314.

(d) Any employee discriminated against is entitled to be restored to his employment and to be compensated by the employer for any loss of wages arising out of such discrimination provided that the employee is qualified to perform the duties of the employment. If it is determined that the employee has been discriminated against, the district director shall also determine whether the employee is qualified to perform the duties of the employment. The district director may use medical evidence submitted by the parties or he may arrange to have the employee examined by a physician selected by the district director. The cost of the medical examination arranged for by the district director may be charged to the special fund established by section 44, 33 U.S.C. 944.

[42 FR 45302, Sept. 9, 1977, as amended at 50 FR 400, Jan. 3, 1985; 62 FR 53956, Oct. 17, 1997; 81 FR 43449, July 1, 2016; 82 FR 5380, Jan. 18, 2017]

§ 702.272 Informal recommendation by district director.

(a) If the district director determines that the employee has been discharged or suffered discrimination and is able to resume his or her duties, the district director will recommend that the employer reinstate the employee and/or make such restitution as is indicated by the circumstances of the case, including compensation for any wage loss suffered as the result of the discharge or discrimination. The district director may also assess the employer an appropriate penalty, as determined under authority vested in the district director by the Act. If the district director determines that no violation occurred he must notify the parties of his findings and the reasons for recommending that the complaint be denied. If the employer and employee accept the district director's recommendation, within 10 days it will be incorporated in an order, to be filed and served in accordance with § 702.349.

(b) If the parties do not agree to the recommendation, the district director must, within 10 days after receipt of the rejection, prepare a memorandum summarizing the disagreement, send a copy to all interested parties, and within 14 days thereafter, refer the case to the Office of the Chief Administrative Law Judge for hearing pursuant to § 702.317.

[42 FR 45302, Sept. 9, 1977, as amended at 80 FR 12929, Mar. 12, 2015]

§ 702.273 Adjudication by Office of the Chief Administrative Law Judge.

The Office of Administrative Law Judges is responsible for final determinations of all disputed issues connected with the discrimination complaint, including the amount of penalty to be assessed, and shall proceed with a formal hearing as described in §§ 702.331 to 702.394.

[42 FR 45302, Sept. 9, 1977]

§ 702.274 Employer's refusal to pay penalty.

In the event the employer refuses to pay the penalty assessed, the district

director shall refer the complete administrative file to the Associate Director, Division of Longshore and Harbor Workers' Compensation, for subsequent transmittal to the Associate Solicitor for Employee Benefits, with the request that appropriate legal action be taken to recover the penalty.

[42 FR 45302, Sept. 9, 1977]

THIRD PARTY

§ 702.281 Third party action.

(a) Every person claiming benefits under this Act (or the representative) must promptly notify the employer and the district director when:

(1) A claim is made that someone other than the employer or person or persons in its employ, is liable in damages to the claimant because of the injury or death and identify such party by name and address.

(2) Legal action is instituted by the claimant or the representative against some person or party other than the employer or a person or persons in his employ, on the ground that such other person is liable in damages to the claimant on account of the compensable injury and/or death; specify the amount of damages claimed and identify the person or party by name and address.

(3) Any settlement, compromise or any adjudication of such claim has been effected and report the terms, conditions and amounts of such resolution of claim.

(b) Where the claim or legal action instituted against a third party results in a settlement agreement which is for an amount less than the compensation to which a person would be entitled under this Act, the person (or the person's representative) must obtain the prior, written approval of the settlement from the employer and the employer's carrier before the settlement is executed. Failure to do so relieves the employer and/or carrier of liability for compensation described in section 33(f) of Act, 33 U.S.C. 933(f) and for medical benefits otherwise due under section 7 of the Act, 33 U.S.C. 907, regardless of whether the employer or carrier has made payments of acknowledged entitlement to benefits under the Act. The approval must be on a form provided by OWCP and must be filed, within thirty days after the settlement is entered into, with the district director who is administering the claim.

[42 FR 45303, Sept. 9, 1977, as amended at 50 FR 400, Jan. 3, 1985; 51 FR 4284, Feb. 3, 1986; 80 FR 12930, Mar. 12, 2015]

REPORT OF EARNINGS

§ 702.285 Report of earnings.

(a) An employer, carrier or the Director (for those cases being paid from the Special Fund) may require an employee to whom it is paying compensation to submit a report on earnings from employment or self-employment. This report may not be required any more frequently than semi-annually. The report shall be made on a form prescribed by the Director and shall include all earnings from employment and self-employment and the periods for which the earnings apply. The employee must return the complete report on earnings even where he or she has no earnings to report.

(b) For these purposes the term ''earnings'' is defined as all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss of if the profits were reinvested.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 400, Jan. 3, 1985]

§ 702.286 Report of earnings; forfeiture of compensation.

(a) Any employee who fails to submit the report on earnings from employment or self-employment under § 702.285 or, who knowingly and willingly omits or understates any part of such earnings, shall upon a determination by the district director forfeit all right to compensation with respect to any period during which the employee was required to file such a report. The employee must return the completed report on earnings (even where he or she reports no earnings) within thirty (30) days of the date of receipt; this period may be extended for good cause, by the

district director, in determining whether a violation of this requirement has occurred.

(b) Any employer or carrier who believes that a violation of paragraph (a) of this section has occurred may file a charge with the district director. The allegation shall be accompanied by evidence which includes a copy of the report, with proof of service requesting the information from the employee and clearly stating the dates for which the employee was required to report income. Where the employer/carrier is alleging an omission or understatement of earnings, it shall, in addition, present evidence of earnings by the employee during that period, including copies of checks, affidavits from employers who paid the employee earnings, receipts of income from self-employment or any other evidence showing earnings not reported or underreported for the period in question. Where the district director finds the evidence sufficient to support the charge he or she shall convene an informal conference as described in subpart C and shall issue a compensation order affiming or denying the charge and setting forth the amount of compensation for the specified period. If there is a conflict over any issue relating to this matter any party may request a formal hearing before an Administrative Law Judge as described in subpart C.

(c) Compensation forfeited under paragraph (b) of this section, if already paid, shall be recovered by a deduction from the compensation payable to the employee if any, on such schedule as determined by the district director. The district director's discretion in such cases extends only to rescheduling repayment by crediting future compensation and not to whether and in what amounts compensation is forfeited. For this purpose, the district director shall consider the employee's essential expenses for living, income from whatever source, and assets, including cash, savings and checking accounts, stocks, bonds, and other securities.

[50 FR 400, Jan. 3, 1985]

Subpart C—Adjudication Procedures

GENERAL

§ 702.301 Scope of this subpart.

The regulations in this subpart govern the adjudication of claims in which the employer has filed a notice of controversion under § 702.251, or the employee has filed notice of contest under § 702.261. In the vast majority of cases, the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law. Such problems seldom require resolution through formal hearings, with the attendant production of expert witnesses. Accordingly, by § 702.311 *et seq.*, the district directors are empowered to amicably and promptly resolve such problems by informal procedures. Where there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at § 702.331. Supplementary compensation orders, modifications, and interlocutory matters are governed by regulations beginning with § 702.371. Thereafter, appeals from compensation orders are discussed beginning with § 702.391 (the regulations of the Benefits Review Board are set forth in full in part 802 of this title).

ACTION BY DISTRICT DIRECTORS

§ 702.311 Handling of claims matters by district directors; informal conferences.

The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discussions by telephone or by conferences at the district director's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a

full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

§ 702.312 Informal conferences; called by and held before whom.

Informal conferences shall be called by the district director or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the district director, except that a compenstion order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

[42 FR 45303, Sept. 9, 1977]

§ 702.313 Informal conferences; how called; when called.

Informal conferences may be called upon not less than 10 days' notice to the parties, unless the parties agree to meet at an earlier date. The notice may be given by telephone, but shall be confirmed by use of a written notice on a form prescribed by the Director. The notice shall indicate the date, time and place of the conference, and shall also specify the matters to be discussed. For good cause shown conferences may be rescheduled. A copy of such notice shall be placed in the administrative file.

§ 702.314 Informal conferences; how conducted; where held.

(a) No stenographic report shall be taken at informal conferences and no witnesses shall be called. The district director shall guide the discussion toward the achievement of the purpose of such conference, recommending courses of action where there are disputed issues, and giving the parties the benefit of his experience and specialized knowledge in the field of workmen's compensation.

(b) Conferences generally shall be held at the district director's office. However, such conferences may be held at any place which, in the opinion of the district director, will be of greater convenience to the parties or to their representatives.

§ 702.315 Conclusion of conference; agreement on all matters with respect to the claim.

(a) Following an informal conference at which agreement is reached on all issues, the district director must (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and served in accordance with § 702.349. If either party requests that a formal compensation order be issued, the district director must, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of written correspondence, the district director must prepare a memorandum or order setting forth the terms agreed upon and notify the parties either by telephone or in writing, as appropriate. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action must be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The district director must, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

[80 FR 12930, Mar. 12, 2015]

§ 702.316 Conclusion of conference; no agreement on all matters with respect to the claim.

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the district director shall bring the conference to a close, shall evaluate all evidence available to him or her, and after such evaluation shall prepare a memorandum of conference

setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the district director whether they agree or disagree with his or her recommendations. If they agree, the district director shall proceed as in § 702.315(a). If they disagree (Caution: See § 702.134), then the district director may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331–702.351).

[42 FR 42551, Aug. 23, 1977, as amended at 60 FR 51348, Oct. 2, 1995]

§ 702.317 Preparation and transfer of the case for hearing.

A case is prepared for transfer in the following manner:

(a) The district director will furnish each of the parties or their representatives with a copy of a prehearing statement form.

(b) Each party must, within 21 days after receipt of such form, complete it and return it to the district director and serve copies on all other parties. Extensions of time for good cause may be granted by the district director.

(c) Upon receipt of the completed forms, the district director, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, will transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearings (exclusive of X-rays, slides and other materials not suitable for transmission which may be offered into evidence at the time of the hearing); the materials transmitted must not include any recommendations expressed or memoranda prepared by the district director pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the district director or indicate that material evidence will be submitted that could reasonably have been made available to the district director before he or she prepared the last memorandum of conference, the district director will transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her pre-hearing statement form within the time allowed, the district director may, at his or her discretion, transmit the case without that party's form. However, such transmittal must include a statement from the district director setting forth the circumstances causing the failure to include the form, and such party's failure to submit a pre-hearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

[80 FR 12930, Mar. 12, 2015]

§ 702.318 The record; what constitutes; nontransferability of the administrative file.

For the purpose of any further proceedings under the Act, the formal record of proceedings shall consist of the hearing record made before the administrative law judge (see § 702.344). When transferring the case for hearing pursuant to § 702.317, the district director shall not transfer the administrative file under any circumstances.

§ 702.319 Obtaining documents from the administrative file for reintroduction at formal hearings.

Whenever any party considers any document in the administrative file essential to any further proceedings under the Act, it is the responsibility of such party to obtain such document

from the district director and reintroduce it for the record before the administrative law judge. The type of document that may be obtained will be limited to documents previously submitted to the district director, including documents or forms with respect to notices, claims, controversions, contests, progress reports, medical services or supplies, etc. The work products of the district director or his staff will not be subject to retrieval. The procedure for obtaining documents will be for the requesting party to inform the district director in writing of the documents he wishes to obtain, specifying them with particularity. Upon receipt, the district director must promptly forward a copy of the requested materials to the requesting party. A copy of the letter of request and a statement of whether it has been satisfied must be kept in the case file.

[80 FR 12930, Mar. 12, 2015]

SPECIAL FUND

§ 702.321 Procedures for determining applicability of section 8(f) of the Act.

(a) *Application: filing, service, contents.* (1) An employer or insurance carrier which seeks to invoke the provisions of section 8(f) of the Act must request limitation of its liability and file a fully documented application with the district director. A fully documented application must contain a specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability and the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent partial disability or that the death would not have ensued but for that disability. These reasons must be supported by medical evidence as specified in this paragraph. The application must also contain the basis for the assertion that the pre-existing condition relied upon was manifest in the employer and documentary medical evidence relied upon in support of the request for section 8(f) relief. This medical evidence must include, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement. If the claimant has already reached maximum medical improvement, a report prepared at that time will satisfy the requirement for a current medical report. If the current disability is total, the medical report must explain why the disability is not due solely to the second injury. If the current disability is partial, the medical report must explain why the disability is not due solely to the second injury and why the resulting disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. If the injury is loss of hearing, the pre-existing hearing loss must be documented by an audiogram which complies with the requirements of § 702.441. If the claim is for survivor's benefits, the medical report must establish that the death was not due solely to the second injury. Any other evidence considered necessary for consideration of the request for section 8(f) relief must be submitted when requested by the district director or Director.

(2) If claim is being paid by the special fund and the claimant dies, an employer need not reapply for section 8(f) relief. However, survivor benefits will not be paid until it has been established that the death was due to the accepted injury and the eligible survivors have been identified. The district director will issue a compensation order after a claim has been filed and entitlement of the survivors has been verified. Since the employer remains a party in interest to the claim, a compensation order will not be issued without the agreement of the employer.

(b) *Application: Time for filing.* (1) A request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute. This could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition. Where the claim is for death benefits, the request should be made as soon as possible after the date of death. Along with the request for section 8(f) relief, the applicant must also submit all the supporting documentation required by this section, described in paragraph (a) of

this section. Where possible, this documentation should accompany the request, but may be submitted separately, in which case the district director must, at the time of the request, fix a date for submission of the fully documented application. The date must be fixed as follows:

(i) Where notice is given to all parties that permanency will be an issue at an informal conference, the fully documented application must be submitted at or before the conference. For these purposes, notice means when the issue of permanency is noted on the form LS–141, Notice of Informal Conference. All parties are required to list issues reasonably anticipated to be discussed at the conference when the initial request for a conference is made and to notify all parties of additional issues which arise during the period before the conference is actually held.

(ii) Where the issue of permanency is first raised at the informal conference and could not have reasonably been anticipated by the parties prior to the conference, the district director must adjourn the conference and establish the date by which the fully documented application must be submitted and so notify the employer/carrier. The date will be set by the district director after reviewing the circumstances of the case.

(2) At the request of the employer or insurance carrier, and for good cause, the district director, at his/her discretion, may grant an extension of the date for submission of the fully documented application. In fixing the date for submission of the application under circumstances other than described above or in considering any request for an extension of the date for submitting the application, the district director must consider all the circumstances of the case, including but not limited to: Whether the claimant is being paid compensation and the hardship to the claimant of delaying referral of the case to the Office of Administrative Law Judges (OALJ); the complexity of the issues and the availability of medical and other evidence to the employer; the length of time the employer was or should have been aware that permanency is an issue; and, the reasons listed in support of the request. If the employer/carrier requested a specific date, the reasons for selection of that date will also be considered. Neither the date selected for submission of the fully documented application nor any extension therefrom can go beyond the date the case is referred to the OALJ for formal hearing.

(3) Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the district director will be an absolute defense to the liability of the special fund. This defense is an affirmative defense which must be raised and pleaded by the Director. The absolute defense will not be raised where permanency was not an issue before the district director. In all other cases, where permanency has been raised, the failure of an employer to submit a timely and fully documented application for section 8(f) relief will not prevent the district director, at his/her discretion, from considering the claim for compensation and transmitting the case for formal hearing. The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director. Relief under section 8(f) is not available to an employer who fails to comply with section 32(a) of the Act, 33 U.S.C. 932(a).

(c) *Application: Approval, disapproval.* If all the evidence required by paragraph (a) of this section was submitted with the application for section 8(f) relief and the facts warrant relief under this section, the district director must award such relief after concurrence by the Associate Director, DLHWC, or his or her designee. If the district director or the Associate Director or his or her designee finds that the facts do not warrant relief under section 8(f) the district director must advise the employer of the grounds for the denial.

The application for section 8(f) relief may then be considered by an administrative law judge. When a case is transmitted to the Office of Administrative Law Judges the district director must also attach a copy of the application for section 8(f) relief submitted by the employer, and notwithstanding § 702.317(c), the district director's denial of the application.

(Approved by the Office of Management and Budget under control number 1215–0160)

[51 FR 4285, Feb. 3, 1986, as amended at 80 FR 12930, Mar. 12, 2015]

FORMAL HEARINGS

§ 702.331 Formal hearings; procedure initiating.

Formal hearings are initiated by transmitting to the Office of the Chief Administrative Law Judge the prehearing statement forms, the available evidence which the parties intend to submit at the formal hearing, and the letter of transmittal from the district director as provided in § 702.316 and § 702.317.

[42 FR 42552, Aug. 23, 1977]

§ 702.332 Formal hearings; how conducted.

Formal hearings shall be conducted by the administrative law judge assigned the case by the Office of the Chief Administrative Law Judge in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 554 *et seq*. All hearings shall be transcribed.

§ 702.333 Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.

§ 702.334 Formal hearings; representatives of parties.

The claimant and the employer or carrier may be represented by persons of their choice.

§ 702.335 Formal hearings; notice.

On a form prescribed for this purpose, the Office of the Chief Administrative Law Judge shall notify the parties (See § 702.333) of the place and time of the formal hearing not less than 30 days in advance thereof.

[42 FR 42552, Aug. 23, 1977]

§ 702.336 Formal hearings; new issues.

(a) If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it. If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to, § 702.316.

(b) At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue. The parties shall be given not less than 10 days' notice of the hearing on such new issue. The parties may stipulate that the issue may be heard at an earlier time and shall proceed to a hearing on the new issue in the same manner as on an issue initially considered.

[38 FR 26861, Sept. 26, 1973, as amended at 42 FR 42552, Aug. 23, 1977]

§ 702.337 Formal hearings; change of time or place for hearings; postponements.

(a) Except for good cause shown, hearings shall be held at convenient locations not more than 75 miles from the claimant's residence.

(b) Once a formal hearing has been scheduled, continuances shall not be granted except in cases of extreme hardship or where attendance of a party or his or her representative is

mandated at a previously scheduled judicial proceeding. Unless the ground for the request arises thereafter, requests for continuances must be received by the Chief Administrative Law Judge at least 10 days before the scheduled hearing date, must be served upon the other parties and must specify the extreme hardship or previously scheduled judicial proceeding claimed.

(c) The Chief Administrative Law Judge or the administrative law judge assigned to the case may change the time and place of the hearing, or temporarily adjourn a hearing, on his own motion or for good cause shown by a party. The parties shall be given not less than 10 days' notice of the new time and place of the hearing, unless they agree to such change without notice.

[42 FR 42552, Aug. 23, 1977]

§ 702.338 Formal hearings; general procedures.

All hearings shall be attended by the parties or their representatives and such other persons as the administrative law judge deems necessary and proper. The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time, prior to the filing of the compensation order, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedures at the hearings generally, except as these regulations otherwise expressly provide, shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

§ 702.339 Formal hearings; evidence.

In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.

§ 702.340 Formal hearings; witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge may examine the witnesses and shall allow the parties or their representatives to do so.

(b) No person shall be required to attend as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his place of residence, unless his lawful mileage and fees for one day's attendance shall be paid or tendered to him in advance of the hearing date.

§ 702.341 Formal hearings; depositions; interrogatories.

The testimony of any witness, including any party represented by counsel, may be taken by deposition or interrogatory according to the Federal Rules of Civil Procedure as supplemented by local rules of practice for the Federal district court for the judicial district in which the case is pending. However, such depositions or interrogatories must be completed within reasonable times to be fixed by the Chief Administrative Law Judge or the administrative law judge assigned to the case.

[42 FR 42552, Aug. 23, 1977]

§ 702.342 Formal hearings; witness fees.

Witnesses summoned in a formal hearing before an administrative law judge or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States (33 U.S.C. 925).

§ 702.343 Formal hearings; oral argument and written allegations.

Any party upon request shall be allowed a reasonable time for presentation of oral argument and shall be permitted to file a pre-hearing brief or other written statement of fact or law. A copy of any such pre-hearing brief or other written statement shall be filed with the Chief Administrative Law Judge or the administrative law judge

assigned to the case before or during the proceeding at which evidence is submitted to the administrative law judge and shall be served upon each other party. Post-hearing briefs will not be permitted except at the request of the administrative law judge or upon averment on the record of a party that the case presents a specific novel or difficult legal or factual issue (or issues) that cannot be adequately addressed in oral summation. When permitted, any such brief shall be limited to the issue or issues specified by the administrative law judge or by the party in his or her averment and shall be due from any party desiring to address such issue or issues within 15 days of the conclusion of the proceeding at which evidence is submitted to the administrative law judge. Enlargement of the time for filing such briefs shall be granted only if the administrative law judge is persuaded that the brief will be helpful to him or her and that the enlargement granted will not delay decision of the case.

[42 FR 42552, Aug. 23, 1977]

§ 702.344 Formal hearings; record of hearing.

All formal hearings shall be open to the public and shall be stenographically reported. All evidence upon which the administrative law judge relies for his final decision shall be contained in the transcript of testimony either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, in whole or in material part, shall be incorporated into the record either by reference or as an appendix.

§ 702.345 Formal hearings; consolidated issues; consolidated cases.

(a) When one or more additional issues are raised by the administrative law judge pursuant to § 702.336, such issues may, in the discretion of the administrative law judge, be consolidated for hearing and decision with other issues pending before him.

(b) When two or more cases are transferred for formal hearings and have common questions of law or which arose out of a common accident, the Chief Administrative Law Judge may consolidate such cases for hearing.

§ 702.346 Formal hearings; waiver of right to appear.

If all parties waive their right to appear before the administrative law judge or to present evidence or argument personally or by representative, it shall not be necessary for the administrative law judge to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge. Where such a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case and the decision shall be based on them.

§ 702.347 Formal hearings; termination.

(a) Formal hearings are normally terminated upon the conclusion of the proceeding at which evidence is submitted to the administrative law judge.

(b) In exceptional cases the Chief Administrative Law Judge or the administrative law judge assigned to the case may, in his or her discretion, extend the time for official termination of the hearing.

[42 FR 42552, Aug. 23, 1977]

§ 702.348 Formal hearings; preparation of final decision and order; content.

Within 20 days after the official termination of the hearing as defined by § 702.347, the administrative law judge shall have prepared a final decision and order, in the form of a compensation order, with respect to the claim, making an award to the claimant or rejecting the claim. The compensation order shall contain appropriate findings of facts and conclusions of law with respect thereto, and shall be concluded with one or more paragraphs containing the order of the administrative law judge, his signature, and the date of issuance.

§ 702.349 Formal hearings; filing and mailing of compensation orders; waiver of service; disposition of transcripts.

(a) An administrative law judge must, within 20 days after the official termination of the hearing, deliver by mail, or otherwise, to the district director that administered the claim, the transcript of the hearing, other documents or pleadings filed with him with respect to the claim, and his signed compensation order. Upon receipt thereof, the district director, being the official custodian of all records with respect to claims he administers, must formally date and file the transcript, pleadings, and compensation order in his office. Such filing must be accomplished by the close of business on the next succeeding working day, and the district director must, on the same day as the filing was accomplished, serve a copy of the compensation order on the parties and on the representatives of the parties, if any. Service on the parties and their representatives must be made by certified mail unless a party has previously waived service by this method under paragraph (b) of this section.

(b) All parties and their representatives are entitled to be served with compensation orders via registered or certified mail. Parties and their representatives may waive this right and elect to be served with compensation orders electronically by filing the appropriate waiver form with the district director responsible for administering the claim. To waive service by registered or certified mail, employers, insurance carriers, and their representatives must file form LS–801 (Waiver of Service by Registered or Certified Mail for Employers and/or Insurance Carriers), and claimants and their representatives must file form LS–802 (Waiver of Service by Registered or Certified Mail for Claimants and/or Authorized Representatives). A signature on a waiver form represents a knowing and voluntary waiver of that party's or representative's right to receive compensation orders via registered or certified mail.

(1) Waiving parties and representatives must provide a valid electronic address on the waiver form.

(2) Parties and representatives must submit a separate waiver form for each case in which they intend to waive the right to certified or registered mail service.

(3) A representative may not sign a waiver form on a party's behalf.

(4) All compensation orders issued in a claim after receipt of the waiver form will be sent to the electronic address provided on the waiver form. Any changes to the address must be made by submitting another waiver form. Individuals may revoke their service waiver at any time by submitting a new waiver form that specifies that the service waiver is being revoked.

(5) If it appears that service in the manner selected by the individual has not been effective, the district director will serve the individual by certified mail.

[80 FR 12931, Mar. 12, 2015]

§ 702.350 Finality of compensation orders.

Compensation orders shall become effective when filed in the office of the district director, and unless proceedings for suspension or setting aside of such orders are instituted within 30 days of such filing, shall become final at the expiration of the 30th day after such filing, as provided in section 21 of the Act 33 U.S.C. 921. If any compensation payable under the terms of such order is not paid within 10 days after it becomes due, section 14(f) of the Act requires that there be added to such unpaid compensation an amount equal to 20 percent thereof which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order is had as provided in such section 21 and an order staying payment has been issued by the Benefits Review Board or the reviewing court.

§ 702.351 Withdrawal of controversion of issues set for formal hearing; effect.

Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall

then proceed to dispose of the case as provided for in § 702.315.

INTERLOCUTORY MATTERS, SUPPLEMENTARY ORDERS, AND MODIFICATIONS

§ 702.371 Interlocutory matters.

Compensation orders shall not be made or filed with respect to interlocutory matters of a procedural nature arising during the pendency of a compensation case.

§ 702.372 Supplementary compensation orders.

(a) In any case in which the employer or insurance carrier is in default in the payment of compensation due under any award of compensation, for a period of 30 days after the compensation is due and payable, the person to whom such compensation is payable may, within 1 year after such default, apply in writing to the district director for a supplementary compensation order declaring the amount of the default. Upon receipt of such application, the district director will institute proceedings with respect to such application as if such application were an original claim for compensation, and the matter will be disposed of as provided for in § 702.315, or if agreement on the issue is not reached, then as in §§ 702.316 through 702.319.

(b) If, after disposition of the application as provided for in paragraph (a) of this section, a supplementary compensation order is entered declaring the amount of the default, which amount may be the whole of the award notwithstanding that only one or more installments is in default, a copy of such supplementary order must be filed and served in accordance with § 702.349. Thereafter, the applicant may obtain and file with the clerk of the Federal district court for the judicial district where the injury occurred or the district in which the employer has his principal place of business or maintains an office, a certified copy of said order and may seek enforcement thereof as provided for by section 18 of the Act, 33 U.S.C. 918.

[80 FR 12932, Mar. 12, 2015]

§ 702.373 Modification of awards.

(a) Upon his/her own initiative, or upon application of any party in interest (including an employer or carrier which has been granted relief under section 8(f) of the Act, 33 U.S.C. 908(f)), the district director may review any compensation case (including a case under which payments are made pursuant to section 44(i) of the Act, 33 U.S.C. 944(i)) in accordance with the procedure in subpart C of this part, and after such review of the case under § 702.315, or review at formal hearings under the regulations governing formal hearings in subpart C of this part, file a new compensation order terminating, continuing, reinstating, increasing or decreasing such compensation, or awarding compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made retroactive from the date of injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the district director or the administrative law judge. Settlements cannot be modified.

(b) Review of a compensation case under this section may be made at any time prior to 1 year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to 1 year after the rejection of a claim.

(c) Review of a compensation case may be had only for the reason that there is a change in conditions or that there was a mistake in the determination of facts.

(d) If the investigation, described in § 702.148(c), discloses a change in conditions and the employer or insurance carrier intends to pursue modification of the award of compensation the district director and claimant shall be notified through an informal conference. At the conclusion of the informal conference the district director shall issue a recommendation either for or against

the modification. This recommendation shall also be sent to the Associate Director, Division of Longshoremen's and Harbor Workers' Compensation (DLHWC) for a determination on whether or not to participate in the modification proceeding on behalf of the special fund. Lack of concurrence of the Associate Director, DLHWC or lack of participation by a representative of the special fund shall not be a bar to the modification proceeding.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 401, Jan. 3, 1985]

APPEALS

§ 702.391 Appeals; where.

Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeals with the office of the district director for the compensation district in which the decision or order appealed from was filed and by submitting to the Board a petition for review of such decision or order, in accordance with the provisions of part 802 of this title 20.

§ 702.392 Appeals; what may be appealed.

An appeal raising a substantial question of law or fact may be taken from a decision with respect to a claim under the Act. Such appeals may be taken from compensation orders when they have been filed as provided for in § 702.349.

§ 702.393 Appeals; time limitations.

The notice of appeal (see § 702.391) shall be filed with the district director within 30 days of the filing of the decision or order complained of, as defined and described in §§ 802.205 and 802.206 of this title. A petition for review of the decision or order is required to be filed within 30 days after receipt of the Board's acknowledgment of the notice of appeal, as provided in § 802.210 of this title.

§ 702.394 Appeals; procedure.

The procedure for appeals to the Benefits Review Board shall be as provided by the Board in its Rules of Practice and Procedure, set forth in part 802 of this title.

Subpart D—Medical Care and Supervision

§ 702.401 Medical care defined.

(a) Medical care shall include medical, surgical, and other attendance or treatment, nursing and hospital services, laboratory, X-ray and other technical services, medicines, crutches, or other apparatus and prosthetic devices, and any other medical service or supply, including the reasonable and necessary cost of travel incident thereto, which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.

(b) An employee may rely on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized church or religious denomination, by an accredited practitioner of such recognized church or religious denomination, and nursing services rendered in accordance with such tenets and practice without loss or diminution of compensation or benefits under the Act. For purposes of this section, a recognized church or religious denomination shall be any religious organization: (1) That is recognized by the Social Security Administration for purposes of reimbursements for treatment under Medicare and Medicaid or (2) that is recognized by the Internal Revenue Service for purposes of tax exempt status.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.402 Employer's duty to furnish; duration.

It is the duty of the employer to furnish appropriate medical care (as defined in § 702.401(a)) for the employee's injury, and for such period as the nature of the injury or the process of recovery may require.

[50 FR 402, Jan. 3, 1985]

§ 702.403 Employee's right to choose physician; limitations.

The employee shall have the right to choose his/her attending physician from among those authorized by the Director, OWCP, to furnish such care and treatment, except those physicians included on the Secretary's list of

debarred physicians. In determining the choice of a physician, consideration must be given to availability, the employee's condition and the method and means of transportation. Generally 25 miles from the place of injury, or the employee's home is a reasonable distance to travel, but other pertinent factors must also be taken into consideration.

[50 FR 402, Jan. 3, 1985]

§ 702.404 Physician defined.

The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings. Physicians defined in this part may interpret their own X-rays. All physicians in these categories are authorized by the Director to render medical care under the Act. Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term ''physician'' as used in this part.

[42 FR 45303, Sept. 9, 1977]

§ 702.405 Selection of physician; emergencies.

Whenever the nature of the injury is such that immediate medical care is required and the injured employee is unable to select a physician, the employer shall select a physician. Thereafter the employee may change physicians when he is able to make a selection. Such changes shall be made upon obtaining written authorization from the employer or, if consent is withheld, from the district director. The Director will direct reimbursement of medical claims for services rendered by physicians or health care providers who are on the list of those excluded from providing care under the Act, if such services were rendered in an emergency. (See §§ 702.417 and 702.435(b)).

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.406 Change of physicians; nonemergencies.

(a) Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

(b) The district director for the appropriate compensation district may order a change of physicians or hospitals when such a change is found to be necessary or desirable or where the fees charged exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.407 Supervision of medical care.

The Director, OWCP, through the district directors and their designees, shall actively supervise the medical care of an injured employee covered by the Act. Such supervision shall include:

(a) The requirement that periodic reports on the medical care being rendered be filed in the office of the district director, the frequency thereof being determined by order of the district director or sound judgment of the attending physician as the nature of the injury may dictate;

(b) The determination of the necessity, character and sufficiency of any medical care furnished or to be furnished the employee, including whether the charges made by any medical care provider exceed those permitted under the Act;

(c) The determination of whether a change of physicians, hospitals or other persons or locales providing treatment should be made or is necessary;

(d) The further evaluation of medical questions arising in any case under the

Act, with respect to the nature and extent of the covered injury, and the medical care required therefor.

[38 FR 26861, Sept. 26, 1973, as amended at 50 FR 402, Jan. 3, 1985]

§ 702.408 Evaluation of medical questions; impartial specialists.

In any case in which medical questions arise with respect to the appropriate diagnosis, extent, effect of, appropriate treatment, and the duration of any such care or treatment, for an injury covered by the Act, the Director, OWCP, through the district directors having jurisdiction, shall have the power to evaluate such questions by appointing one or more especially qualified physicians to examine the employee, or in the case of death to make such inquiry as may be appropriate to the facts and circumstances of the case. The physician or physicians, including appropriate consultants, should report their findings with respect to the questions raised as expeditiously as possible. Upon receipt of such report, action appropriate therewith shall be taken.

§ 702.409 Evaluation of medical questions; results disputed.

Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed by or selected by the Director, and such review or reexamination shall be granted unless it is found that it is clearly unwarranted. Such review shall be completed within 2 weeks from the date ordered unless it is impossible to complete the review and render a report thereon within such time period. Upon receipt of the report of this additional review and reexamination, such action as may be appropriate shall forthwith be taken.

§ 702.410 Duties of employees with respect to special examinations.

(a) For any special examination required of an employee by §§ 702.408 and 702.409, the employee shall submit to such examination at such place as is designated in the order to report, but the place so selected shall be reasonably convenient for the employee.

(b) Where an employee fails to submit to an examination required by §§ 702.408 and 702.409, the district director or administrative law judge may order that no compensation otherwise payable shall be paid for any period during which the employee refuses to submit to such examination unless circumstances justified the refusal.

(c) Where an employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the district director or administrative law judge may by order suspend the payment of further compensation during such time as the refusal continues. Except that refusal to submit to medical treatment because of adherence to the tenets of a recognized church or religious denomination as described in § 702.401(b) shall not cause the suspension of compensation.

[42 FR 45303, Sept. 9, 1977, as amended at 50 FR 402, Jan. 3, 1985; 51 FR 4286, Feb. 3, 1986]

§ 702.411 Special examinations; nature of impartiality of specialists.

(a) The special examinations required by § 702.408 shall be accomplished in a manner designed to preclude prejudgment by the impartial examiner. No physician previously connected with the case shall be present, nor may any other physician selected by the employer, carrier, or employee be present. The impartial examiner may be made aware, by any party or by the OWCP, of the opinions, reports, or conclusions of any prior examining physician with respect to the nature and extent of the impairment, its cause, or its effect upon the wage-earning capacity of the injured employee, if the district director determines that, for good cause, such opinions, reports, or conclusions shall be made available. Upon request, any party shall be given a copy of all materials made available to the impartial examiner.

(b) The impartiality of the specialists shall not be considered to have been compromised if the district director deems it advisable to, and does, apprise the specialist by memorandum of those undisputed facts pertaining to the nature of the employee's employment, of the nature of the injury, of the post-injury employment activity, if any, and

of any other facts which are not disputed and are deemed pertinent to the type of injury and/or the type of examination being conducted.

(c) No physician selected to perform impartial examinations shall be, or shall have been for a period of 2 years prior to the examination, an employee of an insurance carrier or self-insured employer, or who has accepted or participated in any fee from an insurance carrier or self-insured employer, unless the parties in interest agree thereto.

[38 FR 26861, Sept. 26, 1973, as amended at 42 FR 45303, Sept. 9, 1977]

§ 702.412 Special examinations; costs chargeable to employer or carrier.

(a) The Director or his designee ordering the special examination shall have the power, in the exercise of his discretion, to charge the cost of the examination or review to the employer, to the insurance carrier, or to the special fund established by section 44 of the Act, 33 U.S.C. 944.

(b) The Director or his designee may also order the employer or the insurance carrier to provide the employee with the services of an attendant, where the district director considers such services necessary, because the employee is totally blind, has lost the use of both hands, or both feet or is paralyzed and unable to walk, or because of other disability making the employee so helpless as to require constant attendance in the discretion of the district director. Fees payable for such services shall be in accord with the provisions of § 702.413.

[42 FR 45303, Sept. 9, 1977]

§ 702.413 Fees for medical services; prevailing community charges.

All fees charged by medical care providers for persons covered by this Act shall be limited to such charges for the same or similar care (including supplies) as prevails in the community in which the medical care provider is located and shall not exceed the customary charges of the medical care provider for the same or similar services. Where a dispute arises concerning the amount of a medical bill, the Director shall determine the prevailing community rate using the OWCP Medical Fee Schedule (as described in 20 CFR 10.805 *through 10.810*) to the extent appropriate, and where not appropriate, may use other state or federal fee schedules. The opinion of the Director that a charge by a medical care provider disputed under the provisions of section 702.414 exceeds the charge which prevails in the community in which said medical care provider is located shall constitute sufficient evidence to warrant further proceedings pursuant to section 702.414 and to permit the Director to direct the claimant to select another medical provider for care to the claimant.

[60 FR 51348, Oct. 2, 1995, as amended at 77 FR 37286, June 21, 2012]

§ 702.414 Fees for medical services; unresolved disputes on prevailing charges.

(a) The Director may, upon written complaint of an interested party, or upon the Director's own initiative, investigate any medical care provider or any fee for medical treatment, services, or supplies that appears to exceed prevailing community charges for similar treatment, services or supplies or the provider's customary charges. The OWCP medical fee schedule (see section 702.413) shall be used by the Director, where appropriate, to determine the prevailing community charges for a medical procedure by a physician or hospital (to the extent such procedure is covered by the OWCP fee schedule). The Director's investigation may initially be conducted informally through contact of the medical care provider by the district director. If this informal investigation is unsuccessful further proceedings may be undertaken. These proceedings may include, but not be limited to: an informal conference involving all interested parties; agency interrogatories to the pertinent medical care provider; and issuance of subpoenas duces tecum for documents having a bearing on the dispute.

(1) A claim by the provider that the OWCP fee schedule does not represent the prevailing community rate will be considered only where the following circumstances are presented:

(i) where the actual procedure performed was incorrectly identified by medical procedure code;

(ii) that the presence of a severe or concomitant medical condition made treatment especially difficult;

(iii) the provider possessed unusual qualifications (board certification in a specialty is not sufficient evidence in itself of unusual qualifications); or

(iv) the provider or service is not one covered by the OWCP fee schedule as described by 20 CFR 10.805 *through 10.810*.

(2) The circumstances listed in paragraph (a)(1) of this section are the only ones which will justify reevaluation of the amount calculated under the OWCP fee schedule.

(b) The failure of any medical care provider to present any evidence required by the Director pursuant to this section without good cause shall not prevent the Director from making findings of fact.

(c) After any proceeding under this section the Director shall make specific findings on whether the fee exceeded the prevailing community charges (as established by the OWCP fee schedule, where appropriate) or the provider's customary charges and provide notice of these findings to the affected parties.

(d) The Director may suspend any such proceedings if after receipt of the written complaint the affected parties agree to withdraw the controversy from agency consideration on the basis that such controversy has been resolved by the affected parties. Such suspension, however, shall be at the discretion of the Director.

[51 FR 4286, Feb. 3, 1986, as amended at 60 FR 51348, Oct. 2, 1995; 77 FR 37286, June 21, 2012]

§ 702.415 Fees for medical services; unresolved disputes on charges; procedure.

After issuance of specific findings of fact and proposed action by the Director as provided in § 702.414 any affected provider employer or other interested party has the right to seek a hearing pursuant to section 556 of title 5, United States Code. Upon written request for such a hearing, the matter shall be referred by the District Director to the OALJ for formal hearing in accordance with the procedures in subpart C of this part. If no such request for a hearing is filed with the district director within thirty (30) days the findings issued pursuant to § 702.414 shall be final.

[51 FR 4286, Feb. 3, 1986]

§ 702.416 Fees for medical services; disputes; hearings; necessary parties.

At formal hearings held pursuant to § 702.415, the necessary parties shall be the person whose fee or cost charge is in question and the Director, or their representatives. The employer or carrier may also be represented, and other parties, or associations having an interest in the proceedings, may be heard, in the discretion of the administrative law judge.

§ 702.417 Fees for medical services; disputes; effect of adverse decision.

If the final decision and order upholds the finding of the Director that the fee or charge in dispute was not in accordance with prevailing community charges or the provider's customary charges, the person claiming such fee or cost charge shall be given thirty (30) days after filing of such decision and order to make the necessary adjustment. If such person still refuses to make the required readjustment, such person shall not be authorized to conduct any further treatments or examinations (if a physician) or to provide any other services or supplies (if by other than a physician). Any fee or cost charge subsequently incurred for services performed or supplies furnished shall not be a reimbursable medical expense under this subpart. This prohibition shall apply notwithstanding the fact that the services performed or supplies furnished were in all other respects necessary and appropriate within the provision of these regulations. However, the Director may direct reimbursement of medical claims for services rendered if such services were rendered in an emergency (see § 702.435(b)). At the termination of the proceedings provided for in this section the district director shall determine whether further proceedings under § 702.432 should be initiated.

[50 FR 403, Jan. 3, 1985]

MEDICAL PROCEDURES

§ 702.418 Procedure for requesting medical care; employee's duty to notify employer.

(a) As soon as practicable, but within 30 days after occurrence of an injury covered by the Act, or within 30 days after an employee becomes aware, or in the exercise of reasonable diligence should be aware, of the relationship between an injury or disease and his employment, the injured employee or someone on his behalf shall give written notice thereof to the district director having jurisdiction over the place where the injury occurred and to the employer. If a form has been prescribed for such purpose it shall be used, if available and practicable under the circumstances. Notices filed under subpart B of this part, if on the form prescribed by the Director for such purpose, satisfy the written notice requirements of this subpart.

(b) In the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given: (1) To the district director in the compensation district in which the injury or death occurred, and (2) to the employer.

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 403, Jan. 3, 1985]

§ 702.419 Action by employer upon acquiring knowledge or being given notice of injury.

Whenever an employer acquires knowledge of an employee's injury, through receipt of a written notice or otherwise, said employer shall forthwith authorize, in writing, appropriate medical care. If a form is prescribed for this purpose it shall be used whenever practicable. Authorization shall also be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

[50 FR 403, Jan. 3, 1985]

§ 702.420 Issuance of authorization; binding effect upon insurance carrier.

The issuance of an authorization for treatment by the employer shall bind his insurance carrier to furnish and pay for such care and services.

§ 702.421 Effect of failure to obtain initial authorization.

An employee shall not be entitled to recover for medical services and supplies unless:

(a) The employer shall have refused or neglected a request to furnish such services and the employee has complied with sections 7 (b) and (c) of the Act, 33 U.S.C. 907 (b) and (c) and these regulations; or

(b) The nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

[50 FR 403, Jan. 3, 1985]

§ 702.422 Effect of failure to report on medical care after initial authorization.

(a) Notwithstanding that medical care is properly obtained in accordance with these regulations, a finding by the Director that a medical care provider has failed to comply with the reporting requirements of the Act shall operate as a mandatory revocation of authorization of such medical care provider. The effect of a final finding to this effect operates to release the employer/carrier from liability of the expenses of such care. In addition to this, when such a finding is made by the Director, the claimant receiving treatment will be directed by the district director to seek authorization for medical care from another source.

(b) For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act and further, may make an award

for the reasonable value of such medical care.

[50 FR 403, Jan. 3, 1985]

DEBARMENT OF PHYSICIANS AND OTHER PROVIDERS OF MEDICAL SERVICES AND SUPPLIERS AND CLAIMS REPRESENTATIVES

§ 702.431 Grounds for debarment.

A physician or health care provider shall be debarred if it is found, after appropriate investigation as described in § 702.414 and proceedings under §§ 702.432 and 702.433, that such physician or health care provider has:

(a) Knowingly and willfully made, or caused to be made, any false statement or misrepresentation of a material fact for use in a claim for compensation or claim for reimbursement of medical expenses under this Act;

(b) Knowingly and willfully submitted, or caused to be submitted, a bill or request for payment under this Act containing a charge which the Director finds to be substantially in excess of the charge for the service, appliance, or supply prevailing within the community or in excess of the provider's customary charges, unless the Director finds there is good cause for the bill or request containing the charge;

(c) Knowingly and willfully furnished a service, appliance, or supply which is determined by the Director to be substantially in excess of the need of the recipient thereof or to be of a quality which substantially fails to meet professionally recognized standards;

(d) Been convicted under any criminal statute, without regard to pending appeal thereof, for fraudulent activities in connection with federal or state program for which payments are made to physicians or providers of similar services, appliances, or supplies; or has otherwise been excluded from participation in such program.

(e) The fact that a physician or health care provider has been convicted of a crime previously described in (d), or excluded or suspended, or has resigned in lieu of exclusion or suspension, from participation in any program as described in (d), shall be a prima facie finding of fact for purposes of section 7(j)(2) of the Act, 33 U.S.C. 907(j)(2).

[50 FR 404, Jan. 3, 1985]

§ 702.432 Debarment process.

(a) *Pertaining to health care providers.* Upon receipt of information indicating that a physician or health care provider has engaged in activities enumerated in subparagraphs (a) through (c) of § 702.431, the Director, through the Director's designees, may evaluate the information (as described in § 702.414) to ascertain whether proceedings should be initiated against the physician or health care provider to remove authorization to render medical care or service under the Longshore and Harbor Workers' Compensation Act.

(b) *Pertaining to health care providers and claims representatives.* If after appropriate investigation the Director determines that proceedings should be initiated, written notice thereof must be provided to the physician, health care provider or claims representative. Notice must contain the following:

(1) A concise statement of the grounds upon which debarment will be based;

(2) A summary of the information upon which the director has relied in reaching an initial decision that debarment proceedings should be initiated;

(3) An invitation to the physician, health care provider or claims representative to: (i) Resign voluntarily from participation in the program without admitting or denying the allegations presented in the written notice; or (ii) request a decision on debarment to be based upon the existing agency record and any other information the physician, health care provider or claims representative may wish to provide;

(4) A notice of the physician's, health care provider's or claims representative's right, in the event of an adverse ruling by the Director, to request a formal hearing before an administrative law judge;

(5) A notice that should the physician, health care provider or claims representative fail to provide written answer to the written notice described in this section within thirty (30) days of receipt, the Director may deem the allegations made therein to be true and

may order exclusion of the physician, health care provider or claims representative without conducting any further proceedings; and

(6) The name and address of the district director who will be responsible for receiving the answer from the physician, health care provider or claims representative.

(c) Should the physician, health care provider or claims representative fail to file a written answer to the notice described in this section within thirty (30) days of receipt thereof, the Director may deem the allegations made therein to be true and may order debarment of the physician, health care provider or claims representative.

(d) The physician, health care provider or claims representative may inspect or request copies of information in the agency records at any time prior to the Director's decision.

(e) The Director must issue a decision in writing, and must send a copy of the decision to the physician, health care provider or claims representative. The decision must advise the physician, health care provider or claims representative of the right to request, within thirty (30) days of the date of an adverse decision, a formal hearing before an administrative law judge under the procedures set forth herein. The filing of such a request for hearing within the time specified will operate to stay the effectiveness of the decision to debar.

[50 FR 404, Jan. 3, 1985, as amended at 80 FR 12932, Mar. 12, 2015]

§ 702.433 Requests for hearing.

(a) A request for hearing must be sent to the district director and contain a concise notice of the issues on which the physician, health care provider or claims representative desires to give evidence at the hearing with identification of witnesses and documents to be submitted at the hearing.

(b) If a request for hearing is timely received by the district director, the matter must be referred to the Chief Administrative Law Judge who must assign it for hearing with the assigned administrative law judge issuing a notice of hearing for the conduct of the hearing. A copy of the hearing notice must be served on the physician, health care provider or claims representative.

(c) If a request for hearing contains identification of witnesses or documents not previously considered by the Director, the Director may make application to the assigned administrative law judge for an offer of proof from the physician, health care provider or claims representative for the purpose of discovery prior to hearing. If the offer of proof indicates injection of new issues or new material evidence not previously considered by the Director, the Director may request a remand order for purposes of reconsideration of the decision made pursuant to § 702.432 of these regulations.

(d) The parties may make application for the issuance of subpoenas upon a showing of good cause therefore to the administrative law judge.

(e) The administrative law judge will issue a recommended decision after the termination of the hearing. The recommended decision must contain appropriate findings, conclusions and a recommended order and be forwarded, together with the record of the hearing, to the Administrative Review Board for a final decision. The recommended decision must be served upon all parties to the proceeding.

(f) Based upon a review of the record and the recommended decision of the administrative law judge, the Administrative Review Board will issue a final decision.

[50 FR 404, Jan. 3, 1985, as amended at 55 FR 28606, July 12, 1990; 61 FR 19984, May 3, 1996; 80 FR 12932, Mar. 12, 2015]

§ 702.434 Judicial review.

(a) Any physician, health care provider or claims representative, after any final decision of the Administrative Review Board made after a hearing to which such person was a party, irrespective of the amount of controversy, may obtain a review of such decision by a civil action commenced within sixty (60) days after the mailing to him or her of notice of such decision, but the pendency of such review shall not operate as a stay upon the effect of such decision. Such action shall be brought in the Court of Appeals of the United States for the judicial circuit in which the plaintiff resides or has his or

her principal place of business, or the Court of Appeals for the District of Columbia pursuant to section 7(j)(4) of the Act, 33 U.S.C. 907(j)(4).

(b) As part of the Administrative Review Board answer, he or she shall file a certified copy of the transcript of the record of the hearing, including all evidence submitted in connection therewith.

(c) The findings of fact of the Administrative Review Board, if based on substantial evidence in the record as a whole, shall be conclusive.

[50 FR 405, Jan. 3, 1985, as amended at 55 FR 28606, July 12, 1990; 61 FR 19984, May 3, 1996]

§ 702.435 Effects of debarment.

(a) The Director shall give notice of the debarment of a physician, hospital, or provider of medical support services or supplies to:

(1) All OWCP district offices;

(2) The Health Care Financing Administration;

(3) The State or Local authority responsible for licensing or certifying the debarred party;

(4) The employers and authorized insurers under the Act by means of an annual bulletin sent to them by the Director; and

(5) The general public by posting in the district office in the jurisdiction where the debarred party maintains a place of business.

If a claims representative is debarred, the Director shall give notice to those groups listed in paragraphs (a) (1), (3), (4), and (5) of this section.

(b) Notwithstanding any debarment under this subpart, the Director shall not refuse a claimant reimbursement for any otherwise reimbursable medical expense if the treatment, service or supply was rendered by debarred provider in an emergency situation. However, such claimant will be directed by the Director to select a duly qualified provider upon the earliest opportunity.

[50 FR 405, Jan. 3, 1985]

§ 702.436 Reinstatement.

(a) If a physician or health care provider has been debarred or pursuant to § 702.431(d) or if a claims representative has been debarred pursuant to § 702.131(c) (1) or (3) the person debarred will be automatically reinstated upon notice to the Director that the conviction or exclusion has been reversed or withdrawn. However, such reinstatement will not preclude the Director from instituting debarment proceedings based upon the subject matter involved.

(b) A physician, health care provider or claims representative otherwise debarred by the Director may apply for reinstatement to participate in the program by application to the Director after three years from the date of entry of the order of exclusion. Such application for reinstatement shall be addressed to the Associate Director for the Longshore program, and shall contain a statement of the basis of the application along with any supporting documentation.

(c) The Director may further investigate the merits of the reinstatement application by requiring special reporting procedures from the applicant for a probationary period not to exceed six months to be monitored by the district office where the provider maintains a place of business.

(d) At the end of aforesaid probationary period, the Director may order full reinstatement of the physician, health care provider or claims representative if such reinstatement is clearly consistent with the program goal to protect itself against fraud and abuse and, further, if the physician, health care provider or claims representative has given reasonable assurances that the basis for the debarment will not be repeated.

[50 FR 405, Jan. 3, 1985]

HEARING LOSS CLAIMS

§ 702.441 Claims for loss of hearing.

(a) Claims for hearing loss pending on or filed after September 28, 1984 (the date of enactment of Pub. L. 98–426) shall be adjudicated with respect to the determination of the degree of hearing impairment in accordance with these regulations.

(b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the following requirements are met:

(1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 CFR 1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. 667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

(2) The employee was provided the audiogram and a report thereon at the time it was administered or within thirty (30) days thereafter.

(3) No one produces a contrary audiogram of equal probative value (meaning one performed using the standards described herein) made at the same time. ''Same time'' means within thirty (30) days thereof where noise exposure continues or within six (6) months where exposure to excessive noise levels does not continue. Audiometric tests performed prior to the enactment of Public Law 98–426 will be considered presumptively valid if the employer complied with the procedures in this section for administering audiograms.

(c) In determining the amount of preemployment hearing loss, an audiogram must be submitted which was performed prior to employment or within thirty (30) days of the date of the first employment-related noise exposure. Audiograms performed after December 27, 1984 must comply with the standards described in paragraph (d) of this section.

(d) In determining the loss of hearing under the Act, the evaluators shall use the criteria for measuring and calculating hearing impairment as published and modified from time-to-time by the American Medical Association in the *Guides to the Evaluation of Permanent Impairment*, using the most currently revised edition of this publication. In addition, the audiometer used for testing the individual's threshold of hearing must be calibrated according to current American National Standard Specifications for Audiometers. Audiometer testing procedures required by hearing conservation programs pursuant to the Occupational Safety and Health Act of 1970 should be followed (as described at 29 CFR 1910.95 and appendices).

(Approved by the Office of Management and Budget under control number 1215–0160)

[50 FR 405, Jan. 3, 1985]

Subpart E—Vocational Rehabilitation

§ 702.501 Vocational rehabilitation; objective.

The objective of vocational rehabilitation is the return of permanently disabled persons to gainful employment commensurate with their physical or mental impairments, or both, through a program of reevaluation or redirection of their abilities, or retraining in another occupation, or selective job placement assistance.

§ 702.502 Vocational rehabilitation; action by district directors.

All injury cases which are likely to result in, or have resulted in, permanent disability, and which are of a character likely to require review by a vocational rehabilitation adviser on the staff of the Director, shall promptly be referred to such adviser by the district director or his designee having charge of the case. A form has been prescribed for such purpose and shall be used. Medical data and other pertinent information shall accompany the referral.

(Approved by the Office of Management and Budget under control number 1215–0051)

(Pub. L. No. 96–511)

[38 FR 26861, Sept. 26, 1973, as amended at 49 FR 18294, Apr. 30, 1984]

§ 702.503 Vocational rehabilitation; action by adviser.

The vocational rehabilitation adviser, upon receipt of the referral, shall promptly consider the feasibility of a vocational referral or request for cooperative services from available resources or facilities, to include counseling, vocational survey, selective job placement assistance, and retraining. Public or private agencies may be utilized in arranging necessary vocational rehabilitation services under the Federal Vocational Rehabilitation Act, 29 U.S.C. 31 *et seq*.

§ 702.504 Vocational rehabilitation; referrals to State Employment Agencies.

Vocational rehabilitation advisers will arrange referral procedures with State Employment Service units within their assigned geographical districts for the purpose of securing employment counseling, job classification, and selective placement assistance. Referrals shall be made to State Employment Offices based upon the following:

(a) Vocational rehabilitation advisers will screen cases so as to refer only those disabled employees who are considered to have employment potential;

(b) Only employees will be referred who have permanent, compensable disabilities resulting in a significant vocational handicap and loss of wage earning capacity;

(c) Disabled employees, whose initial referral to former private employers did not result in a job reassignment or in a job retention, shall be referred for employment counseling and/or selective placement unless retraining services consideration is requested;

(d) The vocational rehabilitation advisers shall arrange for employees' referrals if it is ascertained that they may benefit from registering with the State Employment Service;

(e) Referrals will be made to appropriate State Employment Offices by letter, including all necessary information and a request for a report on the services provided the employee when he registers;

(f) The injured employee shall be advised of available job counseling services and informed that he is being referred for employment and selective placement;

(g) A followup shall be made within 60 days on all referrals to assure uniform reporting by State agencies on cases referred for a vocational survey.

§ 702.505 Vocational rehabilitation; referrals to other public and private agencies.

Referrals to such other public and private agencies providing assistance to disabled persons such as public welfare agencies, Public Health Services facilities, social services units of the Veterans Administration, the Social Security Administration, and other such agencies, shall be made by the vocational rehabilitation adviser, where appropriate, on an individual basis when requested by disabled employees. Such referrals do not provide for a service cost reimbursement by the Department of Labor.

§ 702.506 Vocational rehabilitation; training.

Vocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially. The following procedures shall apply in arranging for or providing training:

(a) The vocational rehabilitation adviser shall arrange for and develop all vocational training programs.

(b) Training programs shall be developed to meet the varying needs of eligible beneficiaries, and may include courses at colleges, technical schools, training at rehabilitation centers, on-the-job training, or tutorial courses. The courses shall be pertinent to the occupation for which the employee is being trained.

(c) Training may be terminated if the injured employee fails to cooperate with the Department of Labor or with the agency supervising his course of training. The employee shall be counseled before training is terminated.

(d) Reports shall be required at periodic intervals on all persons in approved training programs.

§ 702.507 Vocational rehabilitation; maintenance allowance.

(a) An injured employee who, as a result of injury, is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Director is being rendered fit to engage in a remunerative occupation, shall be paid additional compensation necessary for this maintenance, not exceeding $25 a week. The expense shall be paid out of the special fund established in section 44 of the Act, 33 U.S.C. 944. The maximum maintenance allowance shall not be provided on an automatic basis, but shall be based on the recommendation of a State agency that a claimant is unable to meet additional costs by reason of being in training.

(b) When required by reason of personal illness or hardship, limited periods of absence from training may be allowed without terminating the maintenance allowance. A maintenance allowance shall be terminated when it is shown to the satisfaction of the Director that a trainee is not complying reasonably with the terms of the training plan or is absenting himself without good cause from training so as to materially interfere with the accomplishment of the training objective.

§ 702.508 Vocational rehabilitation; confidentiality of information.

The following safeguards will be observed to protect the confidential character of information released regarding an individual undergoing rehabilitation:

(a) Information will be released to other agencies from which an injured employee has requested services only if such agencies have established regulations assuring that such information will be considered confidential and will be used only for the purpose for which it is provided;

(b) Interested persons and agencies have been advised that any information concerning rehabilitation program employees is to be held confidential;

(c) A rehabilitation employee's written consent is secured for release of information regarding disability to a person, agency, or establishment seeking the information for purposes other than the approved rehabilitation planning with such employee.

Subpart F—Occupational Disease Which Does Not Immediately Result in Death or Disability

SOURCE: 50 FR 406, Jan. 3, 1985, unless otherwise noted.

§ 702.601 Definitions.

(a) *Time of injury*. For purposes of this subpart and with respect to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

(b) *Disability*. With regard to an occupational disease for which the time of injury, as defined in § 702.601(a), occurs after the employee was retired, disability shall mean permanent impairment as determined according to the *Guides to the Evaluation of Permanent Impairment* which is prepared and modified from time-to-time by the American Medical Association, using the most currently revised edition of this publication. If this guide does not evaluate the impairment, other professionally recognized standards may be utilized. The disability described in this paragraph shall be limited to permanent partial disability. For that reason they are not subject to adjustments under section 10(f) of the Act, 33 U.S.C. 910(f).

(c) *Retirement*. For purposes of this subpart, retirement shall mean that the claimant, or decedent in cases involving survivor's benefits, has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce.

[50 FR 406, Jan. 3, 1985, as amended at 51 FR 4286, Feb. 3, 1986]

§ 702.602 Notice and claims.

(a) *Time for giving notice of injury or death*. Refer to § 702.207.

(b) *Time for filing of claims.* Refer to § 702.212.

§ 702.603 Determining the payrate for compensating occupational disease claims which become manifest after retirement.

(a) If the time of injury occurs within the first year after the employee has retired, the payrate for compensation purposes shall be one fifty-second part of the employee's average annual earnings during the fifty-two week period preceding retirement.

(b) If the time of injury occurs more than one year after the employee has retired the payrate for compensation purposes shall be the national average weekly wage, determined according to section 6(b)(3) of the Act, 33 U.S.C. 906(b)(3), at the time of injury.

§ 702.604 Determining the amount of compensation for occupational disease claims which become manifest after retirement.

(a) If the claim is for disability benefits and the time of injury occurs after the employee has retired, compensation shall be 66⅔ percent of the payrate, as determined under § 702.603, times the disability, as determined according to § 702.601(b).

(b) If the claim is for death benefits and the time of injury occurs after the decedent has retired, compensation shall be the percent specified in section 9 of the Act, 33 U.S.C. 909, times the payrate determined according to § 702.603. Total weekly death benefits shall not exceed one fifty-second part of the decedent's average annual earnings during the fifty-two week period preceding retirement, such benefits shall be subject to the limitation provided for in section 6(b)(1) of the Act, 33 U.S.C. 906(b)(1).

[50 FR 406, Jan. 3, 1985, as amended at 51 FR 4286, Feb. 3, 1986]

PART 703—INSURANCE REGULATIONS

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AUTHORITY: 5 U.S.C. 301, and 8171 *et seq.;* 33 U.S.C. 901 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1333; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary's Order 10–2009, 74 FR 58834.

SOURCE: 38 FR 26873, Sept. 26, 1973, unless otherwise noted.

Subpart A—General

SOURCE: 70 FR 43233, July 26, 2005, unless otherwise noted.

§ 703.1 Scope of part.

Part 703 governs insurance carrier authorizations, insurance carrier security deposits, self-insurer authorizations, and certificates of compliance with the insurance regulations. These provisions are required by the LHWCA and apply to the extensions of the LHWCA except as otherwise provided in part 704 of this subchapter.

§ 703.2 Forms.

(a) Any information required by the regulations in this part to be submitted to OWCP must be submitted on forms the Director authorizes from time to time for such purpose. Persons submitting forms may not modify the forms or use substitute forms without OWCP's approval. These forms must be submitted, sent, or filed in the manner prescribed by OWCP.

Form No.	Title
(1) LS–271	Application for Self-Insurance.
(2) LS–274	Report of Injury Experience.
(3) LS–275 SI	Self-Insurer's Agreement and Undertaking.
(4) LS–275 IC	Insurance Carrier's Agreement and Undertaking.
(5) LS–276	Application for Security Deposit Determination.
(6) LS–405	Indemnity Bond.
(7) LS–570	Card Report of Insurance.

(b) Copies of the forms listed in this section are available for public inspection at the Office of Workers' Compensation Programs, U.S. Department of Labor, Washington, DC 20210. They may also be obtained from OWCP district offices and on the Internet at *http://www.dol.gov/owcp/dlhwc*.

[70 FR 43233, July 26, 2005, as amended at 77 FR 37286, June 21, 2012; 80 FR 12932, Mar. 12, 2015]

§ 703.3 Failure to secure coverage; penalties.

(a) Each employer must secure the payment of compensation under the Act either through an authorized insurance carrier or by becoming an authorized self-insurer under section 32(a)(1) or (2) of the Act (33 U.S.C. 932(a)(1) or (2)). An employer who fails to comply with these provisions is subject, upon conviction, to a fine of not more than $10,000, or by imprisonment for not more than one year, or both. Where the employer is a corporation, the president, secretary and treasurer each will also be subject to this fine and/or imprisonment, in addition to the fine against the corporation, and each is severally personally liable,

jointly with the corporation, for all compensation or other benefits payable under the Act while the corporation fails to secure the payment of compensation.

(b) Any employer who willingly and knowingly transfers, sells, encumbers, assigns or in any manner disposes of, conceals, secretes, or destroys any property belonging to the employer after an employee sustains an injury covered by the Act, with the intent to avoid payment of compensation under the Act to that employee or his/her dependents, shall be guilty of a misdemeanor and punished, upon conviction, by a fine of not more than $10,000 and/or imprisonment for one year. Where the employer is a corporation, the president, secretary and treasurer are also severally liable to imprisonment and, along with the corporation, jointly liable for the fine.

Subpart B—Authorization of Insurance Carriers

§ 703.101 Types of companies which may be authorized by the OWCP.

The OWCP will consider for the granting of authority to write insurance under the Longshoremen's and Harbor Workers' Compensation Act and its extensions the application of any stock company, mutual company or association, or any other person or fund, while authorized under the laws of the United States or for any State to insure workmen's compensation. The term ''carrier'' as used in this part means any person or fund duly authorized to insure workmen's compensation benefits under said Act, or its extensions.

§ 703.102 Applications for authority to write insurance; how filed; evidence to be submitted; other requirements.

An application for authority to write insurance under this Act shall be made in writing, signed by an officer of the applicant duly authorized to make such application, and transmitted to the Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, DC 20210. Such application shall be accompanied by full and complete information regarding the history and experience of such applicant in the writing of workmen's compensation insurance, together with evidence that it has authority in its charter or form of organization to write such insurance, and evidence that the applicant is currently authorized to insure workmen's compensation liability under the laws of the United States or of any State. The statements of fact in each application and in the supporting evidence shall be verified by the oath of the officer of the applicant who signs such application. Each applicant shall state in its application the area or areas, in which it intends to do business. In connection with any such application the following shall be submitted, the Office reserving the right to call for such additional information as it may deem necessary in any particular case:

(a) A copy of the last annual report made by the applicant to the insurance department or other authority of the State in which it is incorporated, or the State in which its principal business is done.

(b) A certified copy from the proper State authorities of the paper purporting to show the action taken upon such report, or such other evidence as the applicant desires to submit in respect of such report, which may obviate delay caused by an inquiry of the OWCP of the State authorities relative to the standing and responsibility of the applicant.

(c) A full and complete statement of its financial condition, if not otherwise shown, and, if a stock company, shall show specifically its capital stock and surplus.

(d) A copy of its charter or other formal outline of its organization, its rules, its bylaws, and other documents, writings, or agreements by and under which it does business, and such other evidence as it may deem proper to make a full exposition of its affairs and financial condition.

[38 FR 26873, Sept. 26, 1973; 50 FR 406, Jan. 3, 1985]

§ 703.103 Stock companies holding Treasury certificates of authority.

A stock company furnishing evidence that it is authorized to write workmen's compensation insurance under the laws of the United States or of any

State, which holds a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, unless requested to do so, need not transmit to the Office with its application copies of such financial reports as are on file in the Department of the Treasury. The acceptance by that Department of such a company will be considered by the Office in conjunction with the application of such company, provided there has been compliance with the other requirements of the regulations in this part.

§ 703.104 Applicants currently authorized to write insurance under the extensions of the LHWCA.

Any applicant currently authorized by the Office to write insurance under any extension of the LHWCA need not support its application under the LHWCA or any other LHWCA extension with the evidence required by the regulations in this part, except the form of policy and endorsement which it proposes to use, unless specifically requested by the Office, but instead its application may refer to the fact that it has been so authorized.

§ 703.105 Copies of forms of policies to be submitted with application.

With each application for authority to write insurance there shall be submitted for the approval of the Office copies of the forms of policies which the applicant proposes to issue in writing insurance under the LHWCA, or its extensions, to which shall be attached the appropriate endorsement to be used in connection therewith.

§ 703.106 Certificate of authority to write insurance.

No corporation, company, association, person, or fund shall write insurance under this Act without first having received from the OWCP a certificate of authority to write such insurance. Any such certificate issued by the Office, after application therefor in accordance with these regulations, may authorize the applicant to write such insurance in a limited territory as determined by the Office. Any such certificate may be suspended or revoked by the Office prior to its expiration for good cause shown, but no suspension or revocation shall affect the liability of any carrier already incurred. Good cause shall include, without limitation, the failure to maintain in such limited territory a regular business office with full authority to act on all matters falling within the Act, and the failure to promptly and properly perform the carrier's responsibilities under the Act and these regulations, with special emphasis upon lack of promptness in making payments when due, upon failure to furnish appropriate medical care, and upon attempts to offer to, or urge upon, claimants inequitable settlements. A hearing may be requested by the aggrieved party and shall be held before the Director or his representative prior to the taking of any adverse action under this section.

§ 703.108 Period of authority to write insurance.

Effective with the end of the authorization period July 1, 1983, through June 30, 1984, annual reauthorization of authority to write insurance coverage under the Act is no longer necessary. Beginning July 1, 1984, and thereafter, newly issued Certificates of Authority will show no expiration date. Certificates of Authority will remain in force for so long as the carrier complies with the requirements of the OWCP.

[50 FR 406, Jan. 3, 1985]

§ 703.109 Longshoremen's endorsement; see succeeding parts for endorsements for extensions.

(a) The following form of endorsement application to the standard workmen's compensation and employer's liability policy, shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. _____,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of this Act, and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, U.S. Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be cancelled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to this employer.

All terms, conditions, requirements, and obligations, expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

§ 703.110 Other forms of endorsements and policies.

Where the form of endorsement prescribed by § 703.109 is not appropriate when used in conjunction with a form of policy approved for use by the Office no modification thereof shall be used unless specifically approved by the Office. Where the form of policy is designed to include therein the obligations of the insurer under said Act without the use of the appropriate endorsements, the policy shall contain the provisions required to be included in any of the endorsements. Such a policy, however, shall not be used until expressly approved by the Office.

§ 703.111 Submission of new forms of policies for approval; other endorsements.

No new forms of policies or modification of existing forms of policies shall be used by an insurer authorized by the Office under the regulations in this part to write insurance under said Act except after submission to and approval by the Office. No endorsement altering any provisions of a policy approved by the Office shall be used except after submission to and approval by the Office.

§ 703.112 Terms of policies.

A policy or contract of insurance shall be issued for the term of not less than 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 703.113 Marine insurance contracts.

A longshoremen's policy, or the longshoremen's endorsement provided for by § 703.109 for attachment to a marine policy, may specify the particular vessel or vessels in respect of which the policy applies and the address of the employer at the home port thereof. The report of the issuance of a policy or endorsement required by § 703.116 must be made to DLHWC and must show the name and address of the owner as well as the name or names of such vessel or vessels.

[80 FR 12933, Mar. 12, 2015]

§ 703.114 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of the Act will not become effective otherwise than as provided by 33 U.S.C. 936(b); 30 days before such cancellation is intended to be effective, notice of a proposed cancellation must be given to the district director and the employer in accordance with the provisions of 33 U.S.C. 912(c). The notice requirements of 33 U.S.C. 912(c) will be considered met when:

(a) Notice to the district director is given by a method specified in § 702.101(a) of this chapter or in the same manner that reports of issuance of policies and endorsements are reported under § 703.116; and

(b) Notice to the employer is given by a method specified in § 702.101(b) of this chapter.

[80 FR 12933, Mar. 12, 2015]

§ 703.115 Discharge by the carrier of obligations and duties of employer.

Every obligation and duty in respect of payment of compensation, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by said Act and in respect of the carrying out of the administrative procedure required or imposed by said Act or the regulations in this part upon an employer shall be discharged and carried out by the carrier except that the prescribed report of injury or death shall be sent

by the employer to the district director and to the insurance carrier as required by 33 U.S.C. 930. Such carrier shall be jointly responsible with the employer for the submission of all reports, notices, forms, and other administrative papers required by the district director or the Office in the administration of said Act to be submitted by the employer, but any form or paper so submitted where required therein shall contain in addition to the name and address of the carrier, the full name and address of the employer on whose behalf it is submitted. Notice to or knowledge of an employer of the occurrence of the injury or death shall be notice to or knowledge of such carrier. Jurisdiction of the employer by a district director, the Office, or appropriate appellate authority under said Act shall be jurisdiction of such carrier. Any requirement under any compensation order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the employer.

§ 703.116 Report by carrier of issuance of policy or endorsement.

Each carrier must report to DLHWC each policy and endorsement issued by it to an employer whose employees are engaging in work subject to the Act and its extensions. Such reports must be made in a manner prescribed by OWCP. Reports made to an OWCP-authorized intermediary, such as an industry data collection organization, satisfy this reporting requirement.

[80 FR 12933, Mar. 12, 2015]

§ 703.117 Report; by whom sent.

The report of issuance of a policy and endorsement provided for in § 703.116 or notice of cancellation provided for in § 703.114 must be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies in any compensation district to make such reports, provided the carrier notifies DLHWC of the agencies so duly authorized.

[80 FR 12933, Mar. 12, 2015]

§ 703.118 Agreement to be bound by report.

Every applicant for the authority to write insurance under the provisions of this Act, will be deemed to have included in its application an agreement that the acceptance by DLHWC of a report of insurance, as provided for by § 703.116, binds the carrier to full liability for the obligations under this Act of the employer named in said report, and every certificate of authority to write insurance under this Act will be deemed to have been issued by the Office upon consideration of the carrier's agreement to become so bound. It will be no defense to this agreement that the carrier failed or delayed to issue the policy to the employer covered by this report.

[80 FR 12933, Mar. 12, 2015]

§ 703.119 [Reserved]

§ 703.120 Name of one employer only in each report.

For policies that are reported to DLHWC on Form LS–570 (Carrier's Report of Issuance of Policy), a separate report of the issuance of a policy and endorsement, provided for by § 703.116, must be made for each employer covered by a policy. If a policy is issued insuring more than one employer, a separate form LS–570 for each employer so covered must be sent to DLHWC in the manner described in § 703.116, with the name of only one employer on each form.

[80 FR 12933, Mar. 12, 2015]

Subpart C—Insurance Carrier Security Deposit Requirements

SOURCE: 70 FR 43234, July 26, 2005, unless otherwise noted.

§ 703.201 Deposits of security by insurance carriers.

The regulations in this subpart require certain insurance carriers to deposit security in the form of indemnity bonds, letters of credit or negotiable securities (chosen at the option of the carrier) of a kind and in an amount determined by the Office, and prescribe the conditions under which deposits must be made. Security deposits secure

the payment of compensation and medical benefits when an insurance carrier defaults on any of its obligations under the LHWCA, regardless of the date such obligations arose. They also secure the payment of compensation and medical benefits when a carrier becomes insolvent and such obligations are not otherwise fully secured by a State guaranty fund. Any gap in State guaranty fund coverage will have a direct effect on the amount of security the Office will require a carrier to post. As used in this subpart, the terms ''obligations under the Act'' and ''LHWCA obligations'' mean a carrier's liability for compensation payments and medical benefits arising under the Longshore and Harbor Workers' Compensation Act and any of its extensions.

§ 703.202 Identification of significant gaps in State guaranty fund coverage for LHWCA obligations.

(a) In determining the amount of a carrier's required security deposit, the Office will consider the extent to which a State guaranty fund secures the insurance carrier's LHWCA obligations in that State. When evaluating State guaranty funds, the Office may consider a number of factors including, but not limited to—

(1) Limits on weekly benefit amounts;

(2) Limits on aggregate maximum benefit amounts;

(3) Time limits on coverage;

(4) Ocean marine exclusions;

(5) Employer size and viability provisions; and

(6) Financial strength of the State guaranty fund itself.

(b) OWCP will identify States without guaranty funds and States with guaranty funds that do not fully and immediately secure LHWCA obligations and will post its findings on the Internet at *http://www.dol.gov/owcp/dlhwc*. These findings will indicate the extent of any partial or total gap in coverage provided by a State guaranty fund, and they will be open for inspection and comment by all interested parties. If the extent of coverage a particular State guaranty fund provides either cannot be determined or is ambiguous, OWCP will deem one third (33⅓ percent) of a carrier's LHWCA obligations in that State to be unsecured. OWCP will revise its findings from time to time, in response to substantiated public comments it receives or for any other reasons it considers relevant.

[70 FR 43234, July 26, 2005, as amended at 77 FR 37286, June 21, 2012]

§ 703.203 Application for security deposit determination; information to be submitted; other requirements.

(a) Each insurance carrier authorized by OWCP to write insurance under the LHWCA or any of its extensions, and each insurance carrier seeking initial authorization to write such insurance, must apply annually, on a schedule set by OWCP, for a determination of the extent of its unsecured obligations and the security deposit required. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain the following:

(1) Any carrier seeking an exemption from the security deposit requirements based on its financial standing (*see* § 703.204(c)(1)) must submit documentation establishing the carrier's current rating and its rating for the immediately preceding year from each insurance rating service designated by the Branch and posted on the Internet at *http://www.dol.gov/owcp/dlhwc*.

(2) All other carriers, and any carrier whose exemption request under paragraph (a)(1) of this section has been denied, must provide—

(i) A statement of the carrier's outstanding liabilities under the LHWCA or any of its extensions for its LHWCA obligations for each State in which the obligations arise; and

(ii) Any other information the Branch requests to enable it to give the application adequate consideration including, but not limited to, the reports set forth at § 703.212.

(b) If the carrier disagrees with any of OWCP's findings regarding State guaranty funds made under § 703.202(b) as they exist when it submits its application, the carrier may submit a statement of its unsecured obligations based

on a different conclusion regarding the extent of coverage afforded by one or more State guaranty funds. The carrier must submit evidence and/or argument with its application sufficient to establish that such conclusion is correct.

(c) The carrier must sign and swear to the application. If the carrier is not an individual, the carrier's duly authorized officer must sign and swear to the application and list his or her official designation. If the carrier is a corporation, the officer must also affix the corporate seal.

(d) At any time after filing an application, the carrier must inform the Branch immediately of any material changes that may have rendered its application incomplete, inaccurate or misleading.

(e) By filing an application, the carrier consents to be bound by and to comply with the regulations and requirements in this part.

[70 FR 43234, July 26, 2005, as amended at 77 FR 37286, June 21, 2012]

§ 703.204 Decision on insurance carrier's application; minimum amount of deposit.

(a) The Branch will issue a decision on the application determining the extent of an insurance carrier's unsecured LHWCA obligations and fixing the amount of security the carrier must deposit to fully secure payment of its unsecured obligations. The Branch will transmit its decision to the applicant in a way it considers appropriate.

(b) The Branch may consider a number of factors in setting the security deposit amount including, but not limited to, the—

(1) Financial strength of the carrier as determined by private insurance rating organizations;

(2) Financial strength of the carrier's insureds in the Longshore industry;

(3) Extent to which State guaranty funds secure the carrier's LHWCA obligations in the event the carrier defaults on its obligations or becomes insolvent;

(4) Carrier's longevity in writing LHWCA or other workers' compensation coverage;

(5) Extent of carrier's exposure for LHWCA coverage; and

(6) Carrier's payment history in satisfying its LHWCA obligations.

(c) In setting the security deposit amount, the Branch will follow these criteria:

(1) Carriers who hold the highest rating awarded by each of the three insurance rating services designated by the Branch and posted on the Internet at *http://www.dol.gov/owcp/dlhwc* for both the current rating year and the immediately preceding year will not be required to deposit security.

(2) Carriers whose LHWCA obligations are fully secured by one or more State guaranty funds, as evaluated by OWCP under § 703.202 of this subpart, will not be required to deposit security.

(3) The Branch will require all carriers not meeting the requirements of paragraphs (c)(1) or (2) of this section to deposit security for their LHWCA obligations not secured by a State guaranty fund, as evaluated by OWCP under § 703.202 of this subpart. For carriers that write only an insignificant or incidental amount of LHWCA insurance, the Branch will require a deposit in an amount determined by the Branch from time to time. For all other carriers, the Branch will require a minimum deposit of one third (33⅓ percent) of a carrier s outstanding LHWCA obligations not secured by a State guaranty fund, but may require a deposit up to an amount equal to the carrier's total outstanding LHWCA obligations (100 percent) not secured by a State guaranty fund.

(d) If a carrier believes that a lesser deposit would fully secure its LHWCA obligations, the carrier may request a hearing before the Director of the Division of Longshore and Harbor Workers' Compensation (Longshore Director) or the Longshore Director's representative. Requests for hearing must be in writing and sent to the Branch within 10 days of the date of the Branch's decision. The carrier may submit new evidence and/or argument in support of its challenge to the Branch's decision and must provide any additional documentation OWCP requests. The Longshore Director or his representative will notify the carrier of the hearing date within 10 days of receiving the request. The Longshore Director or his representative will issue the final

agency decision on the application within 60 days of the hearing date, or, where evidence is submitted after the hearing, within 60 days of the receipt of such evidence, but no later than 180 days after receiving the carrier's request for a hearing.

[70 FR 43234, July 26, 2005, as amended at 77 FR 37286, June 21, 2012]

§ 703.205 Filing of Agreement and Undertaking; deposit of security.

Within 45 days of the date on which the insurance carrier receives the Branch's decision (or, if the carrier requests a hearing, a period set by the Longshore Director or the Longshore Director's representative) determining the extent of its unsecured LHWCA obligations and fixing the required security deposit amount (*see* § 703.204), the carrier must:

(a) Execute and file with the Branch an Agreement and Undertaking, in a form prescribed and provided by OWCP, in which the carrier shall agree to—

(1) Deposit with the Branch indemnity bonds or letters of credit in the amount fixed by the Office, or deposit negotiable securities under §§ 703.207 and 703.208 in that amount;

(2) Authorize the Branch, at its discretion, to bring suit under any deposited indemnity bond or to draw upon any deposited letters of credit, as appropriate under the terms of the security instrument, or to collect the interest and principal as they become due on any deposited negotiable securities and to sell or otherwise liquidate such negotiable securities or any part thereof when—

(i) The carrier defaults on any of its LHWCA obligations;

(ii) The carrier fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(iii) The carrier fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(iv) State insolvency proceedings are initiated against the carrier; or

(v) The carrier fails to comply with any of the terms of the Agreement and Undertaking; and

(3) Authorize the Branch, at its discretion, to pay such ongoing claims of the carrier as it may find to be due and payable from the proceeds of the deposited security;

(b) Give security in the amount fixed in the Office's decision:

(1) In the form of an indemnity bond with sureties satisfactory to the Branch and in such form, and containing such provisions, as the Branch may prescribe: *Provided*, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds (*see* Department of Treasury's Circular–570), and that a surety company that is a corporate subsidiary of an insurance carrier may not act as surety on such carrier's indemnity bond;

(2) In the form of letters of credit issued by a financial institution satisfactory to the Branch and upon which the Branch may draw; or

(3) By a deposit of negotiable securities with a Federal Reserve Bank or the Treasurer of the United States in compliance with §§ 703.207 and 703.208.

§ 703.206 [Reserved]

§ 703.207 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.

An insurance carrier electing to deposit negotiable securities to secure its obligations under the Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (*See* 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 703.208 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.

Deposits of negotiable securities provided for by the regulations in this part must be made with any Federal

Reserve bank or any branch of a Federal Reserve bank designated by the Branch, or the Treasurer of the United States, and must be held subject to the order of the Branch. The Branch will authorize the insurance carrier to collect interest on the securities it deposits unless any of the conditions set forth at § 703.211(a) occur.

§ 703.209 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.

(a) A carrier may not substitute other security for any indemnity bond or letters of credit deposited under the regulations in this part except when authorized by the Branch. A carrier may, however, substitute negotiable securities acceptable under the regulations in this part for previously-deposited negotiable securities without the Branch's prior approval.

(b) A carrier that has ceased to write insurance under the Act may apply to the Branch for withdrawal of its security deposit. The carrier must file with its application a sworn statement setting forth—

(1) A list of all cases in each State in which the carrier is paying compensation, together with the names of the employees and other beneficiaries, a description of causes of injury or death, and a statement of the amount of compensation paid;

(2) A similar list of all pending cases in which the carrier has not yet paid compensation; and

(3) A similar list of all cases in which injury or death has occurred within one year before such application or in which the last payment of compensation was made within one year before such application.

(c) The Branch may authorize withdrawal of previously-deposited indemnity bonds, letters of credit and negotiable securities that, in the opinion of the Branch, are not necessary to provide adequate security for the payment of the carrier's outstanding and potential LHWCA liabilities. No withdrawals will be authorized unless there has been no claim activity involving the carrier for a minimum of five years, and the Branch is reasonably certain that no further claims will arise.

§ 703.210 Increase or reduction in security deposit amount.

(a) Whenever the Office considers the security deposited by an insurance carrier insufficient to fully secure the carrier's LHWCA obligations, the carrier must, upon demand by the Branch, deposit additional security in accordance with the regulations in this part in an amount fixed by the Branch. The Branch will issue its decision requiring additional security in accordance with § 703.204, and the procedures set forth at §§ 703.204(d) and 703.205 for requesting a hearing and complying with the Office's decision will apply as appropriate.

(b) The Branch may reduce the required security at any time on its own initiative, or upon application of a carrier, when in the Branch's opinion the facts warrant a reduction. A carrier seeking a reduction must furnish any information the Office requests regarding its outstanding LHWCA obligations for any State in which it does business, its obligations not secured by a State guaranty fund in each of these States, and any other evidence as the Branch considers necessary.

§ 703.211 Authority to seize security deposit; use and/or return of proceeds.

(a) The Office may take any of the actions set forth in paragraph (b) of this section when an insurance carrier—

(1) Defaults on any of its LHWCA obligations;

(2) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place;

(4) Has State insolvency proceedings initiated against it; or

(5) Fails to comply with any of the terms of the Agreement and Undertaking.

(b) When any of the conditions set forth in paragraph (a) of this section occur, the Office may, within its discretion and as appropriate to the security instrument—

(1) Bring suit under any indemnity bond;

(2) Draw upon any letters of credit;

(3) Seize any negotiable securities, collect the interest and principal as they may become due, and sell or otherwise liquidate the negotiable securities or any part thereof.

(c) When the Office, within its discretion, determines that it no longer needs to collect the interest and principal of any negotiable securities seized pursuant to paragraphs (a) and (b) of this section, or to retain the proceeds of their sale, it must return any of the carrier's negotiable securities still in its possession and any remaining proceeds of their sale.

§ 703.212 Required reports; examination of insurance carrier accounts.

(a) Upon the Office's request, each insurance carrier must submit the following reports:

(1) A certified financial statement of the carrier's assets and liabilities, or a balance sheet.

(2) A sworn statement showing the extent of the carrier's unsecured LHWCA obligations for each State in which it is authorized to write insurance under the LHWCA or any of its extensions.

(3) A sworn statement reporting the carrier's open cases as of the date of such report, listing by State all death and injury cases, together with a report of the status of all outstanding claims.

(b) Whenever it considers necessary, the Office may inspect or examine a carrier's books of account, records, and other papers to verify any financial statement or other information the carrier furnished to the Office in any statement or report required by this section, or any other section of the regulations in this part. The carrier must permit the Office or its duly authorized representative to make the inspection or examination. Alternatively, the Office may accept an adequate independent audit by a certified public accountant.

§ 703.213 Failure to comply.

The Office may suspend or revoke a carrier's certificate of authority to write LHWCA insurance under § 703.106 when the carrier fails to comply with any of the requirements of this part.

Subpart D—Authorization of Self-Insurers

SOURCE: 70 FR 43234, July 26, 2005, unless otherwise noted.

§ 703.301 Employers who may be authorized as self-insurers.

The regulations in this subpart set forth procedures for authorizing employers to self-insure the payment of compensation under the Longshore and Harbor Workers' Compensation Act, or its extensions. The Office may authorize any employer to self-insure who, pursuant to the regulations in this part, furnishes to the Office satisfactory proof of its ability to pay compensation directly, and who agrees to immediately cancel any existing insurance policy covering its Longshore obligations (except for excess or catastrophic workers' compensation insurance, *see* §§ 703.302(a)(6), 703.304(a)(6)) when OWCP approves the employer's application to be self-insured. The regulations require self-insurers to deposit security in the form of an indemnity bond, letters of credit or negotiable securities (at the option of the employer) of a kind and in an amount determined by the Office, and prescribe the conditions under which such deposits shall be made. The term ''self-insurer'' as used in these regulations means any employer securing the payment of compensation under the LHWCA or its extensions in accordance with the provisions of 33 U.S.C. 932(a)(2) and these regulations.

§ 703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.

(a) Any employer may apply to become an authorized self-insurer. The application must be addressed to the Branch of Financial Management and Insurance (Branch) within OWCP's Division of Longshore and Harbor Workers' Compensation, and be made on a form provided by OWCP. The application must contain—

(1) A statement of the employer's total payroll for the 12 months before the application date;

(2) A statement of the average number of employees engaged in employment within the purview of the LHWCA or any of its extensions for the 12 months before the application date;

(3) A statement of the number of injuries to such employees resulting in disability of more than 7 days' duration, or in death, during each of the 5 years before the application date;

(4) A certified financial report for each of the three years before the application date;

(5) A description of the facilities maintained or the arrangements made for the medical and hospital care of injured employees;

(6) A statement describing the provisions and maximum amount of any excess or catastrophic insurance; and

(7) Any other information the Branch requests to enable it to give the application adequate consideration including, but not limited to, the reports set forth at § 703.310.

(b) The employer must sign and swear to the application. If the employer is not an individual, the employer's duly authorized officer must sign and swear to the application and list his or her official designation. If the employer is a corporation, the officer must also affix the corporate seal.

(c) At any time after filing an application, the employer must inform the Branch immediately of any material changes that may have rendered its application incomplete, inaccurate or misleading.

(d) By filing an application, the employer consents to be bound by and to comply with the regulations and requirements in this part.

§ 703.303 Decision on employer's application.

(a) The Branch will issue a decision granting or denying the employer's application to be an authorized self-insurer. If the Branch grants the application, the decision will fix the amount of security the employer must deposit. The Branch will transmit its decision to the employer in a way it considers appropriate.

(b) The employer is authorized to self-insure beginning with the date of the Branch's decision. Each grant of authority to self-insure is conditioned, however, upon the employer's execution and filing of an Agreement and Undertaking and deposit of the security fixed in the decision in the form and within the time limits required by § 703.304. In the event the employer fails to comply with the requirements set forth in § 703.304, its authorization to self-insure will be considered never to have been effective, and the employer will be subject to appropriate penalties for failure to secure its LHWCA obligations.

(c) The Branch will require security in the amount it considers necessary to fully secure the employer's LHWCA obligations. When fixing the amount of security, the Branch may consider a number of factors including, but not limited to, the—

(1) Employer's overall financial standing;

(2) Nature of the employer's work;

(3) Hazard of the work in which the employees are employed;

(4) Employer's payroll amount for employees engaged in employment within the purview of the Act; and

(5) Employer's accident record as shown in the application and the Office's records.

(d) If an employer believes that the Branch incorrectly denied its application to self-insure, or that a lesser security deposit would fully secure its LHWCA obligations, the employer may request a hearing before the Director of the Division of Longshore and Harbor Workers' Compensation (Longshore Director) or the Longshore Director's representative. Requests for hearing must be in writing and sent to the Branch within ten days of the date of the Branch's decision. The employer may submit new evidence and/or argument in support of its challenge to the Branch's decision and must provide any additional documentation OWCP requests. The Longshore Director or his representative will notify the employer of the hearing date within 10 days of receiving the request. The Longshore Director or his representative will issue the final agency decision on the application within 60 days of the

hearing date, or, where evidence is submitted after the hearing, within 60 days of the receipt of such evidence, but no later than 180 days after receiving the employer's request for a hearing.

§ 703.304 Filing of Agreement and Undertaking; deposit of security.

Within 45 days of the date on which the employer receives the Branch's decision (or, if the employer requests a hearing, a period set by the Longshore Director or the Longshore Director's representative) granting its application to self-insure and fixing the required security deposit amount (*see* § 703.303), the employer must:

(a) Execute and file with the Branch an Agreement and Undertaking, in a form prescribed and provided by OWCP, in which the employer shall agree to:

(1) Pay when due, as required by the provisions of the Act, all compensation payable on account of injury or death of any of its employees injured within the purview of the Act;

(2) Furnish medical, surgical, hospital, and other attendance, treatment and care as required by the Act;

(3) Deposit with the Branch indemnity bonds or letters of credit in the amount fixed by the Office, or deposit negotiable securities under §§ 703.306 and 703.307 in that amount;

(4) Authorize the Branch, at its discretion, to bring suit under any deposited indemnity bond or to draw upon any deposited letters of credit, as appropriate under the terms of the security instrument, or to collect the interest and principal as they become due on any deposited negotiable securities and to seize and sell or otherwise liquidate such negotiable securities or any part thereof when the employer:

(i) Defaults on any of its LHWCA obligations;

(ii) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(iii) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place; or

(iv) Fails to comply with any of the terms of the Agreement and Undertaking;

(5) Authorize the Branch, at its discretion, to pay such compensation, medical, and other expenses and any accrued penalties imposed by law as it may find to be due and payable from the proceeds of the deposited security; and

(6) Obtain and maintain, if required by the Office, excess or catastrophic insurance in amounts to be determined by the Office.

(b) Give security in the amount fixed in the Office's decision:

(1) In the form of an indemnity bond with sureties satisfactory to the Office, and in such form and containing such provisions as the Office may prescribe: *Provided*, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds (*see* Department of Treasury's Circular–570);

(2) In the form of letters of credit issued by a financial institution satisfactory to the Branch and upon which the Branch may draw; or,

(3) By a deposit of negotiable securities with a Federal Reserve Bank or the Treasurer of the United States in compliance with §§ 703.306 and 703.307.

§ 703.305 [Reserved]

§ 703.306 Kinds of negotiable securities that may be deposited; conditions of deposit; acceptance of deposits.

A self-insurer or a self-insurer applicant electing to deposit negotiable securities to secure its obligations under the Act in the amount fixed by the Office under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. (*See* 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 703.307 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; interest thereon.

Deposits of negotiable securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office. The Office will authorize the self-insurer to collect interest on the securities deposited by it unless any of the conditions set forth at § 703.304(a)(4) occur.

§ 703.308 Substitution and withdrawal of indemnity bond, letters of credit or negotiable securities.

(a) A self-insurer may not substitute other security for any indemnity bond or letters of credit deposited under the regulations in this part except when authorized by the Office. A self-insurer may, however, substitute negotiable securities acceptable under the regulations in this part for previously-deposited negotiable securities without the Office's prior approval.

(b) A self-insurer discontinuing business, discontinuing operations within the purview of the Act, or securing the payment of compensation by commercial insurance under the provisions of the Act may apply to the Office for the withdrawal of the security it provided under the regulations in this part. The self-insurer must file with its application a sworn statement setting forth—

(1) A list of all cases in each compensation district in which the self-insurer is paying compensation, together with the names of the employees and other beneficiaries, a description of causes of injury or death, and a statement of the amount of compensation paid;

(2) A similar list of all pending cases in which the self-insurer has not yet paid compensation; and

(3) A similar list of all cases in which injury or death has occurred within one year before such application or in which the last payment of compensation was made within one year before such application.

(c) The Office may authorize withdrawal of previously-deposited indemnity bonds, letters of credit and negotiable securities that, in the opinion of the Office, are not necessary to provide adequate security for the payment of the self-insurer's outstanding and potential LHWCA obligations. No withdrawals will be authorized unless there has been no claim activity involving the self-insurer for a minimum of five years, and the Office is reasonably certain no further claims will arise.

§ 703.309 Increase or reduction in the amount of indemnity bond, letters of credit or negotiable securities.

(a) Whenever the Office considers the principal sum of the indemnity bond or letters of credit filed or the amount of the negotiable securities deposited by a self-insurer insufficient to fully secure the self-insurer's LHWCA obligations, the self-insurer must, upon demand by the Office, deposit additional security in accordance with the regulations in this part in an amount fixed by the Branch. The Branch will issue its decision requiring additional security in accordance with § 703.303, and the procedures set forth at §§ 703.303(d) and 703.304 for requesting a hearing and complying with the Office's decision will apply as appropriate.

(b) The Office may reduce the required security at any time on its own initiative, or upon application of a self-insurer, when in the Office's opinion the facts warrant a reduction. A self-insurer seeking a reduction must furnish any information the Office requests regarding its current affairs, the nature and hazard of the work of its employees, the amount of its payroll for employees engaged in maritime employment within the purview of the Act, its financial condition, its accident experience, a record of compensation payments it has made, and any other evidence the Branch considers necessary.

§ 703.310 Authority to seize security deposit; use and/or return of proceeds.

(a) The Office may take any of the actions set forth in paragraph (b) of this section when a self-insurer—

(1) Defaults on any of its LHWCA obligations;

(2) Fails to renew any deposited letter of credit or substitute a new letter of credit, indemnity bond or acceptable negotiable securities in its place;

(3) Fails to renew any deposited negotiable securities at maturity or substitute a letter of credit, indemnity bond or acceptable negotiable securities in their place; or

(4) Fails to comply with any of the terms of the Agreement and Undertaking.

(b) When any of the conditions set forth in paragraph (a) of this section occur, the Office may, within its discretion and as appropriate to the security instrument—

(1) Bring suit under any indemnity bond;

(2) Draw upon any letters of credit;

(3) Seize any negotiable securities, collect the interest and principal as they may become due, and sell or otherwise liquidate the negotiable securities or any part thereof.

(c) When the Office, within its discretion, determines that it no longer needs to collect the interest and principal of any negotiable securities seized pursuant to paragraphs (a) and (b) of this section, or to retain the proceeds of their sale, it must return any of the employer's negotiable securities still in its possession and any remaining proceeds of their sale.

§ 703.311 Required reports; examination of self-insurer accounts.

(a) Upon the Office's request, each self-insurer must submit the following reports:

(1) A certified financial statement of the self-insurer's assets and liabilities, or a balance sheet.

(2) A sworn statement showing by classifications the payroll of employees of the self-insurer who are engaged in employment within the purview of the LHWCA or any of its extensions.

(3) A sworn statement covering the six-month period preceding the date of such report, listing by compensation districts all death and injury cases which have occurred during such period, together with a report of the status of all outstanding claims showing the particulars of each case.

(b) Whenever it considers necessary, the Office may inspect or examine a self-insurer's books of account, records, and other papers to verify any financial statement or other information the self-insurer furnished to the Office in any report required by this section, or any other section of the regulations in this part. The self-insurer must permit the Office or its duly authorized representative to make the inspection or examination. Alternatively, the Office may accept an adequate report of a certified public accountant.

§ 703.312 Period of authorization as self-insurer.

(a) Self-insurance authorizations will remain in effect for so long as the self-insurer complies with the requirements of the Act, the regulations in this part, and OWCP.

(b) A self-insurer who has secured its liability by depositing an indemnity bond with the Office will, on or about May 10 of each year, receive from the Office a form for executing a bond that will continue its self-insurance authorization. The submission of such bond, duly executed in the amount indicated by the Office, will be deemed a condition of the continuing authorization.

§ 703.313 Revocation of authorization to self-insure.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on its indemnity bond, or impairment of financial responsibility of such self-insurer, shall be deemed good cause for suspension or revocation.

Subpart E—Issuance of Certificates of Compliance

§ 703.501 Issuance of certificates of compliance.

Every employer who has secured the payment of compensation as required by 33 U.S.C. 932 and by the regulations in this part may request a certificate from the district director in the compensation district in which he has operations, and for which a certificate is required by 33 U.S.C. 937, showing that

such employer has secured the payment of compensation. Only one such certificate will be issued to an employer in a compensation district, and it will be valid only during the period for which such employer has secured such payment. An employer so desiring may have photocopies of such a certificate made for use in different places within the compensation district. Two forms of such certificates have been provided by the Office, one form for use where the employer has obtained insurance generally under these regulations, and one for use where the employer has been authorized as a self-insurer.

§ 703.502 [Reserved]

§ 703.503 Return of certificates of compliance.

Upon the termination by expiration, cancellation or otherwise, of a policy of insurance issued under the provisions of law and these regulations, or the revocation or termination of the privilege of self-insurance granted by the Office, all certificates of compliance issued on the basis of such insurance or self-insurance shall be void and shall be returned by the employer to the district director issuing them with a statement of the reason for such return. An employer holding certificate of compliance under an insurance policy which has expired, pending renewal of such insurance need not return such certificate of compliance if such expired insurance is promptly replaced. An employer who has secured renewal of insurance upon the expiration of policy under said Act or whose self-insurance thereunder is reauthorized without a break in the continuity thereof need not return an expired certificate of compliance.

PART 704—SPECIAL PROVISIONS FOR LHWCA EXTENSIONS

Sec.

704.001 Extensions covered by this part.
704.002 Scope of part.

DEFENSE BASE ACT

704.101 Administration; compensation districts.
704.102 Commutation of payments to aliens and nonresidents.
704.103 Removal of certain minimums when computing or paying compensation.
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DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

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OUTER CONTINENTAL SHELF LANDS ACT

704.301 Administration; compensation districts.
704.351 OCSLA endorsement.

NONAPPROPRIATED FUND INSTRUMENTALITIES ACT

704.401 Administration; compensation districts.
704.451 NFIA endorsement.

AUTHORITY: 5 U.S.C. 301; Reorg. Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; 33 U.S.C. 939; 36 D.C. Code 501 *et seq.;* 42 U.S.C. 1651 *et seq.;* 43 U.S.C. 1331; 5 U.S.C. 6171 *et seq.;* Secretary's Order 1–89; Employment Standards Order No. 90–02.

SOURCE: 38 FR 26877, Sept. 26, 1973, unless otherwise noted.

§ 704.001 Extensions covered by this part.

(a) Defense Base Act (DBA).

(b) District of Columbia Workmen's Compensation Act (DCCA).

(c) Outer Continental Shelf Lands Act (OCSLA).

(d) Nonappropriated Fund Instrumentalities Act (NFIA).

§ 704.002 Scope of part.

The regulations governing the administration of the LHWCA as set forth in parts 702 and 703 of this subchapter govern the administration of the LHWCA extensions (see § 704.001) in nearly every respect, and are not repeated in this part 704. Such special provisions as are necessary to the proper administration of each of the extensions are set forth in this part. To the extent of any inconsistency between regulations in parts 702 and 703 of this subchapter and those in this part, the latter supersedes those in parts 702 and 703 of this subchapter.

DEFENSE BASE ACT

§ 704.101 Administration; compensation districts.

For the purpose of administration of this Act areas assigned to the compensation districts established for administration of the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter shall be extended in the following manner to include:

(a) Canada, east of the 75th degree west longitude, Newfoundland, and Greenland are assigned to District No. 1.

(b) Canada, west of the 75th degree and east of the 110th degree west longitude, is assigned to District No. 10.

(c) Canada, west of the 110th degree west longitude, and all areas in the Pacific Ocean north of the 45th degree north latitude are assigned to District No. 14.

(d) All areas west of the continents of North and South America (except coastal islands) to the 60th degree east longitude, except for Iran, are assigned to District No. 15.

(e) Mexico, Central and South America (including coastal islands); areas east of the continents of North and South America to the 60th degree east longitude, including Iran, and any other areas or locations not covered under any other district office, are assigned to District No. 2.

§ 704.102 Commutation of payments to aliens and nonresidents.

Authority to commute payments to aliens and nonnationals who are not residents of the United States and Canada, section 2(b) of the Defense Base Act, 42 U.S.C. 1652(b), though separately stated in this Act, is identical in language to section 9(g) of the Longshoremen's Act. Thus, except for the different statutory citation, the LHWCA regulation at § 702.142 of this subchapter shall apply.

§ 704.103 Removal of certain minimums when computing or paying compensation.

The minimum limitation on weekly compensation for disability established by section 6 of the LHWCA, 33 U.S.C. 906, and the minimum limit on the average weekly wages on which death benefits are to be computed under section 9 of the LHWCA, 33 U.S.C. 909, shall not apply in computing compensation and death benefits under this Act; section 2(a), 42 U.S.C. 1652(a).

§ 704.151 DBA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employers' liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ____,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the provisions of the Defense Base Act, and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The Company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The Company agrees to abide by all the provisions of said Acts and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to this employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT

§ 704.201 Administration; compensation districts.

For the purpose of administration of this Act, the District of Columbia shall be the compensation district and is designated as District No. 40.

§ 704.251 DCCA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ____,

The obligations of the policy include the District of Columbia Workmen's Compensation Act, and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, and all laws amendatory of either of said Acts or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said District of Columbia Workmen's Compensation Act and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director for the District of Columbia and to this employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

OUTER CONTINENTAL SHELF LANDS ACT

§ 704.301 Administration; compensation districts.

For the purpose of administration of this Act, the compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter shall administer this Act, and their jurisdiction for this purpose is extended, where appropriate, to include those parts of the Outer Continental Shelf adjacent to the State or States in such districts having adjacent shelf areas.

§ 704.351 OCSLA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ____,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Outer Continental Shelf Lands Act, and all the laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said laws and all the lawful rules, regulations, orders and decisions of the Office of Workmen's Compensation Programs, Department of Labor, until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to his employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

NONAPPROPRIATED FUND INSTRUMENTALITIES ACT

§ 704.401 Administration; compensation districts.

For the purpose of administration of this Act within the continental United States, Hawaii, and Alaska, the compensation districts established for administration of the Longshoremen's and Harbor Workers' Compensation Act as set forth in part 702 of this subchapter are established as the administrative districts under this Act. For the purpose of administration of this Act outside the continental United States, Alaska, and Hawaii, the compensation districts established for such

overseas administration of the Defense Base Act as set forth in § 704.101 are established as the administrative districts under this Act.

§ 704.451 NFIA endorsement.

The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ____,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Nonappropriated Fund Instrumentalities Act, and all of the laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of said Acts and all the lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Acts.

This endorsement shall not be canceled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to the within named employer.

All terms, conditions, requirements, and obligations expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

SUBCHAPTER B—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED

PART 718—STANDARDS FOR DETERMINING COAL MINERS' TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS

Subpart A—General

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718.305 Presumption of pneumoconiosis.
718.306 [Reserved]

APPENDIX A TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF CHEST RADIOGRAPHS (X-RAYS)

APPENDIX B TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF PULMONARY FUNCTION TESTS. TABLES B1, B2, B3, B4, B5, B6

APPENDIX C TO PART 718—BLOOD-GAS TABLES

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 6 of 1950, 15 FR 3174; 30 U.S.C. 901 *et seq.*, 902(f), 934, 936; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 405; Secretary's Order 10–2009, 74 FR 58834.

SOURCE: 45 FR 13678, Feb. 29, 1980, unless otherwise noted.

Subpart A—General

SOURCE: 65 FR 80045, Dec. 20, 2000, unless otherwise noted.

§ 718.1 Statutory provisions.

Section 402(f) of the Act authorizes the Secretary of Labor to establish criteria for determining total disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under Part C of the Act. Section 402(f) further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques used to take chest roentgenograms (x-rays) in connection with a claim for benefits under the Act.

[78 FR 59114, Sept. 25, 2013]

§ 718.2 Applicability of this part.

(a) With the exception of the second sentence of § 718.204(a), this part is applicable to the adjudication of all claims filed on or after June 30, 1982 under Part C of the Act. It provides standards for establishing entitlement to benefits under the Act and describes the criteria for the development of medical evidence used in establishing such entitlement. The second sentence of § 718.204(a) is applicable to the adjudication of all claims filed after January 19, 2001.

(b) Publication of certain provisions or parts of certain provisions that apply only to claims filed prior to June 30, 1982, or to claims subject to Section

435 of the Act, has been discontinued because those provisions affect an increasingly smaller number of claims. The version of Part 718 set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 2010, applies to the adjudication of all claims filed prior to June 30, 1982, as appropriate.

(c) The provisions of this part must, to the extent appropriate, be construed together in the adjudication of claims.

[78 FR 59114, Sept. 25, 2013]

§ 718.3 Scope and intent of this part.

(a) This part sets forth the standards to be applied in determining whether a coal miner is or was totally disabled due to pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

(b) This part is designed to interpret the presumptions contained in section 411(c) of the Act, evidentiary standards and criteria contained in section 413(b) of the Act and definitional requirements and standards contained in section 402(f) of the Act within a coherent framework for the adjudication of claims. It is intended that these enumerated provisions of the Act be construed as provided in this part.

[65 FR 80045, Dec. 20, 2000, as amended at 78 FR 59114, Sept. 25, 2013]

§ 718.4 Definitions and use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in § 725.101 of subpart A of part 725 of this title shall be applicable to this part.

§ 718.5 Incorporations by reference.

(a) The materials listed in paragraphs (b) through (f) of this section are incorporated by reference in this part. The Director of the Federal Register has approved these incorporations by reference under 5 U.S.C. 522(a) and 1 CFR part 51. To enforce any edition other than that specified in these regulations, OWCP must publish notice of change in the FEDERAL REGISTER. All approved material is available from the sources listed below. You may inspect a copy of the approved material at the Division of Coal Mine Workers' Compensation, OWCP, U.S. Department of Labor, Washington, DC. To arrange for an inspection at OWCP, call 202–693–0046. These materials are also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federalregister/codeoffederalregulations/ibrlocations.html*.

(b) American Association of Physicists in Medicine, Order Department, Medical Physics Publishing, 4513 Vernon Blvd., Madison, WI 53705, *http://www.aapm.org/pubs/reports:*

(1) AAPM On-Line Report No. 03, Assessment of Display Performance for Medical Imaging Systems, April 2005, IBR approved for Appendix A to part 718, paragraph (d).

(2) AAPM Report No. 93, Acceptance Testing and Quality Control of Photostimulable Storage Phosphor Imaging Systems, October 2006, IBR approved for Appendix A to part 718, paragraph (d).

(c) American College of Radiology, 1891 Preston White Dr., Reston, VA 20191, *http://www.acr.org/~/media/ACR/Documents/PGTS/guidelines/Reference_Levels.pdf:*

(1) ACR Practice Guideline for Diagnostic Reference Levels in Medical X-Ray Imaging, Revised 2008 (Resolution 3), IBR approved for Appendix A to part 718, paragraph (d).

(2) [Reserved]

(d) International Labour Office, CH–1211 Geneva 22, Switzerland, *http://www.ilo.org/publns:* (1) Occupational Safety and Health Series No. 22, Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, Revised edition 2011, IBR approved for § 718.102(d) and Appendix A to part 718, paragraph (d).

(2) Occupational Safety and Health Series No. 22 (Rev. 2000), Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, Revised edition 2000, IBR approved for § 718.102(d).

(3) Occupational Safety and Health Series No. 22 (Rev. 80), Guidelines for the Use of ILO International Classification of Radiographs of

Pneumoconioses, Revised edition 1980, IBR approved for § 718.102(d).

(e) National Council on Radiation Protection and Measurements, NCRP Publications, 7910 Woodmont Avenue, Suite 400, Bethesda, MD 20814–3095, Telephone (800) 229–2652, *http://www.ncrppublications.org:*

(1) NCRP Report No. 102, Medical X–Ray, Electron Beam, and Gamma–Ray Protection for Energies Up to 50 MeV (Equipment Design, Performance, and Use), issued June 30, 1989, IBR approved for Appendix A to part 718, paragraph (b).

(2) NCRP Report No. 105, Radiation Protection for Medical and Allied Health Personnel, issued October 30, 1989, IBR approved for Appendix A to part 718, paragraph (b).

(3) NCRP Report No. 147, Structural Shielding Design for Medical X–Ray Imaging Facilities, revised March 18, 2005, IBR approved for Appendix A to part 718, paragraph (b).

(f) National Electrical Manufacturers Association, 1300 N. 17th Street, Rosslyn, VA 22209, *http://medical.nema.org:*

(1) DICOM Standard PS 3.3–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 3: Information Object Definitions, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(2) DICOM Standard PS 3.4–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 4: Service Class Specifications, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(3) DICOM Standard PS 3.10–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 10: Media Storage and File Format for Media Interchange, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(4) DICOM Standard PS 3.11–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 11: Media Storage Application Profiles, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(5) DICOM Standard PS 3.12–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 12: Media Formats and Physical Media for Media Interchange, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(6) DICOM Standard PS 3.14–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 14: Grayscale Standard Display Function, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

(7) DICOM Standard PS 3.16–2011, Digital Imaging and Communications in Medicine (DICOM) standard, Part 16: Content Mapping Resource, copyright 2011, IBR approved for Appendix A to part 718, paragraph (d).

[79 FR 21611, Apr. 17, 2014]

Subpart B—Criteria for the Development of Medical Evidence

SOURCE: 65 FR 80045, Dec. 20, 2000, unless otherwise noted.

§ 718.101 General.

(a) The Office of Workers' Compensation Programs (hereinafter OWCP or the Office) must develop the medical evidence necessary to determine each claimant's entitlement to benefits. Each miner who files a claim for benefits under the Act must be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation including, but not limited to, a chest radiograph (X-ray), physical examination, pulmonary function tests, and a blood-gas study.

(b) The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after January 19, 2001 in connection with a claim governed by this part (see §§ 725.406(b), 725.414(a), 725.456(d)). These standards shall also apply to claims governed by part 727 (see 20 CFR 725.4(d)), but only for clinical tests or examinations conducted after January 19, 2001. Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial

compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

[65 FR 80045, Dec. 20, 2000, as amended at 78 FR 35555, June 13, 2013; 79 FR 21611, Apr. 17, 2014]

§ 718.102 Chest radiographs (X-rays).

(a) A chest radiograph (X-ray) must be of suitable quality for proper classification of pneumoconiosis and must conform to the standards for administration and interpretation of chest X-rays as described in Appendix A.

(b) Chest X-rays may be produced by either film or digital radiography systems as defined in Appendix A to this part.

(c) The images described in paragraphs (c)(1) and (2) of this section will not be considered of suitable quality for proper classification of pneumoconiosis under this section:

(1) Digital images derived from film screen chest X-rays (e.g., by scanning or digital photography); and

(2) Images that were acquired using digital systems and then printed on transparencies for back-lighted display (e.g., using traditional view boxes).

(d) Standards for classifying radiographs:

(1) To establish the existence of pneumoconiosis, a film chest X-ray must be classified as Category 1, 2, 3, A, B, or C, in accordance with the International Labour Organization (ILO) classification system established in one of the following:

(i) Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, revised edition 2011 (incorporated by reference, *see* § 718.5).

(ii) Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, revised edition 2000 (incorporated by reference, *see* § 718.5).

(iii) Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses, revised edition 1980 (incorporated by reference, *see* § 718.5).

(2) To establish the existence of pneumoconiosis, a digital chest radiograph must be classified as Category 1, 2, 3, A, B, or C, in accordance with the ILO classification system established in Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses, revised edition 2011.

(3) A chest radiograph classified under any of the foregoing ILO classification systems as Category 0, including subcategories 0-, 0/0, or 0/1, does not constitute evidence of pneumoconiosis.

(e) An X-ray report must include the following:

(1) The name and qualifications of the person who took the X-ray.

(2) The name and qualifications of the physician who interpreted the X-ray. The interpreting physician must indicate whether he or she was a Board-certified radiologist, a Board-eligible radiologist, or a Certified B Reader as defined below on the date the interpretation was made.

(i) *Board-certified radiologist* means that the physician is certified in radiology or diagnostic radiology by the American Board of Radiology, Inc., or the American Osteopathic Association.

(ii) *Board-eligible radiologist* means that the physician has successfully completed a formal accredited residency program in radiology or diagnostic radiology.

(iii) *Certified B Reader* means that the physician has demonstrated ongoing proficiency in evaluating chest radiographs for radiographic quality and in the use of the ILO classification for interpreting chest radiographs for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the National Institute for Occupational Safety and Health (NIOSH), and has maintained that certification through the date the interpretation is made. *See* 42 CFR 37.52(b).

(3) A description and interpretation of the findings in terms of the ILO classification described in paragraph (d) of this section.

(4) A statement that the X-ray was interpreted in compliance with this section.

(f) Radiograph Submission: For film X-rays, the original film on which the X-ray report is based must be supplied to OWCP. For digital X-rays, a copy of the original digital object upon which the X-ray report is based, formatted to meet the standards for transmission of

diagnostic chest images set forth in Appendix A, paragraph (d), must be provided to OWCP on a DVD or other media specified by OWCP. In cases where the law prohibits the parties or a physician from supplying the original film or a copy of the digital image, the report will be considered as evidence only if the original film or digital image is otherwise available to OWCP and the other parties.

(g) Where the chest X-ray of a deceased miner has been lost or destroyed, or is otherwise unavailable, a report of the chest X-ray submitted by any party may be considered in connection with the claim.

(h) Except as provided in this paragraph (h), no chest X-ray may constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section and Appendix A. In the absence of evidence to the contrary, compliance with the requirements of Appendix A must be presumed. In the case of a deceased miner where the only available X-ray does not substantially comply with paragraphs (a) through (e) of this section, the X-ray may form the basis for a finding of the presence or absence of pneumoconiosis if it is of sufficient quality for determining whether pneumoconiosis is present and it was interpreted by a Board-certified radiologist, Board-eligible radiologist, or Certified B Reader.

[79 FR 21612, Apr. 17, 2014]

§ 718.103 Pulmonary function tests.

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing). The report shall provide the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC). The report shall also provide the FEV1/FVC ratio, expressed as a percentage. If the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1.

(b) All pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient. Pulmonary function test results developed in connection with a claim for benefits shall also include a statement signed by the physician or technician conducting the test setting forth the following:

(1) Date and time of test;

(2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;

(3) Name of technician;

(4) Name and signature of physician supervising the test;

(5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person executing the report shall set forth the reasons for such failure;

(6) Paper speed of the instrument used;

(7) Name of the instrument used;

(8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and

(9) That the requirements of paragraphs (b) and (c) of this section have been complied with.

(c) Except as provided in this paragraph, no results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed. In the case of a deceased miner, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for

a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner.

§ 718.104 Report of physical examinations.

(a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the Office or in a manner containing substantially the same information. Any such report shall include the following information and test results:

(1) The miner's medical and employment history;

(2) All manifestations of chronic respiratory disease;

(3) Any pertinent findings not specifically listed on the form;

(4) If heart disease secondary to lung disease is found, all symptoms and significant findings;

(5) The results of a chest X-ray conducted and interpreted as required by § 718.102; and

(6) The results of a pulmonary function test conducted and reported as required by § 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to § 718.304, the report must be based on other medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a), a report of physical examination may be based on any other procedures such as electrocardiogram, blood-gas studies conducted and reported as required by § 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

(c) In the case of a deceased miner, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

(d) *Treating physician.* In weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis, the adjudication officer must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's treating physician:

(1) *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

§ 718.105 Arterial blood-gas studies.

(a) Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. No blood-gas study shall be performed if medically contraindicated.

(b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

(c) Any report of a blood-gas study submitted in connection with a claim shall specify:

(1) Date and time of test;

(2) Altitude and barometric pressure at which the test was conducted;

(3) Name and DOL claim number of the claimant;

(4) Name of technician;

(5) Name and signature of physician supervising the study;

(6) The recorded values for PC02, P02, and PH, which have been collected simultaneously (specify values at rest and, if performed, during exercise);

(7) Duration and type of exercise;

(8) Pulse rate at the time the blood sample was drawn;

(9) Time between drawing of sample and analysis of sample; and

(10) Whether equipment was calibrated before and after each test.

(d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death. (e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with paragraphs (a), (b), and (c), noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's death.

§ 718.106 Autopsy; biopsy.

(a) A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

(b) In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A noncomplying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

§ 718.107 Other medical evidence.

(a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

(b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

Subpart C—Determining Entitlement to Benefits

SOURCE: 65 FR 80045, Dec. 20, 2000, unless otherwise noted.

§ 718.201 Definition of pneumoconiosis.

(a) For the purpose of the Act, ''pneumoconiosis'' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or ''clinical'', pneumoconiosis and statutory, or ''legal'', pneumoconiosis.

(1) *Clinical Pneumoconiosis.* ''Clinical pneumoconiosis'' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.,* the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis.* ''Legal pneumoconiosis'' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease ''arising out of coal mine employment'' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, ''pneumoconiosis'' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows in paragraphs (a)(1) through (4) of this section:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration must be given to the radiological qualifications of the physicians interpreting such X-rays (*see* § 718.102(d)).

(2) A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, must not be considered sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy must be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in § 718.304 or § 718.305 are applicable, it must be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding must be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding must be supported by a reasoned medical opinion.

(b) A claim for benefits must not be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis must not be made—

(1) Solely on the basis of a living miner's statements or testimony; or

(2) In a claim involving a deceased miner, solely on the basis of the affidavit(s) (or equivalent testimony) of

the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

[79 FR 21612, Apr. 17, 2014]

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

(b)(1) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption described in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

(i) From performing his or her usual coal mine work; and

(ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(2) *Medical criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:

(i) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV1 test; if, in addition, such tests also reveal the values specified in either paragraph (b)(2)(i)(A) or (B) or (C) of this section:

(A) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(B) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(C) A percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC test (FEV1/FVC equal to or less than 55%), or

(ii) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(iii) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure, or

(iv) Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be

found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

(c)(1) *Total disability due to pneumoconiosis defined.* A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a ''substantially contributing cause'' of the miner's disability if it:

(i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

(2) Except as provided in § 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

(d) *Lay evidence.* In establishing total disability, lay evidence may be used in the following cases:

(1) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition.

(2) In a case involving a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, which is subject to § 718.306, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total or partial disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

(3) In a case involving a deceased miner whose claim was filed on or after January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(4) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.

(5) In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine

shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels of rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

§ 718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. In order to receive benefits based on a showing of death due to pneumoconiosis, a claimant must prove that:

(1) The miner had pneumoconiosis (*see* § 718.202);

(2) The miner's pneumoconiosis arose out of coal mine employment (*see* § 718.203); and

(3) The miner's death was due to pneumoconiosis as provided by this section.

(b) Death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 is applicable, or

(4) For survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the presumption at § 718.305 is invoked and not rebutted.

(5) However, except where the § 718.304 presumption is invoked, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury (including suicide) or the principal cause of death was a medical condition not related to pneumoconiosis, unless the claimant establishes (by proof or presumption) that pneumoconiosis was a substantially contributing cause of death.

(6) Pneumoconiosis is a ''substantially contributing cause'' of a miner's death if it hastens the miner's death.

[78 FR 59114, Sept. 25, 2013]

§ 718.206 Effect of findings by persons or agencies.

Decisions, statements, reports, opinions, or the like, of agencies, organizations, physicians or other individuals, about the existence, cause, and extent of a miner's disability, or the cause of a miner's death, are admissible. If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

Subpart D—Presumptions Applicable to Eligibility Determinations

SOURCE: 65 FR 80045, Dec. 20, 2000, unless otherwise noted.

§ 718.301 Establishing length of employment as a miner.

The presumptions set forth in §§ 718.302 and 718.305 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of the miner's coal mine work history must be computed as provided by 20 CFR 725.101(a)(32).

[78 FR 59114, Sept. 25, 2013]

§ 718.302 Relationship of pneumoconiosis to coal mine employment.

If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. (See § 718.203.)

§ 718.303 [Reserved]

§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (*see* § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C in accordance with the classification system established in Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses as provided in § 718.102(d); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* that any diagnosis made under this paragraph must accord with acceptable medical procedures.

[79 FR 21613, Apr. 17, 2014]

§ 718.305 Presumption of pneumoconiosis.

(a) *Applicability*. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

(b) *Invocation*. (1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) The miner or survivor cannot establish entitlement under § 718.304 by means of chest x-ray evidence; and

(iii) The miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) does not apply.

(2) The conditions in a mine other than an underground mine will be considered ''substantially similar'' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.

(4) In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(c) *Facts presumed*. Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) In a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) *Rebuttal*—(1) *Miner's claim*. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in § 718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201.

(2) *Survivor's claim.* In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner did not have:

(A) Legal pneumoconiosis as defined in § 718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (*see* § 718.203); or

(ii) Establishing that no part of the miner's death was caused by pneumoconiosis as defined in § 718.201.

(3) The presumption must not be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

[78 FR 59114, Sept. 25, 2013]

§ 718.306 [Reserved]

APPENDIX A TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF CHEST RADIOGRAPHS (X-RAYS)

The following standards are established in accordance with sections 402(f)(1)(D) and 413(b) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention in the Department of Health and Human Services. These standards are promulgated for the guidance of physicians and medical technicians to ensure that uniform procedures are used in administering and interpreting X-rays and that the best available medical evidence will be submitted in connection with a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be assigned to the physician's report of an X-ray.

(a) *Definitions.* (1) *Digital radiography systems,* as used in this context, include both digital radiography (DR) and computed radiography (CR). Digital radiography is the term used for digital X-ray image acquisition systems in which the X-ray signals received by the image detector are converted nearly instantaneously to electronic signals without moveable cassettes. Computed radiography is the term for digital X-ray image acquisition systems that detect X-ray signals using a cassette-based photostimulable storage phosphor. Subsequently, the cassette is processed using a stimulating laser beam to convert the latent radiographic image to electronic signals which are then processed and stored so they can be displayed.

(2) *Qualified medical physicist* means an individual who is trained in evaluating the performance of radiographic equipment including radiation controls and facility quality assurance programs, and has the relevant current certification by a competent U.S. national board, or unrestricted license or approval from a U.S. State or Territory.

(3) *Radiographic technique chart* means a table that specifies the types of cassette, intensifying screen, film or digital detector, grid, filter, and lists X-ray machine settings (timing, kVp, mA) that enables the radiographer to select the correct settings based on the body habitus or the thickness of the chest tissue.

(4) *Radiologic technologist* means an individual who has met the requirements for privileges to perform general radiographic procedures and for competence in using the equipment and software employed by the examining facility to obtain chest images as specified by the State or Territory and examining facility in which such services are provided. Optimally, such an individual will have completed a formal training program in radiography leading to a certificate, an associate's degree, or a bachelor's degree and participated in the voluntary initial certification and annual renewal of registration for radiologic technologists offered by the American Registry of Radiologic Technologists.

(5) *Soft copy* means the image of a coal miner's chest radiograph acquired using a digital radiography system, viewed at the full resolution of the image acquisition system using an electronic medical image display device.

(b) *General provisions.* (1) Facilities must maintain ongoing licensure and certification under relevant local, State, and Federal laws and regulations for all digital equipment and related processes covered by this Appendix. Radiographic equipment, its use and the facilities (including mobile facilities) in which such equipment is used must conform to applicable State or Territorial and Federal regulations. Where no applicable regulations exist regarding reducing the risk from ionizing radiation exposure in the clinical setting, radiographic equipment, its use and the facilities (including mobile facilities) in which such equipment is used should conform to the recommendations in NCRP Report No. 102, NCRP Report No. 105, and NCRP Report No. 147 (incorporated by reference, *see* § 718.5).

(2) Chest radiographs of miners must be performed:

(i) By or under the supervision of a physician who makes chest radiographs in the

normal course of practice and who has demonstrated ability to make chest radiographs of a quality to best ascertain the presence of pneumoconiosis; or

(ii) By a radiologic technologist.

(3) Miners must be disrobed from the waist up at the time the radiograph is given. The facility must provide a dressing area and for those miners who wish to use one, the facility will provide a clean gown. Facilities must be heated to a comfortable temperature.

(4) Before the miner is advised that the examination is concluded, the radiograph must be processed and inspected and accepted for quality standards by the physician, or if the physician is not available, acceptance may be made by the radiologic technologist. In a case of a substandard radiograph, another must be made immediately.

(c) *Chest radiograph specifications—film.* (1) Every chest radiograph must be a single posteroanterior projection at full inspiration on a film being no less than 14 by 17 inch film. Additional chest films or views must be obtained if they are necessary for clarification and classification. The film and cassette must be capable of being positioned both vertically and horizontally so that the chest radiograph will include both apices and costophrenic angles. If a miner is too large to permit the above requirements, then a projection with minimum loss of costophrenic angle must be made.

(2) Radiographs must be made with a diagnostic X-ray machine having a rotating anode tube with a maximum of a 2 mm source (focal spot).

(3) Except as provided in paragraph (c)(4) of this appendix, radiographs must be made with units having generators that comply with the following:

(i) Generators of existing radiographic units acquired by the examining facility prior to July 27, 1973, must have a minimum rating of 200 mA at 100 kVp;

(ii) Generators of units acquired subsequent to that date must have a minimum rating of 300 mA at 125 kVp. A generator with a rating of 150 kVp is recommended.

(4) Radiographs made with battery-powered mobile or portable equipment must be made with units having a minimum rating of 100 mA at 110 kVp at 500 Hz, or 200 mA at 110 kVp at 60 Hz.

(5) Capacitor discharge and field emission units may be used.

(6) Radiographs must be given only with equipment having a beam-limiting device that does not cause large unexposed boundaries. The use of such a device must be discernible from an examination of the radiograph.

(7) To ensure high quality chest radiographs:

(i) The maximum exposure time must not exceed 50 milliseconds except that with single phase units with a rating less than 300 mA at 125 kVp and subjects with chests over 28 cm postero-anterior, the exposure may be increased to not more than 100 milliseconds;

(ii) The source or focal spot to film distance must be at least 6 feet.

(iii) Medium-speed film and medium-speed intensifying screens are recommended. However, any film-screen combination, the rated ''speed'' of which is at least 100 and does not exceed 300, which produces radiographs with spatial resolution, contrast, latitude and quantum mottle similar to those of systems designated as ''medium speed'' may be employed;

(iv) Film-screen contact must be maintained and verified at 6-month or shorter intervals.

(v) Intensifying screens must be inspected at least once a month and cleaned when necessary by the method recommended by the manufacturer;

(vi) All intensifying screens in a cassette must be of the same type and made by the same manufacturer;

(vii) When using over 90 kV, a suitable grid or other means of reducing scattered radiation must be used;

(viii) The geometry of the radiographic system must ensure that the central axis (ray) of the primary beam is perpendicular to the plane of the film surface and impinges on the center of the film.

(8) Radiographic processing:

(i) Either automatic or manual film processing is acceptable. A constant time-temperature technique must be meticulously employed for manual processing.

(ii) If mineral or other impurities in the processing water introduce difficulty in obtaining a high-quality radiograph, a suitable filter or purification system must be used.

(9) An electric power supply must be used that complies with the voltage, current, and regulation specified by the manufacturer of the machine.

(10) A test object may be required on each radiograph for an objective evaluation of film quality at the discretion of the Department of Labor.

(11) Each radiograph made under this Appendix must be permanently and legibly marked with the name and address of the facility at which it is made, the miner's DOL claim number, the date of the radiograph, and left and right side of the film. No other identifying markings may be recorded on the radiograph.

(d) *Chest radiograph specifications—digital radiography systems.* (1) Every digital chest radiograph must be a single posteroanterior projection at full inspiration on a digital detector with sensor area being no less than 1505 square centimeters with a minimum width of 35 cm. The imaging plate must have a maximum pixel pitch of 200 μm, with a minimum bit depth of 10. Spatial resolution

must be at least 2.5 line pairs per millimeter. The storage phosphor cassette or digital image detector must be positioned either vertically or horizontally so that the image includes the apices and costophrenic angles of both right and left lungs. If the detector cannot include the apices and costophrenic angles of both lungs as described, then the two side-by-side images can be obtained that together include the apices and costophrenic angles of both right and left lungs.

(2) Radiographs must be made with a diagnostic X-ray machine with a maximum actual (not nominal) source (focal spot) of 2 mm, as measured in two orthogonal directions.

(3) Radiographs must be made with units having generators which have a minimum rating of 300 mA at 125 kVp. Exposure kilovoltage must be at least the minimum as recommended by the manufacturer for chest radiography.

(4) An electric power supply must be used that complies with the voltage, current, and regulation specified by the manufacturer of the machine. If the manufacturer or installer of the radiographic equipment recommends equipment for control of electrical power fluctuations, such equipment must be used as recommended.

(5) Radiographs must be obtained only with equipment having a beam-limiting device that does not cause large unexposed boundaries. The beam limiting device must provide rectangular collimation. Electronic post-image acquisition ''shutters'' available on some CR or DR systems that limit the size of the final image and that simulate collimator limits must not be used. The use and effect of the beam limiting device must be discernible on the resulting image.

(6) Radiographic technique charts must be used that are developed specifically for the X-ray system and detector combinations used, indicating exposure parameters by anatomic measurements.

(7) To ensure high quality chest radiographs:

(i) The maximum exposure time must not exceed 50 milliseconds except for subjects with chests over 28 cm posteroanterior, for whom the exposure time must not exceed 100 milliseconds.

(ii) The distance from source or focal spot to detector must be at least 70 inches (or 180 centimeters if measured in centimeters).

(iii) The exposure setting for chest images must be within the range of 100–300 equivalent exposure speeds and must comply with ACR Practice Guidelines for Diagnostic Reference Levels in Medical X-ray Imaging, Section V—Diagnostic Reference Levels for Imaging with Ionizing Radiation and Section VII-Radiation Safety in Imaging (incorporated by reference, *see* §718.5). Radiation exposures should be periodically measured and patient radiation doses estimated by the medical physicist to assure doses are as low as reasonably achievable.

(iv) Digital radiography system performance, including resolution, modulation transfer function (MTF), image signal-to-noise and detective quantum efficiency must be evaluated and judged acceptable by a qualified medical physicist using the specifications in AAPM Report No. 93, pages 1–68 (incorporated by reference, *see* §718.5). Image management software and settings for routine chest imaging must be used, including routine amplification of digital detector signal as well as standard image post-processing functions. Image or edge enhancement software functions must not be employed unless they are integral to the digital radiography system (not elective); in such cases, only the minimum image enhancement permitted by the system may be employed.

(v)(A) The image object, transmission and associated data storage, film format, and transmissions of associated information must conform to the following components of the Digital Imaging and Communications in Medicine (DICOM) standard (incorporated by reference, *see* §718.5):

(*1*) DICOM Standard PS 3.3–2011, Annex A—Composite Information Object Definitions, sections: Computed Radiographic Image Information Object Definition; Digital X-Ray Image Information Object Definition; X-Ray Radiation Dose SR Information Object Definition; and Grayscale Softcopy Presentation State Information Object Definition.

(*2*) DICOM Standard PS 3.4–2011: Annex B—Storage Service Class; Annex N—Softcopy Presentation State Storage SOP Classes; Annex O—Structured Reporting Storage SOP Classes.

(*3*) DICOM Standard PS 3.10–2011.

(*4*) DICOM Standard PS 3.11–2011.

(*5*) DICOM Standard PS 3.12–2011.

(*6*) DICOM Standard PS 13.14–2011.

(*7*) DICOM Standard PS 3.16–2011.

(B) Identification of each miner, chest image, facility, date and time of the examination must be encoded within the image information object, according to DICOM Standard PS 3.3–2011, Information Object Definitions, for the DICOM ''DX'' object. If data compression is performed, it must be lossless. Exposure parameters (kVp, mA, time, beam filtration, scatter reduction, radiation exposure) must be stored in the DX information object.

(C) Exposure parameters as defined in the DICOM Standard PS 3.16–2011 must additionally be provided when such parameters are available from the facility digital image acquisition system or recorded in a written report or electronic file and transmitted to OWCP.

(8) A specific test object may be required on each radiograph for an objective evaluation of image quality at the Department of Labor's discretion.

(9) CR imaging plates must be inspected at least once a month and cleaned when necessary by the method recommended by the manufacturer.

(10) A grid or air gap for reducing scattered radiation must be used; grids must not be used that cause Moiré interference patterns in either horizontal or vertical images.

(11) The geometry of the radiographic system must ensure that the central axis (ray) of the primary beam is perpendicular to the plane of the CR imaging plate or DR detector and is correctly aligned to the grid.

(12) Radiographs must not be made when the environmental temperatures and humidity in the facility are outside the manufacturer's recommended range of the CR and DR equipment to be used.

(13) All interpreters, whenever classifying digitally acquired chest radiographs, must have immediately available for reference a complete set of ILO standard digital chest radiographic images provided for use with the Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses (2011 Revision) (incorporated by reference, *see* §718.5). Modification of the appearance of the standard images using software tools is not permitted.

(14) Viewing systems should enable readers to display the coal miner's chest image at the full resolution of the image acquisition system, side-by-side with the selected ILO standard images for comparison.

(i)(A) Image display devices must be flat panel monitors displaying at least 3 MP at 10 bit depth. Image displays and associated graphics cards must meet the calibration and other specifications of the Digital Imaging and Communications in Medicine (DICOM) standard PS 3.14–2011 (incorporated by reference, *see* §718.5).

(B) Image displays and associated graphics cards must not deviate by more than 10 percent from the grayscale standard display function (GSDF) when assessed according to the AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* §718.5).

(ii) Display system luminance (maximum and ratio), relative noise, linearity, modulation transfer function (MTF), frequency, and glare should meet or exceed recommendations listed in AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* §718.5). Viewing displays must have a maximum luminance of at least 171 cd/m^2, a ratio of maximum luminance to minimum luminance of at least 250, and a glare ratio greater than 400. The contribution of ambient light reflected from the display surface, after light sources have been minimized, must be included in luminance measurements.

(iii) Displays must be situated so as to minimize front surface glare. Readers must minimize reflected light from ambient sources during the performance of classifications.

(iv) Measurements of the width and length of pleural shadows and the diameter of opacities must be taken using calibrated software measuring tools. If permitted by the viewing software, a record must be made of the presentation state(s), including any noise reduction and edge enhancement or restoration functions that were used in performing the classification, including any annotations and measurements.

(15) Quality control procedures for devices used to display chest images for classification must comply with the recommendations of the American Association of Physicists in Medicine AAPM On-Line Report No. 03, pages 1–146 (incorporated by reference, *see* §718.5). If automatic quality assurance systems are used, visual inspection must be performed using one or more test patterns recommended by the medical physicist every 6 months, or more frequently, to check for defects that automatic systems may not detect.

(16) Classification of CR and DR digitally-acquired chest radiographs under this Part must be performed based on the viewing images displayed as soft copies using the viewing workstations specified in this section. Classification of radiographs must not be based on the viewing of hard copy printed transparencies of images that were digitally-acquired.

(17) The classification of chest radiographs based on digitized copies of chest radiographs that were originally acquired using film-screen techniques is not permissible.

[79 FR 21613, Apr. 17, 2014]

APPENDIX B TO PART 718—STANDARDS FOR ADMINISTRATION AND INTERPRETATION OF PULMONARY FUNCTION TESTS. TABLES B1, B2, B3, B4, B5, B6.

The following standards are established in accordance with section 402(f)(1)(D) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health (NIOSH). These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting ventilatory function tests and that the best available medical evidence will be submitted in support of a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests.

(1) Instruments to be used for the administration of pulmonary function tests shall be approved by NIOSH and shall conform to the following criteria:

(i) The instrument shall be accurate within ±50 ml or within ±3 percent of reading, whichever is greater.

(ii) The instrument shall be capable of measuring vital capacity from 0 to 7 liters BTPS.

(iii) The instrument shall have a low inertia and offer low resistance to airflow such that the resistance to airflow at 12 liters per second must be less than 1.5 cm H20/liter/sec.

(iv) The instrument or user of the instrument must have a means of correcting volumes to body temperature saturated with water vapor (BTPS) under conditions of varying ambient spirometer temperatures and barometric pressures.

(v) The instrument used shall provide a tracing of flow versus volume (flow-volume loop) which displays the entire maximum inspiration and the entire maximum forced expiration. The instrument shall, in addition, provide tracings of the volume versus time tracing (spirogram) derived electronically from the flow-volume loop. Tracings are necessary to determine whether maximum inspiratory and expiratory efforts have been obtained during the FVC maneuver. If maximum voluntary ventilation is measured, the tracing shall record the individual breaths volumes versus time.

(vi) The instrument shall be capable of accumulating volume for a minimum of 10 seconds after the onset of exhalation.

(vii) The instrument must be capable of being calibrated in the field with respect to the FEV1. The volume calibration shall be accomplished with a 3 L calibrating syringe and should agree to within 1 percent of a 3 L calibrating volume. The linearity of the instrument must be documented by a record of volume calibrations at three different flow rates of approximately 3 L/6 sec, 3 L/3 sec, and 3 L/sec.

(viii) For measuring maximum voluntary ventilation (MVV) the instrument shall have a response which is flat within ±10 percent up to 4 Hz at flow rates up to 12 liters per second over the volume range.

(ix) The spirogram shall be recorded at a speed of at least 20 mm/sec and a volume excursion of at least 10mm/L. Calculation of the FEVl from the flow-volume loop is not acceptable. Original tracings shall be submitted.

(2) The administration of pulmonary function tests shall conform to the following criteria:

(i) Tests shall not be performed during or soon after an acute respiratory illness.

(ii) For the FEV1 and FVC, use of a nose clip is required. The procedures shall be explained in simple terms to the patient who shall be instructed to loosen any tight clothing and stand in front of the apparatus. The subject may sit, or stand, but care should be taken on repeat testing that the same position be used. Particular attention shall be given to insure that the chin is slightly elevated with the neck slightly extended. The subject shall be instructed to expire completely, momentarily hold his breath, place the mouthpiece in his mouth and close the mouth firmly about the mouthpiece to ensure no air leak. The subject will than make a maximum inspiration from the instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort. A minimum of three flow-volume loops and derived spirometric tracings shall be carried out. The patient shall be observed throughout the study for compliance with instructions. Inspiration and expiration shall be checked visually for reproducibility. The effort shall be judged unacceptable when the patient:

(A) Has not reached full inspiration preceding the forced expiration; or

(B) Has not used maximal effort during the entire forced expiration; or

(C) Has not continued the expiration for least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; or

(D) Has coughed or closed his glottis; or

(E) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). Peak flow should be attained at the start of expiration and the volume-time tracing (spirogram) should have a smooth contour revealing gradually decreasing flow throughout expiration; or

(G) Has an excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.

(iii) For the MVV, the subject shall be instructed before beginning the test that he or she will be asked to breathe as deeply and as rapidly as possible for approximately 15 seconds. The test shall be performed with the subject in the standing position, if possible. Care shall be taken on repeat testing that the same position be used. The subject shall breathe normally into the mouthpiece of the

apparatus for 10 to 15 seconds to become accustomed to the system. The subject shall then be instructed to breathe as deeply and as rapidly as possible, and shall be continually encouraged during the remainder of the maneuver. Subject shall continue the maneuver for 15 seconds. At least 5 minutes of rest shall be allowed between maneuvers. At least three MVV's shall be carried out. (*But see* §718.103(b).) During the maneuvers the patient shall be observed for compliance with instructions. The effort shall be judged unacceptable when the patient:

(A) Has not maintained consistent effort for at least 12 to 15 seconds; or

(B) Has coughed or closed his glottis; or

(C) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(D) Has an excessive variability between the three acceptable curves. The variation between the two largest MVVs of the three satisfactory tracings shall not exceed 10 percent.

(iv) A calibration check shall be performed on the instrument each day before use, using a volume source of at least three liters, accurate to within ±1 percent of full scale. The volume calibration shall be performed in accordance with the method described in paragraph (1)(vii) of this Appendix. Accuracy of the time measurement used in determining the FEV1 shall be checked using the manufacturer's stated procedure and shall be within ±3 percent of actual. The procedure described in the Appendix shall be performed as well as any other procedures suggested by the manufacturer of the spirometer being used.

(v)(A) The first step in evaluating a spirogram for the FVC and FEV1 shall be to determine whether or not the patient has performed the test properly or as described in (2)(ii) of this Appendix. The largest recorded FVC and FEV1, corrected to BTPS, shall be used in the analysis.

(B) Only MVV maneuvers which demonstrate consistent effort for at least 12 seconds shall be considered acceptable. The largest accumulated volume for a 12 second period corrected to BTPS and multiplied by five or the largest accumulated volume for a 15 second period corrected to BTPS and multiplied by four is to be reported as the MVV.

PREDICTION EQUATIONS FOR FEV1 MALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	1.85	1.88	1.90	1.75	1.74	1.72	1.70	1.69	1.67	1.66	1.64	1.62	1.61	1.59	1.58	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.45	1.43	1.41
59.4	1.88	1.90	1.93	1.78	1.77	1.75	1.74	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.44
59.8	1.90	1.93	1.96	1.82	1.80	1.78	1.77	1.75	1.73	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.52	1.51	1.49	1.48
60.2	1.93	1.96	1.99	1.85	1.83	1.81	1.80	1.78	1.77	1.75	1.73	1.72	1.70	1.68	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.56	1.54	1.52	1.51
60.6	1.96	1.99	2.01	1.88	1.86	1.85	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.72	1.70	1.68	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.55	1.54
61.0	1.99	2.01	2.04	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.71	1.70	1.68	1.67	1.65	1.63	1.62	1.60	1.59	1.57
61.4	2.01	2.04	2.07	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.75	1.73	1.71	1.70	1.68	1.67	1.65	1.63	1.62	1.60
61.8	2.04	2.07	2.10	1.97	1.96	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.70	1.68	1.66	1.65	1.63
62.2	2.07	2.10	2.12	2.00	1.99	1.97	1.95	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.70	1.68	1.66
62.6	2.10	2.12	2.15	2.03	2.02	2.00	1.99	1.97	1.95	1.94	1.92	1.90	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.77	1.76	1.74	1.73	1.71	1.69
63.0	2.13	2.15	2.18	2.07	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.94	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.81	1.79	1.77	1.76	1.74	1.73
63.4	2.15	2.18	2.21	2.10	2.08	2.06	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.80	1.79	1.77	1.76
63.8	2.18	2.21	2.23	2.13	2.11	2.10	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.84	1.82	1.80	1.79
64.2	2.21	2.24	2.26	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.96	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.83	1.82
64.6	2.24	2.26	2.29	2.19	2.17	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.04	2.03	2.01	2.00	1.98	1.96	1.95	1.93	1.91	1.90	1.88	1.87	1.85
65.0	2.26	2.29	2.32	2.22	2.20	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.08	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.95	1.93	1.91	1.90	1.88
65.4	2.29	2.32	2.34	2.25	2.24	2.22	2.20	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.94	1.93	1.91
65.7	2.32	2.35	2.37	2.28	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.02	2.01	1.99	1.98	1.96	1.94
66.1	2.35	2.37	2.40	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.06	2.04	2.02	2.01	1.99	1.97
66.5	2.37	2.40	2.43	2.35	2.33	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.18	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.05	2.04	2.02	2.01
66.9	2.40	2.43	2.46	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.09	2.07	2.05	2.04
67.3	2.43	2.46	2.48	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.08	2.07
67.7	2.46	2.48	2.51	2.44	2.42	2.41	2.39	2.37	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.16	2.15	2.13	2.12	2.10
68.1	2.48	2.51	2.54	2.47	2.45	2.44	2.42	2.41	2.39	2.37	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.20	2.18	2.16	2.15	2.13
68.5	2.51	2.54	2.57	2.50	2.49	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.19	2.18	2.16
68.9	2.54	2.57	2.59	2.53	2.52	2.50	2.48	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.23	2.21	2.19
69.3	2.57	2.59	2.62	2.56	2.55	2.53	2.52	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.22
69.7	2.59	2.62	2.65	2.60	2.58	2.56	2.55	2.53	2.51	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.30	2.29	2.27	2.26
70.1	2.62	2.65	2.68	2.63	2.61	2.59	2.58	2.56	2.55	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.34	2.32	2.30	2.29
70.5	2.65	2.68	2.70	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.33	2.32
70.9	2.68	2.70	2.73	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.49	2.48	2.46	2.45	2.43	2.41	2.40	2.38	2.37	2.35
71.3	2.70	2.73	2.76	2.72	2.70	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.53	2.51	2.49	2.48	2.46	2.45	2.43	2.41	2.40	2.38
71.7	2.73	2.76	2.79	2.75	2.74	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.48	2.46	2.44	2.43	2.41
72.0	2.76	2.79	2.81	2.78	2.77	2.75	2.73	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.47	2.46	2.44
72.4	2.79	2.81	2.84	2.81	2.80	2.78	2.77	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.55	2.54	2.52	2.51	2.49	2.47
72.8	2.82	2.84	2.87	2.85	2.83	2.81	2.80	2.78	2.76	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.59	2.57	2.55	2.54	2.52	2.50
73.2	2.84	2.87	2.90	2.88	2.86	2.84	2.83	2.81	2.80	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.58	2.57	2.55	2.54
73.6	2.87	2.90	2.92	2.91	2.89	2.88	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.66	2.65	2.63	2.62	2.60	2.58	2.57
74.0	2.90	2.93	2.95	2.94	2.92	2.91	2.89	2.87	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.74	2.73	2.71	2.70	2.68	2.66	2.65	2.63	2.61	2.60
74.4	2.93	2.95	2.98	2.97	2.95	2.94	2.92	2.91	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.78	2.76	2.74	2.73	2.71	2.69	2.68	2.66	2.65	2.63
74.8	2.95	2.98	3.01	3.00	2.99	2.97	2.95	2.94	2.92	2.90	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.73	2.71	2.69	2.68	2.66
75.2	2.98	3.01	3.03	3.03	3.02	3.00	2.98	2.97	2.95	2.94	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69
75.6	3.01	3.04	3.06	3.06	3.05	3.03	3.02	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.76	2.74	2.72
76.0	3.04	3.06	3.09	3.09	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.75
76.4	3.06	3.09	3.12	3.13	3.11	3.09	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.79
76.8	3.09	3.12	3.15	3.16	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.87	2.85	2.83	2.82
77.2	3.12	3.15	3.17	3.19	3.17	3.16	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.86	2.85
77.6	3.15	3.17	3.20	3.22	3.20	3.19	3.17	3.15	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.94	2.93	2.91	2.90	2.88
78.0	3.17	3.20	3.23	3.25	3.23	3.22	3.20	3.19	3.17	3.15	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.98	2.96	2.94	2.93	2.91
78.3	3.20	3.23	3.26	3.28	3.27	3.25	3.23	3.22	3.20	3.18	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.97	2.96	2.94
78.7	3.23	3.26	3.28	3.31	3.30	3.28	3.26	3.25	3.23	3.22	3.20	3.18	3.17	3.15	3.14	3.12	3.10	3.09	3.07	3.05	3.04	3.02	3.01	2.99	2.97
79.1	3.26	3.28	3.31	3.34	3.33	3.31	3.30	3.28	3.26	3.25	3.23	3.21	3.20	3.18	3.17	3.15	3.13	3.12	3.10	3.09	3.07	3.05	3.04	3.02	3.00
79.5	3.28	3.31	3.34	3.38	3.36	3.34	3.33	3.31	3.29	3.28	3.26	3.25	3.23	3.21	3.20	3.18	3.17	3.15	3.13	3.12	3.10	3.08	3.07	3.05	3.04
79.9	3.31	3.34	3.37	3.41	3.39	3.37	3.36	3.34	3.33	3.31	3.29	3.28	3.26	3.24	3.23	3.21	3.20	3.18	3.16	3.15	3.13	3.12	3.10	3.08	3.07
80.3	3.34	3.37	3.39	3.44	3.42	3.41	3.39	3.37	3.36	3.34	3.32	3.31	3.29	3.28	3.26	3.24	3.23	3.21	3.19	3.18	3.16	3.15	3.13	3.11	3.10
80.7	3.37	3.39	3.42	3.47	3.45	3.44	3.42	3.40	3.39	3.37	3.36	3.34	3.32	3.31	3.29	3.27	3.26	3.24	3.23	3.21	3.19	3.18	3.16	3.15	3.13
81.1	3.39	3.42	3.45	3.50	3.48	3.47	3.45	3.44	3.42	3.40	3.39	3.37	3.35	3.34	3.32	3.31	3.29	3.27	3.26	3.24	3.22	3.21	3.19	3.18	3.16
81.5	3.42	3.45	3.48	3.53	3.52	3.50	3.48	3.47	3.45	3.43	3.42	3.40	3.39	3.37	3.35	3.34	3.32	3.30	3.29	3.27	3.26	3.24	3.22	3.21	3.19
81.9	3.45	3.48	3.50	3.56	3.55	3.53	3.51	3.50	3.48	3.47	3.45	3.43	3.42	3.40	3.38	3.37	3.35	3.34	3.32	3.30	3.29	3.27	3.25	3.24	3.22
82.3	3.48	3.50	3.53	3.59	3.58	3.56	3.55	3.53	3.51	3.50	3.48	3.46	3.45	3.43	3.42	3.40	3.38	3.37	3.35	3.33	3.32	3.30	3.29	3.27	3.25
82.7	3.51	3.53	3.56	3.63	3.61	3.59	3.58	3.56	3.54	3.53	3.51	3.50	3.48	3.46	3.45	3.43	3.41	3.40	3.38	3.37	3.35	3.33	3.32	3.30	3.29

PREDICTION EQUATIONS FOR FEV1 MALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
59.1	1.40	1.38	1.36	1.35	1.33	1.32	1.30	1.28	1.27	1.25	1.23	1.22	1.20	1.19	1.17	1.15	1.14	1.12	1.11	1.09	1.07	1.06	1.04	1.02	1.01
59.4	1.43	1.41	1.40	1.38	1.36	1.35	1.33	1.31	1.30	1.28	1.27	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14	1.12	1.10	1.09	1.07	1.06	1.04
59.8	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.35	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.14	1.12	1.10	1.09	1.07
60.2	1.49	1.47	1.46	1.44	1.43	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.30	1.28	1.26	1.25	1.23	1.22	1.20	1.18	1.17	1.15	1.13	1.12	1.10
60.6	1.52	1.51	1.49	1.47	1.46	1.44	1.42	1.41	1.39	1.38	1.36	1.34	1.33	1.31	1.29	1.28	1.26	1.25	1.23	1.21	1.20	1.18	1.17	1.15	1.13
61.0	1.55	1.54	1.52	1.50	1.49	1.47	1.46	1.44	1.42	1.41	1.39	1.37	1.36	1.34	1.33	1.31	1.29	1.28	1.26	1.25	1.23	1.21	1.20	1.18	1.16
61.4	1.58	1.57	1.55	1.54	1.52	1.50	1.49	1.47	1.45	1.44	1.42	1.41	1.39	1.37	1.36	1.34	1.32	1.31	1.29	1.28	1.26	1.24	1.23	1.21	1.20
61.8	1.62	1.60	1.58	1.57	1.55	1.53	1.52	1.50	1.49	1.47	1.45	1.44	1.42	1.40	1.39	1.37	1.36	1.34	1.32	1.31	1.29	1.28	1.26	1.24	1.23
62.2	1.65	1.63	1.61	1.60	1.58	1.57	1.55	1.53	1.52	1.50	1.48	1.47	1.45	1.44	1.42	1.40	1.39	1.37	1.35	1.34	1.32	1.31	1.29	1.27	1.26
62.6	1.68	1.66	1.65	1.63	1.61	1.60	1.58	1.56	1.55	1.53	1.52	1.50	1.48	1.47	1.45	1.43	1.42	1.40	1.39	1.37	1.35	1.34	1.32	1.31	1.29
63.0	1.71	1.69	1.68	1.66	1.64	1.63	1.61	1.60	1.58	1.56	1.55	1.53	1.51	1.50	1.48	1.47	1.45	1.43	1.42	1.40	1.38	1.37	1.35	1.34	1.32
63.4	1.74	1.72	1.71	1.69	1.68	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.55	1.53	1.51	1.50	1.48	1.46	1.45	1.43	1.42	1.40	1.38	1.37	1.35
63.8	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.63	1.61	1.59	1.58	1.56	1.54	1.53	1.51	1.50	1.48	1.46	1.45	1.43	1.41	1.40	1.38
64.2	1.80	1.79	1.77	1.75	1.74	1.72	1.71	1.69	1.67	1.66	1.64	1.62	1.61	1.59	1.58	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.45	1.43	1.41
64.6	1.83	1.82	1.80	1.78	1.77	1.75	1.74	1.72	1.70	1.69	1.67	1.66	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.53	1.51	1.49	1.48	1.46	1.44
65.0	1.86	1.85	1.83	1.82	1.80	1.78	1.77	1.75	1.74	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.61	1.59	1.57	1.56	1.54	1.52	1.51	1.49	1.48
65.4	1.90	1.88	1.86	1.85	1.83	1.81	1.80	1.78	1.77	1.75	1.73	1.72	1.70	1.69	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.56	1.54	1.52	1.51
65.7	1.93	1.91	1.89	1.88	1.86	1.85	1.83	1.81	1.80	1.78	1.77	1.75	1.73	1.72	1.70	1.68	1.67	1.65	1.64	1.62	1.60	1.59	1.57	1.55	1.54
66.1	1.96	1.94	1.93	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.72	1.70	1.68	1.67	1.65	1.63	1.62	1.60	1.59	1.57
66.5	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.80	1.78	1.76	1.75	1.73	1.71	1.70	1.68	1.67	1.65	1.63	1.62	1.60
66.9	2.02	2.00	1.99	1.97	1.96	1.94	1.92	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.75	1.73	1.71	1.70	1.68	1.66	1.65	1.63
67.3	2.05	2.04	2.02	2.00	1.99	1.97	1.95	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.83	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.70	1.68	1.66
67.7	2.08	2.07	2.05	2.03	2.02	2.00	1.99	1.97	1.95	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.69
68.1	2.11	2.10	2.08	2.07	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.94	1.92	1.90	1.89	1.87	1.86	1.84	1.82	1.81	1.79	1.77	1.76	1.74	1.73
68.5	2.15	2.13	2.11	2.10	2.08	2.06	2.05	2.03	2.02	2.00	1.98	1.97	1.95	1.94	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.81	1.79	1.77	1.76
68.9	2.18	2.16	2.14	2.13	2.11	2.10	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.89	1.87	1.85	1.84	1.82	1.80	1.79
69.3	2.21	2.19	2.18	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.05	2.03	2.01	2.00	1.98	1.97	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.84	1.82
69.7	2.24	2.22	2.21	2.19	2.17	2.16	2.14	2.13	2.11	2.09	2.08	2.06	2.04	2.03	2.01	2.00	1.98	1.96	1.95	1.93	1.92	1.90	1.88	1.87	1.85
70.1	2.27	2.25	2.24	2.22	2.21	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.08	2.06	2.04	2.03	2.01	2.00	1.98	1.96	1.95	1.93	1.91	1.90	1.88
70.5	2.30	2.29	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.16	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.95	1.93	1.91
70.9	2.33	2.32	2.30	2.28	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.11	2.09	2.07	2.06	2.04	2.03	2.01	1.99	1.98	1.96	1.94
71.3	2.36	2.35	2.33	2.32	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.19	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.06	2.04	2.02	2.01	1.99	1.98
71.7	2.40	2.38	2.36	2.35	2.33	2.31	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.18	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.05	2.04	2.02	2.01
72.0	2.43	2.41	2.39	2.38	2.36	2.35	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.22	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.09	2.07	2.05	2.04
72.4	2.46	2.44	2.43	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.17	2.15	2.13	2.12	2.10	2.08	2.07
72.8	2.49	2.47	2.46	2.44	2.42	2.41	2.39	2.38	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.16	2.15	2.13	2.12	2.10
73.2	2.52	2.50	2.49	2.47	2.46	2.44	2.42	2.41	2.39	2.37	2.36	2.34	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.20	2.18	2.16	2.15	2.13
73.6	2.55	2.54	2.52	2.50	2.49	2.47	2.45	2.44	2.42	2.41	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.19	2.18	2.16
74.0	2.58	2.57	2.55	2.53	2.52	2.50	2.49	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.36	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.23	2.21	2.19
74.4	2.61	2.60	2.58	2.57	2.55	2.53	2.52	2.50	2.48	2.47	2.45	2.44	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.22
74.8	2.64	2.63	2.61	2.60	2.58	2.56	2.55	2.53	2.52	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.39	2.37	2.35	2.34	2.32	2.30	2.29	2.27	2.26
75.2	2.68	2.66	2.64	2.63	2.61	2.60	2.58	2.56	2.55	2.53	2.51	2.50	2.48	2.47	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.34	2.32	2.30	2.29
75.6	2.71	2.69	2.67	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.55	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.42	2.40	2.38	2.37	2.35	2.33	2.32
76.0	2.74	2.72	2.71	2.69	2.67	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.50	2.48	2.46	2.45	2.43	2.41	2.40	2.38	2.37	2.35
76.4	2.77	2.75	2.74	2.72	2.70	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.58	2.56	2.54	2.53	2.51	2.49	2.48	2.46	2.45	2.43	2.41	2.40	2.38
76.8	2.80	2.78	2.77	2.75	2.74	2.72	2.70	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.53	2.51	2.49	2.48	2.46	2.44	2.43	2.41
77.2	2.83	2.82	2.80	2.78	2.77	2.75	2.73	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.61	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.48	2.46	2.44
77.6	2.86	2.85	2.83	2.81	2.80	2.78	2.77	2.75	2.73	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.56	2.54	2.52	2.51	2.49	2.47
78.0	2.89	2.88	2.86	2.85	2.83	2.81	2.80	2.78	2.76	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.55	2.54	2.52	2.51
78.3	2.93	2.91	2.89	2.88	2.86	2.84	2.83	2.81	2.80	2.78	2.76	2.75	2.73	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.59	2.57	2.55	2.54
78.7	2.96	2.94	2.92	2.91	2.89	2.88	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.58	2.57
79.1	2.99	2.97	2.96	2.94	2.92	2.91	2.89	2.87	2.86	2.84	2.83	2.81	2.79	2.78	2.76	2.75	2.73	2.71	2.70	2.68	2.66	2.65	2.63	2.62	2.60
79.5	3.02	3.00	2.99	2.97	2.95	2.94	2.92	2.91	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.78	2.76	2.74	2.73	2.71	2.70	2.68	2.66	2.65	2.63
79.9	3.05	3.03	3.02	3.00	2.99	2.97	2.95	2.94	2.92	2.90	2.89	2.87	2.86	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.73	2.71	2.69	2.68	2.66
80.3	3.08	3.07	3.05	3.03	3.02	3.00	2.98	2.97	2.95	2.94	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.81	2.79	2.77	2.76	2.74	2.73	2.71	2.69
80.7	3.11	3.10	3.08	3.06	3.05	3.03	3.02	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.89	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.76	2.74	2.72
81.1	3.14	3.13	3.11	3.10	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.97	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.84	2.82	2.80	2.79	2.77	2.76
81.5	3.18	3.16	3.14	3.13	3.11	3.09	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.92	2.90	2.88	2.87	2.85	2.84	2.82	2.80	2.79
81.9	3.21	3.19	3.17	3.16	3.14	3.13	3.11	3.09	3.08	3.06	3.04	3.03	3.01	3.00	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.87	2.85	2.83	2.82
82.3	3.24	3.22	3.21	3.19	3.17	3.16	3.14	3.12	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.95	2.93	2.91	2.90	2.88	2.86	2.85
82.7	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.16	3.14	3.12	3.11	3.09	3.07	3.06	3.04	3.03	3.01	2.99	2.98	2.96	2.94	2.93	2.91	2.90	2.88

PREDICTION EQUATIONS FOR FEV1 FEMALES * 80% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
51.2	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05
51.6	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.12	1.10	1.09	1.08	1.07
52.0	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08
52.4	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10
52.8	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11
53.1	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13
53.5	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15
53.9	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16
54.3	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18
54.7	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20
55.1	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21
55.5	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23
55.9	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24
56.3	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26
56.7	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28
57.1	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29
57.5	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31
57.9	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33
58.3	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34
58.7	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36
59.1	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37
59.4	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39
59.8	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.41
60.2	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42
60.6	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44
61.0	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46
61.4	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47
61.8	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49
62.2	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50
62.6	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52
63.0	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54
63.4	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55
63.8	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57
64.2	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.58
64.6	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60
65.0	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.62
65.4	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63
65.7	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65
66.1	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67
66.5	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68
66.9	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70
67.3	2.02	2.00	1.99	1.98	1.97	1.95	1.94	1.93	1.92	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71
67.7	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73
68.1	2.05	2.04	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75
68.5	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76
68.9	2.08	2.07	2.06	2.04	2.03	2.02	2.01	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78
69.3	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80
69.7	2.11	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81
70.1	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.00	1.99	1.98	1.97	1.95	1.94	1.93	1.92	1.90	1.89	1.88	1.87	1.85	1.84	1.83
70.5	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.84
70.9	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86
71.3	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88
71.7	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.04	2.03	2.02	2.01	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89
72.0	2.21	2.20	2.19	2.17	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91
72.4	2.23	2.21	2.20	2.19	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.92
72.8	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.00	1.99	1.98	1.97	1.95	1.94
73.2	2.26	2.25	2.23	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96
73.6	2.28	2.26	2.25	2.24	2.23	2.21	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.99	1.97
74.0	2.29	2.28	2.27	2.25	2.24	2.23	2.22	2.20	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99
74.4	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.11	2.09	2.08	2.07	2.06	2.04	2.03	2.02	2.01
74.8	2.32	2.31	2.30	2.29	2.27	2.26	2.25	2.24	2.22	2.21	2.20	2.19	2.17	2.16	2.15	2.14	2.12	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02

PREDICTION EQUATIONS FOR FEV1 FEMALES * 60% OF PREDICTED **

HEIGHT	AGE (YEARS)																								
(IN)	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
51.2	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.94	0.92	0.91	0.90	0.89	0.87	0.86	0.85	0.84	0.82	0.81	0.80	0.79	0.77	0.76	0.75	0.73
51.6	1.05	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.86	0.85	0.84	0.83	0.81	0.80	0.79	0.78	0.76	0.75
52.0	1.07	1.06	1.04	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93	0.92	0.91	0.89	0.88	0.87	0.86	0.84	0.83	0.82	0.81	0.79	0.78	0.77
52.4	1.09	1.07	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92	0.91	0.90	0.88	0.87	0.86	0.85	0.83	0.82	0.81	0.80	0.78
52.8	1.10	1.09	1.08	1.06	1.05	1.04	1.03	1.01	1.00	0.99	0.98	0.96	0.95	0.94	0.93	0.91	0.90	0.89	0.88	0.86	0.85	0.84	0.83	0.81	0.80
53.1	1.12	1.11	1.09	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.87	0.85	0.84	0.83	0.82
53.5	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.05	1.03	1.02	1.01	1.00	0.98	0.97	0.96	0.95	0.93	0.92	0.91	0.90	0.88	0.87	0.86	0.84	0.83
53.9	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.94	0.92	0.91	0.90	0.89	0.87	0.86	0.85
54.3	1.17	1.15	1.14	1.13	1.12	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93	0.92	0.90	0.89	0.88	0.86
54.7	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93	0.92	0.91	0.89	0.88
55.1	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09	1.07	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92	0.91	0.90
55.5	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.03	1.01	1.00	0.99	0.98	0.96	0.95	0.94	0.93	0.91
55.9	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.97	0.95	0.94	0.93
56.3	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.05	1.03	1.02	1.01	1.00	0.98	0.97	0.96	0.95
56.7	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.02	1.01	1.00	0.99	0.97	0.96
57.1	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.12	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.02	1.00	0.99	0.98
57.5	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.01	0.99
57.9	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.09	1.07	1.06	1.05	1.04	1.02	1.01
58.3	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06	1.05	1.04	1.03
58.7	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.06	1.04
59.1	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.10	1.08	1.07	1.06
59.4	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.13	1.11	1.10	1.09	1.08
59.8	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14	1.13	1.12	1.10	1.09
60.2	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22	1.21	1.20	1.18	1.17	1.16	1.15	1.13	1.12	1.11
60.6	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.14	1.12
61.0	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.22	1.20	1.19	1.18	1.17	1.15	1.14
61.4	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.21	1.19	1.18	1.17	1.16
61.8	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17
62.2	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19
62.6	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20
63.0	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.30	1.28	1.27	1.26	1.25	1.23	1.22
63.4	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26	1.25	1.24
63.8	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25
64.2	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27
64.6	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.29
65.0	1.60	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30
65.4	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39	1.38	1.37	1.36	1.34	1.33	1.32
65.7	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33
66.1	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35
66.5	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37
66.9	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38
67.3	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40
67.7	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.42
68.1	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43
68.5	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46	1.45
68.9	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51	1.50	1.49	1.48	1.46
69.3	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48
69.7	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.50
70.1	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63	1.61	1.60	1.59	1.58	1.56	1.55	1.54	1.53	1.51
70.5	1.83	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.57	1.55	1.54	1.53
70.9	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.55
71.3	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56
71.7	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58
72.0	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59
72.4	1.91	1.90	1.89	1.87	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61
72.8	1.93	1.92	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.63
73.2	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.81	1.79	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64
73.6	1.96	1.95	1.94	1.92	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71	1.70	1.68	1.67	1.66
74.0	1.98	1.96	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.78	1.76	1.75	1.74	1.73	1.71	1.70	1.69	1.67
74.4	1.99	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69
74.8	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.90	1.88	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71

PREDICTION EQUATIONS FOR FVC MALES * 60% OF PREDICTED **

HEIGHT	AGE (YEARS)																								
(IN)	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	2.22	2.27	2.32	2.14	2.12	2.10	2.09	2.07	2.05	2.04	2.02	2.00	1.98	1.97	1.95	1.93	1.91	1.90	1.88	1.86	1.84	1.83	1.81	1.79	1.77
59.4	2.25	2.30	2.35	2.18	2.16	2.14	2.13	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97	1.95	1.93	1.92	1.90	1.88	1.87	1.85	1.83	1.81
59.8	2.28	2.33	2.38	2.22	2.20	2.18	2.17	2.15	2.13	2.11	2.10	2.08	2.06	2.04	2.03	2.01	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85
60.2	2.31	2.36	2.41	2.26	2.24	2.22	2.20	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.07	2.05	2.03	2.01	2.00	1.98	1.96	1.94	1.93	1.91	1.89
60.6	2.34	2.39	2.44	2.30	2.28	2.26	2.24	2.23	2.21	2.19	2.17	2.16	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.95	1.93
61.0	2.37	2.42	2.47	2.33	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.20	2.18	2.16	2.14	2.13	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97
61.4	2.40	2.45	2.50	2.37	2.36	2.34	2.32	2.30	2.29	2.27	2.25	2.23	2.22	2.20	2.18	2.16	2.15	2.13	2.11	2.10	2.08	2.06	2.04	2.03	2.01
61.8	2.43	2.48	2.53	2.41	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.27	2.26	2.24	2.22	2.20	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.06	2.05
62.2	2.46	2.51	2.56	2.45	2.43	2.42	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.23	2.21	2.19	2.17	2.16	2.14	2.12	2.10	2.09
62.6	2.49	2.54	2.59	2.49	2.47	2.46	2.44	2.42	2.40	2.39	2.37	2.35	2.33	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14	2.13
63.0	2.52	2.57	2.62	2.53	2.51	2.49	2.48	2.46	2.44	2.43	2.41	2.39	2.37	2.36	2.34	2.32	2.30	2.29	2.27	2.25	2.23	2.22	2.20	2.18	2.16
63.4	2.55	2.60	2.65	2.57	2.55	2.53	2.52	2.50	2.48	2.46	2.45	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.26	2.24	2.22	2.20
63.8	2.58	2.63	2.68	2.61	2.59	2.57	2.56	2.54	2.52	2.50	2.49	2.47	2.45	2.43	2.42	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24
64.2	2.61	2.66	2.71	2.65	2.63	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.46	2.44	2.42	2.40	2.39	2.37	2.35	2.33	2.32	2.30	2.28
64.6	2.64	2.69	2.74	2.69	2.67	2.65	2.63	2.62	2.60	2.58	2.56	2.55	2.53	2.51	2.49	2.48	2.46	2.44	2.42	2.41	2.39	2.37	2.36	2.34	2.32
65.0	2.67	2.72	2.77	2.72	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.59	2.57	2.55	2.53	2.52	2.50	2.48	2.46	2.45	2.43	2.41	2.39	2.38	2.36
65.4	2.70	2.75	2.80	2.76	2.75	2.73	2.71	2.69	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.49	2.47	2.45	2.43	2.42	2.40
65.7	2.73	2.78	2.83	2.80	2.79	2.77	2.75	2.73	2.72	2.70	2.68	2.66	2.65	2.63	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44
66.1	2.76	2.81	2.86	2.84	2.82	2.81	2.79	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.62	2.60	2.58	2.56	2.55	2.53	2.51	2.49	2.48
66.5	2.79	2.84	2.89	2.88	2.86	2.85	2.83	2.81	2.79	2.78	2.76	2.74	2.72	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.52
66.9	2.82	2.87	2.92	2.92	2.90	2.88	2.87	2.85	2.83	2.82	2.80	2.78	2.76	2.75	2.73	2.71	2.69	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55
67.3	2.85	2.90	2.95	2.96	2.94	2.92	2.91	2.89	2.87	2.85	2.84	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.65	2.63	2.61	2.59
67.7	2.88	2.93	2.98	3.00	2.98	2.96	2.95	2.93	2.91	2.89	2.88	2.86	2.84	2.82	2.81	2.79	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63
68.1	2.91	2.96	3.01	3.04	3.02	3.00	2.98	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.85	2.83	2.81	2.79	2.78	2.76	2.74	2.72	2.71	2.69	2.67
68.5	2.94	2.99	3.04	3.08	3.06	3.04	3.02	3.01	2.99	2.97	2.95	2.94	2.92	2.90	2.88	2.87	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71
68.9	2.97	3.02	3.07	3.11	3.10	3.08	3.06	3.05	3.03	3.01	2.99	2.98	2.96	2.94	2.92	2.91	2.89	2.87	2.85	2.84	2.82	2.80	2.78	2.77	2.75
69.3	3.00	3.05	3.10	3.15	3.14	3.12	3.10	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93	2.91	2.89	2.88	2.86	2.84	2.82	2.81	2.79
69.7	3.03	3.08	3.13	3.19	3.18	3.16	3.14	3.12	3.11	3.09	3.07	3.05	3.04	3.02	3.00	2.98	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.84	2.83
70.1	3.06	3.11	3.16	3.23	3.21	3.20	3.18	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.01	2.99	2.97	2.95	2.94	2.92	2.90	2.88	2.87
70.5	3.09	3.14	3.19	3.27	3.25	3.24	3.22	3.20	3.18	3.17	3.15	3.13	3.11	3.10	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.91
70.9	3.12	3.17	3.22	3.31	3.29	3.27	3.26	3.24	3.22	3.21	3.19	3.17	3.15	3.14	3.12	3.10	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94
71.3	3.15	3.20	3.25	3.35	3.33	3.31	3.30	3.28	3.26	3.24	3.23	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.04	3.02	3.00	2.98
71.7	3.18	3.23	3.28	3.39	3.37	3.35	3.34	3.32	3.30	3.28	3.27	3.25	3.23	3.21	3.20	3.18	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02
72.0	3.21	3.26	3.31	3.43	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.24	3.22	3.20	3.18	3.17	3.15	3.13	3.11	3.10	3.08	3.06
72.4	3.24	3.29	3.34	3.47	3.45	3.43	3.41	3.40	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.20	3.19	3.17	3.15	3.13	3.12	3.10
72.8	3.27	3.32	3.37	3.50	3.49	3.47	3.45	3.43	3.42	3.40	3.38	3.37	3.35	3.33	3.31	3.30	3.28	3.26	3.24	3.23	3.21	3.19	3.17	3.16	3.14
73.2	3.30	3.35	3.40	3.54	3.53	3.51	3.49	3.47	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.27	3.25	3.23	3.21	3.20	3.18
73.6	3.33	3.38	3.43	3.58	3.57	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22
74.0	3.36	3.41	3.46	3.62	3.60	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.40	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26
74.4	3.39	3.44	3.49	3.66	3.64	3.63	3.61	3.59	3.57	3.56	3.54	3.52	3.50	3.49	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.30
74.8	3.42	3.47	3.52	3.70	3.68	3.66	3.65	3.63	3.61	3.60	3.58	3.56	3.54	3.53	3.51	3.49	3.47	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33
75.2	3.45	3.50	3.55	3.74	3.72	3.70	3.69	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.50	3.48	3.46	3.44	3.43	3.41	3.39	3.37
75.6	3.48	3.53	3.58	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.66	3.64	3.62	3.60	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41
76.0	3.51	3.56	3.61	3.82	3.80	3.78	3.76	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.63	3.61	3.59	3.57	3.56	3.54	3.52	3.50	3.49	3.47	3.45
76.4	3.54	3.59	3.64	3.86	3.84	3.82	3.80	3.79	3.77	3.75	3.73	3.72	3.70	3.68	3.66	3.65	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49
76.8	3.57	3.62	3.67	3.89	3.88	3.86	3.84	3.82	3.81	3.79	3.77	3.76	3.74	3.72	3.70	3.69	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53
77.2	3.60	3.65	3.70	3.93	3.92	3.90	3.88	3.86	3.85	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.71	3.69	3.67	3.66	3.64	3.62	3.60	3.59	3.57
77.6	3.63	3.68	3.73	3.97	3.96	3.94	3.92	3.90	3.89	3.87	3.85	3.83	3.82	3.80	3.78	3.76	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61
78.0	3.66	3.71	3.76	4.01	3.99	3.98	3.96	3.94	3.92	3.91	3.89	3.87	3.86	3.84	3.82	3.80	3.79	3.77	3.75	3.73	3.72	3.70	3.68	3.66	3.65
78.3	3.69	3.74	3.79	4.05	4.03	4.02	4.00	3.98	3.96	3.95	3.93	3.91	3.89	3.88	3.86	3.84	3.82	3.81	3.79	3.77	3.75	3.74	3.72	3.70	3.69
78.7	3.72	3.77	3.82	4.09	4.07	4.05	4.04	4.02	4.00	3.99	3.97	3.95	3.93	3.92	3.90	3.88	3.86	3.85	3.83	3.81	3.79	3.78	3.76	3.74	3.72
79.1	3.75	3.80	3.85	4.13	4.11	4.09	4.08	4.06	4.04	4.02	4.01	3.99	3.97	3.95	3.94	3.92	3.90	3.88	3.87	3.85	3.83	3.82	3.80	3.78	3.76
79.5	3.78	3.83	3.88	4.17	4.15	4.13	4.12	4.10	4.08	4.06	4.05	4.03	4.01	3.99	3.98	3.96	3.94	3.92	3.91	3.89	3.87	3.85	3.84	3.82	3.80
79.9	3.81	3.86	3.91	4.21	4.19	4.17	4.15	4.14	4.12	4.10	4.08	4.07	4.05	4.03	4.02	4.00	3.98	3.96	3.95	3.93	3.91	3.89	3.88	3.86	3.84
80.3	3.84	3.89	3.94	4.25	4.23	4.21	4.19	4.18	4.16	4.14	4.12	4.11	4.09	4.07	4.05	4.04	4.02	4.00	3.98	3.97	3.95	3.93	3.91	3.90	3.88
80.7	3.87	3.92	3.97	4.28	4.27	4.25	4.23	4.22	4.20	4.18	4.16	4.15	4.13	4.11	4.09	4.08	4.06	4.04	4.02	4.01	3.99	3.97	3.95	3.94	3.92
81.1	3.90	3.95	4.00	4.32	4.31	4.29	4.27	4.25	4.24	4.22	4.20	4.18	4.17	4.15	4.13	4.11	4.10	4.08	4.06	4.05	4.03	4.01	3.99	3.98	3.96
81.5	3.93	3.98	4.03	4.36	4.35	4.33	4.31	4.29	4.28	4.26	4.24	4.22	4.21	4.19	4.17	4.15	4.14	4.12	4.10	4.08	4.07	4.05	4.03	4.01	4.00
81.9	3.96	4.01	4.06	4.40	4.38	4.37	4.35	4.33	4.31	4.30	4.28	4.26	4.24	4.23	4.21	4.19	4.18	4.16	4.14	4.12	4.11	4.09	4.07	4.05	4.04
82.3	3.99	4.04	4.09	4.44	4.42	4.41	4.39	4.37	4.35	4.34	4.32	4.30	4.28	4.27	4.25	4.23	4.21	4.20	4.18	4.16	4.14	4.13	4.11	4.09	4.08
82.7	4.02	4.07	4.12	4.48	4.46	4.44	4.43	4.41	4.39	4.38	4.36	4.34	4.32	4.31	4.29	4.27	4.25	4.24	4.22	4.20	4.18	4.17	4.15	4.13	4.11

PREDICTION EQUATIONS FOR FVC MALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
59.1	1.76	1.74	1.72	1.70	1.69	1.67	1.65	1.63	1.62	1.60	1.58	1.57	1.55	1.53	1.51	1.50	1.48	1.46	1.44	1.43	1.41	1.39	1.37	1.36	1.34
59.4	1.80	1.78	1.76	1.74	1.73	1.71	1.69	1.67	1.66	1.64	1.62	1.60	1.59	1.57	1.55	1.53	1.52	1.50	1.48	1.47	1.45	1.43	1.41	1.40	1.38
59.8	1.83	1.82	1.80	1.78	1.77	1.75	1.73	1.71	1.70	1.68	1.66	1.64	1.63	1.61	1.59	1.57	1.56	1.54	1.52	1.50	1.49	1.47	1.45	1.43	1.42
60.2	1.87	1.86	1.84	1.82	1.80	1.79	1.77	1.75	1.73	1.72	1.70	1.68	1.66	1.65	1.63	1.61	1.60	1.58	1.56	1.54	1.53	1.51	1.49	1.47	1.46
60.6	1.91	1.90	1.88	1.86	1.84	1.83	1.81	1.79	1.77	1.76	1.74	1.72	1.70	1.69	1.67	1.65	1.63	1.62	1.60	1.58	1.56	1.55	1.53	1.51	1.50
61.0	1.95	1.93	1.92	1.90	1.88	1.86	1.85	1.83	1.81	1.80	1.78	1.76	1.74	1.73	1.71	1.69	1.67	1.66	1.64	1.62	1.60	1.59	1.57	1.55	1.53
61.4	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85	1.83	1.82	1.80	1.78	1.76	1.75	1.73	1.71	1.69	1.68	1.66	1.64	1.63	1.61	1.59	1.57
61.8	2.03	2.01	2.00	1.98	1.96	1.94	1.93	1.91	1.89	1.87	1.86	1.84	1.82	1.80	1.79	1.77	1.75	1.73	1.72	1.70	1.68	1.66	1.65	1.63	1.61
62.2	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.95	1.93	1.91	1.89	1.88	1.86	1.84	1.83	1.81	1.79	1.77	1.76	1.74	1.72	1.70	1.69	1.67	1.65
62.6	2.11	2.09	2.07	2.06	2.04	2.02	2.00	1.99	1.97	1.95	1.93	1.92	1.90	1.88	1.86	1.85	1.83	1.81	1.79	1.78	1.76	1.74	1.73	1.71	1.69
63.0	2.15	2.13	2.11	2.09	2.08	2.06	2.04	2.02	2.01	1.99	1.97	1.96	1.94	1.92	1.90	1.89	1.87	1.85	1.83	1.82	1.80	1.78	1.76	1.75	1.73
63.4	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.06	2.05	2.03	2.01	1.99	1.98	1.96	1.94	1.92	1.91	1.89	1.87	1.86	1.84	1.82	1.80	1.79	1.77
63.8	2.22	2.21	2.19	2.17	2.16	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96	1.95	1.93	1.91	1.89	1.88	1.86	1.84	1.82	1.81
64.2	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14	2.12	2.11	2.09	2.07	2.05	2.04	2.02	2.00	1.99	1.97	1.95	1.93	1.92	1.90	1.88	1.86	1.85
64.6	2.30	2.29	2.27	2.25	2.23	2.22	2.20	2.18	2.16	2.15	2.13	2.11	2.09	2.08	2.06	2.04	2.02	2.01	1.99	1.97	1.95	1.94	1.92	1.90	1.89
65.0	2.34	2.32	2.31	2.29	2.27	2.25	2.24	2.22	2.20	2.19	2.17	2.15	2.13	2.12	2.10	2.08	2.06	2.05	2.03	2.01	1.99	1.98	1.96	1.94	1.92
65.4	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.22	2.21	2.19	2.17	2.15	2.14	2.12	2.10	2.09	2.07	2.05	2.03	2.02	2.00	1.98	1.96
65.7	2.42	2.40	2.38	2.37	2.35	2.33	2.32	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16	2.14	2.12	2.11	2.09	2.07	2.05	2.04	2.02	2.00
66.1	2.46	2.44	2.42	2.41	2.39	2.37	2.35	2.34	2.32	2.30	2.28	2.27	2.25	2.23	2.22	2.20	2.18	2.16	2.15	2.13	2.11	2.09	2.08	2.06	2.04
66.5	2.50	2.48	2.46	2.45	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.25	2.24	2.22	2.20	2.18	2.17	2.15	2.13	2.11	2.10	2.08
66.9	2.54	2.52	2.50	2.48	2.47	2.45	2.43	2.41	2.40	2.38	2.36	2.35	2.33	2.31	2.29	2.28	2.26	2.24	2.22	2.21	2.19	2.17	2.15	2.14	2.12
67.3	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44	2.42	2.40	2.38	2.37	2.35	2.33	2.31	2.30	2.28	2.26	2.25	2.23	2.21	2.19	2.18	2.16
67.7	2.61	2.60	2.58	2.56	2.55	2.53	2.51	2.49	2.48	2.46	2.44	2.42	2.41	2.39	2.37	2.35	2.34	2.32	2.30	2.28	2.27	2.25	2.23	2.21	2.20
68.1	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.51	2.50	2.48	2.46	2.44	2.43	2.41	2.39	2.38	2.36	2.34	2.32	2.31	2.29	2.27	2.25	2.24
68.5	2.69	2.68	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.48	2.47	2.45	2.43	2.41	2.40	2.38	2.36	2.34	2.33	2.31	2.29	2.28
68.9	2.73	2.71	2.70	2.68	2.66	2.64	2.63	2.61	2.59	2.58	2.56	2.54	2.52	2.51	2.49	2.47	2.45	2.44	2.42	2.40	2.38	2.37	2.35	2.33	2.31
69.3	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.61	2.60	2.58	2.56	2.54	2.53	2.51	2.49	2.47	2.46	2.44	2.42	2.41	2.39	2.37	2.35
69.7	2.81	2.79	2.77	2.76	2.74	2.72	2.71	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55	2.53	2.51	2.50	2.48	2.46	2.44	2.43	2.41	2.39
70.1	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71	2.69	2.67	2.66	2.64	2.62	2.61	2.59	2.57	2.55	2.54	2.52	2.50	2.48	2.47	2.45	2.43
70.5	2.89	2.87	2.85	2.84	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.64	2.63	2.61	2.59	2.57	2.56	2.54	2.52	2.50	2.49	2.47
70.9	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.80	2.79	2.77	2.75	2.74	2.72	2.70	2.68	2.67	2.65	2.63	2.61	2.60	2.58	2.56	2.54	2.53	2.51
71.3	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.77	2.76	2.74	2.72	2.70	2.69	2.67	2.65	2.64	2.62	2.60	2.58	2.57	2.55
71.7	3.00	2.99	2.97	2.95	2.94	2.92	2.90	2.88	2.87	2.85	2.83	2.81	2.80	2.78	2.76	2.74	2.73	2.71	2.69	2.67	2.66	2.64	2.62	2.60	2.59
72.0	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.90	2.89	2.87	2.85	2.83	2.82	2.80	2.78	2.77	2.75	2.73	2.71	2.70	2.68	2.66	2.64	2.63
72.4	3.08	3.07	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93	2.91	2.89	2.87	2.86	2.84	2.82	2.80	2.79	2.77	2.75	2.73	2.72	2.70	2.68	2.67
72.8	3.12	3.10	3.09	3.07	3.05	3.03	3.02	3.00	2.98	2.97	2.95	2.93	2.91	2.90	2.88	2.86	2.84	2.83	2.81	2.79	2.77	2.76	2.74	2.72	2.70
73.2	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.00	2.99	2.97	2.95	2.93	2.92	2.90	2.88	2.86	2.85	2.83	2.81	2.80	2.78	2.76	2.74
73.6	3.20	3.18	3.16	3.15	3.13	3.11	3.10	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94	2.92	2.90	2.89	2.87	2.85	2.83	2.82	2.80	2.78
74.0	3.24	3.22	3.20	3.19	3.17	3.15	3.13	3.12	3.10	3.08	3.06	3.05	3.03	3.01	3.00	2.98	2.96	2.94	2.93	2.91	2.89	2.87	2.86	2.84	2.82
74.4	3.28	3.26	3.24	3.23	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.03	3.02	3.00	2.98	2.96	2.95	2.93	2.91	2.89	2.88	2.86
74.8	3.32	3.30	3.28	3.26	3.25	3.23	3.21	3.19	3.18	3.16	3.14	3.13	3.11	3.09	3.07	3.06	3.04	3.02	3.00	2.99	2.97	2.95	2.93	2.92	2.90
75.2	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22	3.20	3.18	3.16	3.15	3.13	3.11	3.09	3.08	3.06	3.04	3.03	3.01	2.99	2.97	2.96	2.94
75.6	3.39	3.38	3.36	3.34	3.33	3.31	3.29	3.27	3.26	3.24	3.22	3.20	3.19	3.17	3.15	3.13	3.12	3.10	3.08	3.06	3.05	3.03	3.01	2.99	2.98
76.0	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.29	3.28	3.26	3.24	3.22	3.21	3.19	3.17	3.16	3.14	3.12	3.10	3.09	3.07	3.05	3.03	3.02
76.4	3.47	3.46	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.26	3.25	3.23	3.21	3.19	3.18	3.16	3.14	3.12	3.11	3.09	3.07	3.06
76.8	3.51	3.49	3.48	3.46	3.44	3.42	3.41	3.39	3.37	3.36	3.34	3.32	3.30	3.29	3.27	3.25	3.23	3.22	3.20	3.18	3.16	3.15	3.13	3.11	3.09
77.2	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.39	3.38	3.36	3.34	3.32	3.31	3.29	3.27	3.25	3.24	3.22	3.20	3.19	3.17	3.15	3.13
77.6	3.59	3.57	3.55	3.54	3.52	3.50	3.49	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33	3.31	3.29	3.28	3.26	3.24	3.22	3.21	3.19	3.17
78.0	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49	3.47	3.45	3.44	3.42	3.40	3.39	3.37	3.35	3.33	3.32	3.30	3.28	3.26	3.25	3.23	3.21
78.3	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.49	3.48	3.46	3.44	3.42	3.41	3.39	3.37	3.35	3.34	3.32	3.30	3.28	3.27	3.25
78.7	3.71	3.69	3.67	3.65	3.64	3.62	3.60	3.59	3.57	3.55	3.53	3.52	3.50	3.48	3.46	3.45	3.43	3.41	3.39	3.38	3.36	3.34	3.32	3.31	3.29
79.1	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.54	3.52	3.50	3.48	3.47	3.45	3.43	3.42	3.40	3.38	3.36	3.35	3.33
79.5	3.78	3.77	3.75	3.73	3.72	3.70	3.68	3.66	3.65	3.63	3.61	3.59	3.58	3.56	3.54	3.52	3.51	3.49	3.47	3.45	3.44	3.42	3.40	3.38	3.37
79.9	3.82	3.81	3.79	3.77	3.75	3.74	3.72	3.70	3.68	3.67	3.65	3.63	3.62	3.60	3.58	3.56	3.55	3.53	3.51	3.49	3.48	3.46	3.44	3.42	3.41
80.3	3.86	3.85	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.71	3.69	3.67	3.65	3.64	3.62	3.60	3.58	3.57	3.55	3.53	3.51	3.50	3.48	3.46	3.45
80.7	3.90	3.88	3.87	3.85	3.83	3.81	3.80	3.78	3.76	3.75	3.73	3.71	3.69	3.68	3.66	3.64	3.62	3.61	3.59	3.57	3.55	3.54	3.52	3.50	3.48
81.1	3.94	3.92	3.91	3.89	3.87	3.85	3.84	3.82	3.80	3.78	3.77	3.75	3.73	3.71	3.70	3.68	3.66	3.64	3.63	3.61	3.59	3.58	3.56	3.54	3.52
81.5	3.98	3.96	3.94	3.93	3.91	3.89	3.88	3.86	3.84	3.82	3.81	3.79	3.77	3.75	3.74	3.72	3.70	3.68	3.67	3.65	3.63	3.61	3.60	3.58	3.56
81.9	4.02	4.00	3.98	3.97	3.95	3.93	3.91	3.90	3.88	3.86	3.84	3.83	3.81	3.79	3.78	3.76	3.74	3.72	3.71	3.69	3.67	3.65	3.64	3.62	3.60
82.3	4.06	4.04	4.02	4.01	3.99	3.97	3.95	3.94	3.92	3.90	3.88	3.87	3.85	3.83	3.81	3.80	3.78	3.76	3.74	3.73	3.71	3.69	3.67	3.66	3.64
82.7	4.10	4.08	4.06	4.04	4.03	4.01	3.99	3.97	3.96	3.94	3.92	3.91	3.89	3.87	3.85	3.84	3.82	3.80	3.78	3.77	3.75	3.73	3.71	3.70	3.68

PREDICTION EQUATIONS FOR FVC FEMALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
51.2	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24	1.23	1.21
51.6	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24
52.0	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.34	1.32	1.31	1.30	1.29	1.27	1.26
52.4	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28
52.8	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30
53.1	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.37	1.35	1.34	1.33
53.5	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35
53.9	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37
54.3	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.41	1.39
54.7	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44	1.43	1.41
55.1	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44
55.5	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.49	1.47	1.46
55.9	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48
56.3	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50
56.7	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.53
57.1	1.86	1.85	1.84	1.82	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55
57.5	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57
57.9	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62	1.61	1.59
58.3	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.61
58.7	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.72	1.70	1.69	1.68	1.66	1.65	1.64
59.1	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66
59.4	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.69	1.68
59.8	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.70
60.2	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.73
60.6	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75
61.0	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77
61.4	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79
61.8	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.81
62.2	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84
62.6	2.17	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86
63.0	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88
63.4	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90
63.8	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92
64.2	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95
64.6	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97
65.0	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99
65.4	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.01
65.7	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04
66.1	2.37	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06
66.5	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.27	2.25	2.24	2.23	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08
66.9	2.42	2.41	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.16	2.14	2.13	2.12	2.10
67.3	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12
67.7	2.46	2.45	2.44	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.21	2.20	2.19	2.17	2.16	2.15
68.1	2.49	2.47	2.46	2.45	2.43	2.42	2.41	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17
68.5	2.51	2.49	2.48	2.47	2.46	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19
68.9	2.53	2.52	2.50	2.49	2.48	2.46	2.45	2.44	2.42	2.41	2.40	2.38	2.37	2.36	2.35	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.21
69.3	2.55	2.54	2.53	2.51	2.50	2.49	2.47	2.46	2.45	2.43	2.42	2.41	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.28	2.26	2.25	2.24
69.7	2.57	2.56	2.55	2.54	2.52	2.51	2.50	2.48	2.47	2.46	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26
70.1	2.60	2.58	2.57	2.56	2.54	2.53	2.52	2.50	2.49	2.48	2.46	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35	2.33	2.32	2.31	2.29	2.28
70.5	2.62	2.61	2.59	2.58	2.57	2.55	2.54	2.53	2.51	2.50	2.49	2.47	2.46	2.45	2.43	2.42	2.41	2.39	2.38	2.37	2.36	2.34	2.33	2.32	2.30
70.9	2.64	2.63	2.61	2.60	2.59	2.58	2.56	2.55	2.54	2.52	2.51	2.50	2.48	2.47	2.46	2.44	2.43	2.42	2.40	2.39	2.38	2.36	2.35	2.34	2.32
71.3	2.66	2.65	2.64	2.62	2.61	2.60	2.58	2.57	2.56	2.54	2.53	2.52	2.50	2.49	2.48	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35
71.7	2.69	2.67	2.66	2.65	2.63	2.62	2.61	2.59	2.58	2.57	2.55	2.54	2.53	2.51	2.50	2.49	2.47	2.46	2.45	2.43	2.42	2.41	2.40	2.38	2.37
72.0	2.71	2.69	2.68	2.67	2.65	2.64	2.63	2.62	2.60	2.59	2.58	2.56	2.55	2.54	2.52	2.51	2.50	2.48	2.47	2.46	2.44	2.43	2.42	2.40	2.39
72.4	2.73	2.72	2.70	2.69	2.68	2.66	2.65	2.64	2.62	2.61	2.60	2.58	2.57	2.56	2.55	2.53	2.52	2.51	2.49	2.48	2.47	2.45	2.44	2.43	2.41
72.8	2.75	2.74	2.73	2.71	2.70	2.69	2.67	2.66	2.65	2.63	2.62	2.61	2.59	2.58	2.57	2.55	2.54	2.53	2.51	2.50	2.49	2.48	2.46	2.45	2.44
73.2	2.77	2.76	2.75	2.73	2.72	2.71	2.70	2.68	2.67	2.66	2.64	2.63	2.62	2.60	2.59	2.58	2.56	2.55	2.54	2.52	2.51	2.50	2.48	2.47	2.46
73.6	2.80	2.78	2.77	2.76	2.74	2.73	2.72	2.70	2.69	2.68	2.66	2.65	2.64	2.63	2.61	2.60	2.59	2.57	2.56	2.55	2.53	2.52	2.51	2.49	2.48
74.0	2.82	2.81	2.79	2.78	2.77	2.75	2.74	2.73	2.71	2.70	2.69	2.67	2.66	2.65	2.63	2.62	2.61	2.59	2.58	2.57	2.55	2.54	2.53	2.52	2.50
74.4	2.84	2.83	2.81	2.80	2.79	2.78	2.76	2.75	2.74	2.72	2.71	2.70	2.68	2.67	2.66	2.64	2.63	2.62	2.60	2.59	2.58	2.56	2.55	2.54	2.52
74.8	2.86	2.85	2.84	2.82	2.81	2.80	2.78	2.77	2.76	2.74	2.73	2.72	2.70	2.69	2.68	2.67	2.65	2.64	2.63	2.61	2.60	2.59	2.57	2.56	2.55

PREDICTION EQUATIONS FOR FVC — FEMALES — * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
51.2	1.20	1.19	1.17	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.96	0.95	0.94	0.92	0.91	0.90	0.88
51.6	1.22	1.21	1.20	1.18	1.17	1.16	1.14	1.13	1.12	1.10	1.09	1.08	1.07	1.05	1.04	1.03	1.01	1.00	0.99	0.97	0.96	0.95	0.93	0.92	0.91
52.0	1.25	1.23	1.22	1.21	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.07	1.06	1.05	1.03	1.02	1.01	0.99	0.98	0.97	0.96	0.94	0.93
52.4	1.27	1.25	1.24	1.23	1.21	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02	1.00	0.99	0.98	0.96	0.95
52.8	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.18	1.17	1.16	1.14	1.13	1.12	1.11	1.09	1.08	1.07	1.05	1.04	1.03	1.01	1.00	0.99	0.97
53.1	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.07	1.06	1.05	1.03	1.02	1.01	1.00
53.5	1.33	1.32	1.31	1.29	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10	1.08	1.07	1.06	1.04	1.03	1.02
53.9	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.22	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11	1.09	1.08	1.07	1.05	1.04
54.3	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.19	1.18	1.17	1.15	1.14	1.13	1.11	1.10	1.09	1.08	1.06
54.7	1.40	1.39	1.37	1.36	1.35	1.34	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.16	1.15	1.14	1.12	1.11	1.10	1.08
55.1	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.26	1.25	1.24	1.23	1.21	1.20	1.19	1.17	1.16	1.15	1.13	1.12	1.11
55.5	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.19	1.18	1.17	1.15	1.14	1.13
55.9	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.38	1.36	1.35	1.34	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22	1.20	1.19	1.18	1.16	1.15
56.3	1.49	1.48	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.34	1.33	1.32	1.30	1.29	1.28	1.27	1.25	1.24	1.23	1.21	1.20	1.19	1.17
56.7	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.27	1.26	1.25	1.23	1.22	1.21	1.20
57.1	1.53	1.52	1.51	1.49	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.34	1.32	1.31	1.30	1.28	1.27	1.26	1.24	1.23	1.22
57.5	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44	1.42	1.41	1.40	1.38	1.37	1.36	1.35	1.33	1.32	1.31	1.29	1.28	1.27	1.25	1.24
57.9	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33	1.31	1.30	1.29	1.28	1.26
58.3	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35	1.34	1.32	1.31	1.30	1.28
58.7	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.46	1.45	1.44	1.43	1.41	1.40	1.39	1.37	1.36	1.35	1.33	1.32	1.31
59.1	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.39	1.38	1.37	1.35	1.34	1.33
59.4	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42	1.40	1.39	1.38	1.36	1.35
59.8	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.54	1.53	1.52	1.50	1.49	1.48	1.47	1.45	1.44	1.43	1.41	1.40	1.39	1.37
60.2	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46	1.45	1.43	1.42	1.41	1.40
60.6	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48	1.47	1.46	1.44	1.43	1.42
61.0	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.58	1.57	1.56	1.55	1.53	1.52	1.51	1.49	1.48	1.47	1.45	1.44
61.4	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53	1.51	1.50	1.49	1.47	1.46
61.8	1.80	1.79	1.77	1.76	1.75	1.73	1.72	1.71	1.69	1.68	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55	1.54	1.52	1.51	1.50	1.48
62.2	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.66	1.65	1.64	1.62	1.61	1.60	1.59	1.57	1.56	1.55	1.53	1.52	1.51
62.6	1.84	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59	1.58	1.57	1.55	1.54	1.53
63.0	1.87	1.85	1.84	1.83	1.81	1.80	1.79	1.77	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62	1.60	1.59	1.58	1.56	1.55
63.4	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.70	1.69	1.68	1.67	1.65	1.64	1.63	1.61	1.60	1.59	1.57
63.8	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66	1.65	1.63	1.62	1.61	1.59
64.2	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68	1.67	1.66	1.64	1.63	1.62
64.6	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.74	1.73	1.72	1.71	1.69	1.68	1.67	1.65	1.64
65.0	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73	1.71	1.70	1.69	1.67	1.66
65.4	2.00	1.99	1.97	1.96	1.95	1.93	1.92	1.91	1.89	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75	1.74	1.72	1.71	1.70	1.68
65.7	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.82	1.81	1.80	1.78	1.77	1.76	1.75	1.73	1.72	1.71
66.1	2.04	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79	1.78	1.77	1.75	1.74	1.73
66.5	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.97	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82	1.80	1.79	1.78	1.76	1.75
66.9	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.90	1.89	1.88	1.86	1.85	1.84	1.83	1.81	1.80	1.79	1.77
67.3	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86	1.85	1.83	1.82	1.81	1.79
67.7	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.01	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88	1.87	1.86	1.84	1.83	1.82
68.1	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.94	1.93	1.92	1.91	1.89	1.88	1.87	1.85	1.84
68.5	2.18	2.16	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93	1.91	1.90	1.89	1.87	1.86
68.9	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.09	2.08	2.07	2.05	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95	1.94	1.92	1.91	1.90	1.88
69.3	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.02	2.01	2.00	1.98	1.97	1.96	1.95	1.93	1.92	1.91
69.7	2.24	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99	1.98	1.97	1.95	1.94	1.93
70.1	2.27	2.25	2.24	2.23	2.21	2.20	2.19	2.17	2.16	2.15	2.13	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02	2.00	1.99	1.98	1.96	1.95
70.5	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.06	2.05	2.04	2.03	2.01	2.00	1.99	1.97
70.9	2.31	2.30	2.28	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06	2.05	2.03	2.02	2.01	1.99
71.3	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.21	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08	2.07	2.06	2.04	2.03	2.02
71.7	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.14	2.13	2.12	2.10	2.09	2.08	2.07	2.05	2.04
72.0	2.38	2.36	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13	2.11	2.10	2.09	2.07	2.06
72.4	2.40	2.39	2.37	2.36	2.35	2.33	2.32	2.31	2.29	2.28	2.27	2.25	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15	2.14	2.12	2.11	2.10	2.08
72.8	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.18	2.17	2.16	2.15	2.13	2.12	2.11
73.2	2.44	2.43	2.42	2.40	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19	2.18	2.17	2.15	2.14	2.13
73.6	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35	2.33	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22	2.20	2.19	2.18	2.16	2.15
74.0	2.49	2.48	2.46	2.45	2.44	2.42	2.41	2.40	2.38	2.37	2.36	2.34	2.33	2.32	2.30	2.29	2.28	2.26	2.25	2.24	2.22	2.21	2.20	2.19	2.17
74.4	2.51	2.50	2.48	2.47	2.46	2.44	2.43	2.42	2.41	2.39	2.38	2.37	2.35	2.34	2.33	2.31	2.30	2.29	2.27	2.26	2.25	2.23	2.22	2.21	2.19
74.8	2.53	2.52	2.51	2.49	2.48	2.47	2.45	2.44	2.43	2.41	2.40	2.39	2.37	2.36	2.35	2.34	2.32	2.31	2.30	2.28	2.27	2.26	2.24	2.23	2.22

PREDICTION EQUATIONS FOR MVV MALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
59.1	74.	75.	76.	70.	69.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.	57.	57.
59.4	75.	76.	77.	71.	71.	70.	69.	69.	68.	67.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.
59.8	76.	77.	78.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.
60.2	77.	78.	79.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	64.	63.	62.	62.	61.	60.
60.6	78.	79.	81.	75.	74.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.	62.	62.
61.0	79.	81.	82.	76.	76.	75.	74.	74.	73.	72.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.
61.4	81.	82.	83.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.
61.8	82.	83.	84.	79.	78.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	68.	68.	67.	67.	66.	65.
62.2	83.	84.	85.	80.	79.	79.	78.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	68.	68.	67.	67.
62.6	84.	85.	86.	81.	81.	80.	79.	79.	78.	77.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	68.	68.
63.0	85.	86.	87.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.
63.4	86.	87.	88.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	73.	72.	72.	71.	70.
63.8	87.	88.	89.	85.	84.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	73.	72.	71.
64.2	88.	89.	90.	86.	86.	85.	84.	84.	83.	82.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	73.
64.6	89.	91.	92.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.
65.0	91.	92.	93.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.	77.	77.	76.	75.
65.4	92.	93.	94.	90.	89.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.	77.	76.
65.7	93.	94.	95.	91.	91.	90.	89.	89.	88.	87.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.
66.1	94.	95.	96.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.
66.5	95.	96.	97.	94.	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.	82.	82.	81.	80.
66.9	96.	97.	98.	95.	94.	94.	93.	92.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.	82.	81.
67.3	97.	98.	99.	96.	96.	95.	94.	94.	93.	92.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.
67.7	98.	99.	100.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.
68.1	99.	100.	102.	99.	98.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.	87.	87.	86.	85.
68.5	100.	102.	103.	100.	99.	99.	98.	97.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.	87.	86.
68.9	102.	103.	104.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.
69.3	103.	104.	105.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.
69.7	104.	105.	106.	104.	103.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.	92.	92.	91.	90.
70.1	105.	106.	107.	105.	104.	104.	103.	102.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.	92.	91.
70.5	106.	107.	108.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.
70.9	107.	108.	109.	108.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.	97.	97.	96.	95.	95.	94.
71.3	108.	109.	110.	109.	108.	108.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.	97.	97.	96.	95.
71.7	109.	110.	111.	110.	109.	109.	108.	107.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.	97.	96.
72.0	110.	111.	113.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.
72.4	112.	113.	114.	113.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.	102.	102.	101.	100.	100.	99.
72.8	113.	114.	115.	114.	113.	113.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.	102.	101.	101.	100.
73.2	114.	115.	116.	115.	114.	114.	113.	112.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.	102.	101.
73.6	115.	116.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.
74.0	116.	117.	118.	118.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.	107.	107.	106.	105.	105.	104.
74.4	117.	118.	119.	119.	118.	118.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.	107.	106.	106.	105.
74.8	118.	119.	120.	120.	119.	119.	118.	117.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.	107.	106.
75.2	119.	120.	121.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.
75.6	120.	121.	122.	123.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	112.	111.	110.	110.	109.
76.0	121.	123.	124.	124.	123.	122.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	111.	111.	110.
76.4	123.	124.	125.	125.	124.	124.	123.	122.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	111.
76.8	124.	125.	126.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.
77.2	125.	126.	127.	128.	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.	117.	117.	116.	115.	115.	114.
77.6	126.	127.	128.	129.	128.	127.	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.	117.	116.	116.	115.
78.0	127.	128.	129.	130.	129.	129.	128.	127.	127.	126.	125.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.	117.	116.
78.3	128.	129.	130.	131.	131.	130.	129.	129.	128.	127.	127.	126.	125.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.
78.7	129.	130.	131.	133.	132.	131.	131.	130.	129.	129.	128.	127.	127.	126.	125.	125.	124.	123.	123.	122.	122.	121.	120.	120.	119.
79.1	130.	131.	132.	134.	133.	132.	132.	131.	131.	130.	129.	129.	128.	127.	127.	126.	125.	125.	124.	123.	123.	122.	121.	121.	120.
79.5	131.	132.	134.	135.	134.	134.	133.	132.	132.	131.	130.	130.	129.	129.	128.	127.	127.	126.	125.	125.	124.	123.	123.	122.	121.
79.9	132.	134.	135.	136.	136.	135.	134.	134.	133.	132.	132.	131.	130.	130.	129.	128.	128.	127.	127.	126.	125.	125.	124.	123.	123.
80.3	134.	135.	136.	138.	137.	136.	136.	135.	134.	134.	133.	132.	132.	131.	130.	130.	129.	128.	128.	127.	127.	126.	125.	125.	124.
80.7	135.	136.	137.	139.	138.	137.	137.	136.	136.	135.	134.	134.	133.	132.	132.	131.	130.	130.	129.	128.	128.	127.	126.	126.	125.
81.1	136.	137.	138.	140.	139.	139.	138.	137.	137.	136.	135.	135.	134.	134.	133.	132.	132.	131.	130.	130.	129.	128.	128.	127.	126.
81.5	137.	138.	139.	141.	141.	140.	139.	139.	138.	137.	137.	136.	135.	135.	134.	133.	133.	132.	132.	131.	130.	130.	129.	128.	128.
81.9	138.	139.	140.	143.	142.	141.	141.	140.	139.	139.	138.	137.	137.	136.	135.	135.	134.	133.	133.	132.	131.	131.	130.	130.	129.
82.3	139.	140.	141.	144.	143.	142.	142.	141.	141.	140.	139.	139.	138.	137.	137.	136.	135.	135.	134.	133.	133.	132.	131.	131.	130.
82.7	140.	141.	142.	145.	144.	144.	143.	142.	142.	141.	140.	140.	139.	139.	138.	137.	137.	136.	135.	135.	134.	133.	133.	132.	131.

PREDICTION EQUATIONS FOR MVV — MALES — * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
59.1	56.	55.	55.	54.	53.	53.	52.	51.	51.	50.	49.	49.	48.	47.	47.	46.	46.	45.	44.	44.	43.	42.	42.	41.	40.
59.4	57.	56.	56.	55.	55.	54.	53.	53.	52.	51.	51.	50.	49.	49.	48.	47.	47.	46.	45.	45.	44.	44.	43.	42.	42.
59.8	58.	58.	57.	56.	56.	55.	54.	54.	53.	53.	52.	51.	51.	50.	49.	49.	48.	47.	47.	46.	45.	45.	44.	43.	43.
60.2	60.	59.	58.	58.	57.	56.	56.	55.	54.	54.	53.	52.	52.	51.	51.	50.	49.	49.	48.	47.	47.	46.	45.	45.	44.
60.6	61.	60.	60.	59.	58.	58.	57.	56.	56.	55.	54.	54.	53.	52.	52.	51.	50.	50.	49.	49.	48.	47.	47.	46.	45.
61.0	62.	61.	61.	60.	60.	59.	58.	58.	57.	56.	56.	55.	54.	54.	53.	52.	52.	51.	50.	50.	49.	49.	48.	47.	47.
61.4	63.	63.	62.	61.	61.	60.	59.	59.	58.	58.	57.	56.	56.	55.	54.	54.	53.	52.	52.	51.	50.	50.	49.	48.	48.
61.8	65.	64.	63.	63.	62.	61.	61.	60.	59.	59.	58.	57.	57.	56.	56.	55.	54.	54.	53.	52.	52.	51.	50.	50.	49.
62.2	66.	65.	65.	64.	63.	63.	62.	61.	61.	60.	59.	59.	58.	57.	57.	56.	55.	55.	54.	54.	53.	52.	52.	51.	50.
62.6	67.	66.	66.	65.	65.	64.	63.	63.	62.	61.	61.	60.	59.	59.	58.	57.	57.	56.	55.	55.	54.	53.	53.	52.	52.
63.0	68.	68.	67.	66.	66.	65.	64.	64.	63.	63.	62.	61.	61.	60.	59.	59.	58.	57.	57.	56.	55.	55.	54.	53.	53.
63.4	70.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	61.	60.	59.	59.	58.	57.	57.	56.	55.	55.	54.
63.8	71.	70.	70.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	59.	58.	57.	57.	56.	55.
64.2	72.	71.	71.	70.	70.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.	57.	57.
64.6	73.	73.	72.	71.	71.	70.	69.	69.	68.	68.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.	58.	58.
65.0	75.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	66.	65.	64.	64.	63.	62.	62.	61.	60.	60.	59.
65.4	76.	75.	75.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	64.	63.	62.	62.	61.	60.
65.7	77.	76.	76.	75.	74.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.	62.	62.
66.1	78.	78.	77.	76.	76.	75.	74.	74.	73.	73.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.	63.	63.
66.5	80.	79.	78.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	71.	70.	69.	69.	68.	67.	67.	66.	65.	65.	64.
66.9	81.	80.	80.	79.	78.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	69.	68.	67.	67.	66.	65.
67.3	82.	81.	81.	80.	79.	79.	78.	78.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	68.	68.	67.	67.
67.7	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.	68.	68.
68.1	85.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	76.	75.	74.	74.	73.	72.	72.	71.	70.	70.	69.
68.5	86.	85.	85.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	74.	73.	72.	72.	71.	70.
68.9	87.	86.	86.	85.	84.	84.	83.	83.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	73.	72.	72.
69.3	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	81.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.	73.	73.
69.7	90.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	79.	78.	77.	77.	76.	75.	75.	74.
70.1	91.	90.	90.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	79.	78.	77.	77.	76.	75.
70.5	92.	91.	91.	90.	89.	89.	88.	88.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.	77.	77.
70.9	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	86.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.	78.	78.
71.3	95.	94.	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	84.	83.	82.	82.	81.	80.	80.	79.
71.7	96.	95.	95.	94.	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.	82.	82.	81.	80.
72.0	97.	96.	96.	95.	94.	94.	93.	93.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.	82.	82.
72.4	98.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	91.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.	83.	83.
72.8	100.	99.	98.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	89.	88.	87.	87.	86.	85.	85.	84.
73.2	101.	100.	100.	99.	98.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.	87.	87.	86.	85.
73.6	102.	101.	101.	100.	99.	99.	98.	98.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.	87.	86.
74.0	103.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	96.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.	88.	88.
74.4	105.	104.	103.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	94.	93.	92.	92.	91.	90.	90.	89.
74.8	106.	105.	104.	104.	103.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.	92.	92.	91.	90.
75.2	107.	106.	106.	105.	104.	104.	103.	103.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.	92.	91.
75.6	108.	108.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	101.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.	93.	93.
76.0	110.	109.	108.	108.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	99.	98.	97.	97.	96.	95.	95.	94.
76.4	111.	110.	109.	109.	108.	108.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.	97.	97.	96.	95.
76.8	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.	97.	96.
77.2	113.	113.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	106.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.	98.	98.
77.6	115.	114.	113.	113.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	104.	103.	102.	102.	101.	100.	100.	99.
78.0	116.	115.	114.	114.	113.	113.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.	102.	102.	101.	100.
78.3	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	111.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.	102.	101.
78.7	118.	118.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.	103.	103.
79.1	120.	119.	118.	118.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	109.	108.	107.	107.	106.	105.	105.	104.
79.5	121.	120.	119.	119.	118.	118.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.	107.	107.	106.	105.
79.9	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	116.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.	107.	106.
80.3	123.	123.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	114.	113.	112.	112.	111.	110.	110.	109.	108.	108.
80.7	125.	124.	123.	123.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	112.	111.	110.	110.	109.
81.1	126.	125.	124.	124.	123.	123.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	112.	111.	110.
81.5	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	121.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.	112.	111.
81.9	128.	128.	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	119.	118.	117.	117.	116.	115.	115.	114.	113.	113.
82.3	130.	129.	128.	128.	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.	117.	117.	116.	115.	115.	114.
82.7	131.	130.	129.	129.	128.	128.	127.	126.	126.	125.	124.	124.	123.	122.	122.	121.	120.	120.	119.	118.	118.	117.	116.	116.	115.

PREDICTION EQUATIONS FOR MVP FEMALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46
51.2	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.
51.6	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.
52.0	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.
52.4	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.
52.8	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.
53.1	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.
53.5	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.
53.9	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.
54.3	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.
54.7	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.
55.1	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	50.	50.	49.	49.	48.
55.5	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.
55.9	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.
56.3	63.	62.	62.	61.	61.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.
56.7	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.
57.1	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.
57.5	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.
57.9	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.
58.3	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.
58.7	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.
59.1	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.
59.4	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.
59.8	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.
60.2	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.
60.6	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.
61.0	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.
61.4	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.
61.8	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	59.
62.2	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.
62.6	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.
63.0	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.
63.4	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.
63.8	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.
64.2	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.
64.6	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.
65.0	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.
65.4	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.
65.7	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	68.	68.	67.	67.	66.	66.
66.1	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.
66.5	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.
66.9	80.	80.	79.	79.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.
67.3	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.
67.7	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.
68.1	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.
68.5	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.
68.9	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.
69.3	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.
69.7	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.
70.1	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.
70.5	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.
70.9	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.
71.3	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.
71.7	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.
72.0	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.	77.	77.	76.
72.4	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	77.	77.
72.8	90.	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.	78.
73.2	90.	90.	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.	78.
73.6	91.	91.	90.	90.	89.	89.	88.	88.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.	79.	79.
74.0	92.	91.	91.	90.	90.	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.	80.
74.4	92.	92.	91.	91.	90.	90.	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.	80.
74.8	93.	92.	92.	91.	91.	90.	90.	89.	89.	88.	88.	87.	87.	86.	86.	85.	85.	84.	84.	83.	83.	82.	82.	81.	81.

PREDICTION EQUATIONS FOR MVV FEMALES * 60% OF PREDICTED **

HEIGHT (IN)	AGE (YEARS) 47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71
51.2	41.	40.	40.	39.	39.	39.	38.	38.	37.	37.	37.	36.	35.	35.	34.	34.	33.	33.	32.	32.	31.	31.	30.	30.	29.
51.5	42.	41.	41.	40.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.	33.	32.	32.	31.	31.	30.
52.0	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.	33.	32.	32.	31.	31.
52.4	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.	33.	32.	32.	31.
52.8	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.	32.	32.
53.3	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.	33.
53.9	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.	33.
54.3	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.	34.	34.
54.7	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.	35.
55.1	48.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.	36.	35.
55.5	49.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.	37.	36.
55.9	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.	37.
56.3	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.	38.	38.
56.7	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.	39.
57.1	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.	39.
57.6	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.	40.	40.
58.3	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.	41.	41.
58.7	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.	42.
59.1	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.	43.	42.
59.4	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.	43.
59.8	55.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.	44.
60.2	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.	45.	44.
60.6	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.	45.
61.0	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.	46.
61.4	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.	46.
61.8	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.	47.	47.
62.2	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.	48.
62.6	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.	48.
63.0	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.	49.	49.
63.4	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.	50.
63.8	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.	50.
64.2	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.	51.	51.
64.6	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.	52.
65.0	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.	52.
65.4	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.	53.
65.7	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.	53.
66.1	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.	54.	54.
66.5	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.	55.
66.9	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.	55.
67.3	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.	56.	56.
67.7	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.	57.
68.1	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.	57.
68.5	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.	58.	58.
68.9	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.	59.
69.3	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.	59.
69.7	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.	60.	60.
70.1	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.	61.
70.5	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.	61.
70.9	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.	62.	62.
71.3	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.	63.
71.7	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.	63.
72.0	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.	64.
72.4	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.	64.
72.8	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.	65.	65.
73.2	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.	66.
73.6	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.	66.
74.0	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.	67.	67.
74.4	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.	68.
74.8	80.	80.	79.	79.	78.	78.	77.	77.	76.	76.	75.	75.	74.	74.	73.	73.	72.	72.	71.	71.	70.	70.	69.	69.	68.

APPENDIX C TO PART 718—BLOOD-GAS TABLES

The following tables set forth the values to be applied in determining whether total disability may be established in accordance with §718.204(b)(2)(ii). The values contained in the tables are indicative of impairment only. They do not establish a degree of disability except as provided in §718.204(b)(2)(ii) of this subchapter, nor do they establish standards for determining normal alveolar gas exchange values for any particular individual. Tests must not be performed during or soon after an acute respiratory or cardiac illness. A miner who meets the following medical specifications must be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met:

(1) For arterial blood-gas studies performed at test sites up to 2,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	75
26	74
27	73
28	72
29	71
30	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40–49	60
Above 50	(1)

1 Any value.

(2) For arterial blood-gas studies performed at test sites 3,000 to 5,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	70
26	69
27	68
28	67
29	66
30	65
31	64
32	63
33	62
34	61
35	60
36	59
37	58
38	57
39	56
40–49	55
Above 50	(2)

2 Any value.

(3) For arterial blood-gas studies performed at test sites 6,000 feet or more above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	65
26	64
27	63
28	62
29	61
30	60
31	59
32	58
33	57
34	56
35	55
36	54
37	53
38	52
39	51
40–49	50
Above 50	(3)

3 Any value.

[65 FR 80045, Dec. 20, 2000, as amended at 78 FR 59115, Sept. 25, 2013]

PART 722—CRITERIA FOR DETERMINING WHETHER STATE WORKERS' COMPENSATION LAWS PROVIDE ADEQUATE COVERAGE FOR PNEUMOCONIOSIS AND LISTING OF APPROVED STATE LAWS

Sec.
722.1 Purpose.
722.2 Definitions.
722.3 General criteria; inclusion in and removal from the Secretary's list.
722.4 The Secretary's list.

AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 *et seq.*, 921, 932, 936; 33 U.S.C. 901 *et seq.*, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

SOURCE: 65 FR 80053, Dec. 20, 2000, unless otherwise noted.

§ 722.1 Purpose.

Section 421 of the Black Lung Benefits Act provides that a claim for benefits based on the total disability or death of a coal miner due to pneumoconiosis must be filed under a State workers' compensation law where such law provides adequate coverage for pneumoconiosis. A State workers' compensation law may be deemed to provide adequate coverage only when it is included on a list of such laws maintained by the Secretary. The purpose of this part is to set forth the procedures and criteria for inclusion on that list, and to provide that list.

§ 722.2 Definitions.

(a) The definitions and use of terms contained in subpart A of part 725 of this title shall be applicable to this part.

(b) For purposes of this part, the following definitions apply:

(1) *State agency* means, with respect to any State, the agency, department or officer designated by the workers' compensation law of the State to administer such law. In any case in which more than one agency participates in the administration of a State workers' compensation law, the Governor of the State may designate which of the agencies shall be the State agency for purposes of this part.

(2) *The Secretary's list* means the list published by the Secretary of Labor in the FEDERAL REGISTER (see § 722.4) containing the names of those States which have in effect a workers' compensation law which provides adequate coverage for death or total disability due to pneumoconiosis.

§ 722.3 General criteria; inclusion in and removal from the Secretary's list.

(a) The Governor of any State or any duly authorized State agency may, at any time, request that the Secretary include such State's workers' compensation law on his list of those State workers' compensation laws providing adequate coverage for total disability or death due to pneumoconiosis. Each such request shall include a copy of the State workers' compensation law and any other pertinent State laws; a copy of any regulations, either proposed or promulgated, implementing such laws; and a copy of any relevant administrative or court decision interpreting such laws or regulations, or, if such decisions are published in a readily available report, a citation to such decision.

(b) Upon receipt of a request that a State be included on the Secretary's list, the Secretary shall include the State on the list if he finds that the State's workers' compensation law guarantees the payment of monthly and medical benefits to all persons who would be entitled to such benefits under the Black Lung Benefits Act at the time of the request, at a rate no less than that provided by the Black Lung Benefits Act. The criteria used by the Secretary in making such determination shall include, but shall not be limited to, the criteria set forth in section 421(b)(2) of the Act.

(c) The Secretary may require each State included on the list to submit reports detailing the extent to which the State's workers' compensation laws, as reflected by statute, regulation, or administrative or court decision, continues to meet the requirements of paragraph (b) of this section. If the Secretary concludes that the State's workers' compensation law does not provide adequate coverage at any time, either because of changes to the State workers' compensation law or the Black Lung Benefits Act, he shall remove the State from the Secretary's list after providing the State with notice of such removal and an opportunity to be heard.

§ 722.4 The Secretary's list.

(a) The Secretary has determined that publication of the Secretary's list in the Code of Federal Regulations is appropriate. Accordingly, in addition to its publication in the FEDERAL REGISTER as required by section 421 of the Black Lung Benefits Act, the list shall also appear in paragraph (b) of this section.

(b) Upon review of all requests filed with the Secretary under section 421 of the Black Lung Benefits Act and this part, and examination of the workers' compensation laws of the States making such requests, the Secretary has determined that the workers' compensation law of each of the following listed States, for the period from the date shown in the list until such date as the Secretary may make a contrary determination, provides adequate coverage for pneumoconiosis.

State	Period commencing
None	

PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

Subpart A—General

Sec.

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725.2 Purpose and applicability of this part.
725.3 Contents of this part.
725.4 Applicability of other parts in this title.
725.101 Definitions and use of terms.

725.102 Disclosure of program information.
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725.202 Miner defined; conditions of entitlement, miner.
725.203 Duration and cessation of entitlement, miner.

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725.205 Determination of dependency; spouse.
725.206 Determination of relationship; divorced spouse.
725.207 Determination of dependency; divorced spouse.
725.208 Determination of relationship; child.
725.209 Determination of dependency; child.
725.210 Duration of augmented benefits.
725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

CONDITIONS AND DURATION OF ENTITLEMENT: MINER'S SURVIVORS

725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.
725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.
725.214 Determination of relationship; surviving spouse.
725.215 Determination of dependency; surviving spouse.
725.216 Determination of relationship; surviving divorced spouse.
725.217 Determination of dependency; surviving divorced spouse.
725.218 Conditions of entitlement; child.
725.219 Duration of entitlement; child.
725.220 Determination of relationship; child.
725.221 Determination of dependency; child.
725.222 Conditions of entitlement; parent, brother or sister.
725.223 Duration of entitlement; parent, brother or sister.
725.224 Determination of relationship; parent, brother or sister.
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AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174; 30 U.S.C. 901 *et seq.*, 902(f), 921, 932, 936; 33 U.S.C. 901 *et seq.;* 42 U.S.C. 405; Secretary's Order 10–2009, 74 FR 58834.

SOURCE: 65 FR 80054, Dec. 20, 2000, unless otherwise noted.

Subpart A—General

§ 725.1 Statutory provisions.

(a) *General.* Subchapter IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Amendments of 1981, the Black Lung Benefits Revenue Act of 1981, the Black Lung Consolidation of Responsibility Act of 2002, and the Patient Protection and Affordable Care Act of 2010 (together comprising the Black Lung Benefits Act (*see* § 725.101(a)(1)) provides for the payment of benefits to certain disabled coal miners and their survivors. *See* § 725.201.

(b) *Part B.* Part B of subchapter IV of the Act provided that claims filed before July 1, 1973 were to be filed with, and adjudicated and administered by, the Social Security Administration (SSA). If awarded, these claims were paid by SSA out of appropriated funds. The Black Lung Consolidation of Administrative Responsibility Act (*see* paragraph (h) of this section) transferred all responsibility for continued administration of these claims to the Department of Labor.

(c) *Part C.* Claims filed by a miner or survivor on or after January 1, 1974, are filed, adjudicated, and paid under the provisions of part C of subchapter IV of the Act. Part C requires that a claim filed on or after January 1, 1974, shall be filed under an applicable approved State workers' compensation law, or if no such law has been approved by the Secretary of Labor, the claim may be filed with the Secretary of Labor under Section 422 of the Act. Claims filed with the Secretary of Labor under part C are processed and adjudicated by the Secretary. Individual coal mine operators are primarily liable for benefits; however, if the miner's last coal mine employment terminated before January 1, 1970, or if no responsible operator can be identified, benefits are paid by the Black Lung Disability Trust Fund. Claims adjudicated under part C are subject to certain incorporated provisions of the Longshore and Harbor Workers' Compensation Act.

(d) *Changes made by the Black Lung Benefits Reform Act of 1977.* The Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for determining eligibility for benefits. Among these are:

(1) A provision which clarifies the definition of ''pneumoconiosis'' to include any ''chronic dust disease of the

lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment'';

(2) A provision which defines ''miner'' to include any person who works or has worked in or around a coal mine or coal preparation facility, and in coal mine construction or coal transportation under certain circumstances;

(3) A provision that continued employment in a coal mine is not conclusive proof that a miner is not or was not totally disabled;

(4) A provision which authorizes the Secretary of Labor to establish standards and develop criteria for determining total disability or death due to pneumoconiosis with respect to a part C claim;

(5) Provisions relating to the treatment to be accorded a survivor's affidavit, certain X-ray interpretations, and certain autopsy reports in the development of a claim; and

(6) Other clarifying, procedural, and technical amendments.

(e) *Changes made by the Black Lung Benefits Revenue Act of 1977*. The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) produced and sold or used in the United States after March 31, 1978. The Secretary of the Treasury is the managing trustee of the fund and benefits are paid from the fund upon the direction of the Secretary of Labor. The fund was made liable for the payment of all claims approved under part C of the Act for all periods of eligibility occurring on or after January 1, 1974, with respect to claims where the miner's last coal mine employment terminated before January 1, 1970, or where individual liability can not be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund was also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and to seek reimbursement from such operator. The purpose of the fund and the Black Lung Benefits Revenue Act of 1977 was to insure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contained other provisions relating to the fund and authorized a coal mine operator to establish its own trust fund for the payment of certain claims.

(f) *Changes made by the Black Lung Benefits Amendments of 1981*. The Black Lung Benefits Amendments of 1981 made a number of significant changes in the Act's standards for determining eligibility for benefits and concerning the payment of such benefits, and applied the changes to claims filed on or after January 1, 1982. Among these are:

(1) The Secretary of Labor may reread any X-ray submitted in support of a claim and may rely upon a second opinion concerning such an X-ray as a means of auditing the validity of the claim;

(2) The rebuttable presumption that the total disability of a miner with fifteen or more years employment in the coal mines, who has demonstrated a totally disabling respiratory or pulmonary impairment, is due to pneumoconiosis is no longer applicable (but the presumption was reinstated for claims filed after January 1, 2005, and pending on or after March 23, 2010, by the Patient Protection and Affordable Care Act of 2010 (*see* paragraph (i) of this section));

(3) In the case of deceased miners, where no medical or other relevant evidence is available, only affidavits from persons not eligible to receive benefits as a result of the adjudication of the claim will be considered sufficient to establish entitlement to benefits;

(4) Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on and after January 1, 1982, only when the miner's death was due to pneumoconiosis (but for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, an award of a miner's claim may form the basis for a survivor's entitlement under the Patient Protection and Affordable Care Act of 2010 (*see* paragraph (i) of this section));

(5) Benefits payable under this part are subject to an offset on account of excess earnings by the miner; and

(6) Other technical amendments.

(g) *Changes made by the Black Lung Benefits Revenue Act of 1981*. The Black Lung Benefits Revenue Act of 1981 temporarily doubles the amount of the tax upon coal until the fund has repaid all advances received from the United States Treasury and the interest on all such advances. With respect to claims filed on or after January 1, 1982, the fund's authorization for the payment of interim benefits is limited to the payment of prospective benefits only. These changes also define the rates of interest to be paid to and by the fund.

(h) *Changes made by the Black Lung Consolidation of Administrative Responsibility Act*. The Black Lung Consolidation of Administrative Responsibility Act of 2002 transferred administrative responsibility for all claims previously filed with or administered by the Social Security Administration to the Department of Labor, effective January 31, 2003. As a result, certain obsolete provisions in the BLBA (30 U.S.C. 904, 924a, and 945) were repealed. Various technical changes were made to other statutory provisions.

(i) *Changes made by the Patient Protection and Affordable Care Act of 2010*. The Patient Protection and Affordable Care Act of 2010 (the ACA) changed the entitlement criteria for miners' and survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, by reinstating two provisions made inapplicable by the Black Lung Benefits Amendments of 1981.

(1) For miners' claims meeting these date requirements, the ACA reinstated the rebuttable presumption that the miner is (or was) totally disabled due to pneumoconiosis if the miner has (or had) 15 or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment.

(2) For survivors' claims meeting these date requirements, the ACA made two changes. First, it reinstated the rebuttable presumption that the miner's death was due to pneumoconiosis if the miner had 15 years or more of qualifying coal mine employment and was totally disabled by a respiratory or pulmonary impairment at the time of death. Second, it reinstituted derivative survivors' entitlement. As a result, an eligible survivor will be entitled to benefits if the miner is or was found entitled to benefits on his or her lifetime claim based on total disability due to pneumoconiosis arising out of coal-mine employment.

(j) *Longshore Act provisions*. The adjudication of claims filed under part C of the Act (*i.e.*, claims filed on or after January 1, 1974) is governed by various procedural and other provisions contained in the Longshore and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by section 422. The incorporated LHWCA provisions are applicable under the Act except as is otherwise provided by the Act or as provided by regulations of the Secretary. Although occupational disease benefits are also payable under the LHWCA, the primary focus of the procedures set forth in that Act is upon a time-definite-traumatic injury or death. Because of this and other significant differences between a black lung and longshore claim, it is determined, in accordance with the authority set forth in Section 422 of the Act, that certain of the incorporated procedures prescribed by the LHWCA must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim. The changes made are based upon the Department's experience in processing black lung claims since July 1, 1973, and all such changes are specified in this part. No other departure from the incorporated provisions of the LHWCA is intended.

(k) *Social Security Act provisions*. Section 402 of Part A of the Act incorporates certain definitional provisions from the Social Security Act, 42 U.S.C. 301 *et seq*. Section 430 provides that the 1972, 1977 and 1981 amendments to part B of the Act shall also apply to part C ''to the extent appropriate.'' Sections 412 and 413 incorporate various provisions of the Social Security Act into part B of the Act. To the extent appropriate, therefore, these provisions also apply to part C. In certain cases, the Department has varied the terms of the Social Security Act provisions to accommodate the unique needs of the black lung benefits program. Parts of the Longshore and Harbor Workers'

Compensation Act are also incorporated into part C. Where the incorporated provisions of the two acts are inconsistent, the Department has exercised its broad regulatory powers to choose the extent to which each incorporation is appropriate. Finally, Section 422(g), contained in part C of the Act, incorporates 42 U.S.C. 403(b)–(l).

[78 FR 59115, Sept. 25, 2013]

§ 725.2 Purpose and applicability of this part.

(a) This part sets forth the procedures to be followed and standards to be applied in filing, processing, adjudicating, and paying claims filed under part C of subchapter IV of the Act.

(b) This part applies to all claims filed under part C of subchapter IV of the Act on or after June 30, 1982. Publication of certain provisions or parts of certain provisions that apply only to claims filed prior to June 30, 1982, or to claims subject to Section 435 of the Act, has been discontinued because those provisions affect an increasingly smaller number of claims. The version of Part 725 set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 2010, applies to the adjudication of all claims filed prior to June 30, 1982, as appropriate.

(c) The provisions of this part reflect revisions that became effective on January 19, 2001. This part applies to all claims filed after January 19, 2001 and all benefits payments made on such claims. With the exception of the following sections, this part also applies to the adjudication of claims that were pending on January 19, 2001 and all benefits payments made on such claims: §§ 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.495, 725.547, 725.701(e). The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim will be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

[78 FR 59117, Sept. 25, 2013]

§ 725.3 Contents of this part.

(a) This subpart describes the statutory provisions which relate to claims considered under this part, the purpose and scope of this part, definitions and usages of terms applicable to this part, and matters relating to the availability of information collected by the Department of Labor in connection with the processing of claims.

(b) Subpart B contains criteria for determining who may be found entitled to benefits under this part and other provisions relating to the conditions and duration of eligibility of a particular individual.

(c) Subpart C describes the procedures to be followed and action to be taken in connection with the filing of a claim under this part.

(d) Subpart D sets forth the duties and powers of the persons designated by the Secretary of Labor to adjudicate claims and provisions relating to the rights of parties and representatives of parties.

(e) Subpart E contains the procedures for developing evidence and adjudicating entitlement and liability issues by the district director.

(f) Subpart F describes the procedures to be followed if a hearing before the Office of Administrative Law Judges is required.

(g) Subpart G contains provisions governing the identification of a coal mine operator which may be liable for the payment of a claim.

(h) Subpart H contains provisions governing the payment of benefits with respect to an approved claim.

(i) Subpart I describes the statutory mechanisms provided for the enforcement of a coal mine operator's liability, sets forth the penalties which may be applied in the case of a defaulting coal mine operator, and describes the obligation of coal operators and their insurance carriers to file certain reports.

(j) Subpart J describes the right of certain beneficiaries to receive medical treatment benefits and vocational rehabilitation under the Act.

§ 725.4 Applicability of other parts in this title.

(a) Part 718. Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled due to pneumoconiosis, or whether a miner died due to pneumoconiosis, shall be applicable to the determination of claims under this part. Claims filed after March 31, 1980, are subject to part 718 as promulgated by the Secretary in accordance with section 402(f)(1) of the Act on February 29, 1980 (see § 725.2(c)). The criteria contained in subpart C of part 727 of this subchapter are applicable in determining claims filed prior to April 1, 1980, under this part, and such criteria shall be applicable at all times with respect to claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(b) *Parts 715, 717, and 720.* Pertinent and significant provisions of Parts 715, 717, and 720 of this subchapter (formerly contained in 20 CFR, parts 500 to end, edition revised as of April 1, 1978), which established the procedures for the filing, processing, and payment of claims filed under section 415 of the Act, are included within this part as appropriate.

(c) *Part 726.* Part 726 of this subchapter, which sets forth the obligations imposed upon a coal operator to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part as appropriate.

(d) *Part 727.* Part 727 of this subchapter, which governs the review, adjudication and payment of pending and denied claims under section 435 of the Act, is applicable with respect to such claims. The criteria contained in subpart C of part 727 for determining a claimant's eligibility for benefits are applicable under this part with respect to all claims filed before April 1, 1980, and to all claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977. Because the part 727 regulations affect an increasingly smaller number of claims, however, the Department has discontinued publication of the criteria in the Code of Federal Regulations. The part 727 criteria may be found at 43 FR 36818, Aug. 18, 1978 or 20 CFR, parts 500 to end, edition revised as of April 1, 1999.

(e) *Part 410.* Part 410 of this title, which sets forth provisions relating to a claim for black lung benefits under part B of title IV of the Act, is inapplicable to this part except as is provided in this part, or in part 718 of this subchapter.

§ 725.101 Definition and use of terms.

(a) *Definitions.* For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) The *Act* means the Black Lung Benefits Act, 30 U.S.C. 901–44, as amended.

(2) The *Longshore Act* or *LHWCA* means the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–950, as amended from time to time.

(3) The *Social Security Act* means the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. 301–431, as amended from time to time.

(4) *Administrative law judge* means a person qualified under *5 U.S.C. 3105* to conduct hearings and adjudicate claims for benefits filed pursuant to section 415 and part C of the Act. Until March 1, 1979, it also means an individual appointed to conduct such hearings and adjudicate such claims under Public Law 94–504.

(5) *Beneficiary* means a miner or any surviving spouse, divorced spouse, child, parent, brother or sister, who is entitled to benefits under either section 415 or part C of title IV of the Act.

(6) *Benefits* means all money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis, including augmented benefits (see § 725.520(c)). The term also includes any expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406.

(7) *Benefits Review Board* or *Board* means the Benefits Review Board, U.S. Department of Labor, an appellate tribunal appointed by the Secretary of Labor pursuant to the provisions of section 21(b)(1) of the LHWCA. See parts 801 and 802 of this title.

(8) *Black Lung Disability Trust Fund* or the *fund* means the Black Lung Disability Trust Fund established by the Black Lung Benefits Revenue Act of 1977, as amended by the Black Lung Benefits Revenue Act of 1981, for the payment of certain claims adjudicated under this part (see subpart G of this part).

(9) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001–8002.

(10) *Claim* means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

(11) *Claimant* means an individual who files a claim for benefits under this part.

(12) *Coal mine* means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(13) *Coal preparation* means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

(14) *Department* means the United States Department of Labor.

(15) *Director* means the Director, OWCP, or his or her designee.

(16) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA, or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter (see § 725.350). The term District Director is substituted for the term Deputy Commissioner wherever that term appears in the regulations. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute. Any action taken by a person under the authority of a district director will be considered the action of a deputy commissioner.

(17) *Division* or *DCMWC* means the Division of Coal Mine Workers' Compensation in the OWCP, United States Department of Labor.

(18) *Insurer* or *carrier* means any private company, corporation, mutual association, reciprocal or interinsurance exchange, or any other person or fund, including any State fund, authorized under the laws of a State to insure employers' liability under workers' compensation laws. The term also includes the Secretary of Labor in the exercise of his or her authority under section 433 of the Act.

(19) *Miner* or *coal miner* means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

(20) *The Nation's coal mines* means all coal mines located in any State.

(21) *Office* or *OWCP* means the Office of Workers' Compensation Programs, United States Department of Labor.

(22) *Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

(23) *Operator* means any owner, lessee, or other person who operates, controls or supervises a coal mine, including a prior or successor operator as defined in section 422 of the Act and certain transportation and construction employers (see subpart G of this part).

(24) *Person* means an individual, partnership, association, corporation, firm, subsidiary or parent of a corporation, or other organization or business entity.

(25) *Pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of

coal mine employment (see part 718 of this subchapter).

(26) *Responsible operator* means an operator which has been determined to be liable for the payment of benefits to a claimant for periods of eligibility after December 31, 1973, with respect to a claim filed under section 415 or part C of title IV of the Act or reviewed under section 435 of the Act.

(27) *Secretary* means the Secretary of Labor, United States Department of Labor, or a person, authorized by him or her to perform his or her functions under title IV of the Act.

(28) *State* includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and prior to January 3, 1959, and August 21, 1959, respectively, the territories of Alaska and Hawaii.

(29) *Total disability* and *partial disability*, for purposes of this part, have the meaning given them as provided in part 718 of this subchapter.

(30) *Underground coal mine* means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (*i.e.*, overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.

(31) A *workers' compensation law* means a law providing for payment of benefits to employees, and their dependents and survivors, for disability on account of injury, including occupational disease, or death, suffered in connection with their employment. A payment funded wholly out of general revenues shall not be considered a payment under a workers' compensation law.

(32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 ''working days.'' A ''working day'' means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

(i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, does not establish more than one year.

(ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.

(iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table must be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

(iv) Periods of coal mine employment occurring outside the United States must not be considered in computing the miner's work history.

(b) *Statutory terms.* The definitions contained in this section must not be construed in derogation of terms of the Act.

(c) *Dependents and survivors.* Dependents and survivors are those persons described in subpart B of this part.

[65 FR 80054, Dec. 20, 2000, as amended at 77 FR 37286, June 21, 2012; 78 FR 59117, Sept. 25, 2013]

§ 725.102 Disclosure of program information.

(a) All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director or his or her designee shall be the official custodian of those records maintained by the OWCP at its national office. The District Director shall be the official custodian of those records maintained at a district office.

(b) The official custodian of any record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR Part 70). The original record in any such case shall not be removed from the Office of the custodian for such inspection. The custodian may, in his or her discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his or her opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508 of this chapter.

(c) Any person may request copies of records he or she has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR Part 70).

(d) Any party to a claim (§ 725.360) or his or her duly authorized representative shall be permitted upon request to inspect the file which has been compiled in connection with such claim. Any party to a claim or representative of such party shall upon request be provided with a copy of any or all material contained in such claim file. A request for information by a party or representative made under this paragraph shall be answered within a reasonable time after receipt by the Office. Internal documents prepared by the district director which do not constitute evidence of a fact which must be established in connection with a claim shall not be routinely provided or presented for inspection in accordance with a request made under this paragraph.

§ 725.103 Burden of proof.

Except as otherwise provided in this part and part 718, the burden of proving a fact alleged in connection with any provision shall rest with the party making such allegation.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

§ 725.201 Who is entitled to benefits; contents of this subpart.

(a) Part C of the Act provides for the payment of periodic benefits in accordance with this part to:

(1) A miner who meets the conditions of entitlement set forth in § 725.202(d); or

(2) The surviving spouse or surviving divorced spouse of a deceased miner who meets the conditions of entitlement set forth in § 725.212; or,

(3) Where neither exists, the child of a deceased miner who meets the conditions of entitlement set forth in § 725.218; or

(4) The surviving dependent parents, where there is no surviving spouse or child, or the surviving dependent brothers or sisters, where there is no surviving spouse, child, or parent, of a miner, who meet the conditions of entitlement set forth in § 725.222; or

(5) The child of a miner's surviving spouse who was receiving benefits under Part C of the Act at the time of such spouse's death.

(b) The provisions contained in this subpart describe the conditions of entitlement to benefits applicable to a miner, or a surviving spouse, child, parent, brother, or sister, and the

events which establish or terminate entitlement to benefits.

(c) In order for an entitled miner or surviving spouse to qualify for augmented benefits because of one or more dependents, such dependents must meet relationship and dependency requirements with respect to such beneficiary prescribed by or pursuant to the Act. Such requirements are also set forth in this subpart.

[65 FR 80054, Dec. 20, 2000, as amended at 78 FR 59117, Sept. 25, 2013]

CONDITIONS AND DURATION OF ENTITLEMENT: MINER

§ 725.202 Miner defined; condition of entitlement, miner.

(a) *Miner defined.* A ''miner'' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:

(1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

(2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

(b) *Coal mine construction and transportation workers; special provisions.* A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal. A construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine (see § 725.101(a)(12), (30)).

(1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:

(i) Determining whether such individual is or was a miner;

(ii) Establishing the applicability of any of the presumptions described in section 411(c) of the Act and part 718 of this subchapter; and

(iii) Determining the identity of a coal mine operator liable for the payment of benefits in accordance with § 725.495.

(2) The presumption may be rebutted by evidence which demonstrates that:

(i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or

(ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

(c) A person who is or was a self-employed miner or independent contractor, and who otherwise meets the requirements of this paragraph, shall be considered a miner for the purposes of this part.

(d) *Conditions of entitlement; miner.* An individual is eligible for benefits under this subchapter if the individual:

(1) Is a miner as defined in this section; and

(2) Has met the requirements for entitlement to benefits by establishing that he or she:

(i) Has pneumoconiosis (see § 718.202), and

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

(3) Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.203 Duration and cessation of entitlement; miner.

(a) An individual is entitled to benefits as a miner for each month beginning with the first month on or after January 1, 1974, in which the miner is

totally disabled due to pneumoconiosis arising out of coal mine employment.

(b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events first occurs:

(1) The miner dies; or

(2) The miner's total disability ceases (see § 725.504).

(c) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in his or her usual coal mine work or comparable and gainful work.

(d) Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, if an issue arises pertaining to the validity of the original award.

CONDITIONS AND DURATION OF ENTITLEMENT: MINER'S DEPENDENTS (AUGMENTED BENEFITS)

§ 725.204 Determination of relationship; spouse.

(a) For the purpose of augmenting benefits, an individual will be considered to be the spouse of a miner if:

(1) The courts of the State in which the miner is domiciled would find that such individual and the miner validly married; or

(2) The courts of the State in which the miner is domiciled would find, under the law they would apply in determining the devolution of the miner's intestate personal property, that the individual is the miner's spouse; or

(3) Under State law, such individual would have the right of a spouse to share in the miner's intestate personal property; or

(4) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which, but for a legal impediment, would have been a valid marriage, unless the individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household in the month in which a request is filed that the miner's benefits be augmented because such individual qualifies as the miner's spouse.

(b) The qualification of an individual for augmentation purposes under this section shall end with the month before the month in which:

(1) The individual dies, or

(2) The individual who previously qualified as a spouse for purposes of § 725.520(c), entered into a valid marriage without regard to this section, with a person other than the miner.

§ 725.205 Determination of dependency; spouse.

For the purposes of augmenting benefits, an individual who is the miner's spouse (see § 725.204) will be determined to be dependent upon the miner if:

(a) The individual is a member of the same household as the miner (see § 725.232); or

(b) The individual is receiving regular contributions from the miner for support (see § 725.233(c)); or

(c) The miner has been ordered by a court to contribute to such individual's support (see § 725.233(e)); or

(d) The individual is the natural parent of the son or daughter of the miner; or

(e) The individual was married to the miner (see § 725.204) for a period of not less than 1 year.

§ 725.206 Determination of relationship; divorced spouse.

For the purposes of augmenting benefits with respect to any claim considered or reviewed under this part or part 727 of this subchapter (see § 725.4(d)), an individual will be considered to be the divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to the miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final.

§ 725.207 Determination of dependency; divorced spouse.

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§ 725.206) will be determined to be dependent upon the miner if:

(a) The individual is receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order requires the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.208 Determination of relationship; child.

As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of death (see § 725.212), or a miner. An individual will be considered to be the child of a beneficiary if:

(a) The courts of the State in which the beneficiary is domiciled (see § 725.231) would find, under the law they would apply, that the individual is the beneficiary's child; or

(b) The individual is the legally adopted child of such beneficiary; or

(c) The individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent or adopting parent to such beneficiary; or

(d) The individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section if the beneficiary and the mother or the father, as the case may be, of the individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of the beneficiary if:

(1) The beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the parent of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(e)) because the individual is his or her son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time the beneficiary became entitled to benefits.

§ 725.209 Determination of dependency; child.

(a) For purposes of augmenting the benefits of a miner or surviving spouse, the term ''beneficiary'' as used in this section means only a miner or surviving spouse entitled to benefits (see § 725.202 and § 725.212). An individual who is the beneficiary's child (§ 725.208) will be determined to be, or to have been, dependent on the beneficiary, if the child:

(1) Is unmarried; and

(2)(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or

(iii) Is 18 years of age or older and is a student.

(b)(1) The term ''student'' means a ''full-time student'' as defined in section 202(d)(7) of the Social Security Act, 42 U.S.C. 402(d)(7) (see §§ 404.367–404.369 of this title), or an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(i) A school, college, or university operated or directly supported by the United States, or by a State or local

government or political subdivision thereof; or

(ii) A school, college, or university which has been accredited by a State or by a State-recognized or nationally-recognized accrediting agency or body; or

(iii) A school, college, or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited; or

(iv) A technical, trade, vocational, business, or professional school accredited or licensed by the Federal or a State government or any political subdivision thereof, providing courses of not less than 3 months' duration that prepare the student for a livelihood in a trade, industry, vocation, or profession.

(2) A student will be considered to be ''pursuing a full-time course of study or training at an institution'' if the student is enrolled in a noncorrespondence course of at least 13 weeks duration and is carrying a subject load which is considered full-time for day students under the institution's standards and practices. A student beginning or ending a full-time course of study or training in part of any month will be considered to be pursuing such course for the entire month.

(3) A child is considered not to have ceased to be a student:

(i) During any interim between school years, if the interim does not exceed 4 months and the child shows to the satisfaction of the Office that he or she has a bona fide intention of continuing to pursue a full-time course of study or training; or

(ii) During periods of reasonable duration in which, in the judgment of the Office, the child is prevented by factors beyond the child's control from pursuing his or her education.

(4) A student whose 23rd birthday occurs during a semester or the enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period, unless eligibility is otherwise terminated.

§ 725.210 Duration of augmented benefits.

Augmented benefits payable on behalf of a spouse or divorced spouse, or a child, shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. Augmentation of benefits on account of a dependent continues through the month before the month in which the dependent ceases to satisfy these conditions, except in the case of a child who qualifies as a dependent because such child is a student. In the latter case, benefits continue to be augmented through the month before the first month during no part of which such child qualifies as a student.

§ 725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

With respect to the spouse or child of a miner entitled to benefits, and with respect to the child of a surviving spouse entitled to benefits, the determination as to whether an individual purporting to be a spouse or child is related to or dependent upon such miner or surviving spouse shall be based on the facts and circumstances present in each case, at the appropriate time.

CONDITIONS AND DURATION OF ENTITLEMENT: MINER'S SURVIVORS

§ 725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Is determined to have died due to pneumoconiosis; or

(ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving spouse or surviving divorced spouse filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

(b) If more than one spouse meets the conditions of entitlement prescribed in paragraph (a), then each spouse will be considered a beneficiary for purposes of section 412(a)(2) of the Act without regard to the existence of any other entitled spouse or spouses.

[65 FR 80054, Dec. 20, 2000, as amended at 78 FR 59117, Sept. 25, 2013]

§ 725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual is entitled to benefits as a surviving spouse, or as a surviving divorced spouse, for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.212 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which either of the following events first occurs:

(1) The surviving spouse or surviving divorced spouse marries; or

(2) The surviving spouse or surviving divorced spouse dies.

(c) A surviving spouse or surviving divorced spouse whose entitlement to benefits has been terminated pursuant to § 725.213(b)(1) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.212. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.212(a)(3)(i)) or the miner's death due to pneumoconiosis (§ 725.212(a)(3)(ii)).

§ 725.214 Determination of relationship; surviving spouse.

An individual shall be considered to be the surviving spouse of a miner if:

(a) The courts of the State in which the miner was domiciled (see § 725.231) at the time of his or her death would find that the individual and the miner were validly married; or

(b) The courts of the State in which the miner was domiciled (see § 725.231) at the time of the miner's death would find that the individual was the miner's surviving spouse; or

(c) Under State law, such individual would have the right of the spouse to share in the miner's intestate personal property; or

(d) Such individual went through a marriage ceremony with the miner, resulting in a purported marriage between them which, but for a legal impediment (see § 725.230), would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner's death.

§ 725.215 Determination of dependency; surviving spouse.

An individual who is the miner's surviving spouse (see § 725.214) shall be determined to have been dependent on the miner if, at the time of the miner's death:

(a) The individual was living with the miner (see § 725.232); or

(b) The individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (see § 725.233); or

(c) The individual was living apart from the miner because of the miner's desertion or other reasonable cause; or

(d) The individual is the natural parent of the miner's son or daughter; or

(e) The individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or

(f) The individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g)(1) The individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (g)(2) of this section), or

(ii) Occurs in line of duty while the miner is a member of a uniformed service serving on active duty (as defined in § 404.1019 of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which such miner died.

(2) For purposes of paragraph (g)(1)(i) of this section, the death of a miner is accidental if such individual received bodily injuries solely through violent, external, and accidental means, and as a direct result of the bodily injuries and independently of all other causes, dies not later than 3 months after the day on which such miner receives such bodily injuries. The term ''accident'' means an event that was unpremeditated and unforeseen from the standpoint of the deceased individual. To determine whether the death of an individual did, in fact, result from an accident the adjudication officer will consider all the circumstances surrounding the casualty. An intentional and voluntary suicide will not be considered to be death by accident; however, suicide by an individual who is so incompetent as to be incapable of acting intentionally and voluntarily will be considered to be a death by accident. In no event will the death of an individual resulting from violent and external causes be considered a suicide unless there is direct proof that the fatal injury was self-inflicted.

(3) The provisions of paragraph (g) shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

§ 725.216 Determination of relationship; surviving divorced spouse.

An individual will be considered to be the surviving divorced spouse of a deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter (see § 725.4(d)), if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

§ 725.217 Determination of dependency; surviving divorced spouse.

An individual who is the miner's surviving divorced spouse (see § 725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(a) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order required the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.218 Conditions of entitlement; child.

(a) An individual is entitled to benefits where he or she meets the required standards of relationship and dependency under this subpart (see § 725.220 and § 725.221) and is the child of a deceased miner who:

(1) Is determined to have died due to pneumoconiosis; or

(2) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving child filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

(b) A child is not entitled to benefits for any month for which a miner, or the surviving spouse or surviving divorced spouse of a miner, establishes entitlement to benefits.

[65 FR 80054, Dec. 20, 2000, as amended at 78 FR 59117, Sept. 25, 2013]

§ 725.219 Duration of entitlement; child.

(a) An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.218 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the child attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the child's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the child is a student; or

(ii) The month in which the child attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the child's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

(d) A child whose entitlement to benefits has been terminated pursuant to § 725.219(b)(2) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.218. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.218(a)(1)) or the miner's death due to pneumoconiosis (§ 725.212(a)(2)).

§ 725.220 Determination of relationship; child.

For purposes of determining whether an individual may qualify for benefits as the child of a deceased miner, the provisions of § 725.208 shall be applicable. As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of such surviving spouse's death (see § 725.212), or a miner. For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or

mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

§ 725.221 Determination of dependency; child.

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained age 22, or in the case of a student, before the child ceased to be a student.

§ 725.222 Conditions of entitlement; parent, brother, or sister.

(a) An individual is eligible for benefits as a surviving parent, brother or sister if all of the following requirements are met:

(1) The individual is the parent, brother, or sister of a deceased miner;

(2) The individual was dependent on the miner at the pertinent time;

(3) Proof of support is filed within 2 years after the miner's death, unless the time is extended for good cause (§ 725.226);

(4) In the case of a brother or sister, such individual also:

(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), which began before such individual attained age 22, or in the case of a student, before the student ceased to be a student; or

(iii) Is a student (see § 725.209(b)); or

(iv) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), at the time of the miner's death;

(5) The deceased miner:

(i) Is determined to have died due to pneumoconiosis; or

(ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving parent, brother or sister filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

(b)(1) A parent is not entitled to benefits if the deceased miner was survived by a spouse or child at the time of such miner's death.

(2) A brother or sister is not entitled to benefits if the deceased miner was survived by a spouse, child, or parent at the time of such miner's death.

[65 FR 80054, Dec. 20, 2000, as amended at 78 FR 59117, Sept. 25, 2013]

§ 725.223 Duration of entitlement; parent, brother, or sister.

(a) A parent, sister, or brother is entitled to benefits beginning with the month all the conditions of entitlement described in § 725.222 are met.

(b) The last month for which such parent is entitled to benefits is the month in which the parent dies.

(c) The last month for which such brother or sister is entitled to benefits is the month before the month in which any of the following events first occurs:

(1) The individual dies;

(2)(i) The individual marries or remarries; or

(ii) If already married, the individual received support in any amount from his or her spouse;

(3) The individual attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the individual attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the individual's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the individual is a student; or

(ii) The month in which the individual attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the individual's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

§ 725.224 Determination of relationship; parent, brother, or sister.

(a) An individual will be considered to be the parent, brother, or sister of a miner if the courts of the State in which the miner was domiciled (see § 225.231) at the time of death would

find, under the law they would apply, that the individual is the miner's parent, brother, or sister.

(b) Where, under State law, the individual is not the miner's parent, brother, or sister, but would, under State law, have the same status (*i.e.*, right to share in the miner's intestate personal property) as a parent, brother, or sister, the individual will be considered to be the parent, brother, or sister as appropriate.

§ 725.225 Determination of dependency; parent, brother, or sister.

An individual who is the miner's parent, brother, or sister will be determined to have been dependent on the miner if, during the 1–year period immediately prior to the miner's death:

(a) The individual and the miner were living in the same household (see § 725.232); and

(b) The individual was totally dependent on the miner for support (see § 725.233(h)).

§ 725.226 "Good cause" for delayed filing of proof of support.

(a) *What constitutes ''good cause.''* ''Good cause'' may be found for failure to file timely proof of support where the parent, brother, or sister establishes to the satisfaction of the Office that such failure to file was due to:

(1) Circumstances beyond the individual's control, such as extended illness, mental, or physical incapacity, or communication difficulties; or

(2) Incorrect or incomplete information furnished the individual by the Office; or

(3) Efforts by the individual to secure supporting evidence without a realization that such evidence could be submitted after filing proof of support.

(b) *What does not constitute ''good cause.''* ''Good cause'' for failure to file timely proof of support (see § 725.222(a)(3)) does not exist when there is evidence of record in the Office that the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence.

§ 725.227 Time of determination of relationship and dependency of survivors.

The determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

§ 725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

An individual who has been convicted of the felonious and intentional homicide of a miner or other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary, and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

TERMS USED IN THIS SUBPART

§ 725.229 Intestate personal property.

References in this subpart to the ''same right to share in the intestate personal property'' of a deceased miner (or surviving spouse) refer to the right of an individual to share in such distribution in the individual's own right and not the right of representation.

§ 725.230 Legal impediment.

For purposes of this subpart, ''legal impediment'' means an impediment resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution or resulting from a defect in the procedure followed in connection with the purported marriage ceremony—for example, the solemnization of a marriage only through a religious ceremony in a country which requires a civil ceremony for a valid marriage.

§ 725.231 Domicile.

(a) For purposes of this subpart, the term ''domicile'' means the place of an individual's true, fixed, and permanent home.

(b) The domicile of a deceased miner or surviving spouse is determined as of the time of death.

(c) If an individual was not domiciled in any State at the pertinent time, the law of the District of Columbia is applied.

§ 725.232 Member of the same household—"living with," "living in the same household," and "living in the miner's household," defined.

(a) *Defined*. (1) The term ''member of the same household'' as used in section 402(a)(2) of the Act (with respect to a spouse); the term ''living with'' as used in section 402(e) of the Act (with respect to a surviving spouse); and the term ''living in the same household'' as used in this subpart, means that a husband and wife were customarily living together as husband and wife in the same place.

(2) The term ''living in the miner's household'' as used in section 412(a)(5) of the Act (with respect to a parent, brother, or sister) means that the miner and such parent, brother, or sister were sharing the same residence.

(b) *Temporary absence*. The temporary absence from the same residence of either the miner, or the miner's spouse, parent, brother, or sister (as the case may be), does not preclude a finding that one was ''living with'' the other, or that they were ''members of the same household.'' The absence of one such individual from the residence in which both had customarily lived shall, in the absence of evidence to the contrary, be considered temporary:

(1) If such absence was due to service in the Armed Forces of the United States; or

(2) If the period of absence from his or her residence did not exceed 6 months and the absence was due to business or employment reasons, or because of confinement in a penal institution or in a hospital, nursing home, or other curative institution; or

(3) In any other case, if the evidence establishes that despite such absence they nevertheless reasonably expected to resume physically living together.

(c) *Relevant period of time*. (1) The determination as to whether a surviving spouse had been ''living with'' the miner shall be based upon the facts and circumstances as of the time of the death of the miner.

(2) The determination as to whether a spouse is a ''member of the same household'' as the miner shall be based upon the facts and circumstances with respect to the period or periods of time as to which the issue of membership in the same household is material.

(3) The determination as to whether a parent, brother, or sister was ''living in the miner's household'' shall take account of the 1-year period immediately prior to the miner's death.

§ 725.233 Support and contributions.

(a) *Support* defined. The term ''support'' includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.

(b) *Contributions* defined. The term ''contributions'' refers to contributions actually provided by the contributor from such individual's property, or the use thereof, or by the use of such individual's own credit.

(c) *Regular contributions* and *substantial contributions* defined. The terms ''regular contributions'' and ''substantial contributions'' mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support.

(d) *Contributions and community property*. When a spouse receives and uses for his or her support income from services or property, and such income, under applicable State law, is the community property of the wife and her husband, no part of such income is a ''contribution'' by one spouse to the other's support regardless of the legal interest of the donor. However, when a spouse receives and uses for support, income from the services and the property of the other spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by the donor to the spouse's support.

(e) *Court order for support* defined. References to a support order in this

subpart means any court order, judgment, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual's support and which is in effect at the applicable time. If such contributions are required by a court order, this condition is met whether or not the contributions were actually made.

(f) *Written agreement* defined. The term ''written agreement'' in the phrase ''substantial contributions pursuant to a written agreement'', as used in this subpart means an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable.

(g) *One-half support* defined. The term ''one-half support'' means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual's support at such time or during such period.

(h) *Totally dependent for support* defined. The term ''totally dependent for support'' as used in § 725.225(b) means that the miner made regular contributions to the support of the miner's parents, brother, or sister, as the case may be, and that the amount of such contributions at least equalled the total cost of such individual's support.

Subpart C—Filing of Claims

§ 725.301 Who may file a claim.

(a) Any person who believes he or she may be entitled to benefits under the Act may file a claim in accordance with this subpart.

(b) A claimant who has attained the age of 18, is mentally competent and physically able, may file a claim on his or her own behalf.

(c) If a claimant is unable to file a claim on his or her behalf because of a legal or physical impairment, the following rules shall apply:

(1) A claimant between the ages of 16 and 18 years who is mentally competent and not under the legal custody or care of another person, or a committee or institution, may upon filing a statement to the effect, file a claim on his or her own behalf. In any other case where the claimant is under 18 years of age, only a person, or the manager or principal officer of an institution having legal custody or care of the claimant may file a claim on his or her behalf.

(2) If a claimant over 18 years of age has a legally appointed guardian or committee, only the guardian or committee may file a claim on his or her behalf.

(3) If a claimant over 18 years of age is mentally incompetent or physically unable to file a claim and is under the care of another person, or an institution, only the person, or the manager or principal officer of the institution responsible for the care of the claimant, may file a claim on his or her behalf.

(4) For good cause shown, the Office may accept a claim executed by a person other than one described in paragraphs (c)(2) or (3) of this section.

(d) Except as provided in § 725.305, in order for a claim to be considered, the claimant must be alive at the time the claim is filed.

§ 725.302 Evidence of authority to file a claim on behalf of another.

A person filing a claim on behalf of a claimant shall submit evidence of his or her authority to so act at the time of filing or at a reasonable time thereafter in accordance with the following:

(a) A legally appointed guardian or committee shall provide the Office with certification of appointment by a proper official of the court.

(b) Any other person shall provide a statement describing his or her relationship to the claimant, the extent to which he or she has care of the claimant, or his or her position as an officer of the institution of which the claimant is an inmate. The Office may, at any time, require additional evidence to establish the authority of any such person.

§ 725.303 Date and place of filing of claims.

(a)(1) Claims for benefits shall be delivered, mailed to, or presented at, any

of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims, or, in the case of a claim filed by or on behalf of a claimant residing outside the United States, mailed or presented to any office maintained by the Foreign Service of the United States. A claim shall be considered filed on the day it is received by the office in which it is first filed.

(2) A claim submitted to a Foreign Service Office or any other agency or subdivision of the U.S. Government shall be forwarded to the Office and considered filed as of the date it was received at the Foreign Service Office or other governmental agency or unit.

(b) A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark. In the absence of a legible postmark, other evidence may be used to establish the mailing date.

§ 725.304 Forms and initial processing.

(a) Claims shall be filed on forms prescribed and approved by the Office. The district office at which the claim is filed will assist claimants in completing their forms.

(b) If the place at which a claim is filed is an office of the Social Security Administration, such office shall forward the completed claim form to an office of the DCMWC, which is authorized to process the claim.

§ 725.305 When a written statement is considered a claim.

(a) The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part under the following circumstances:

(1) The claimant or a proper person on his or her behalf (see § 725.301) executes and files a prescribed claim form with the Office during the claimant's lifetime within the period specified in paragraph (b) of this section.

(2) Where the claimant dies within the period specified in paragraph (b) of this section without filing a prescribed claim form, and a person acting on behalf of the deceased claimant's estate executes and files a prescribed claim form within the period specified in paragraph (c) of this section.

(b) Upon receipt of a written statement indicating an intention to claim benefits, the Office shall notify the signer in writing that to be considered the claim must be executed by the claimant or a proper party on his or her behalf on the prescribed form and filed with the Office within six months from the date of mailing of the notice.

(c) If before the notice specified in paragraph (b) of this section is sent, or within six months after such notice is sent, the claimant dies without having executed and filed a prescribed form, or without having had one executed and filed in his or her behalf, the Office shall upon receipt of notice of the claimant's death advise his or her estate, or those living at his or her last known address, in writing that for the claim to be considered, a prescribed claim form must be executed and filed by a person authorized to do so on behalf of the claimant's estate within six months of the date of the later notice.

(d) Claims based upon written statements indicating an intention to claim benefits not perfected in accordance with this section shall not be processed.

§ 725.306 Withdrawal of a claim.

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under § 725.305, may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

(3) Any payments made to the claimant in accordance with § 725.522 are reimbursed.

(b) When a claim has been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

§ 725.307 Cancellation of a request for withdrawal.

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

§ 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part on or before December 31, 1980. Any claim filed after that date shall be untimely unless the time for filing has been enlarged for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

§ 725.309 Additional claims; effect of prior denial of benefits.

(a) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim must be merged with the earlier claim for all purposes. For purposes of this section, a claim must be considered pending if it has not yet been finally denied.

(b) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a request for modification of the prior denial and will be processed and adjudicated under § 725.310.

(c) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim must be considered a subsequent claim for benefits. A subsequent claim will be processed and adjudicated in accordance with the provisions of subparts E and F of this part. Except as provided in paragraph (1) below, a subsequent claim must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules apply to the adjudication of a subsequent claim:

(1) The requirement to establish a change in an applicable condition of entitlement does not apply to a survivor's claim if the requirements of §§ 725.212(a)(3)(ii), 725.218(a)(2), or 725.222(a)(5)(ii) are met, and the survivor's prior claim was filed—

(i) On or before January 1, 2005, or

(ii) After January 1, 2005 and was finally denied prior to March 23, 2010.

(2) Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(3) For purposes of this section, the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual

worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(4) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(5) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

(6) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(d) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid will be subject to collection or offset under subpart H of this part.

[78 FR 59118, Sept. 25, 2013]

§ 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings must be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, are each entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414. Modification proceedings may not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings before the district director, the district director may issue a proposed decision and order (§ 725.418) or, if appropriate, deny the claim by reason of abandonment (§ 725.409). In any case in which the district director has initiated modification proceedings on his own initiative to alter the terms of an award or denial of benefits issued by an administrative law judge, the district director must, at the conclusion of modification proceedings, forward the claim for a hearing (§ 725.421). In any case forwarded for a hearing, the administrative law judge assigned to hear such case must consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact.

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order must not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to

the date upon which the party requested reconsideration under paragraph (a) of this section will be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) will be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) will be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings under paragraph (a) will be subject to collection or offset under subpart H of this part.

(e)(1) In this paragraph, an order is ''effective'' as described in § 725.502(a) and ''final'' as described in §§ 725.419(d), 725.479(a) or 802.406.

(2) Any modification request by an operator must be denied unless the operator proves that at the time of the request, the operator has:

(i) Paid to the claimant all monetary benefits, including retroactive benefits and interest under § 725.502(b)(2), due under any effective order;

(ii) Paid to the claimant all additional compensation (*see* § 725.607) due under an effective order;

(iii) Paid all medical benefits (*see* § 725.701 *et seq.*) due under any effective award, but only if the order awards payment of specific medical expenses;

(iv) Paid all final orders awarding attorney's fees and expenses under § 725.367 and witness fees under § 725.459, but only if the underlying benefits order is final (*see* § 725.367(b)); and

(v) Reimbursed the Black Lung Disability Trust Fund, with interest, for all benefits paid under the orders described in paragraphs (e)(2)(i) or (iii) of this section and the costs for the medical examination under § 725.406.

(3) The requirements of paragraph (e)(2) of this section are inapplicable to any benefits owed pursuant to an effective but non-final order if the payment of such benefits has been stayed by the Benefits Review Board or appropriate court under 33 U.S.C. 921.

(4) Except as provided by paragraph (e)(5) of this section, the operator must submit all documentary evidence pertaining to its compliance with the requirements of paragraph (e)(2) of this section to the district director concurrently with its request for modification. The claimant is also entitled to submit any relevant evidence to the district director. Absent extraordinary circumstances, no documentary evidence pertaining to the operator's compliance with the requirements of paragraph (e)(2) at the time of the modification request will be admitted into the hearing record or otherwise considered at any later stage of the proceeding.

(5) The requirements imposed by paragraph (e)(2) of this section are continuing in nature. If at any time during the modification proceedings the operator fails to meet the payment obligations described, the adjudication officer must issue an order to show cause why the operator's modification request should not be denied and afford all parties time to respond to such order. Responses may include evidence pertaining to the operator's continued compliance with the requirements of paragraph (e)(2). If, after the time for response has expired, the adjudication officer determines that the operator is not meeting its obligations, the adjudication officer must deny the operator's modification request.

(6) The denial of a request for modification under this section will not bar any future modification request by the operator, so long as the operator satisfies the requirements of paragraph (e)(2) of this section with each future modification petition.

(7) The provisions of this paragraph apply to all modification requests filed on or after May 26, 2016.

[65 FR 80054, Dec. 20, 2000, as amended at 81 FR 24479, Apr. 26, 2016]

§ 725.311 Communications with respect to claims; time computations.

(a) Unless otherwise specified by this part, all requests, responses, notices, decisions, orders, or other communications required or permitted by this part shall be in writing.

(b) If required by this part, any document, brief, or other statement submitted in connection with the adjudication of a claim under this part shall be sent to each party to the claim by the submitting party. If proof of service is required with respect to any communication, such proof of service shall be submitted to the appropriate adjudication officer and filed as part of the claim record.

(c) In computing any period of time described in this part, by any applicable statute, or by the order of any adjudication officer, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday. ''Legal holiday'' includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States.

(d) In computing any period of time described in this part in which the period within which to file a response commences upon receipt of a document, it shall be presumed, in the absence of evidence to the contrary, that the document was received on the seventh day after it was mailed. In any case in which a provision of this part requires a document to be sent to a person or party by certified mail, and the document is not sent by certified mail, but the person or party actually received the document, the document shall be deemed to have been sent in compliance with the provisions of this part. In such a case, any time period which commences upon the service of the document shall commence on the date the document was received.

Subpart D—Adjudication Officers; Parties and Representatives

§ 725.350 Who are the adjudication officers?

(a) *General*. The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called ''adjudication officers.'' This section describes the status of black lung claims adjudication officers.

(b) *District Director*. The district director is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

(c) *Administrative law judge*. An administrative law judge is that official appointed pursuant to 5 U.S.C. 3105 (or Public Law 94–504) who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings with respect to, and adjudicate, claims in accordance with this part. A person appointed under Public Law 94–504 shall not be considered an administrative law judge for purposes of this part for any period after March 1, 1979.

§ 725.351 Powers of adjudication officers.

(a) *District Director*. The district director is authorized to:

(1) Make determinations with respect to claims as is provided in this part;

(2) Conduct conferences and informal discovery proceedings as provided in this part;

(3) Compel the production of documents by the issuance of a subpoena;

(4) Prepare documents for the signature of parties;

(5) Issue appropriate orders as provided in this part; and

(6) Do all other things necessary to enable him or her to discharge the duties of the office.

(b) Administrative Law Judge. An administrative law judge is authorized to:

(1) Conduct formal hearings in accordance with the provisions of this part;

(2) Administer oaths and examine witnesses;

(3) Compel the production of documents and appearance of witnesses by the issuance of subpoenas;

(4) Issue decisions and orders with respect to claims as provided in this part; and

(5) Do all other things necessary to enable him or her to discharge the duties of the office.

(c) If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the district director, or the administrative law judge responsible for the adjudication of the claim, shall certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting (or to the U.S. District Court for the District of Columbia if he or she is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

§ 725.352 Disqualification of adjudication officer.

(a) No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision. A decision to withdraw from the consideration of a claim shall be within the discretion of the adjudication officer. If that adjudication officer withdraws, another officer shall be designated by the Director or the Chief Administrative Law Judge, as the case may be, to complete the adjudication of the claim.

(b) No adjudication officer shall be permitted to appear or act as a representative of a party under this part while such individual is employed as an adjudication officer. No adjudication officer shall be permitted at any time to appear or act as a representative in connection with any case or claim in which he or she was personally involved. No fee or reimbursement shall be awarded under this part to an individual who acts in violation of this paragraph.

(c) No adjudication officer shall act in any claim involving a party which employed such adjudication officer within one year before the adjudication of such claim.

(d) Notwithstanding paragraph (a) of this section, no adjudication officer shall be permitted to act in any claim involving a party who is related to the adjudication officer by consanguinity or affinity within the third degree as determined by the law of the place where such party is domiciled. Any action taken by an adjudication officer in knowing violation of this paragraph shall be void.

§ 725.360 Parties to proceedings.

(a) Except as provided in § 725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim. The following persons shall be parties:

(1) The claimant;

(2) A person other than a claimant, authorized to execute a claim on such claimant's behalf under § 725.301;

(3) Any coal mine operator notified under § 725.407 of its possible liability for the claim;

(4) Any insurance carrier of such operator; and

(5) The Director in all proceedings relating to a claim for benefits under this part.

(b) A widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party.

(c) Any coal mine operator or prior operator or insurance carrier which has not been notified under § 725.407 and which makes a showing in writing that its rights may be prejudiced by a decision of an adjudication officer may be made a party.

(d) Any other individual may be made a party if that individual's rights with respect to benefits may be prejudiced by a decision to be made.

§ 725.361 Party amicus curiae.

At the discretion of the Chief Administrative Law Judge or the administrative law judge assigned to the case, a person or entity which is not a party may be allowed to participate amicus curiae in a formal hearing only as to an issue of law. A person may participate amicus curiae in a formal hearing upon written request submitted with supporting arguments prior to the hearing. If the request is granted, the administrative law judge hearing the case will inform the party of the extent to which participation will be permitted. The request may, however, be denied summarily and without explanation.

§ 725.362 Representation of parties.

(a) Except for the Secretary of Labor, whose interests shall be represented by the Solicitor of Labor or his or her designee, each of the parties may appoint an individual to represent his or her interest in any proceeding for determination of a claim under this part. Such appointment shall be made in writing or on the record at the hearing. An attorney qualified in accordance with § 725.363(a) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing. Any other person (see § 725.363(b)) shall file a written notice of appointment signed by the party or his or her legal guardian, or enter his or her appearance on the record at a formal hearing if the party he or she seeks to represent is present and consents to the representation. Any written declaration or notice required by this section shall include the OWCP number assigned by the Office and shall be sent to the Office or, for representation at a formal hearing, to the Chief Administrative Law Judge. In any case, such representative must be qualified under § 725.363. No authorization for representation or agreement between a claimant and representative as to the amount of a fee, filed with the Social Security Administration in connection with a claim under part B of title IV of the Act, shall be valid under this part. A claimant who has previously authorized a person to represent him or her in connection with a claim originally filed under part B of title IV may renew such authorization by filing a statement to such effect with the Office or appropriate adjudication officer.

(b) Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

§ 725.363 Qualification of representative.

(a) *Attorney*. Any attorney in good standing who is admitted to practice before a court of a State, territory, district, or insular possession, or before the Supreme Court of the United States or other Federal court and is not, pursuant to any provision of law, prohibited from acting as a representative, may be appointed as a representative.

(b) *Other person.* With the approval of the adjudication officer, any other person may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative.

§ 725.364 Authority of representative.

A representative, appointed and qualified as provided in §§ 725.362 and 725.363, may make or give on behalf of the party he or she represents, any request or notice relative to any proceeding before an adjudication officer, including formal hearing and review, except that such representative may not execute a claim for benefits, unless he or she is a person designated in § 725.301 as authorized to execute a claim. A representative shall be entitled to present or elicit evidence and make allegations as to facts and law in any proceeding affecting the party represented and to obtain information with respect to the claim of such party to the same extent as such party. Notice given to any party of any administrative action, determination, or decision, or request to any party for the production of evidence shall be sent to the representative of such party and such notice or request shall have the same force and effect as if it had been sent to the party represented.

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the district director, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the district director, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under part B of title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and part 727 of this subchapter (see § 725.4(d)).

(c) In awarding a fee, the appropriate adjudication officer shall consider, and

shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a district director is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the district director awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

§ 725.367 Payment of a claimant's attorney's fee by responsible operator or fund.

(a) An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in a case in which there is no operator who is liable for the payment of benefits, from the fund. Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant. The fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship. Circumstances in which a successful attorney's fees shall be payable by the responsible operator or the fund include, but are not limited to, the following:

(1) The responsible operator designated by the district director (see § 725.410(a)(3)) fails to accept the claimant's entitlement to benefits within the 30-day period provided by § 725.412(b) and is ultimately determined to be liable for benefits. The operator shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(2) There is no operator that may be held liable for the payment of benefits, and the district director issues a schedule for the submission of additional evidence under § 725.410. The fund shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(3) The claimant submits a bill for medical treatment, and the party liable for the payment of benefits declines to pay the bill on the grounds that the treatment is unreasonable, or is for a condition that is not compensable. The responsible operator or fund, as appropriate, shall be liable for an attorney's fee with respect to all necessary services performed by the claimant's attorney;

(4) A beneficiary seeks an increase in the amount of benefits payable, and the responsible operator or fund contests the claimant's right to that increase. If the beneficiary is successful in securing an increase in the amount of benefits payable, the operator or fund shall be liable for an attorney's fee with respect to all necessary services performed by the beneficiary's attorney;

(5) The responsible operator or fund seeks a decrease in the amount of benefits payable. If the beneficiary is successful in resisting the request for a decrease in the amount of benefits payable, the operator or fund shall be liable for an attorney's fee with respect to all necessary services performed by the beneficiary's attorney. A request for information clarifying the amount of

benefits payable shall not be considered a request to decrease that amount.

(b) Any fee awarded under this section shall be in addition to the award of benefits, and shall be awarded, in an order, by the district director, administrative law judge, Board or court, before whom the work was performed. The operator or fund shall pay such fee promptly and directly to the claimant's attorney in a lump sum after the award of benefits becomes final.

(c) Section 205(a) of the Black Lung Benefits Amendments of 1981, Public Law 97–119, amended section 422 of the Act and relieved operators and carriers from liability for the payment of benefits on certain claims. Payment of benefits on those claims was made the responsibility of the fund. The claims subject to this transfer of liability are described in § 725.496. On claims subject to the transfer of liability described in this paragraph the fund will pay all fees and costs which have been or will be awarded to claimant's attorneys which were or would have become the liability of an operator or carrier but for the enactment of the 1981 Amendments and which have not already been paid by such operator or carrier. Section 9501(d)(7) of the Internal Revenue Code (26 U.S.C.), which was also enacted as a part of the 1981 Amendments to the Act, expressly prohibits the fund from reimbursing an operator or carrier for any attorney fees or costs which it has paid on cases subject to the transfer of liability provisions.

Subpart E—Adjudication of Claims by the District Director

§ 725.401 Claims development—general.

After a claim has been received by the district director, the district director shall take such action as is necessary to develop, process, and make determinations with respect to the claim as provided in this subpart.

§ 725.402 Approved State workers' compensation law.

If a district director determines that any claim filed under this part is one subject to adjudication under a workers' compensation law approved under part 722 of this subchapter, he or she shall advise the claimant of this determination and of the Act's requirement that the claim must be filed under the applicable State workers' compensation law. The district director shall then prepare a proposed decision and order dismissing the claim for lack of jurisdiction pursuant to § 725.418 and proceed as appropriate.

§ 725.403 [Reserved]

§ 725.404 Development of evidence—general.

(a) *Employment history*. Each claimant shall furnish the district director with a complete and detailed history of the coal miner's employment and, upon request, supporting documentation.

(b) *Matters of record*. Where it is necessary to obtain proof of age, marriage or termination of marriage, death, family relationship, dependency (see subpart B of this part), or any other fact which may be proven as a matter of public record, the claimant shall furnish such proof to the district director upon request.

(c) *Documentary evidence*. If a claimant is required to submit documents to the district director, the claimant shall submit either the original, a certified copy or a clear readable copy thereof. The district director or administrative law judge may require the submission of an original document or certified copy thereof, if necessary.

(d) *Submission of insufficient evidence*. In the event a claimant submits insufficient evidence regarding any matter, the district director shall inform the claimant of what further evidence is necessary and request that such evidence be submitted within a specified reasonable time which may, upon request, be extended for good cause.

§ 725.405 Development of medical evidence; scheduling of medical examinations and tests.

(a) Upon receipt of a claim, the district director shall ascertain whether the claim was filed by or on account of a miner as defined in § 725.202, and in the case of a claim filed on account of a deceased miner, whether the claim was filed by an eligible survivor of such miner as defined in subpart B of this part.

(b) In the case of a claim filed by or on behalf of a miner, the district director shall, where necessary, schedule the miner for a medical examination and testing under § 725.406.

(c) In the case of a claim filed by or on behalf of a survivor of a miner, the district director shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.

(d) The district director shall, where appropriate, collect other evidence necessary to establish:

(1) The nature and duration of the miner's employment; and

(2) All other matters relevant to the determination of the claim.

(e) If at any time during the processing of the claim by the district director, the evidence establishes that the claimant is not entitled to benefits under the Act, the district director may terminate evidentiary development of the claim and proceed as appropriate.

§ 725.406 Medical examinations and tests.

(a) The Act requires the Department to provide each miner who applies for benefits with the opportunity to undergo a complete pulmonary evaluation at no expense to the miner. A complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest radiograph, and, unless medically contraindicated, a blood gas study.

(b) As soon as possible after a miner files an application for benefits, the district director will provide the miner with a list of medical facilities and physicians in the state of the miner's residence and states contiguous to the state of the miner's residence that the Office has authorized to perform complete pulmonary evaluations. The miner must select one of the facilities or physicians on the list, provided that the miner may not select any physician to whom the miner or the miner's spouse is related to the fourth degree of consanguinity, and the miner may not select any physician who has examined or provided medical treatment to the miner within the twelve months preceding the date of the miner's application. The district director will make arrangements for the miner to be given a complete pulmonary evaluation by that facility or physician. The results of the complete pulmonary evaluation must not be counted as evidence submitted by the miner under § 725.414.

(c) If any medical examination or test conducted under paragraph (a) of this section is not administered or reported in substantial compliance with the provisions of part 718 of this subchapter, or does not provide sufficient information to allow the district director to decide whether the miner is eligible for benefits, the district director must schedule the miner for further examination and testing. Where the deficiencies in the report are the result of a lack of effort on the part of the miner, the miner will be afforded one additional opportunity to produce a satisfactory result. In order to determine whether any medical examination or test was administered and reported in substantial compliance with the provisions of part 718 of this subchapter, the district director may have any component of such examination or test reviewed by a physician selected by the district director.

(d) After the physician completes the report authorized by paragraph (a), the district director will inform the miner that he may elect to have the results of the objective testing sent to his treating physician for use in preparing a medical opinion. The district director will also inform the claimant that any medical opinion submitted by his treating physician will count as one of the two medical opinions that the miner may submit under § 725.414 of this part.

(e) The cost of any medical examination or test authorized under this section, including the cost of travel to and from the examination, must be paid by the fund. Reimbursement for overnight accommodations must not be authorized unless the district director determines that an adequate testing facility is unavailable within one day's round trip travel by automobile from the miner's residence. The fund must be reimbursed for such payments by an operator, if any, found liable for the payment of benefits to the claimant. If an operator fails to repay such expenses,

with interest, upon request of the Office, the entire amount may be collected in an action brought under section 424 of the Act and § 725.603.

[65 FR 80054, Dec. 20, 2000, as amended at 78 FR 35558, June 13, 2013; 79 FR 21615, Apr. 17, 2014]

§ 725.407 Identification and notification of responsible operator.

(a) Upon receipt of the miner's employment history, the district director shall investigate whether any operator may be held liable for the payment of benefits as a responsible operator in accordance with the criteria contained in Subpart G of this part.

(b) The district director may identify one or more operators potentially liable for the payment of benefits in accordance with the criteria set forth in § 725.495 of this part. The district director shall notify each such operator of the existence of the claim. Where the records maintained by the Office pursuant to part 726 of this subchapter indicate that the operator had obtained a policy of insurance, and the claim falls within such policy, the notice provided pursuant to this section shall also be sent to the operator's carrier. Any operator or carrier notified of the claim shall thereafter be considered a party to the claim in accordance with § 725.360 of this part unless it is dismissed by an adjudication officer and is not thereafter notified again of its potential liability.

(c) The notification issued pursuant to this section shall include a copy of the claimant's application and a copy of all evidence obtained by the district director relating to the miner's employment. The district director may request the operator to answer specific questions, including, but not limited to, questions related to the nature of its operations, its relationship with the miner, its financial status, including any insurance obtained to secure its obligations under the Act, and its relationship with other potentially liable operators. A copy of any notification issued pursuant to this section shall be sent to the claimant by regular mail.

(d) If at any time before a case is referred to the Office of Administrative Law Judges, the district director determines that an operator which may be liable for the payment of benefits has not been notified under this section or has been incorrectly dismissed pursuant to § 725.410(a)(3), the district director shall give such operator notice of its potential liability in accordance with this section. The adjudication officer shall then take such further action on the claim as may be appropriate. There shall be no time limit applicable to a later identification of an operator under this paragraph if the operator fraudulently concealed its identity as an employer of the miner. The district director may not notify additional operators of their potential liability after a case has been referred to the Office of Administrative Law Judges, unless the case was referred for a hearing to determine whether the claim was properly denied as abandoned pursuant to § 725.409.

§ 725.408 Operator's response to notification.

(a)(1) An operator which receives notification under § 725.407 shall, within 30 days of receipt, file a response indicating its intent to accept or contest its identification as a potentially liable operator. The operator's response shall also be sent to the claimant by regular mail.

(2) If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term ''operator'' shall include any operator for which the identified operator may be considered a successor operator pursuant to § 725.492.

(i) That the named operator was an operator for any period after June 30, 1973;

(ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;

(iii) That the miner was exposed to coal mine dust while working for the operator;

(iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and

(v) That the operator is capable of assuming liability for the payment of benefits.

(3) An operator which receives notification under § 725.407, and which fails to file a response within the time limit provided by this section, shall not be allowed to contest its liability for the payment of benefits on any of the grounds set forth in paragraph (a)(2).

(b)(1) Within 90 days of the date on which it receives notification under § 725.407, an operator may submit documentary evidence in support of its position.

(2) No documentary evidence relevant to the grounds set forth in paragraph (a)(2) may be admitted in any further proceedings unless it is submitted within the time limits set forth in this section.

§ 725.409 Denial of a claim by reason of abandonment.

(a) A claim may be denied at any time by the district director by reason of abandonment where the claimant fails:

(1) To undergo a required medical examination without good cause; or,

(2) To submit evidence sufficient to make a determination of the claim; or,

(3) To pursue the claim with reasonable diligence; or,

(4) To attend an informal conference without good cause.

(b)(1) If the district director determines that a denial by reason of abandonment under paragraphs (a)(1) through (3) of this section is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. If the claimant completes the action requested within the time allowed, the claim shall be developed, processed and adjudicated as specified in this part. If the claimant does not fully comply with the action requested by the district director, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(2) In any case in which a claimant has failed to attend an informal conference and has not provided the district director with his reasons for failing to attend, the district director shall ask the claimant to explain his absence. In considering whether the claimant had good cause for his failure to attend the conference, the district director shall consider all relevant circumstances, including the age, education, and health of the claimant, as well as the distance between the claimant's residence and the location of the conference. If the district director concludes that the claimant had good cause for failing to attend the conference, he may continue processing the claim, including, where appropriate under § 725.416, the scheduling of an informal conference. If the claimant does not supply the district director with his reasons for failing to attend the conference within 30 days of the date of the district director's request, or the district director concludes that the reasons supplied by the claimant do not establish good cause, the district director shall notify the claimant that the claim has been denied by reason of abandonment. Such notification shall be served on the claimant and all other parties to the claim by certified mail.

(c) The denial of a claim by reason of abandonment shall become effective and final unless, within 30 days after the denial is issued, the claimant requests a hearing. Following the expiration of the 30-day period, a new claim may be filed at any time pursuant to § 725.309. For purposes of § 725.309, a denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement. If the claimant timely requests a hearing, the district director shall refer the case to the Office of Administrative Law Judges in accordance with § 725.421. Except upon the motion or written agreement of the Director, the hearing will be limited to the issue of whether the claim was properly denied by reason of abandonment. If the hearing is limited to the issue of abandonment and the administrative law judge determines that the claim was not properly denied by reason of abandonment, he shall remand the claim to the district director for the completion of administrative processing.

§ 725.410 Submission of additional evidence.

(a) After the district director completes the development of medical evidence under § 725.405 of this part, including the complete pulmonary evaluation authorized by § 725.406, and receives the responses and evidence submitted pursuant to § 725.408, he shall issue a schedule for the submission of additional evidence. The schedule shall contain the following information:

(1) If the claim was filed by, or on behalf of, a miner, the schedule shall contain a summary of the complete pulmonary evaluation administered pursuant to § 725.406. If the claim was filed by, or on behalf of, a survivor, the schedule shall contain a summary of any medical evidence developed by the district director pursuant to § 725.405(c).

(2) The schedule shall contain the district director's preliminary analysis of the medical evidence. If the district director believes that the evidence fails to establish any necessary element of entitlement, he shall inform the claimant of the element of entitlement not established and the reasons for his conclusions and advise the claimant that, unless he submits additional evidence, the district director will issue a proposed decision and order denying the claim.

(3) The schedule shall contain the district director's designation of a responsible operator liable for the payment of benefits. In the event that the district director has designated as the responsible operator an employer other than the employer who last employed the claimant as a miner, the district director shall include, with the schedule, a copy of the statements required by § 725.495(d) of this part. The district director may, in his discretion, dismiss as parties any of the operators notified of their potential liability pursuant to § 725.407. If the district director thereafter determines that the participation of a party dismissed pursuant to this section is required, he may once again notify the operator in accordance with § 725.407(d).

(4) The schedule shall notify the claimant and the designated responsible operator that they have the right to obtain further adjudication of the claim in accordance with this subpart, and that they have the right to submit additional evidence in accordance with this subpart. The schedule shall also notify the claimant that he has the right to obtain representation, under the terms set forth in subpart D, in order to assist him. In a case in which the district director has designated a responsible operator pursuant to paragraph (a)(3), the schedule shall further notify the claimant that if the operator fails to accept the claimant's entitlement to benefits within the time limit provided by § 725.412, the cost of obtaining additional medical and other necessary evidence, along with a reasonable attorney's fee, shall be reimbursed by the responsible operator in the event that the claimant establishes his entitlement to benefits payable by that operator. In a case in which there is no operator liable for the payment of benefits, the schedule shall notify the claimant that the cost of obtaining additional medical and other necessary evidence, along with a reasonable attorney's fee, shall be reimbursed by the fund.

(b) The schedule shall allow all parties not less than 60 days within which to submit additional evidence, including evidence relevant to the claimant's eligibility for benefits and evidence relevant to the liability of the designated responsible operator, and shall provide not less than an additional 30 days within which the parties may respond to evidence submitted by other parties. Any such evidence must meet the requirements set forth in § 725.414 in order to be admitted into the record.

(c) The district director shall serve a copy of the schedule, together with a copy of all of the evidence developed, on the claimant, the designated responsible operator, and all other operators which received notification pursuant to § 725.407. The schedule shall be served on each party by certified mail.

§ 725.411 Initial adjudication in Trust Fund cases.

Notwithstanding the requirements of § 725.410 of this part, if the district director concludes that the results of the complete pulmonary evaluation support a finding of eligibility, and that there is no operator responsible for the

payment of benefits, the district director shall issue a proposed decision and order in accordance with § 725.418 of this part.

§ 725.412 Operator's response.

(a)(1) Within 30 days after the district director issues a schedule pursuant to § 725.410 of this part containing a designation of the responsible operator liable for the payment of benefits, that operator shall file a response with regard to its liability. The response shall specifically indicate whether the operator agrees or disagrees with the district director's designation.

(2) If the responsible operator designated by the district director does not file a timely response, it shall be deemed to have accepted the district director's designation with respect to its liability, and to have waived its right to contest its liability in any further proceeding conducted with respect to the claim.

(b) The responsible operator designated by the district director may also file a statement accepting claimant's entitlement to benefits. If that operator fails to file a timely response to the district director's designation, the district director shall, upon receipt of such a statement, issue a proposed decision and order in accordance with § 725.418 of this part. If the operator fails to file a statement accepting the claimant's entitlement to benefits within 30 days after the district director issues a schedule pursuant to § 725.410 of this part, the operator shall be deemed to have contested the claimant's entitlement.

§ 725.413 Disclosure of medical information.

(a) For purposes of this section, medical information is any written medical data, including data in electronic format, about the miner that a party develops in connection with a claim for benefits, including medical data developed with any prior claim that has not been disclosed previously to the other parties. Medical information includes, but is not limited to—

(1) Any examining physician's written or testimonial assessment of the miner, including the examiner's findings, diagnoses, conclusions, and the results of any tests;

(2) Any other physician's written or testimonial assessment of the miner's respiratory or pulmonary condition;

(3) The results of any test or procedure related to the miner's respiratory or pulmonary condition, including any information relevant to the test or procedure's administration; and

(4) Any physician's or other medical professional's interpretation of the results of any test or procedure related to the miner's respiratory or pulmonary condition.

(b) For purposes of this section, medical information does not include—

(1) Any record of a miner's hospitalization or other medical treatment; or

(2) Communications from a party's representative to a medical expert.

(c) Each party must disclose medical information the party or the party's agent receives by sending a complete copy of the information to all other parties in the claim within 30 days after receipt. If the information is received after the claim is already scheduled for hearing before an administrative law judge, the disclosure must be made at least 20 days before the scheduled hearing is held (*see* § 725.456(b)).

(d) Medical information disclosed under this section must not be considered in adjudicating any claim unless a party designates the information as evidence in the claim.

(e) At the request of any party or on his or her own motion, an adjudication officer may impose sanctions on any party or his or her representative who fails to timely disclose medical information in compliance with this section.

(1) Sanctions must be appropriate to the circumstances and may only be imposed after giving the party an opportunity to demonstrate good cause why disclosure was not made and sanctions are not warranted. In determining an appropriate sanction, the adjudication officer must consider—

(i) Whether the sanction should be mitigated because the party was not represented by an attorney when the information should have been disclosed; and

(ii) Whether the party should not be sanctioned because the failure to disclose was attributable solely to the party's attorney.

(2) Sanctions may include, but are not limited to—

(i) Drawing an adverse inference against the non-disclosing party on the facts relevant to the disclosure;

(ii) Limiting the non-disclosing party's claims, defenses or right to introduce evidence;

(iii) Dismissing the claim proceeding if the non-disclosing party is the claimant and no payments prior to final adjudication have been made to the claimant unless the Director agrees to the dismissal in writing (*see* § 725.465(d));

(iv) Rendering a default decision against the non-disclosing party;

(v) Disqualifying the non-disclosing party's attorney from further participation in the claim proceedings; and

(vi) Relieving a claimant who files a subsequent claim from the impact of § 725.309(c)(6) if the non-disclosed evidence predates the denial of the prior claim and the non-disclosing party is the operator.

(3) Sanctions must not include—

(i) Fines or

(ii) Imprisonment.

(4) Sanctions imposed by a district director are subject to review by an administrative law judge in accordance with the provisions of this part.

(f) This rule applies to—

(1) All claims filed after May 26, 2016;

(2) Pending claims not yet adjudicated by an administrative law judge, except that medical information received prior to May 26, 2016 and not previously disclosed must be provided to the other parties within 60 days of May 26, 2016; and

(3) Pending claims already adjudicated by an administrative law judge where—

(i) The administrative law judge reopens the record for receipt of additional evidence in response to a timely reconsideration motion (*see* § 725.479(b)) or after remand by the Benefits Review Board or a reviewing court; or

(ii) A party requests modification of the award or denial of benefits (*see* § 725.310(a)).

(The Office of Management and Budget has approved the information collection contained in this section and assigned control number 1240–0054 with an expiration date of May 31, 2019.)

[81 FR 24480, Apr. 26, 2016, as amended at 81 FR 31854, May 20, 2016]

§ 725.414 Development of evidence.

(a) *Medical evidence.* (1) For purposes of this section, a medical report is a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence. Supplemental medical reports prepared by the same physician must be considered part of the physician's original medical report. A physician's written assessment of a single objective test, such as a chest X-ray or a pulmonary function test, is not a medical report for purposes of this section.

(2)(i) The claimant is entitled to submit, in support of his affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.

(ii) The claimant is entitled to submit, in rebuttal of the case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to § 725.406. In any case in which the party opposing entitlement has submitted the results of other testing pursuant to § 718.107,

the claimant is entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant is entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant is entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(3)(i) The responsible operator designated pursuant to § 725.410 is entitled to obtain and submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section. In obtaining such evidence, the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by § 725.406 of this part, whichever is greater, unless a trip of greater distance is authorized in writing by the district director. If a miner unreasonably refuses—

(A) To provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or

(B) To submit to an evaluation or test requested by the district director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. (*See* § 725.409 of this part).

(ii) The responsible operator is entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant under paragraph (a)(2)(i) of this section and by the Director pursuant to § 725.406. In any case in which the claimant has submitted the results of other testing pursuant to § 718.107, the responsible operator is entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator is entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the responsible operator, the responsible operator is entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

(iii) In a case in which the district director has not identified any potentially liable operators, or has dismissed all potentially liable operators under § 725.410(a)(3), or has identified a liable operator that ceases to defend the claim on grounds of an inability to provide for payment of continuing benefits, the district director is entitled to exercise the rights of a responsible operator under this section, except that the evidence obtained in connection with the complete pulmonary evaluation performed pursuant to § 725.406 must be considered evidence obtained and submitted by the Director, OWCP, for purposes of paragraph (a)(3)(i) of this section. In a case involving a dispute concerning medical benefits under § 725.708 of this part, the district director is entitled to develop medical evidence to determine whether the medical bill is compensable under the standard set forth in § 725.701 of this part.

(4) Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.

(5) A copy of any documentary evidence submitted by a party must be served on all other parties to the claim. If the claimant is not represented by an attorney, the district director must mail a copy of all documentary evidence submitted by the claimant to all other parties to the claim. Following the development and submission of affirmative medical evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

(b) *Evidence pertaining to liability*. (1) Except as provided by § 725.408(b)(2), the designated responsible operator may submit evidence to demonstrate that it is not the potentially liable operator that most recently employed the claimant.

(2) Any other party may submit evidence regarding the liability of the designated responsible operator or any other operator.

(3) A copy of any documentary evidence submitted under this paragraph must be mailed to all other parties to the claim. Following the submission of affirmative evidence, the parties may submit rebuttal evidence in accordance with the schedule issued by the district director.

(c) *Testimony*. A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician will be considered a medical report for purposes of the limitations provided by this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of § 725.456 of this part. In accordance with the schedule issued by the district director, all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

(d) Except to the extent permitted by §§ 725.456 and 725.310(b), the limitations set forth in this section apply to all proceedings conducted with respect to a claim, and no documentary evidence pertaining to liability may be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director in accordance with this section.

[65 FR 80054, Dec. 20, 2000, as amended at 81 FR 24480, Apr. 26, 2016]

§ 725.415 Action by the district director after development of evidence.

(a) At the end of the period permitted under § 725.410(b) for the submission of evidence, the district director shall review the claim on the basis of all evidence submitted in accordance with § 725.414.

(b) After review of all evidence submitted, the district director may issue another schedule for the submission of additional evidence pursuant to § 725.410, identifying another potentially liable operator as the responsible operator liable for the payment of benefits. In such a case, the district director shall not permit the development or submission of any additional medical evidence until after he has made a final determination of the identity of the responsible operator liable for the payment of benefits. If the operator who is finally determined to be the responsible operator has not had the opportunity to submit medical evidence pursuant to § 725.410, the district director shall allow the designated responsible operator and the claimant not

less than 60 days within which to submit evidence relevant to the claimant's eligibility for benefits. The designated responsible operator may elect to adopt any medical evidence previously submitted by another operator as its own evidence, subject to the limitations of § 725.414. The district director may also schedule a conference in accordance with § 725.416, issue a proposed decision and order in accordance with § 725.418, or take such other action as the district director considers appropriate.

§ 725.416 Conferences.

(a) At the conclusion of the period permitted by § 725.410(b) of this part for the submission of evidence, the district director may conduct an informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim. The conference proceedings shall not be stenographically reported and sworn testimony shall not be taken. Any conference conducted pursuant to this paragraph shall be held no later than 90 days after the conclusion of the period permitted by § 725.410(b) of this part for the submission of evidence, unless one of the parties requests that the time period be extended for good cause shown. If the district director is unable to hold the conference within the time period permitted by this paragraph, he shall proceed to issue a proposed decision and order under § 725.418 of this part.

(b) The district director shall notify the parties of a definite time and place for the conference. The district director shall advise the parties that they have a right to representation at the conference, by an attorney or a lay representative, and that no conference shall take place unless the parties are represented. A coal mine operator which is self-insured, or which is covered by a policy of insurance for the claim for which a conference is scheduled, shall be deemed to be represented. The notification shall set forth the specific reasons why the district director believes that a conference will assist in the voluntary resolution of any issue raised with respect to the claim. No sanction may be imposed under paragraph (c) of this section unless the record contains a notification that meets the requirements of this section. The district director may in his or her discretion, or on the motion of any party, cancel a conference or allow any or all of the parties to participate by telephone.

(c) The unexcused failure of any party to appear at an informal conference shall be grounds for the imposition of sanctions. If the claimant fails to appear, the district director may take such steps as are authorized by § 725.409(b)(2) to deny the claim by reason of abandonment. If the responsible operator fails to appear, it shall be deemed to have waived its right to contest its potential liability for an award of benefits and, in the discretion of the district director, its right to contest any issue related to the claimant's eligibility.

(d) Any representative of an operator, of an operator's insurance carrier, or of a claimant, authorized to represent such party in accordance with paragraph (b), shall be deemed to have sufficient authority to stipulate facts or issues or agree to a final disposition of the claim.

(e) Procedures to be followed at a conference shall be within the discretion of the district director.

§ 725.417 Action at the conclusion of conference.

(a) At the conclusion of a conference, the district director shall prepare a stipulation of contested and uncontested issues which shall be signed by the parties and the district director. If a hearing is conducted with respect to the claim, this stipulation shall be submitted to the Office of Administrative Law Judges and placed in the claim record.

(b) In appropriate cases, the district director may permit a reasonable time for the submission of additional evidence following a conference, provided that such evidence does not exceed the limits set forth in § 725.414. The district director may also notify additional operators of their potential liability pursuant to § 725.407, or issue another schedule for the submission of additional evidence pursuant to § 725.410, designating another potentially liable

operator as the responsible operator liable for the payment of benefits, in order to allow that operator an opportunity to submit evidence relevant to its liability for benefits as well as the claimant's eligibility for benefits.

(c) Within 20 days after the termination of all conference proceedings, the district director shall prepare and send to the parties a proposed decision and order pursuant to § 725.418 of this part.

§ 725.418 Proposed decision and order.

(a) Within 20 days after the termination of all informal conference proceedings, or, if no informal conference is held, at the conclusion of the period permitted by § 725.410(b) for the submission of evidence, the district director will issue a proposed decision and order. A proposed decision and order is a document, issued by the district director after the evidentiary development of the claim is completed and all contested issues, if any, are joined, which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director. A proposed decision and order will be considered a final adjudication of a claim only as provided in § 725.419. A proposed decision and order may be issued by the district director at any time during the adjudication of any claim if:

(1) Issuance is authorized or required by this part;

(2) The district director determines that its issuance will expedite the adjudication of the claim; or

(3) The district director determines that the claimant is a survivor who is entitled to benefits under 30 U.S.C. 932(l). In such cases, the district director may designate the responsible operator in the proposed decision and order regardless of whether the requirements of paragraph (d) of this section have been met. Any operator identified as liable for benefits under this paragraph may challenge the finding of liability by timely requesting revision of the proposed decision and order and specifically indicating disagreement with that finding. *See* 20 CFR 725.419(a) and (b). In such cases, the district director must allow all parties 30 days within which to submit liability evidence. At the end of this period, the district director must issue a new proposed decision and order.

(b) A proposed decision and order must contain findings of fact and conclusions of law. It must be served on all parties to the claim by certified mail.

(c) The proposed decision and order must contain a notice of the right of any interested party to request a formal hearing before the Office of Administrative Law Judges. If the proposed decision and order is a denial of benefits, and the claimant has previously filed a request for a hearing, the proposed decision and order must notify the claimant that the case will be referred for a hearing pursuant to the previous request unless the claimant notifies the district director that he no longer desires a hearing. If the proposed decision and order is an award of benefits, and the designated responsible operator has previously filed a request for a hearing, the proposed decision and order must notify the operator that the case will be referred for a hearing pursuant to the previous request unless the operator notifies the district director that it no longer desires a hearing.

(d) The proposed decision and order must reflect the district director's final designation of the responsible operator liable for the payment of benefits. Except as provided in paragraph (a)(3) of this section, no operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410. The district director must dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407 and that were not previously dismissed pursuant to § 725.410(a)(3).

[78 FR 59118, Sept. 25, 2013]

§ 725.419 Response to proposed decision and order.

(a) Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the district director shall refer the claim to the Office of

Administrative Law Judges (see § 725.421).

(b) Any response made by a party to a proposed decision and order shall specify the findings and conclusions with which the responding party disagrees, and shall be served on the district director and all other parties to the claim.

(c) If a timely request for revision of a proposed decision and order is made, the district director may amend the proposed decision and order, as circumstances require, and serve the revised proposed decision and order on all parties or take such other action as is appropriate. If a revised proposed decision and order is issued, each party to the claim shall have 30 days from the date of issuance of that revised proposed decision and order within which to request a hearing.

(d) If no response to a proposed decision and order is sent to the district director within the period described in paragraph (a) of this section, or if no response to a revised proposed decision and order is sent to the district director within the period described in paragraph (c) of this section, the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310.

§ 725.420 Initial determinations.

(a) Section 9501(d)(1)(A)(1) of the Internal Revenue Code (26 U.S.C.) provides that the Black Lung Disability Trust Fund shall begin the payment of benefits on behalf of an operator in any case in which the operator liable for such payments has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary. For claims filed on or after January 1, 1982, the payment of such interim benefits from the fund is limited to benefits accruing after the date of such initial determination.

(b) Except as provided in § 725.415, after the district director has determined that a claimant is eligible for benefits, on the basis of all evidence submitted by a claimant and operator, and has determined that a hearing will be necessary to resolve the claim, the district director shall in writing so inform the parties and direct the operator to begin the payment of benefits to the claimant in accordance with § 725.522. The date on which this writing is sent to the parties shall be considered the date of initial determination of the claim.

(c) If a notified operator refuses to commence payment of a claim within 30 days from the date on which an initial determination is made under this section, benefits shall be paid by the fund to the claimant in accordance with § 725.522, and the operator shall be liable to the fund, if such operator is determined liable for the claim, for all benefits paid by the fund on behalf of such operator, and, in addition, such penalties and interest as are appropriate.

§ 725.421 Referral of a claim to the Office of Administrative Law Judges.

(a) In any claim for which a formal hearing is requested or ordered, and with respect to which the district director has completed evidentiary development and adjudication without having resolved all contested issues, the district director shall refer the claim to the Office of Administrative Law Judges for a hearing.

(b) In any case referred to the Office of Administrative Law Judges under this section, the district director shall transmit to that office the following documents, which shall be placed in the record at the hearing subject to the objection of any party:

(1) Copies of the claim form or forms;

(2) Any statement, document, or pleading submitted by a party to the claim;

(3) A copy of the notification to an operator of its possible liability for the claim, and any schedule for the submission of additional evidence issued pursuant to § 725.410 designating a potentially liable operator as the responsible operator;

(4) All medical evidence submitted to the district director under this part by the claimant and the potentially liable operator designated as the responsible

operator in the proposed decision and order issued pursuant to § 725.418, or the fund, as appropriate, subject to the limitations of § 725.414 of this part; this evidence shall include the results of any medical examination or test conducted pursuant to § 725.406, and all evidence relevant to the liability of the responsible operator submitted to the district director under this part;

(5) Any written stipulation of law or fact or stipulation of contested and uncontested issues entered into by the parties;

(6) Any pertinent forms submitted to the district director;

(7) The statement by the district director of contested and uncontested issues in the claim; and

(8) The district director's initial determination of eligibility or other documents necessary to establish the right of the fund to reimbursement, if appropriate. Copies of the transmittal notice shall also be sent to all parties to the claim by regular mail.

(c) A party may at any time request and obtain from the district director copies of documents transmitted to the Office of Administrative Law Judges under paragraph (b) of this section. If the party has previously been provided with such documents, additional copies may be sent to the party upon the payment of a copying fee to be determined by the district director.

§ 725.422 Legal assistance.

The Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his or her designee at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the claimant's interests are adverse to those of the Secretary of Labor or the fund.

§ 725.423 Extensions of time.

Except for the 30-day time limit set forth in § 725.419, any of the time periods set forth in this subpart may be extended, for good cause shown, by filing a request for an extension with the district director prior to the expiration of the time period.

Subpart F—Hearings

§ 725.450 Right to a hearing.

Any party to a claim (see § 725.360) shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director. There shall be no right to a hearing until the processing and adjudication of the claim by the district director has been completed. There shall be no right to a hearing in a claim with respect to which a determination of the claim made by the district director has become final and effective in accordance with this part.

§ 725.451 Request for hearing.

After the completion of proceedings before the district director, or as is otherwise indicated in this part, any party may in writing request a hearing on any contested issue of fact or law (see § 725.419). A district director may on his or her own initiative refer a case for hearing. If a hearing is requested, or if a district director determines that a hearing is necessary to the resolution of any issue, the claim shall be referred to the Chief Administrative Law Judge for a hearing under § 725.421.

§ 725.452 Type of hearing; parties.

(a) A hearing held under this part shall be conducted by an administrative law judge designated by the Chief Administrative Law Judge. Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 *et seq*.

(b) All parties to a claim shall be permitted to participate fully at a hearing held in connection with such claim.

(c) A full evidentiary hearing need not be conducted if a party moves for

summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

(d) If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

§ 725.453 Notice of hearing.

All parties shall be given at least 30 days written notice of the date and place of a hearing and the issues to be resolved at the hearing. Such notice shall be sent to each party or representative by certified mail.

§ 725.454 Time and place of hearing; transfer of cases.

(a) The Chief Administrative Law Judge shall assign a definite time and place for a formal hearing, and shall, where possible, schedule the hearing to be held at a place within 75 miles of the claimant's residence unless an alternate location is requested by the claimant.

(b) If the claimant's residence is not in any State, the Chief Administrative Law Judge may, in his or her discretion, schedule the hearing in the country of the claimant's residence.

(c) The Chief Administrative Law Judge or the administrative law judge assigned the case may in his or her discretion direct that a hearing with respect to a claim shall begin at one location and then later be reconvened at another date and place.

(d) The Chief Administrative Law Judge or administrative law judge assigned the case may change the time and place for a hearing, either on his or her own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing for good cause shown, at any time prior to the mailing to the parties of the decision in the case. Unless otherwise agreed, at least 10 days notice shall be given to the parties of any change in the time or place of hearing.

(e) The Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.

§ 725.455 Hearing procedures; generally.

(a) *General*. The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in § 725.421(b)(8), any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge.

(b) *Evidence*. The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the district director under § 725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

(c) *Procedure*. The conduct of the hearing and the order in which allegations and evidence shall be presented shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing.

(d) *Oral argument and written allegations*. The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

§ 725.456 Introduction of documentary evidence.

(a) All documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge, subject to objection by any party.

(b)(1) Documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances. Medical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the hearing record in the absence of good cause.

(2) Subject to the limitations in paragraph (b)(1) of this section, any other documentary material, including medical reports, which was not submitted to the district director, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim.

(3) Documentary evidence, which is not exchanged with the parties in accordance with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(2) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence.

(4) A medical report which is not made available to the parties in accordance with paragraph (b)(2) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

(c) Subject to paragraph (b) of this section, documentary evidence which the district director excludes from the record, and the objections to such evidence, may be submitted by the parties to the administrative law judge, who shall independently determine whether the evidence shall be admitted.

(1) If the evidence is admitted, the administrative law judge may, in his or her discretion, remand the claim to the district director for further consideration.

(2) If the evidence is admitted, the administrative law judge shall afford the opposing party or parties the opportunity to develop such additional documentary evidence as is necessary to protect the right of cross-examination.

(d) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 of this subchapter.

(e) If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to § 725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement (see § 725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

§ 725.457 Witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge and the parties may question witnesses with respect to any matters relevant and material to any contested issue. Any party who intends to present the testimony of an expert witness at a hearing, including any physician, regardless of whether

the physician has previously prepared a medical report, shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

(b) No person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date.

(c) No person shall be permitted to testify as a witness at the hearing, or pursuant to deposition or interrogatory under § 725.458, unless that person meets the requirements of § 725.414(c).

(1) In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director.

(2) In the case of a physician offering testimony relevant to the physical condition of the miner, such physician must have prepared a medical report. Alternatively, in the absence of a showing of good cause under § 725.456(b)(1) of this part, a physician may offer testimony relevant to the physical condition of the miner only to the extent that the party offering the physician's testimony has submitted fewer medical reports than permitted by § 725.414. Such physician's opinion shall be considered a medical report subject to the limitations of § 725.414.

(d) A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible.

§ 725.458 Depositions; interrogatories.

The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived. No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim. The testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of the testimony contained in § 725.457(d).

§ 725.459 Witness fees.

(a) A witness testifying at a hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in courts of the United States. If the witness is an expert, he or she shall be entitled to an expert witness fee. Except as provided in paragraphs (b) and (c) of this section, such fees shall be paid by the proponent of the witness.

(b) If the witness' proponent does not intend to call the witness to appear at a hearing or deposition, any other party may subpoena the witness for cross-examination. The administrative law judge (ALJ) shall authorize the least intrusive and expensive means of cross-examination as the ALJ deems appropriate and necessary to the full and true disclosure of the facts. If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. The fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

(c) If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, or the fund, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator or the fund as attorney's fees, or costs,

fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

[65 FR 80054, Dec. 20, 2000, as amended at 68 FR 69935, Dec. 15, 2003]

§ 725.460 Consolidated hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 725.461 Waiver of right to appear and present evidence.

(a) If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. Such waiver may be withdrawn by a party for good cause shown at any time prior to the mailing of the decision in the claim. Even though all of the parties have filed a waiver of the right to appear, the administrative law judge may, nevertheless, after giving notice of the time and place, conduct a hearing if he or she believes that the personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue in the claim. Where a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant documentary evidence submitted in accordance with this part and any further written stipulations of the parties. Such documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence.

(b) Except as provided in § 725.456(a), the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing, and may result in a dismissal of the claim (see § 725.465).

§ 725.462 Withdrawal of controversion of issues set for formal hearing; effect.

A party may, on the record, withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the district director for the issuance of an appropriate order.

§ 725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the district director (see § 725.421) or any other issue raised in writing before the district director.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the district director to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the district director with instructions for further proceedings, hear and resolve the new issue, or refuse to consider such new issue.

(c) If a new issue is to be considered by the administrative law judge, a party may, upon request, be granted an appropriate continuance.

§ 725.464 Record of hearing.

All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon

which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

§ 725.465 Dismissals for cause.

(a) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim:

(1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge; or

(3) Where there has been a prior final adjudication of the claim or defense to the claim under the provisions of this subchapter and no new evidence is submitted (except as provided in part 727 of this subchapter; see § 725.4(d)).

(b) A party who is not a proper party to the claim (see § 725.360) shall be dismissed by the administrative law judge. The administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director.

(c) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

(d) No claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director.

§ 725.466 Order of dismissal.

(a) An order dismissing a claim shall be served on the parties in accordance with § 725.478. The dismissal of a claim shall have the same effect as a decision and order disposing of the claim on its merits, except as provided in paragraph (b) of this section. Such order shall advise the parties of their right to request review by the Benefits Review Board.

(b) Where the Chief Administrative Law Judge or the presiding administrative law judge issues a decision and order dismissing the claim after a show cause proceeding, the district director shall terminate any payments being made to the claimant under § 725.522, and the order of dismissal shall, if appropriate, order the claimant to reimburse the fund for all benefits paid to the claimant.

§ 725.475 Termination of hearings.

Hearings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge.

§ 725.476 Issuance of decision and order.

Within 20 days after the official termination of the hearing (see § 725.475), the administrative law judge shall issue a decision and order with respect to the claim making an award to the claimant, rejecting the claim, or taking such other action as is appropriate.

§ 725.477 Form and contents of decision and order.

(a) Orders adjudicating claims for benefits shall be designated by the term ''decision and order'' or ''supplemental decision and order'' as appropriate, followed by a descriptive phrase designating the particular type of order, such as ''award of benefits,'' ''rejection of claim,'' ''suspension of benefits,'' ''modification of award.''

(b) A decision and order shall contain a statement of the basis of the order, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based

upon the record made before the administrative law judge.

[65 FR 80054, Dec. 20, 2000, as amended at 72 FR 4205, Jan. 30, 2007]

§ 725.478 Filing and service of decision and order.

On the date of issuance of a decision and order under § 725.477, the administrative law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date, the original record of the claim shall be sent to the DCMWC in Washington, D.C. Upon receipt by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

§ 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the district director (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the decision and order on reconsideration.

(d) Regardless of any defect in service, actual receipt of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision.

§ 725.480 Modification of decisions and orders.

A party who is dissatisfied with a decision and order which has become final in accordance with § 725.479 may request a modification of the decision and order if the conditions set forth in § 725.310 are met.

§ 725.481 Right to appeal to the Benefits Review Board.

Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see § 725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Proceedings before the Board shall be conducted in accordance with part 802 of this title.

§ 725.482 Judicial review.

(a) Any person adversely affected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the U.S. court of appeals for the circuit in which the injury occurred by filing in such court within 60 days following the issuance of such Board order a written petition praying that the order be modified or set aside. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless the court finds that irreparable injury would otherwise ensue to an operator or carrier.

(b) The Director, Office of Workers' Compensation Program, as designee of the Secretary of Labor responsible for the administration and enforcement of the Act, shall be considered the proper party to appear and present argument on behalf of the Secretary of Labor in all review proceedings conducted pursuant to this part and the Act, either as petitioner or respondent.

§ 725.483 Costs in proceedings brought without reasonable grounds.

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground,

the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Subpart G—Responsible Coal Mine Operators

§ 725.490 Statutory provisions and scope.

(a) One of the major purposes of the black lung benefits amendments of 1977 was to provide a more effective means of transferring the responsibility for the payment of benefits from the Federal government to the coal industry with respect to claims filed under this part. In furtherance of this goal, a Black Lung Disability Trust Fund financed by the coal industry was established by the Black Lung Benefits Revenue Act of 1977. The primary purpose of the Fund is to pay benefits with respect to all claims in which the last coal mine employment of the miner on whose account the claim was filed occurred before January 1, 1970. With respect to most claims in which the miner's last coal mine employment occurred after January 1, 1970, individual coal mine operators will be liable for the payment of benefits. The 1981 amendments to the Act relieved individual coal mine operators from the liability for payment of certain special claims involving coal mine employment on or after January 1, 1970, where the claim was previously denied and subsequently approved under section 435 of the Act. See § 725.496 for a detailed description of these special claims. Where no such operator exists or the operator determined to be liable is in default in any case, the fund shall pay the benefits due and seek reimbursement as is appropriate. See also § 725.420 for the fund's role in the payment of interim benefits in certain contested cases. In addition, the Black Lung Benefits Reform Act of 1977 amended certain provisions affecting the scope of coverage under the Act and describing the effects of particular corporate transactions on the liability of operators.

(b) The provisions of this subpart define the term ''operator'' and prescribe the manner in which the identity of an operator which may be liable for the payment of benefits—referred to herein as a ''responsible operator''—will be determined.

§ 725.491 Operator defined.

(a) For purposes of this part, the term ''operator'' shall include:

(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or

(2) Any other person who:

(i) Employs an individual in the transportation of coal or in coal mine construction in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202);

(ii) In accordance with the provisions of § 725.492, may be considered a successor operator; or

(iii) Paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner (see § 725.202).

(b) The terms ''owner,'' ''lessee,'' and ''person'' shall include any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization, as appropriate, except that an officer of a corporation shall not be considered an ''operator'' for purposes of this part. Following the issuance of an order awarding benefits against a corporation that has not secured its liability for benefits in accordance with section 423 of the Act and § 726.4, such order may be enforced against the president, secretary, or treasurer of the corporation in accordance with subpart I of this part.

(c) The term ''independent contractor'' shall include any person who contracts to perform services. Such contractor's status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(d) For the purposes of determining whether a person is or was an operator that may be found liable for the payment of benefits under this part, there shall be a rebuttable presumption that during the course of an individual's employment with such employer, such

individual was regularly and continuously exposed to coal mine dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment.

(e) The operation, control, or supervision referred to in paragraph (a)(1) of this section may be exercised directly or indirectly. Thus, for example, where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator. Similarly, any parent entity or other controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

(f) Neither the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator.

§ 725.492 Successor operator defined.

(a) Any person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof, shall be considered a ''successor operator'' with respect to any miners previously employed by such prior operator.

(b) The following transactions shall also be deemed to create successor operator liability:

(1) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected;

(2) If an operator ceases to exist by reason of a liquidation into a parent or successor corporation; or

(3) If an operator ceases to exist by reason of a sale of substantially all its assets, or as a result of merger, consolidation, or division.

(c) In any case in which a transaction specified in paragraph (b), or substantially similar to a transaction specified in paragraph (b), took place, the resulting entity shall be considered a ''successor operator'' with respect to any miners previously employed by such prior operator.

(d) This section shall not be construed to relieve a prior operator of any liability if such prior operator meets the conditions set forth in § 725.494. If the prior operator does not meet the conditions set forth in § 725.494, the following provisions shall apply:

(1) In any case in which a prior operator transferred a mine or mines, or substantially all of the assets thereof, to a successor operator, or sold its coal mining business or substantially all of the assets thereof, to a successor operator, and then ceased to exist within the terms of paragraph (b), the successor operator as identified in paragraph (a) shall be primarily liable for the payment of benefits to any miners previously employed by such prior operator.

(2) In any case in which a prior operator transferred mines, or substantially all of the assets thereof, to more than one successor operator, the successor operator that most recently acquired a mine or mines or assets from the prior operator shall be primarily liable for the payment of benefits to any miners previously employed by such prior operator.

(3) In any case in which a mine or mines, or substantially all the assets thereof, have been transferred more than once, the successor operator that most recently acquired such mine or mines or assets shall be primarily liable for the payment of benefits to any miners previously employed by the original prior operator. If the most recent successor operator does not meet the criteria for a potentially liable operator set forth in § 725.494, the next most recent successor operator shall be liable.

(e) An ''acquisition,'' for purposes of this section, shall include any transaction by which title to the mine or mines, or substantially all of the assets thereof, or the right to extract or prepare coal at such mine or mines, becomes vested in a person other than the prior operator.

§ 725.493 Employment relationship defined.

(a)(1) In determining the identity of a responsible operator under this part, the terms ''employ'' and ''employment'' shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees. It is the specific intention of this paragraph to disregard any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to miners who, based upon the economic reality of their relationship to this enterprise, are, in fact, employees of the enterprise.

(2) The payment of wages or salary shall be prima facie evidence of the right to direct, control, or supervise an individual's work. The Department intends that where the operator who paid a miner's wages or salary meets the criteria for a potentially liable operator set forth in § 725.494, that operator shall be primarily liable for the payment of any benefits due the miner as a result of such employment. The absence of such payment, however, will not negate the existence of an employment relationship. Thus, the Department also intends that where the person who paid a miner's wages may not be considered a potentially liable operator, any other operator who retained the right to direct, control or supervise the work performed by the miner, or who benefitted from such work, may be considered a potentially liable operator.

(b) This paragraph contains examples of relationships that shall be considered employment relationships for purposes of this part. The list is not intended to be exclusive.

(1) In any case in which an operator may be considered a successor operator, as determined in accordance with § 725.492, any employment with a prior operator shall also be deemed to be employment with the successor operator. In a case in which the miner was not independently employed by the successor operator, the prior operator shall remain primarily liable for the payment of any benefits based on the miner's employment with the prior operator. In a case in which the miner was independently employed by the successor operator after the transaction giving rise to successor operator liability, the successor operator shall be primarily liable for the payment of any benefits.

(2) In any case in which the operator which directed, controlled or supervised the miner is no longer in business and such operator was a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or was substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered the employer of any employees of such operator.

(3) In any claim in which the operator which directed, controlled or supervised the miner is a lessee, the lessee shall be considered primarily liable for the claim. The liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in accordance with the following considerations:

(i) Where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor shall be considered the employer of any employees of the lessee.

(ii) Where a coal mine is leased to a self-employed operator, the lessor shall

be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after August 18, 1978 and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part and part 726 of this subchapter.

(iii) Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after August 18, 1978 and does not require the lessee to secure benefits provided by the Act.

(4) A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

§ 725.494 Potentially liable operators.

An operator may be considered a ''potentially liable operator'' with respect to a claim for benefits under this part if each of the following conditions is met:

(a) The miner's disability or death arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, or by a person with respect to which the operator may be considered a successor operator. For purposes of this section, there shall be a rebuttable presumption that the miner's disability or death arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability or death therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

(b) The operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973.

(c) The miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year (§ 725.101(a)(32)).

(d) The miner's employment with the operator, or any person with respect to which the operator may be considered a successor operator, included at least one working day (§ 725.101(a)(32)) after December 31, 1969.

(e) The operator is capable of assuming its liability for the payment of continuing benefits under this part. An operator will be deemed capable of assuming its liability for a claim if one of the following three conditions is met:

(1) The operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed;

(2) The operator qualified as a self-insurer under section 423 of the Act and part 726 of this subchapter during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to § 726.104(b) is sufficient to secure the payment of benefits in the event the claim is awarded; or

(3) The operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded in accordance with § 725.606.

§ 725.495 Criteria for determining a responsible operator.

(a)(1) The operator responsible for the payment of benefits in a claim adjudicated under this part (the ''responsible operator'') shall be the potentially liable operator, as determined in accordance with § 725.494, that most recently employed the miner.

(2) If more than one potentially liable operator may be deemed to have employed the miner most recently, then the liability for any benefits payable as a result of such employment shall be assigned as follows:

(i) First, to the potentially liable operator that directed, controlled, or supervised the miner;

(ii) Second, to any potentially liable operator that may be considered a successor operator with respect to miners employed by the operator identified in paragraph (a)(2)(i) of this section; and

(iii) Third, to any other potentially liable operator which may be deemed to have been the miner's most recent employer pursuant to § 725.493.

(3) If the operator that most recently employed the miner may not be considered a potentially liable operator, as determined in accordance with § 725.494, the responsible operator shall be the potentially liable operator that next most recently employed the miner. Any potentially liable operator that employed the miner for at least one day after December 31, 1969 may be deemed the responsible operator if no more recent employer may be considered a potentially liable operator.

(4) If the miner's most recent employment by an operator ended while the operator was authorized to self-insure its liability under part 726 of this title, and that operator no longer possesses sufficient assets to secure the payment of benefits, the provisions of paragraph (a)(3) shall be inapplicable with respect to any operator that employed the miner only before he was employed by such self-insured operator. If no operator that employed the miner after his employment with the self-insured operator meets the conditions of § 725.494, the claim of the miner or his survivor shall be the responsibility of the Black Lung Disability Trust Fund.

(b) Except as provided in this section and § 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the responsible operator initially found liable for the payment of benefits pursuant to § 725.410 (the ''designated responsible operator'') is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with § 725.494(e).

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606; or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator within the meaning of § 725.494. In order to establish that a more recent employer is a potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with § 725.606. The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits pursuant to part 726 of this subchapter, possess assets sufficient to secure the payment of benefits, provided such assets may be reached in a proceeding brought under subpart I of this part.

(d) In any case referred to the Office of Administrative Law Judges pursuant to § 725.421 in which the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it maintains pursuant to part 726, and that the

Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2). Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

§ 725.496 Special claims transferred to the fund.

(a) The 1981 amendments to the Act amended section 422 of the Act and transferred liability for payment of certain special claims from operators and carriers to the fund. These provisions apply to claims which were denied before March 1, 1978, and which have been or will be approved in accordance with section 435 of the Act.

(b) Section 402(i) of the Act defines three classes of denied claims subject to the transfer provisions:

(1) Claims filed with and denied by the Social Security Administration before March 1, 1978;

(2) Claims filed with the Department of Labor in which the claimant was notified by the Department of an administrative or informal denial before March 1, 1977, and in which the claimant did not within one year of such notification either:

(i) Request a hearing; or

(ii) Present additional evidence; or

(iii) Indicate an intention to present additional evidence; or

(iv) Request a modification or reconsideration of the denial on the ground of a change in conditions or because of a mistake in a determination of fact;

(3) Claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977, that is, before March 1, 1978, following a formal hearing before an administrative law judge or administrative review before the Benefits Review Board or review before a United States Court of Appeals.

(c) Where more than one claim was filed with the Social Security Administration and/or the Department of Labor prior to March 1, 1978, by or on behalf of a miner or a surviving dependent of a miner, unless such claims were required to be merged by the agency's regulations, the procedural history of each such claim must be considered separately to determine whether the claim is subject to the transfer of liability provisions.

(d) For a claim filed with and denied by the Social Security Administration prior to March 1, 1978, to come within the transfer provisions, such claim must have been or must be approved under the provisions of section 435 of the Act. No claim filed with and denied by the Social Security Administration is subject to the transfer of liability provisions unless a request was made by or on behalf of the claimant for review of such denied claim under section 435. Such review must have been requested by the filing of a valid election card or other equivalent document with the Social Security Administration in accordance with section 435(a) and its implementing regulations at 20 CFR 410.700 through 410.707.

(e) Where a claim filed with the Department of Labor prior to March 1, 1977, was subjected to repeated administrative or informal denials, the last such denial issued during the pendency of the claim determines whether the claim is subject to the transfer of liability provisions.

(f) Where a miner's claim comes within the transfer of liability provisions of the 1981 amendments the fund is also liable for the payment of any benefits to which the miner's dependent survivors are entitled after the miner's death. However, if the survivor's entitlement was established on a separate claim not subject to the transfer of liability provisions prior to approval of the miner's claim under section 435, the party responsible for the payment of such survivors' benefits shall not be relieved of that responsibility because the miner's claim was ultimately approved and found subject to the transfer of liability provisions.

§ 725.497 Procedures in special claims transferred to the fund.

(a) *General.* It is the purpose of this section to define procedures to expedite the handling and disposition of claims affected by the benefit liability

transfer provisions of Section 205 of the Black Lung Benefits Amendments of 1981.

(b) *Action by the Department.* The OWCP shall, in accordance with the criteria contained in § 725.496, review each claim which is or may be affected by the provisions of Section 205 of the Black Lung Benefits Amendments of 1981. Any party to a claim, adjudication officer, or adjudicative body may request that such a review be conducted and that the record be supplemented with any additional documentation necessary for an informed consideration of the transferability of the claim. Where the issue of the transferability of the claim can not be resolved by agreement of the parties and the evidence of record is not sufficient for a resolution of the issue, the hearing record may be reopened or the case remanded for the development of the additional evidence concerning the procedural history of the claim necessary to such resolution. Such determinations shall be made on an expedited basis.

(c) *Dismissal of operators.* If it is determined that a coal mine operator or insurance carrier which previously participated in the consideration or adjudication of any claim, may no longer be found liable for the payment of benefits to the claimant by reason of section 205 of the Black Lung Benefits Amendments of 1981, such operator or carrier shall be promptly dismissed as a party to the claim. The dismissal of an operator or carrier shall be concluded at the earliest possible time and in no event shall an operator or carrier participate as a necessary party in any claim for which only the fund may be liable.

(d) *Procedure following dismissal of an operator.* After it has been determined that an operator or carrier must be dismissed as a party in any claim in accordance with this section, the Director shall take such action as is authorized by the Act to bring about the proper and expeditious resolution of the claim in light of all relevant medical and other evidence. Action to be taken in this regard by the Director may include, but is not limited to, the assignment of the claim to the Black Lung Disability Trust Fund for the payment of benefits, the reimbursement of benefits previously paid by an operator or carrier if appropriate, the defense of the claim on behalf of the fund, or proceedings authorized by § 725.310.

(e) Any claimant whose claim has been subsequently denied in a modification proceeding will be entitled to expedited review of the modification decision. Where a formal hearing was previously held, the claimant may waive his right to a further hearing and ask that a decision be made on the record of the prior hearing, as supplemented by any additional documentary evidence which the parties wish to introduce and briefs of the parties, if desired. In any case in which the claimant waives his right to a second hearing, a decision and order must be issued within 30 days of the date upon which the parties agree the record has been completed.

Subpart H—Payment of Benefits

GENERAL PROVISIONS

§ 725.501 Payment provisions generally.

The provisions of this subpart govern the payment of benefits to claimants whose claims are approved for payment under section 415 and part C of title IV of the Act or approved after review under section 435 of the Act and part 727 of this subchapter (see § 725.4(d)).

§ 725.502 When benefit payments are due; manner of payment.

(a)(1) Except with respect to benefits paid by the fund pursuant to an initial determination issued in accordance with § 725.418 (see § 725.522), benefits under the Act shall be paid when they become due. Benefits shall be considered due after the issuance of an effective order requiring the payment of benefits by a district director, administrative law judge, Benefits Review Board, or court, notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court, except that benefits shall not be considered due where the payment of such benefits has been stayed by the Benefits Review Board or appropriate

court. An effective order shall remain in effect unless it is vacated by an administrative law judge on reconsideration, or, upon review under section 21 of the LHWCA, by the Benefits Review Board or an appropriate court, or is superseded by an effective order issued pursuant to § 725.310.

(2) A proposed order issued by a district director pursuant to § 725.418 becomes effective at the expiration of the thirtieth day thereafter if no party timely requests revision of the proposed decision and order or a hearing (see § 725.419). An order issued by an administrative law judge becomes effective when it is filed in the office of the district director (see § 725.479). An order issued by the Benefits Review Board shall become effective when it is issued. An order issued by a court shall become effective in accordance with the rules of the court.

(b)(1) While an effective order requiring the payment of benefits remains in effect, monthly benefits, at the rates set forth in § 725.520, shall be due on the fifteenth day of the month following the month for which the benefits are payable. For example, benefits payable for the month of January shall be due on the fifteenth day of February.

(2) Within 30 days after the issuance of an effective order requiring the payment of benefits, the district director shall compute the amount of benefits payable for periods prior to the effective date of the order, in addition to any interest payable for such periods (see § 725.608), and shall so notify the parties. Any computation made by the district director under this paragraph shall strictly observe the terms of the order. Benefits and interest payable for such periods shall be due on the thirtieth day following issuance of the district director's computation. A copy of the current table of applicable interest rates shall be attached to the computation.

(c) Benefits are payable for monthly periods and shall be paid directly to an eligible claimant or his or her representative payee (see § 725.510) beginning with the month during which eligibility begins. Benefit payments shall terminate with the month before the month during which eligibility terminates. If a claimant dies in the first month during which all requirements for eligibility are met, benefits shall be paid for that month.

§ 725.503 Date from which benefits are payable.

(a) In accordance with the provisions of section 6(a) of the Longshore Act as incorporated by section 422(a) of the Act, and except as provided in § 725.504, the provisions of this section shall be applicable in determining the date from which benefits are payable to an eligible claimant for any claim filed after March 31, 1980. Except as provided in paragraph (d) of this section, the date from which benefits are payable for any claim approved under part 727 shall be determined in accordance with § 727.302 (see § 725.4(d)).

(b) *Miner's claim.* Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed. In the case of a miner who filed a claim before January 1, 1982, benefits shall be payable to the miner's eligible survivor (if any) beginning with the month in which the miner died.

(c) *Survivor's claim.* Benefits are payable to a survivor who is entitled beginning with the month of the miner's death, or January 1, 1974, whichever is later.

(d) If a claim is awarded pursuant to section 22 of the Longshore Act and § 725.310, then the date from which benefits are payable shall be determined as follows:

(1) *Mistake in fact.* The provisions of paragraphs (b) or (c) of this section, as applicable, shall govern the determination of the date from which benefits are payable.

(2) *Change in conditions.* Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish

the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

(e) In the case of a claim filed between July 1, 1973, and December 31, 1973, benefits shall be payable as provided by this section, except to the extent prohibited by § 727.303 (see § 725.4(d)).

(f) No benefits shall be payable with respect to a claim filed after December 31, 1973 (a part C claim), for any period of eligibility occurring before January 1, 1974.

(g) Each decision and order awarding benefits shall indicate the month from which benefits are payable to the eligible claimant.

§ 725.504 Payments to a claimant employed as a miner.

(a) In the case of a claimant who is employed as a miner (see § 725.202) at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless:

(1) The miner's eligibility is established under section 411(c)(3) of the Act; or

(2) the miner terminates his or her coal mine employment within 1 year from the date of the final determination of the claim.

(b) If the eligibility of a working miner is established under section 411(c)(3) of the Act, benefits shall be payable as is otherwise provided in this part. If eligibility cannot be established under section 411(c)(3), and the miner continues to be employed as a miner in any capacity for a period of less than 1 year after a final determination of the claim, benefits shall be payable beginning with the month during which the miner ends his or her coal mine employment. If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in § 725.310, if applicable, or by filing a new claim under this part. The provisions of Subparts E and F of this part shall be applicable to claims considered under this section as is appropriate.

(c) In any case where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable (except as provided in section 411(c)(3) of the Act) for the period during which the miner continues to work. If the miner again terminates employment, the district director may require the miner to submit to further medical examination before authorizing the payment of benefits.

§ 725.505 Payees.

Benefits may be paid, as appropriate, to a beneficiary, to a qualified dependent, or to a representative authorized under this subpart to receive payments on behalf of such beneficiary or dependent.

§ 725.506 Payment on behalf of another; "legal guardian" defined.

Benefits are paid only to the beneficiary, his or her representative payee (see § 725.510) or his or her legal guardian. As used in this section, ''legal guardian'' means an individual who has been appointed by a court of competent jurisdiction or otherwise appointed pursuant to law to assume control of and responsibility for the care of the beneficiary, the management of his or her estate, or both.

§ 725.507 Guardian for minor or incompetent.

An adjudication officer may require that a legal guardian or representative be appointed to receive benefit payments payable to any person who is mentally incompetent or a minor and to exercise the powers granted to, or to perform the duties otherwise required of such person under the Act.

§ 725.510 Representative payee.

(a) If the district director determines that the best interests of a beneficiary are served thereby, the district director may certify the payment of such beneficiary's benefits to a representative payee.

(b) Before any amount shall be certified for payment to any representative payee for or on behalf of a beneficiary, such representative payee shall submit to the district director such evidence as may be required of his or

her relationship to, or his or her responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his or her authority to receive such a payment. The district director may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility, or authority. If a person requesting representative payee status fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him or her on behalf of the beneficiary unless the required evidence is thereafter submitted.

(c) All benefit payments made to a representative payee shall be available only for the use and benefit of the beneficiary, as defined in § 725.511.

§ 725.511 Use and benefit defined.

(a) Payments certified to a representative payee shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—*i.e.*, to replace current income lost because of the disability of the beneficiary. Where a beneficiary is receiving care in an institution, current maintenance shall include the customary charges made by the institution and charges made for the current and foreseeable needs of the beneficiary which are not met by the institution.

(b) Payments certified to a representative payee which are not needed for the current maintenance of the beneficiary, except as they may be used under § 725.512, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. savings bonds which shall be purchased in accordance with applicable regulations of the U.S. Treasury Department (31 CFR part 315). Surplus funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

Name of beneficiary _____
by (Name of representative payee) representative payee,
or (Name of beneficiary)
by (Name of representative payee) trustee,

U.S. savings bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows: (Name of beneficiary) (Social Security No.), for whom (Name of payee) is representative payee for black lung benefits.

§ 725.512 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

§ 725.513 Accountability; transfer.

(a) The district director may require a representative payee to submit periodic reports including a full accounting of the use of all benefit payments certified to a representative payee. If a requested report or accounting is not submitted within the time allowed, the district director shall terminate the certification of the representative payee and thereafter payments shall be made directly to the beneficiary. A certification which is terminated under this section may be reinstated for good cause, provided that all required reports are supplied to the district director.

(b) A representative payee who has conserved or invested funds from payments under this part shall, upon the direction of the district director, transfer any such funds (including interest) to a successor payee appointed by the district director or, at the option of the district director, shall transfer such

funds to the Office for recertification to a successor payee or the beneficiary.

§ 725.514 Certification to dependent of augmentation portion of benefit.

(a) If the basic benefit of a miner or of a surviving spouse is augmented because of one or more dependents, and it appears to the district director that the best interests of such dependent would be served thereby, or that the augmented benefit is not being used for the use and benefit (as defined in this subpart) of the augmentee, the district director may certify payment of the amount of such augmentation (to the extent attributable to such dependent) to such dependent directly, or to a legal guardian or a representative payee for the use and benefit of such dependent.

(b) Any request to the district director to certify separate payment of the amount of an augmentation in accordance with paragraph (a) of this section shall be in writing on such form and in accordance with such instructions as are prescribed by the Office.

(c) The district director shall specify the terms and conditions of any certification authorized under this section and may terminate any such certification where appropriate.

(d) Any payment made under this section, if otherwise valid under the Act, is a complete settlement and satisfaction of all claims, rights, and interests in and to such payment, except that such payment shall not be construed to abridge the rights of any party to recoup any overpayment made.

§ 725.515 Assignment and exemption from claims of creditors.

(a) Except as provided by the Act and this part, no assignment, release, or commutation of benefits due or payable under this part by a responsible operator shall be valid, and all benefits shall be exempt from claims of creditors and from levy, execution, and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

(b) Notwithstanding any other provision of law, benefits due from, or payable by, the Black Lung Disability Trust Fund under the Act and this part to a claimant shall be subject to legal process brought for the enforcement against the claimant of his or her legal obligations to provide child support or make alimony payments to the same extent as if the fund was a private person.

BENEFIT RATES

§ 725.520 Computation of benefits.

(a) *Basic rate.* The amount of benefits payable to a beneficiary for a month is determined, in the first instance, by computing the ''basic rate.'' The basic rate is equal to 37½ percent of the monthly pay rate for Federal employees in GS–2, step 1. That rate for a month is determined by:

(1) Ascertaining the lowest annual rate of pay (step 1) for Grade GS–2 of the General Schedule applicable to such month (see 5 U.S.C. 5332);

(2) Ascertaining the monthly rate thereof by dividing the amount determined in paragraph (a)(1) of this section by 12; and

(3) Ascertaining the basic rate under the Act by multiplying the amount determined in paragraph (a)(2) of this section by 0.375 (that is, by 37½ percent).

(b) *Basic benefit.* When a miner or surviving spouse is entitled to benefits for a month for which he or she has no dependents who qualify under this part and when a surviving child of a miner or spouse, or a parent, brother, or sister of a miner, is entitled to benefits for a month for which he or she is the only beneficiary entitled to benefits, the amount of benefits to which such beneficiary is entitled is equal to the basic rate as computed in accordance with this section (raised, if not a multiple of 10 cents, to the next high multiple of 10 cents). This amount is referred to as the ''basic benefit.''

(c) *Augmented benefit.* (1) When a miner or surviving spouse is entitled to benefits for a month for which he or she has one or more dependents who qualify under this part, the amount of benefits to which such miner or surviving spouse is entitled is increased. This increase is referred to as an ''augmentation.''

(2) The benefits of a miner or surviving spouse are augmented to take

account of a particular dependent beginning with the first month in which such dependent satisfies the conditions set forth in this part, and continues to be augmented through the month before the month in which such dependent ceases to satisfy the conditions set forth in this part, except in the case of a child who qualifies as a dependent because he or she is a student. In the latter case, such benefits continue to be augmented through the month before the first month during no part of which he or she qualifies as a student.

(3) The basic rate is augmented by 50 percent for one such dependent, 75 percent for two such dependents, and 100 percent for three or more such dependents.

(d) *Survivor benefits.* As used in this section, ''survivor'' means a surviving child of a miner or surviving spouse, or a surviving parent, brother, or sister of a miner, who establishes entitlement to benefits under this part.

(e) *Computation and rounding.* (1) Any computation prescribed by this section is made to the third decimal place.

(2) Monthly benefits are payable in multiples of 10 cents. Therefore, a monthly payment of amounts derived under paragraph (c)(3) of this section which is not a multiple of 10 cents is increased to the next higher multiple of 10 cents.

(3) Since a fraction of a cent is not a multiple of 10 cents, such an amount which contains a fraction in the third decimal place is raised to the next higher multiple of 10 cents.

(f) *Eligibility based on the coal mine employment of more than one miner.* Where an individual, for any month, is entitled (and/or qualifies as a dependent for purposes of augmentation of benefits) based on the disability or death due to pneumoconiosis arising out of the coal mine employment of more than one miner, the benefit payable to or on behalf of such individual shall be at a rate equal to the highest rate of benefits for which entitlement is established by reason of eligibility as a beneficiary, or by reason of his or her qualification as a dependent for augmentation of benefit purposes.

§ 725.521 Commutation of payments; lump sum awards.

(a) Whenever the district director determines that it is in the interest of justice, the liability for benefits or any part thereof as determined by a final adjudication, may, with the approval of the Director, be discharged by the payment of a lump sum equal to the present value of future benefit payments commuted, computed at 4 percent true discount compounded annually.

(b) Applications for commutation of future payments of benefits shall be made to the district director in the manner prescribed by the district director. If the district director determines that an award of a lump sum payment of such benefits would be in the interest of justice, he or she shall refer such application, together with the reasons in support of such determination, to the Director for consideration.

(c) The Director shall, in his or her discretion, grant or deny the application for commutation of payments. Such decision may be appealed to the Benefits Review Board.

(d) The computation of all commutations of such benefits shall be made by the OWCP. For this purpose the file shall contain the date of birth of the person on whose behalf commutation is sought, as well as the date upon which such commutation shall be effective.

(e) For purposes of determining the amount of any lump sum award, the probability of the death of the disabled miner and/or other persons entitled to benefits before the expiration of the period during which he or she is entitled to benefits, shall be determined in accordance with the most current United States Life Tables, as developed by the Department of Health, Education, and Welfare, and the probability of the remarriage of a surviving spouse shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(f) In the event that an operator or carrier is adjudicated liable for the

payment of benefits, such operator or carrier shall be notified of and given an opportunity to participate in the proceedings to determine whether a lump sum award shall be made. Such operator or carrier shall, in the event a lump sum award is made, tender full and prompt payment of such award to the claimant as though such award were a final payment of monthly benefits. Except as provided in paragraph (g) of this section, such lump sum award shall forever discharge such operator or carrier from its responsibility to make monthly benefit payments under the Act to the person who has requested such lump-sum award. In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall not be liable for any portion of a commuted or lump sum award predicated upon benefits due any claimant prior to January 1, 1974.

(g) In the event a lump-sum award is approved under this section, such award shall not operate to discharge an operator carrier, or the fund from any responsibility imposed by the Act for the payment of medical benefits to an eligible miner.

§ 725.522 Payments prior to final adjudication.

(a) If an operator or carrier fails or refuses to commence the payment of benefits within 30 days of issuance of an initial determination of eligibility by the district director (see § 725.420), or fails or refuses to commence the payment of any benefits due pursuant to an effective order by a district director, administrative law judge, Benefits Review Board, or court, the fund shall commence the payment of such benefits and shall continue such payments as appropriate. In the event that the fund undertakes the payment of benefits on behalf of an operator or carrier, the provisions of §§ 725.601 through 725.609 shall be applicable to such operator or carrier.

(b) If benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 and may be recovered in accordance with the provisions of this subpart.

SPECIAL PROVISIONS FOR OPERATOR PAYMENTS

§ 725.530 Operator payments; generally.

(a) Benefits payable by an operator or carrier pursuant to an effective order issued by a district director, administrative law judge, Benefits Review Board, or court, or by an operator that has agreed that it is liable for the payment of benefits to a claimant, shall be paid by the operator or carrier immediately when they become due (see § 725.502(b)). An operator that fails to pay any benefits that are due, with interest, shall be considered in default with respect to those benefits, and the provisions of § 725.605 of this part shall be applicable. In addition, a claimant who does not receive any benefits within 10 days of the date they become due is entitled to additional compensation equal to twenty percent of those benefits (see § 725.607). Arrangements for the payment of medical costs shall be made by such operator or carrier in accordance with the provisions of subpart J of this part.

(b) Benefit payments made by an operator or carrier shall be made directly to the person entitled thereto or a representative payee if authorized by the district director. The payment of a claimant's attorney's fee, if any is awarded, shall be made directly to such attorney. Reimbursement of the fund, including interest, shall be paid directly to the Secretary on behalf of the fund.

§ 725.531 Receipt for payment.

Any individual receiving benefits under the Act in his or her own right, or as a representative payee, or as the duly appointed agent for the estate of a deceased beneficiary, shall execute receipts for benefits paid by any operator which shall be produced by such operator for inspection whenever the district director requires. A canceled check shall be considered adequate receipt of payment for purposes of this section. No operator or carrier shall be

required to retain receipts for payments made for more than 5 years after the date on which such receipt was executed.

§ 725.532 Suspension, reduction, or termination of payments.

(a) No suspension, reduction, or termination in the payment of benefits is permitted unless authorized by the district director, administrative law judge, Board, or court. No suspension, reduction, or termination shall be authorized except upon the occurrence of an event which terminates a claimant's eligibility for benefits (see subpart B of this part) or as is otherwise provided in subpart C of this part, §§ 725.306 and 725.310, or this subpart (see also §§ 725.533 through 725.546).

(b) Any unauthorized suspension in the payment of benefits by an operator or carrier shall be treated as provided in subpart I.

(c) Unless suspension, reduction, or termination of benefits payments is required by an administrative law judge, the Benefits Review Board or a court, the district director, after receiving notification of the occurrence of an event that would require the suspension, reduction, or termination of benefits, shall follow the procedures for the determination of claims set forth in subparts E and F.

INCREASES AND REDUCTIONS OF BENEFITS

§ 725.533 Modification of benefits amounts; general.

(a) Under certain circumstances, the amount of monthly benefits as computed in § 725.520 or lump-sum award (§ 725.521) shall be modified to determine the amount actually to be paid to a beneficiary. With respect to any benefits payable for all periods of eligibility after January 1, 1974, a reduction of the amount of benefits payable shall be required on account of:

(1) Any compensation or benefits received under any State workers' compensation law because of death or partial or total disability due to pneumoconiosis; or

(2) Any compensation or benefits received under or pursuant to any Federal law including part B of title IV of the Act because of death or partial or total disability due to pneumoconiosis; or

(3) In the case of benefits to a parent, brother, or sister as a result of a claim filed at any time or benefits payable on a miner's claim which was filed on or after January 1, 1982, the excess earnings from wages and from net earnings from self-employment (see § 410.530 of this title) of such parent, brother, sister, or miner, respectively; or

(4) The fact that a claim for benefits from an additional beneficiary is filed, or that such claim is effective for a payment during the month of filing, or a dependent qualifies under this part for an augmentation portion of a benefit of a miner or widow for a period in which another dependent has previously qualified for an augmentation.

(b) An adjustment in a beneficiary's monthly benefit may be required because an overpayment or underpayment has been made to such beneficiary (see §§ 725.540–725.546).

(c) A suspension of a beneficiary's monthly benefits may be required when the Office has information indicating that reductions on account of excess earnings may reasonably be expected.

(d) Monthly benefit rates are payable in multiples of 10 cents. Any monthly benefit rate which, after the applicable computations, augmentations, and reductions is not a multiple of 10 cents, is increased to the next higher multiple of 10 cents. Since a fraction of a cent is not a multiple of 10 cents, a benefit rate which contains such a fraction in the third decimal is raised to the next higher multiple of 10 cents.

(e) Any individual entitled to a benefit, who is aware of any circumstances which could affect entitlement to benefits, eligibility for payment, or the amount of benefits, or result in the termination, suspension, or reduction of benefits, shall promptly report these circumstances to the Office. The Office may at any time require an individual receiving, or claiming entitlement to, benefits, either on his or her own behalf or on behalf of another, to submit a written statement giving pertinent information bearing upon the issue of whether or not an event has occurred which would cause such benefit to be terminated, or which would subject

such benefit to reductions or suspension under the provisions of the Act. The failure of an individual to submit any such report or statement, properly executed, to the Office shall subject such benefit to reductions, suspension, or termination as the case may be.

§ 725.534 Reduction of State benefits.

No benefits under section 415 of part B of title IV of the Act shall be payable to the residents of a State which, after December 31, 1969, reduces the benefits payable to persons eligible to receive benefits under section 415 of the Act under State laws applicable to its general work force with regard to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance benefits which are funded in whole or in part out of employer contributions.

§ 725.535 Reductions; receipt of State or Federal benefit.

(a) As used in this section the term ''State or Federal benefit'' means a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation. With respect to a claim for which benefits are payable for any month between July 1 and December 31, 1973, ''State benefit'' means a payment to a beneficiary made on account of disability or death due to pneumoconiosis under State laws relating to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance.

(b) Benefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary for such month.

(c) Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section. In making such a determination, a weekly State or Federal benefit is multiplied by 4⅓ and a biweekly benefit is multiplied by 2⅙ to ascertain the monthly equivalent for reduction purposes.

(d) Amounts paid or incurred or to be incurred by the individual for medical, legal, or related expenses in connection with this claim for State or Federal benefits (defined in paragraph (a) of this section) are excluded in computing the reduction under paragraph (b) of this section, to the extent that they are consistent with State or Federal Law. Such medical, legal, or related expenses may be evidenced by the State or Federal benefit awards, compromise agreement, or court order in the State or Federal benefit proceedings, or by such other evidence as the Office may require. Such other evidence may consist of:

(1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or

(2) Bills, receipts, or canceled checks; or

(3) Other evidence indicating the amount of such expenses; or

(4) Any combination of the foregoing evidence from which the amount of such expenses may be determinable. Such expenses shall not be excluded unless established by evidence as required by the Office.

§ 725.536 Reductions; excess earnings.

In the case of a surviving parent, brother, or sister, whose claim was filed at any time, or of a miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203 (b), (f), (g), (h), (j), and (l) of the Social Security Act (42 U.S.C. 403 (b), (f), (g), (h), (j), and (l)), as if such benefit payments were benefits payable under section 202 of the Social Security Act (42 U.S.C. 402) (see §§ 404.428 through 404.456 of this title).

§ 725.537 Reductions; retroactive effect of an additional claim for benefits.

Except as provided in § 725.212(b), beginning with the month in which a person other than a miner files a claim

and becomes entitled to benefits, the benefits of other persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid.

§ 725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.

(a) Ordinarily, a written request that the benefits of a miner or surviving spouse be augmented on account of a qualified dependent is made as part of the claim for benefits. However, it may also be made thereafter.

(b) In the latter case, beginning with the month in which such a request is filed on account of a particular dependent and in which such dependent qualifies for augmentation purposes under this part, the augmented benefits attributable to other qualified dependents (with respect to the same miner or surviving spouse), if any, are adjusted downward, if necessary, so that the permissible amount of augmented benefits (the maximum amount for the number of dependents involved) will not be exceeded.

(c) Where, based on the entitlement to benefits of a miner or surviving spouse, a dependent would have qualified for augmentation purposes for a prior month of such miner's or surviving spouse's entitlement had such request been filed in such prior month, such request is effective for such prior month. For any month before the month of filing such request, however, otherwise correct benefits previously certified by the Office may not be changed. Rather the amount of the augmented benefit attributable to the dependent filing such request in the later month is reduced for each month of the retroactive period to the extent that may be necessary. This means that for each month of the retroactive period, the amount payable to the dependent filing the later augmentation request is the difference, if any, between:

(1) The total amount of augmented benefits certified for payment for other dependents for that month, and

(2) The permissible amount of augmented benefits (the maximum amount for the number of dependents involved) payable for the month for all dependents, including the dependent filing later.

§ 725.539 More than one reduction event.

If a reduction for receipt of State or Federal benefits and a reduction on account of excess earnings are chargeable to the same month, the benefit for such month is first reduced (but not below zero) by the amount of the State or Federal benefits, and the remainder of the benefit for such month, if any, is then reduced (but not below zero) by the amount of excess earnings chargeable to such month.

OVERPAYMENTS; UNDERPAYMENTS

§ 725.540 Overpayments.

(a) *General.* As used in this subpart, the term ''overpayment'' includes:

(1) Payment where no amount is payable under this part;

(2) Payment in excess of the amount payable under this part;

(3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);

(4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);

(5) Payment resulting from failure to terminate benefits to an individual no longer entitled thereto;

(6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and parts 410 or 727 (see § 725.4(d)) of this title or as provided in § 725.309.

(b) *Overpaid beneficiary is living.* If the beneficiary to whom an overpayment was made is living at the time of a determination of such overpayment, is entitled to benefits at the time of the overpayment, or at any time thereafter becomes so entitled, no benefit for any month is payable to such individual, except as provided in paragraph (c) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded.

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under

paragraph (b) of this section may be effected by withholding a part of the monthly benefit payable to a beneficiary where it is determined that:

(1) Withholding the full amount each month would deprive the beneficiary of income required for ordinary and necessary living expenses;

(2) The overpayment was not caused by the beneficiary's intentionally false statement or representation, or willful concealment of, or deliberate failure to furnish, material information; and

(3) Recoupment can be effected in an amount of not less than $ 10 a month and at a rate which would not unreasonably extend the period of adjustment.

(d) *Overpaid beneficiary dies before adjustment.* If an overpaid beneficiary dies before adjustment is completed under the provisions of paragraph (b) of this section, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary, or by withholding of amounts due the estate of such deceased beneficiary, or both.

§ 725.541 Notice of waiver of adjustment or recovery of overpayment.

Whenever a determination is made that more than the correct amount of payment has been made, notice of the provisions of section 204(b) of the Social Security Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual, to any other individual against whom adjustment or recovery of the overpayment is to be effected, and to any operator or carrier which may be liable to such overpaid individual.

§ 725.542 When waiver of adjustment or recovery may be applied.

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

(a) Who is without fault, and where

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title IV of the Act, or

(2) Be against equity and good conscience.

§ 725.543 Standards for waiver of adjustment or recovery.

The standards for determining the applicability of the criteria listed in § 725.542 shall be the same as those applied by the Social Security Administration under §§ 404.506 through 404.512 of this title.

§ 725.544 Collection and compromise of claims for overpayment.

(a) *General effect of 31 U.S.C. 3711.* In accordance with 31 U.S.C. 3711 and applicable regulations, claims by the Office against an individual for recovery of an overpayment under this part not exceeding the sum of $100,000, exclusive of interest, may be compromised, or collection suspended or terminated, where such individual or his or her estate does not have the present or prospective ability to pay the full amount of the claim within a reasonable time (see paragraph (c) of this section), or the cost of collection is likely to exceed the amount of recovery (see paragraph (d) of this section), except as provided under paragraph (b) of this section.

(b) *When there will be no compromise, suspension, or termination of collection of a claim for overpayment.* (1) In any case where the overpaid individual is alive, a claim for overpayment will not be compromised, nor will there be suspension or termination of collection of the claim by the Office, if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such individual or on the part of any other party having any interest in the claim.

(2) In any case where the overpaid individual is deceased:

(i) A claim for overpayment in excess of $ 5,000 will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such deceased individual; and

(ii) A claim for overpayment, regardless of the amount, will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication that any person other than the deceased overpaid individual had a part

in the fraudulent action which resulted in the overpayment.

(c) *Inability to pay claim for recovery of overpayment.* In determining whether the overpaid individual is unable to pay a claim for recovery of an overpayment under this part, the Office shall consider the individual's age, health, present and potential income (including inheritance prospects), assets (e.g., real property, savings account), possible concealment or improper transfer of assets, and assets or income of such individual which may be available in enforced collection proceedings. The Office will also consider exemptions available to such individual under the pertinent State or Federal law in such proceedings. In the event the overpaid individual is deceased, the Office shall consider the available assets of the estate, taking into account any liens or superior claims against the estate.

(d) *Cost of collection or litigative probabilities.* Where the probable costs of recovering an overpayment under this part would not justify enforced collection proceedings for the full amount of the claim, or where there is doubt concerning the Office's ability to establish its claim as well as the time which it will take to effect such collection, a compromise or settlement for less than the full amount may be considered.

(e) *Amount of compromise.* The amount to be accepted in compromise of a claim for overpayment under this part shall bear a reasonable relationship to the amount which can be recovered by enforced collection proceedings, giving due consideration to the exemption available to the overpaid individual under State or Federal law and the time which collection will take.

(f) *Payment.* Payment of the amount the Office has agreed to accept as a compromise in full settlement of a claim for recovery of an overpayment under this part shall be made within the time and in the manner set by the Office. A claim for the overpayment shall not be considered compromised or settled until the full payment of the compromised amount has been made within the time and manner set by the Office. Failure of the overpaid individual or his or her estate to make such payment as provided shall result in reinstatement of the full amount of the overpayment less any amounts paid prior to such default.

§ 725.545 Underpayments.

(a) *General.* As used in this subpart, the term ''underpayment'' includes a payment in an amount less than the amount of the benefit due for such month, and nonpayment where some amount of such benefits is payable.

(b) *Underpaid individual is living.* If an individual to whom an underpayment was made is living, the deficit represented by such underpayment shall be paid to such individual either in a single payment (if he or she is not entitled to a monthly benefit or if a single payment is requested by the claimant in writing) or by increasing one or more monthly benefit payments to which such individual becomes entitled.

(c) *Underpaid individual dies before adjustment of underpayment.* If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:

(1) The deceased individual's surviving spouse who was either:

(i) Living in the same household with the deceased individual at the time of such individual's death; or

(ii) In the case of a deceased miner, entitled for the month of death to black lung benefits as his or her surviving spouse or surviving divorced spouse.

(2) In the case of a deceased miner or spouse his or her child entitled to benefits as the surviving child of such miner or surviving spouse for the month in which such miner or spouse died (if more than one such child, in equal shares to each such child).

(3) In the case of a deceased miner, his parent entitled to benefits as the surviving parent of such miner for the month in which such miner died (if more than one such parent, in equal shares to each such parent).

(4) The surviving spouse of the deceased individual who does not qualify under paragraph (c)(1) of this section.

(5) The child or children of the deceased individual who do not qualify

under paragraph (c)(2) of this section (if more than one such child, in equal shares to each such child).

(6) The parent or parents of the deceased individual who do not qualify under paragraph (c)(3) of this section (if more than one such parent, in equal shares to each such parent).

(7) The legal representative of the estate of the deceased individual as defined in paragraph (e) of this section.

(d) *Deceased beneficiary*. In the event that a person, who is otherwise qualified to receive payments as the result of a deficit caused by an underpayment under the provisions of paragraph (c) of this section, dies before receiving payment or before negotiating the check or checks representing such payment, his or her share of the underpayment shall be divided among the remaining living person(s) in the same order or priority. In the event that there is (are) no other such person(s), the underpayment shall be paid to the living person(s) in the next lower order of priority under paragraph (c) of this section.

(e) *Definition of legal representative*. The term ''legal representative,'' for the purpose of qualifying for receipt of an underpayment, generally means the executor or the administrator of the estate of the deceased beneficiary. However, it may also include an individual, institution or organization acting on behalf of an unadministered estate, provided the person can give the Office good acquittance (as defined in paragraph (f) of this section). The following persons may qualify as legal representative for purposes of this section, provided they can give the Office good acquittance:

(1) A person who qualifies under a State's ''small estate'' statute; or

(2) A person resident in a foreign country who under the laws and customs of that country, has the right to receive assets of the estate; or

(3) A public administrator; or

(4) A person who has the authority under applicable law to collect the assets of the estate of the deceased beneficiary.

(f) *Definition of ''good acquittance.''* A person is considered to give the Office ''good acquittance'' when payment to that person will release the Office from further liability for such payment.

§ 725.546 Relation to provisions for reductions or increases.

The amount of an overpayment or an underpayment is the difference between the amount to which the beneficiary was actually entitled and the amount paid. Overpayment and underpayment simultaneously outstanding against the same beneficiary shall first be adjusted against one another before adjustment pursuant to the other provisions of this subpart.

§ 725.547 Applicability of overpayment and underpayment provisions to operator or carrier.

(a) The provisions of this subpart relating to overpayments and underpayments shall be applicable to overpayments and underpayments made by responsible operators or their insurance carriers, as appropriate.

(b) No operator or carrier may recover, or make an adjustment of, an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the recovery or adjustment of all overpayments.

§ 725.548 Procedures applicable to overpayments and underpayments.

(a) In any case involving either overpayments or underpayments, the Office may take any necessary action, and district directors may issue appropriate orders to protect the rights of the parties.

(b) Disputes arising out of orders so issued shall be resolved by the procedures set out in subpart F of this part.

Subpart I—Enforcement of Liability; Reports

§ 725.601 Enforcement generally.

(a) The Act, together with certain incorporated provisions from the Longshoremen's and Harbor Workers' Compensation Act, contains a number of provisions which subject an operator or other employer, claimants and others to penalties for failure to comply with certain provisions of the Act, or failure to commence and continue prompt periodic payments to a beneficiary.

(b) It is the policy and intent of the Department to vigorously enforce the provisions of this part through the use of the remedies provided by the Act. Accordingly, if an operator refuses to pay benefits with respect to a claim for which the operator has been adjudicated liable, the Director may invoke and execute the lien on the property of the operator as described in § 725.603. Enforcement of this lien must be pursued in an appropriate U.S. district court. If the Director determines that the remedy provided by § 725.603 may not be sufficient to guarantee the continued compliance with the terms of an award or awards against the operator, the Director may in addition seek an injunction in the U.S. district court to prohibit future noncompliance by the operator and such other relief as the court considers appropriate (*see* § 725.604). If an operator unlawfully suspends or terminates the payment of benefits to a claimant, the district director may declare the award in default and proceed in accordance with § 725.605. In all cases payments of additional compensation (*see* § 725.607) and interest (*see* § 725.608) will be sought by the Director or awarded by the district director.

(c) In certain instances the remedies provided by the Act are concurrent; that is, more than one remedy might be appropriate in any given case. In such a case, the Director may select the remedy or remedies appropriate for the enforcement action. In making this selection, the Director shall consider the best interests of the claimant as well as those of the fund.

[65 FR 80054, Dec. 20, 2000, as amended at 81 FR 24481, Apr. 26, 2016]

§ 725.602 Reimbursement of the fund.

(a) In any case in which the fund has paid benefits, including medical benefits, on behalf of an operator or other employer which is determined liable therefore, or liable for a part thereof, such operator or other employer shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund (with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

(b) In any case where benefit payments have been made by the fund, the fund shall be subrogated to the rights of the beneficiary. The Secretary of Labor may, as appropriate, exercise such subrogation rights.

§ 725.603 Payments by the fund on behalf of an operator; liens.

(a) If an amount is paid out of the fund to an individual entitled to benefits under this part or part 727 of this subchapter (see § 725.4(d)) on behalf of an operator or other employer which is or was required to pay or secure the payment of all or a portion of such amount (see § 725.522), the operator or other employer shall be liable to the United States for repayment to the fund of the amount of benefits properly attributable to such operator or other employer.

(b) If an operator or other employer liable to the fund refuses to pay, after demand, the amount of such liability, there shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such operator or other employer. The lien arises on the date on which such liability is finally determined, and continues until it is satisfied or becomes unenforceable by reason of lapse of time.

(c)(1) Except as otherwise provided under this section, the priority of the lien shall be determined in the same manner as under section 6323 of the Internal Revenue Code (26 U.S.C.).

(2) In the case of a bankruptcy or insolvency proceeding, the lien imposed under this section shall be treated in the same manner as a lien for taxes due and owing to the United States for purposes of the Bankruptcy Act or section 3466 of the Revised Statutes (31 U.S.C. 191).

(3) For purposes of applying section 6323(a) of the Internal Revenue Code (26 U.S.C.) to determine the priority between the lien imposed under this section and the Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of the section, notice of the lien imposed hereunder shall be filed in the same manner as under section 6323(f) (disregarding paragraph (4)

thereof) and (g) of the Internal Revenue Code (26 U.S.C.).

(5) In any case where there has been a refusal or neglect to pay the liability imposed under this section, the Secretary of Labor may bring a civil action in a district court of the United States to enforce the lien of the United States under this section with respect to such liability or to subject any property, of whatever nature, of the operator, or in which it has any right, title, or interest, to the payment of such liability.

(6) The liability imposed by this paragraph may be collected at a proceeding in court if the proceeding is commenced within 6 years after the date upon which the liability was finally determined, or prior to the expiration of any period for collection agreed upon in writing by the operator and the United States before the expiration of such 6-year period. This period of limitation shall be suspended for any period during which the assets of the operator are in the custody or control of any court of the United States, or of any State, or the District of Columbia, and for 6 months thereafter, and for any period during which the operator is outside the United States if such period of absence is for a continuous period of at least 6 months.

§ 725.604 Enforcement of final awards.

Notwithstanding the provisions of § 725.603, if an operator or other employer or its officers or agents fails to comply with an order awarding benefits that has become final, any beneficiary of such award or the district director may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the U.S. District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such operator or other employer or its officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such operator or other employer and its officers or agents compliance with the order.

§ 725.605 Defaults.

(a) Except as is otherwise provided in this part, no suspension, termination or other failure to pay benefits awarded to a claimant is permitted. If an employer found liable for the payment of such benefits fails to make such payments within 30 days after any date on which such benefits are due and payable, the person to whom such benefits are payable may, within one year after such default, make application to the district director for a supplementary order declaring the amount of the default.

(b) If after investigation, notice and hearing as provided in subparts E and F of this part, a default is found, the district director or the administrative law judge, if a hearing is requested, shall issue a supplementary order declaring the amount of the default, if any. In cases where a lump-sum award has been made, if the payment in default is an installment, the district director or administrative law judge, may, in his or her discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the operator has its principal place of business or maintains an office or for the judicial district in which the injury occurred. In case such principal place of business or office is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the U.S. District Court for the District of Columbia. Such supplementary order shall be final and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court

shall modify such judgment to conform to any later benefits order upon presentation of a certified copy thereof to the court.

(c) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the district director shall make payment from the fund, and in addition, provide any necessary medical, surgical, and other treatment required by subpart J of this part. A defaulting employer shall be liable to the fund for payment of the amounts paid by the fund under this section; and for the purpose of enforcing this liability, the fund shall be subrogated to all the rights of the person receiving such payments or benefits.

§ 725.606 Security for the payment of benefits.

(a) Following the issuance of an effective order by a district director (see § 725.418), administrative law judge (see § 725.479), Benefits Review Board, or court that requires the payment of benefits by an operator that has failed to secure the payment of benefits in accordance with section 423 of the Act and § 726.4 of this subchapter, or by a coal mine construction or transportation employer, the Director may request that the operator secure the payment of all benefits ultimately payable on the claim. Such operator or other employer shall thereafter immediately secure the payment of benefits in accordance with the provisions of this section, and provide proof of such security to the Director. Such security may take the form of an indemnity bond, a deposit of cash or negotiable securities in compliance with §§ 726.106(c) and 726.107 of this subchapter, or any other form acceptable to the Director.

(b) The amount of security initially required by this section shall be determined as follows:

(1) In a case involving an operator subject to section 423 of the Act and § 726.4 of this subchapter, the amount of the security shall not be less than $175,000, and may be a higher amount as determined by the Director, taking into account the life expectancies of the claimant and any dependents using the most recent life expectancy tables published by the Social Security Administration; or

(2) In a case involving a coal mine construction or transportation employer, the amount of the security shall be determined by the Director, taking into account the life expectancies of the claimant and any dependents using the most recent life expectancy tables published by the Social Security Administration.

(c) If the operator or other employer fails to provide proof of such security to the Director within 30 days of its receipt of the Director's request to secure the payment of benefits issued under paragraph (a) of this section, the appropriate adjudication officer shall issue an order requiring the operator or other employer to make a deposit of negotiable securities with a Federal Reserve Bank in the amount required by paragraph (b). Such securities shall comply with the requirements of §§ 726.106(c) and 726.107 of this subchapter. In a case in which the effective order was issued by a district director, the district director shall be considered the appropriate adjudication officer. In any other case, the administrative law judge who issued the most recent decision in the case, or such other administrative law judge as the Chief Administrative Law Judge shall designate, shall be considered the appropriate adjudication officer, and shall issue an order under this paragraph on motion of the Director. The administrative law judge shall have jurisdiction to issue an order under this paragraph notwithstanding the pendency of an appeal of the award of benefits with the Benefits Review Board or court.

(d) An order issued under this section shall be considered effective when issued. Disputes regarding such orders shall be resolved in accordance with subpart F of this part.

(e) Notwithstanding any further review of the order in accordance with subpart F of this part, if an operator or other employer subject to an order issued under this section fails to comply with such order, the appropriate adjudication officer shall certify such non-compliance to the appropriate United States district court in accordance with § 725.351(c).

(f) Security posted in accordance with this section may be used to make payment of benefits that become due with respect to the claim in accordance with § 725.502. In the event that either the order awarding compensation or the order issued under this section is vacated or reversed, the operator or other employer may apply to the appropriate adjudication officer for an order authorizing the return of any amounts deposited with a Federal Reserve Bank and not yet disbursed, and such application shall be granted. If at any time the Director determines that additional security is required beyond that initially required by paragraph (b) of this section, he may request the operator or other employer to increase the amount. Such request shall be treated as if it were issued under paragraph (a) of this section.

(g) If a coal mine construction or transportation employer fails to comply with an order issued under paragraph (c), and such employer is a corporation, the provisions of § 725.609 shall be applicable to the president, secretary, and treasurer of such employer.

§ 725.607 Payments of additional compensation.

(a) If any benefits payable under the terms of an award by a district director (§ 725.419(d)), a decision and order filed and served by an administrative law judge (§ 725.478), or a decision filed by the Board or a U.S. court of appeals, are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due, there will be added to such unpaid benefits an amount equal to 20 percent thereof, which must be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the LHWCA and an order staying payments has been issued.

(b) If, on account of an operator's or other employer's failure to pay benefits as provided in paragraph (a) of this section, benefit payments are made by the fund, the eligible claimant will nevertheless be entitled to receive such additional compensation to which he or she may be eligible under paragraph (a), with respect to all amounts paid by the fund on behalf of such operator or other employer.

(c) The fund may not be held liable for payments of additional compensation under any circumstances.

[81 FR 24482, Apr. 26, 2016]

§ 725.608 Interest.

(a)(1) In any case in which an operator fails to pay benefits that are due (§ 725.502), the beneficiary shall also be entitled to simple annual interest, computed from the date on which the benefits were due. The interest shall be computed through the date on which the operator paid the benefits, except that the beneficiary shall not be entitled to interest for any period following the date on which the beneficiary received payment of any benefits from the fund pursuant to § 725.522.

(2) In any case in which an operator is liable for the payment of retroactive benefits, the beneficiary shall also be entitled to simple annual interest on such benefits, computed from 30 days after the date of the first determination that such an award should be made. The first determination that such an award should be made may be a district director's initial determination of entitlement, an award made by an administrative law judge or a decision by the Board or a court, whichever is the first such determination of entitlement made upon the claim.

(3) In any case in which an operator is liable for the payment of additional compensation (§ 725.607), the beneficiary shall also be entitled to simple annual interest computed from the date upon which the beneficiary's right to additional compensation first arose.

(4) In any case in which an operator is liable for the payment of medical benefits, the beneficiary or medical provider to whom such benefits are owed shall also be entitled to simple annual interest, computed from the date upon which the services were rendered, or from 30 days after the date of the first determination that the miner is generally entitled to medical benefits, whichever is later. The first determination that the miner is generally entitled to medical benefits may be a district director's initial determination of entitlement, an award made by

an administrative law judge or a decision by the Board or a court, whichever is the first such determination of general entitlement made upon the claim. The interest shall be computed through the date on which the operator paid the benefits, except that the beneficiary or medical provider shall not be entitled to interest for any period following the date on which the beneficiary or medical provider received payment of any benefits from the fund pursuant to § 725.522 or subpart I of this part.

(b) If an operator or other employer fails or refuses to pay any or all benefits due pursuant to an award of benefits or an initial determination of eligibility made by the district director and the fund undertakes such payments, such operator or other employer shall be liable to the fund for simple annual interest on all payments made by the fund for which such operator is determined liable, computed from the first date on which such benefits are paid by the fund, in addition to such operator's liability to the fund, as is otherwise provided in this part. Interest payments owed pursuant to this paragraph shall be paid directly to the fund.

(c) In any case in which an operator is liable for the payment of an attorney's fee pursuant to § 725.367, and the attorney's fee is payable because the award of benefits has become final, the attorney shall also be entitled to simple annual interest, computed from the date on which the attorney's fee was awarded. The interest shall be computed through the date on which the operator paid the attorney's fee.

(d) The rates of interest applicable to paragraphs (a), (b), and (c) of this section shall be computed as follows:

(1) For all amounts outstanding prior to January 1, 1982, the rate shall be 6% simple annual interest;

(2) For all amounts outstanding for any period during calendar year 1982, the rate shall be 15% simple annual interest; and

(3) For all amounts outstanding during any period after calendar year 1982, the rate shall be simple annual interest at the rate established by section 6621 of the Internal Revenue Code (26 U.S.C.) which is in effect for such period.

(e) The fund shall not be liable for the payment of interest under any circumstances, other than the payment of interest on advances from the United States Treasury as provided by section 9501(c) of the Internal Revenue Code (26 U.S.C.).

§ 725.609 Enforcement against other persons.

In any case in which an award of benefits creates obligations on the part of an operator or insurer that may be enforced under the provisions of this subpart, such obligations may also be enforced, in the discretion of the Secretary or district director, as follows:

(a) In a case in which the operator is a sole proprietorship or partnership, against any person who owned, or was a partner in, such operator during any period commencing on or after the date on which the miner was last employed by the operator;

(b) In a case in which the operator is a corporation that failed to secure its liability for benefits in accordance with section 423 of the Act and § 726.4, and the operator has not secured its liability for the claim in accordance with § 725.606, against any person who served as the president, secretary, or treasurer of such corporation during any period commencing on or after the date on which the miner was last employed by the operator;

(c) In a case in which the operator is no longer capable of assuming its liability for the payment of benefits (§ 725.494(e)), against any operator which became a successor operator with respect to the liable operator (§ 725.492) after the date on which the claim was filed, beginning with the most recent such successor operator;

(d) In a case in which the operator is no longer capable of assuming its liability for the payment of benefits (§ 725.494(e)), and such operator was a subsidiary of a parent company or a product of a joint venture, or was substantially owned or controlled by another business entity, against such parent entity, any member of such joint venture, or such controlling business entity; or

(e) Against any other person who has assumed or succeeded to the obligations of the operator or insurer by operation of any state or federal law, or by any other means.

§ 725.620 Failure to secure benefits; other penalties.

(a) If an operator fails to discharge its insurance obligations under the Act, the provisions of subpart D of part 726 of this subchapter shall apply.

(b) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secrets, or destroys any property belonging to such employer, after one of its employees has been injured within the purview of the Act, and with intent to avoid the payment of benefits under the Act to such miner or his or her dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both. In any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such penalty or imprisonment as well as jointly liable with such corporation for such fine.

(c) No agreement by a miner to pay any portion of a premium paid to a carrier by such miner's employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing benefits or medical services and supplies as required by this part shall be valid; and any employer who makes a deduction for such purpose from the pay of a miner entitled to benefits under the Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(d) No agreement by a miner to waive his or her right to benefits under the Act and the provisions of this part shall be valid.

(e) This section shall not affect any other liability of the employer under this part.

§ 725.621 Reports.

(a) Upon making the first payment of benefits and upon suspension, reduction, or increase of payments, the operator or other employer responsible for making payments shall immediately notify the district director of the action taken, in accordance with a form prescribed by the Office.

(b) Within 16 days after final payment of benefits has been made by an employer, such employer shall so notify the district director, in accordance with a form prescribed by the Office, stating that such final payment, has been made, the total amount of benefits paid, the name of the beneficiary, and such other information as the Office deems pertinent.

(c) The Director may from time to time prescribe such additional reports to be made by operators, other employers, or carriers as the Director may consider necessary for the efficient administration of the Act.

(d) Any employer who fails or refuses to file any report required of such employer under this section, and has penalties assessed for such failure or refusal after January 13, 2017, shall be subject to a civil penalty not to exceed $1,397 for each failure or refusal, which penalty shall be determined in accordance with the procedures set forth in subpart D of part 726 of this subchapter, as appropriate.

(e) No request for information or response to such request shall be considered a report for purposes of this section or the Act, unless it is so designated by the Director or by this section.

[65 FR 80054, Dec. 20, 2000, as amended at 81 FR 43449, July 1, 2016; 82 FR 5380, Jan. 18, 2017]

Subpart J—Medical Benefits and Vocational Rehabilitation

§ 725.701 Availability of medical benefits.

(a) A miner who is determined to be eligible for benefits under this part or part 727 of this subchapter (see § 725.4(d)) is entitled to medical benefits as set forth in this subpart as of the date of his or her claim, but in no event before January 1, 1974. No medical benefits shall be provided to the survivor or dependent of a miner under this part.

(b) A responsible operator, other employer, or where there is neither, the

fund, shall furnish a miner entitled to benefits under this part with such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis and disability requires.

(c) The medical benefits referred to in paragraphs (a) and (b) of this section shall include palliative measures useful only to prevent pain or discomfort associated with the miner's pneumoconiosis or attendant disability.

(d) The costs recoverable under this subpart shall include the reasonable cost of travel necessary for medical treatment (to be determined in accordance with prevailing United States government mileage rates) and the reasonable documented cost to the miner or medical provider incurred in communicating with the employer, carrier, or district director on matters connected with medical benefits.

(e) If a miner receives a medical service or supply, as described in this section, for any pulmonary disorder, there shall be a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis. The party liable for the payment of benefits may rebut the presumption by producing credible evidence that the medical service or supply provided was for a pulmonary disorder apart from those previously associated with the miner's disability, or was beyond that necessary to effectively treat a covered disorder, or was not for a pulmonary disorder at all.

(f) Evidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of any medical service or supply under this subpart. In determining whether the treatment is compensable, the opinion of the miner's treating physician may be entitled to controlling weight pursuant to § 718.104(d). A finding that a medical service or supply is not covered under this subpart shall not otherwise affect the miner's entitlement to benefits.

§ 725.702 Claims for medical benefits only under section 11 of the Reform Act.

(a) Section 11 of the Reform Act directs the Secretary of Health, Education and Welfare to notify each miner receiving benefits under part B of title IV of the Act that he or she may file a claim for medical treatment benefits described in this subpart. Section 725.308(b) provides that a claim for medical treatment benefits shall be filed on or before December 31, 1980, unless the period is enlarged for good cause shown. This section sets forth the rules governing the processing, adjudication, and payment of claims filed under section 11.

(b)(1) A claim filed pursuant to the notice described in paragraph (a) of this section shall be considered a claim for medical benefits only, and shall be filed, processed, and adjudicated in accordance with the provisions of this part, except as provided in this section. While a claim for medical benefits must be treated as any other claim filed under part C of title IV of the Act, the Department shall accept the Social Security Administration's finding of entitlement as its initial determination.

(2) In the case of a part B beneficiary whose coal mine employment terminated before January 1, 1970, the Secretary shall make an immediate award of medical benefits. Where the part B beneficiary's coal mine employment terminated on or after January 1, 1970, the Secretary shall immediately authorize the payment of medical benefits and thereafter inform the responsible operator, if any, of the operator's right to contest the claimant's entitlement for medical benefits.

(c) A miner on whose behalf a claim is filed under this section (see § 725.301) must have been alive on March 1, 1978, in order for the claim to be considered.

(d) The criteria contained in subpart C of part 727 of this subchapter (see § 725.4(d)) are applicable to claims for medical benefits filed under this section.

(e) No determination made with respect to a claim filed under this section shall affect any determination previously made by the Social Security Administration. The Social Security

Administration may, however, reopen a previously approved claim if the conditions set forth in § 410.672(c) of this chapter are present. These conditions are generally limited to fraud or concealment.

(f) If medical benefits are awarded under this section, such benefits shall be payable by a responsible coal mine operator (see subpart G of this part), if the miner's last employment occurred on or after January 1, 1970, and in all other cases by the fund. An operator which may be required to provide medical treatment benefits to a miner under this section shall have the right to participate in the adjudication of the claim as is otherwise provided in this part.

(g) Any miner whose coal mine employment terminated after January 1, 1970, may be required to submit to a medical examination requested by an identified operator. The unreasonable refusal to submit to such an examination shall have the same consequences as are provided under § 725.414.

(h) If a miner is determined eligible for medical benefits in accordance with this section, such benefits shall be provided from the date of filing, except that such benefits may also include payments for any unreimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974, to the date of filing which are attributable to medical care required as a result of the miner's total disability due to pneumoconiosis. No reimbursement for health insurance premiums, taxes attributable to any public health insurance coverage, or other deduction or payments made for the purpose of securing third party liability for medical care costs is authorized by this section. If a miner seeks reimbursement for medical care costs personally incurred before the filing of a claim under this section, the district director shall require documented proof of the nature of the medical service provided, the identity of the medical provider, the cost of the service, and the fact that the cost was paid by the miner, before reimbursement for such cost may be awarded.

§ 725.703 Physician defined.

The term ''physician'' includes only doctors of medicine (MD) and osteopathic practitioners within the scope of their practices as defined by State law. No treatment or medical services performed by any other practitioner of the healing arts is authorized by this part, unless such treatment or service is authorized and supervised both by a physician as defined in this section and the district director.

§ 725.704 Notification of right to medical benefits; authorization of treatment.

(a) Upon notification to a miner of such miner's entitlement to benefits, the Office shall provide the miner with a list of authorized treating physicians and medical facilities in the area of the miner's residence. The miner may select a physician from this list or may select another physician with approval of the Office. Where emergency services are necessary and appropriate, authorization by the Office shall not be required.

(b) The Office may, on its own initiative, or at the request of a responsible operator, order a change of physicians or facilities, but only where it has been determined that the change is desirable or necessary in the best interest of the miner. The miner may change physicians or facilities subject to the approval of the Office.

(c) If adequate treatment cannot be obtained in the area of the claimant's residence, the Office may authorize the use of physicians or medical facilities outside such area as well as reimbursement for travel expenses and overnight accommodations.

§ 725.705 Arrangements for medical care.

(a) *Operator liability*. If an operator has been determined liable for the payment of benefits to a miner, the Office shall notify such operator or insurer of the names, addresses, and telephone numbers of the authorized providers of medical benefits chosen by an entitled miner, and shall require the operator or insurer to:

(1) Notify the miner and the providers chosen that such operator will be responsible for the cost of medical

services provided to the miner on account of the miner's total disability due to pneumoconiosis;

(2) Designate a person or persons with decisionmaking authority with whom the Office, the miner and authorized providers may communicate on matters involving medical benefits provided under this subpart and notify the Office, miner and providers of such designation;

(3) Make arrangements for the direct reimbursement of providers for their services.

(b) *Fund liability*. If there is no operator found liable for the payment of benefits, the Office shall make necessary arrangements to provide medical care to the miner, notify the miner and medical care facility selected of the liability of the fund, designate a person or persons with whom the miner or provider may communicate on matters relating to medical care, and make arrangements for the direct reimbursement of the medical provider.

§ 725.706 Authorization to provide medical services.

(a) Except as provided in paragraph (b) of this section, medical services from an authorized provider which are payable under § 725.701 shall not require prior approval of the Office or the responsible operator.

(b) Except where emergency treatment is required, prior approval of the Office or the responsible operator shall be obtained before any hospitalization or surgery, or before ordering an apparatus for treatment where the purchase price exceeds $300. A request for approval of non-emergency hospitalization or surgery shall be acted upon expeditiously, and approval or disapproval will be given by telephone if a written response cannot be given within 7 days following the request. No employee of the Department of Labor, other than a district director or the Chief, Branch of Medical Analysis and Services, DCMWC, is authorized to approve a request for hospitalization or surgery by telephone.

(c) Payment for medical services, treatment, or an apparatus shall be made at no more than the rate prevailing in the community in which the providing physician, medical facility or supplier is located.

§ 725.707 Reports of physicians and supervision of medical care.

(a) Within 30 days following the first medical or surgical treatment provided under § 725.701, the treating physician or facility shall furnish to the Office and the responsible operator, if any, a report of such treatment.

(b) In order to permit continuing supervision of the medical care provided to the miner with respect to the necessity, character and sufficiency of any medical care furnished or to be furnished, the treating physician, facility, employer or carrier shall provide such reports in addition to those required by paragraph (a) of this section as the Office may from time to time require. Within the discretion of the district director, payment may be refused to any medical provider who fails to submit any report required by this section.

§ 725.708 Disputes concerning medical benefits.

(a) Whenever a dispute develops concerning medical services under this part, the district director shall attempt to informally resolve such dispute. In this regard the district director may, on his or her own initiative or at the request of the responsible operator order the claimant to submit to an examination by a physician selected by the district director.

(b) If no informal resolution is accomplished, the district director shall refer the case to the Office of Administrative Law Judges for hearing in accordance with this part. Any such hearing shall be scheduled at the earliest possible time and shall take precedence over all other requests for hearing except for prior requests for hearing arising under this section and as provided by § 727.405 of this subchapter (see § 725.4(d)). During the pendency of such adjudication, the Director may order the payment of medical benefits prior to final adjudication under the same conditions applicable to benefits awarded under § 725.522.

(c) In the development or adjudication of a dispute over medical benefits, the adjudication officer is authorized

to take whatever action may be necessary to protect the health of a totally disabled miner.

(d) Any interested medical provider may, if appropriate, be made a party to a dispute over medical benefits.

§ 725.710 Objective of vocational rehabilitation.

The objective of vocational rehabilitation is the return of a miner who is totally disabled for work in or around a coal mine and who is unable to utilize those skills which were employed in the miner's coal mine employment to gainful employment commensurate with such miner's physical impairment. This objective may be achieved through a program of re-evaluation and redirection of the miner's abilities, or retraining in another occupation, and selective job placement assistance.

§ 725.711 Requests for referral to vocational rehabilitation assistance.

Each miner who has been determined entitled to receive benefits under part C of title IV of the Act shall be informed by the OWCP of the availability and advisability of vocational rehabilitation services. If such miner chooses to avail himself or herself of vocational rehabilitation, his or her request shall be processed and referred by OWCP vocational rehabilitation advisors pursuant to the provisions of §§ 702.501 through 702.508 of this chapter as is appropriate.

PART 726—BLACK LUNG BENEFITS; REQUIREMENTS FOR COAL MINE OPERATOR'S INSURANCE

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AUTHORITY: 5 U.S.C. 301; 33 U.S.C. 901 *et seq.*, 902(f), 925, 932, 933, 934, 936; 33 U.S.C. 901 *et seq.;* 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at sec. 701; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary's Order 10–2009, 74 FR 58834.

SOURCE: 65 FR 80097, Dec. 20, 2000, unless otherwise noted.

Subpart A—General

§ 726.1 Statutory insurance requirements for coal mine operators.

Section 423 of title IV of the Federal Coal Mine Health and Safety Act as amended (hereinafter the Act) requires each coal mine operator who is operating or has operated a coal mine in a State which is not included in the list published by the Secretary (see part 722 of this subchapter) to secure the payment of benefits for which he may be found liable under section 422 of the Act and the provisions of this subchapter by either:

(a) Qualifying as a self-insurer, or

(b) By subscribing to and maintaining in force a commercial insurance contract (including a policy or contract procured from a State agency).

§ 726.2 Purpose and scope of this part.

(a) This part provides rules directing and controlling the circumstances under which a coal mine operator shall fulfill his insurance obligations under the Act.

(b) This Subpart A sets forth the scope and purpose of this part and generally describes the statutory framework within which this part is operative.

(c) Subpart B of this part sets forth the criteria a coal mine operator must meet in order to qualify as a self-insurer.

(d) Subpart C of this part sets forth the rules and regulations of the Secretary governing contracts of insurance entered into by coal mine operators and commercial insurance sources for the payment of black lung benefits under part C of the Act.

(e) Subpart D of this part sets forth the rules governing the imposition of civil money penalties on coal mine operators that fail to secure their liability under the Act.

§ 726.3 Relationship of this part to other parts in this subchapter.

(a) This part 726 implements and effectuates responsibilities for the payment of black lung benefits placed upon coal mine operators by sections 415 and 422 of the Act and the regulations of the Secretary in this subchapter, particularly those set forth in part 725 of this subchapter. All definitions, usages, procedures, and other rules affecting the responsibilities of coal mine operators prescribed in part 725 of this subchapter are hereby made applicable, as appropriate, to this part 726.

(b) If the provisions of this part appear to conflict with any provision of any other part in this subchapter, the apparently conflicting provisions should be read harmoniously to the fullest extent possible. If a harmonious interpretation is not possible, the provisions of this part should be applied to govern the responsibilities and obligations of coal mine operators to secure the payment of black lung benefits as prescribed by the Act. The provisions of this part do not apply to matters falling outside the scope of this part.

§ 726.4 Who must obtain insurance coverage.

(a) Section 423 of part C of title IV of the Act requires each operator of a coal mine or former operator in any State which does meet the requirements prescribed by the Secretary pursuant to section 411 of part C of title IV of the Act to self-insure or obtain a policy or

contract of insurance to guarantee the payment of benefits for which such operator may be adjudicated liable under section 422 of the Act. In enacting sections 422 and 423 of the Act Congress has unambiguously expressed its intent that coal mine operators bear the cost of providing the benefits established by part C of title IV of the Act. Section 3 of the Act defines an ''operator'' as any owner, lessee, or other person who operates, controls, or supervises a coal mine.

(b) Section 422(i) of the Act clearly recognizes that any individual or business entity who is or was a coal mine operator may be found liable for the payment of pneumoconiosis benefits after December 31, 1973. Within this framework it is clear that the Secretary has wide latitude for determining which operator shall be liable for the payment of part C benefits. Comprehensive standards have been promulgated in subpart G of part 725 of this subchapter for the purpose of guiding the Secretary in making such determination. It must be noted that pursuant to these standards any parent or subsidiary corporation, any individual or corporate partner, or partnership, any lessee or lessor of a coal mine, any joint venture or participant in a joint venture, any transferee or transferor of a corporation or other business entity, any former, current, or future operator or any other form of business entity which has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits after December 31, 1973. The failure of any such business entity to self-insure or obtain a policy or contract of insurance shall in no way relieve such business entity of its obligation to pay pneumoconiosis benefits in respect of any case in which such business entity's responsibility for such payments has been properly adjudicated. Any business entity described in this section shall take appropriate steps to insure that any liability imposed by part C of the Act on such business entity shall be dischargeable.

§ 726.5 Effective date of insurance coverage.

Pursuant to section 422(c) of part C of title IV of the Act, no coal mine operator shall be responsible for the payment of any benefits whatsoever for any period prior to January 1, 1974. However, coal mine operators shall be liable as of January 1, 1974, for the payment of benefits in respect of claims which were filed under section 415 of part B of title IV of the Act after July 1, 1973. Section 415(a)(3) requires the Secretary to notify any operator who may be liable for the payment of benefits under part C of title IV beginning on January 1, 1974, of the pendency of a section 415 claim. Section 415(a)(5) declares that any operator who has been notified of the pendency of a section 415 claim shall be bound by the determination of the Secretary as to such operator's liability and as to the claimant's entitlement to benefits as if the claim were filed under part C of title IV of the Act and section 422 thereof had been applicable to such operator. Therefore, even though no benefit payments shall be required of an operator prior to January 1, 1974, the liability for these payments may be finally adjudicated at any time after July 1, 1973. Neither the failure of an operator to exercise his right to participate in the adjudication of such a claim nor the failure of an operator to obtain insurance coverage in respect of claims filed after June 30, 1973, but before January 1, 1974, shall excuse such operator from his liability for the payment of benefits to such claimants under part C of title IV of the Act.

§ 726.6 The Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs (hereinafter the Office or OWCP) is that division of the U.S. Department of Labor which has been empowered by the Secretary of Labor to carry out his or her functions under section 415 and part C of title IV of the Act. As noted throughout this part 726 the Office shall perform a number of functions with respect to the regulation of both the self-insurance and commercial insurance programs. All correspondence with or submissions to

the Office should be addressed as follows: Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, Washington, DC 20210.

[77 FR 37286, June 21, 2012]

§ 726.7 Forms, submission of information.

Any information required by this part 726 to be submitted to the Office of Workmen's Compensation Programs or any other office or official of the Department of Labor, shall be submitted on such forms or in such manner as the Secretary deems appropriate and has authorized from time to time for such purposes.

§ 726.8 Definitions.

In addition to the definitions provided in part 725 of this subchapter, the following definitions apply to this part:

(a) *Director* means the Director, Office of Workers' Compensation Programs, and includes any official of the Office of Workers' Compensation Programs authorized by the Director to perform any of the functions of the Director under this part and part 725 of this subchapter.

(b) *Person* includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

(c) *Secretary* means the Secretary of Labor or such other official as the Secretary shall designate to carry out any responsibility under this part.

(d) The terms *employ* and *employment* shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint venturers, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees. It is the specific intention of this paragraph to disregard any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to miners who, based upon the economic reality of their relationship to this enterprise, are, in fact, employees of the enterprise.

Subpart B—Authorization of Self-Insurers

§ 726.101 Who may be authorized to self-insure.

(a) Pursuant to section 423 of part C of title IV of the Act, authorization to self-insure against liability incurred by coal mine operators on account of the total disability or death of miners due to pneumoconiosis may be granted or denied in the discretion of the Secretary. The provisions of this subpart describe the minimum requirements established by the Secretary for determining whether any particular coal mine operator shall be authorized as a self-insurer.

(b) The minimum requirements which must be met by any operator seeking authorization to self-insure are as follows:

(1) The operator must, at the time of application, have been in the business of mining coal for at least the 3 consecutive years prior to such application; and,

(2) The operator must demonstrate the administrative capacity to fully service such claims as may be filed against him; and,

(3) The operator's average current assets over the preceding 3 years (in computing average current assets such operator shall not include the amount of any negotiable securities which he may be required to deposit to secure his obligations under the Act) must exceed current liabilities by the sum of—

(i) The estimated aggregate amount of black lung benefits (including medical benefits) which such operator may expect to be required to pay during the ensuing year; and,

(ii) The annual premium cost for any indemnity bond purchased; and

(4) Such operator must obtain security, in a form approved by the Office (see § 726.104) and in an amount to be determined by the Office (see § 726.105); and

(5) No operator with fewer than 5 full-time employee-miners shall be permitted to self-insure.

(c) No operator who is unable to meet the requirements of this section should apply for authorization to self-insure and no application for self-insurance shall be approved by the Office until such time as the amount prescribed by the Office has been secured in accordance with this subpart.

§ 726.102 Application for authority to become a self-insurer; how filed; information to be submitted.

(a) *How filed.* Application for authority to become a self-insurer shall be addressed to the Office and be made on a form provided by the Office. Such application shall be signed by the applicant over his typewritten name and if the applicant is not an individual, by the principal officer of the applicant duly authorized to make such application over his typewritten name and official designation and shall be sworn to by him. If the applicant is a corporation, the corporate seal shall be affixed. The application shall be filed with the Office in Washington, D.C.

(b) *Information to be submitted.* Each application for authority to self-insure shall contain:

(1) A statement of the employer's payroll report for each of the preceding 3 years;

(2) A statement of the average number of employees engaged in employment within the purview of the Act for each of the preceding 3 years;

(3) A list of the mine or mines to be covered by any particular self-insurance agreement. Each such mine or mines listed shall be described by name and reference shall be made to the Federal Identification Number assigned such mine by the Bureau of Mines, U.S. Department of the Interior;

(4) A certified itemized statement of the gross and net assets and liabilities of the operator for each of the 3 preceding years in such manner as prescribed by the Office;

(5) A statement demonstrating the applicant's administrative capacity to provide or procure adequate servicing for a claim including both medical and dollar claims; and

(6) In addition to the aforementioned, the Office may in its discretion, require the applicant to submit such further information or such evidence as the Office may deem necessary to have in order to enable it to give adequate consideration to such application.

(c) *Who may file.* An application for authorization to self-insure may be filed by any parent or subsidiary corporation, partner or partnership, party to a joint venture or joint venture, individual, or other business entity which may be determined liable for the payment of black lung benefits under part C of title IV of the Act, regardless of whether such applicant is directly engaged in the business of mining coal. However, in each case for which authorization to self-insure is granted, the agreement and undertaking filed pursuant to § 726.110 and the security deposit shall be respectively filed by and deposited in the name of the applicant only.

§ 726.103 Application for authority to self-insure; effect of regulations contained in this part.

As appropriate, each of the regulations, interpretations and requirements contained in this part 726 including those described in subpart C of this part shall be binding upon each applicant under this subpart, and the applicant's consent to be bound by all requirements of the said regulations shall be deemed to be included in and a part of the application, as fully as though written therein.

§ 726.104 Action by the Office upon application of operator.

(a) Upon receipt of a completed application for authorization to self-insure, the Office shall, after examination of the information contained in the application, either deny the request or determine the amount of security which must be given by the applicant to guarantee the payment of benefits and the discharge of all other obligations which may be required of such applicant under the Act.

(b) The applicant shall thereafter be notified that he may give security in the amount fixed by the Office (see § 726.105):

(1) In the form of an indemnity bond with sureties satisfactory to the Office;

(2) By a deposit of negotiable securities with a Federal Reserve Bank in compliance with §§ 726.106(c) and 726.107;

(3) In the form of a letter of credit issued by a financial institution satisfactory to the Office (except that a letter of credit shall not be sufficient by itself to satisfy a self-insurer's obligations under this part); or

(4) By funding a trust pursuant to section 501(c)(21) of the Internal Revenue Code (26 U.S.C.).

(c) Any applicant who cannot meet the security deposit requirements imposed by the Office should proceed to obtain a commercial policy or contract of insurance. Any applicant for authorization to self-insure whose application has been rejected or who believes that the security deposit requirements imposed by the Office are excessive may, in writing, request that the Office review its determination. A request for review should contain such information as may be necessary to support the request that the amount of security required be reduced.

(d) Upon receipt of any such request, the Office shall review its previous determination in light of any new or additional information submitted and inform the applicant whether or not a reduction in the amount of security initially required is warranted.

§ 726.105 Fixing the amount of security.

The Office shall require the amount of security which it deems necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an operator by the Act. In determining the amount of security required, the factors that the Office will consider include, but are not limited to, the operator's net worth, the existence of a guarantee by a parent corporation, and the operator's existing liability for benefits. The Office shall also consider such other factors as it considers relevant to any particular case. The amount of security which shall be required may be increased or decreased when experience or changed conditions so warrant.

§ 726.106 Type of security.

(a) The Office shall determine the type or types of security which an applicant shall or may procure. (See § 726.104(b).)

(b) In the event the indemnity bond option is selected, the bond shall be in such form and contain such provisions as the Office may prescribe: *Provided,* That only corporations may act as sureties on such indemnity bonds. In each case in which the surety on any such bond is a surety company, such company must be one approved by the U.S. Treasury Department under the laws of the United States and the applicable rules and regulations governing bonding companies (see Department of Treasury's Circular—570).

(c) An applicant for authorization to self-insure based on a deposit of negotiable securities, in the amount fixed by the Office, shall deposit any negotiable securities acceptable as security for the deposit of public moneys of the United States under regulations issued by the Secretary of the Treasury. (See 31 CFR part 225.) The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States.

§ 726.107 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.

Deposits of securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office with power in the Office, in its discretion in the event of default by the said self-insurer, to collect the interest as it may become due, to sell the securities or any of them as may be required to discharge the obligations of the self-insurer under the Act and to apply the proceeds to the payment of any benefits or medical expenses for which the self-insurer may be liable. The Office may, however, whenever it deems it unnecessary to resort to such securities for the payment of benefits,

authorize the self-insurer to collect interest on the securities deposited by him.

§ 726.108 Withdrawal of negotiable securities.

No withdrawal of negotiable securities deposited by a self-insurer, shall be made except upon authorization by the Office. A self-insurer discontinuing business, or discontinuing operations within the purview of the Act, or providing security for the payment of benefits by commercial insurance under the provisions of the Act may apply to the Office for the withdrawal of securities deposited under the regulations in this part. With such application shall be filed a sworn statement setting forth:

(a) A list of all outstanding cases in which benefits are being paid, with the names of the miners and other beneficiaries, giving a statement of the amounts of benefits paid and the periods for which such benefits have been paid; and

(b) A similar list of all pending cases in which no benefits have as yet been paid. In such cases withdrawals may be authorized by the Office of such securities as in the opinion of the Office may not be necessary to provide adequate security for the payment of outstanding and potential liabilities of such self-insurer under the Act.

§ 726.109 Increase or reduction in the amount of security.

Whenever in the opinion of the Office the amount of security given by the self-insurer is insufficient to afford adequate security for the payment of benefits and medical expenses under the Act, the self-insurer shall, upon demand by the Office, file such additional security as the Office may require. The Office may reduce the amount of security at any time on its own initiative, or upon the application of a self-insurer, when it believes the facts warrant a reduction. A self-insurer seeking a reduction shall furnish such information as the Office may request relative to his current affairs, the nature and hazard of the work of his employees, the amount of the payroll of his employees engaged in coal mine employment within the purview of the Act, his financial condition, and such other evidence as may be deemed material, including a record of benefit payments he has made.

§ 726.110 Filing of agreement and undertaking.

(a) In addition to the requirement that adequate security be procured as set forth in this subpart, the applicant for the authorization to self-insure shall, as a condition precedent to receiving such authorization, execute and file with the Office an agreement and undertaking in a form prescribed and provided by the Office in which the applicant shall agree:

(1) To pay when due, as required by the Act, all benefits payable on account of total disability or death of any of its employee-miners;

(2) To furnish medical, surgical, hospital, and other attendance, treatment, and care as required by the Act;

(3) To provide security in a form approved by the Office (see § 726.104) and in an amount established by the Office (see § 726.105), as elected in the application;

(4) To authorize the Office to sell any negotiable securities so deposited or any part thereof, and to pay from the proceeds thereof such benefits, medical, and other expenses and any accrued penalties imposed by law as the Office may find to be due and payable.

(b) When an applicant has provided the requisite security, he shall send to the Office in Washington, D.C. a completed agreement and undertaking, together with satisfactory proof that his obligations and liabilities under the Act have been secured.

§ 726.111 Notice of authorization to self-insure.

Upon receipt of a completed agreement and undertaking and satisfactory proof that adequate security has been provided, an applicant for authorization to self-insure shall be notified by the Office in writing that he is authorized to self-insure to meet the obligations imposed upon him by section 415 and part C of title IV of the Act.

§ 726.112 Reports required of self-insurer; examination of accounts of self-insurer.

(a) Each operator who has been authorized to self-insure under this part shall submit to the Office reports containing such information as the Office may from time to time require or prescribe.

(b) Whenever it deems it to be necessary, the Office may inspect or examine the books of account, records, and other papers of a self-insurer for the purpose of verifying any financial statement submitted to the Office by the self-insurer or verifying any information furnished to the Office in any report required by this section, or any other section of the regulations in this part, and such self-insurer shall permit the Office or its duly authorized representative to make such an inspection or examination as the Office shall require. In lieu of this requirement the Office may in its discretion accept an adequate report of a certified public accountant.

(c) Failure to submit or make available any report or information requested by the Office from an authorized self-insurer pursuant to this section may, in appropriate circumstances result in a revocation of the authorization to self-insure.

§ 726.113 Disclosure of confidential information.

Any financial information or records, or other information relating to the business of an authorized self-insurer or applicant for the authorization of self-insurance obtained by the Office shall be exempt from public disclosure to the extent provided in 5 U.S.C. 552(b) and the applicable regulations of the Department of Labor promulgated thereunder. (See 29 CFR part 70.)

§ 726.114 Period of authorization as self-insurer; reauthorization.

(a) No initial authorization to self-insure shall be granted for a period in excess of 18 months. A self-insurer who has made an adequate deposit of negotiable securities in compliance with §§ 726.106(c) and 726.107 will be reauthorized for the ensuing fiscal year without additional security if the Office finds that his experience as a self-insurer warrants such action. If the Office determines that such self-insurer's experience indicates a need for the deposit of additional security, no reauthorization shall be issued for the ensuing fiscal year until the Office receives satisfactory proof that the requisite amount of additional securities has been deposited. A self-insurer who currently has on file an indemnity bond will receive from the Office each year a bond form for execution in contemplation of reauthorization, and the submission of such bond duly executed in the amount indicated by the Office will be deemed and treated as such self-insurer's application for reauthorization for the ensuing fiscal year.

(b) In each case for which there is an approved change in the amount of security provided, a new agreement and undertaking shall be executed.

(c) Each operator authorized to self-insure under this part shall apply for reauthorization for any period during which it engages in the operation of a coal mine and for additional periods after it ceases operating a coal mine. Upon application by the operator, accompanied by proof that the security it has posted is sufficient to secure all benefits potentially payable to miners formerly employed by the operator, the Office shall issue a certification that the operator is exempt from the requirements of this part based on its prior operation of a coal mine. The provisions of subpart D of this part shall be applicable to any operator that fails to apply for reauthorization in accordance with the provisions of this section.

§ 726.115 Revocation of authorization to self-insure.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on his indemnity bond, or impairment of financial responsibility of such self-insurer, may be deemed good cause for such suspension or revocation.

Subpart C—Insurance Contracts

§ 726.201 Insurance contracts—generally.

Each operator of a coal mine who has not obtained authorization as a self-insurer shall purchase a policy or enter into a contract with a commercial insurance carrier or State agency. Pursuant to authority contained in sections 422(a) and 423(b) and (c) of part C of title IV of the Act, this subpart describes a number of provisions which are required to be incorporated in a policy or contract of insurance obtained by a coal mine operator for the purpose of meeting the responsibility imposed upon such operator by the Act in respect of the total disability or death of miners due to pneumoconiosis.

§ 726.202 Who may underwrite an operator's liability.

Each coal mine operator who is not authorized to self-insure shall insure and keep insured the payment of benefits as required by the Act with any stock company or mutual company or association, or with any other person, or fund, including any State fund while such company, association, person, or fund is authorized under the law of any State to insure workmen's compensation.

§ 726.203 Federal Coal Mine Health and Safety Act endorsement.

(a) The following form of endorsement shall be attached and applicable to the standard workmen's compensation and employer's liability policy prepared by the National Council on Compensation Insurance affording coverage under the Federal Coal Mine Health and Safety Act of 1969, as amended:

It is agreed that: (1) With respect to operations in a State designated in item 3 of the declarations, the unqualified term ''workmen's compensation law'' includes part C of title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 931–936, and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force, and definition (a) of Insuring Agreement III is amended accordingly; (2) with respect to such insurance as is afforded by this endorsement, (a) the States, if any, named below, shall be deemed to be designated in item 3 of the declaration; (b) Insuring Agreement IV(2) is amended to read ''by disease caused or aggravated by exposure of which the last day of the last exposure, in the employment of the insured, to conditions causing the disease occurs during the policy period, or occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period.''

(b) The term ''effective date'' as used in paragraph (a) of this section shall be construed to mean the effective date of the first policy or contract of insurance procured by an operator for purposes of meeting the obligations imposed on such operator by section 423 of part C of title IV of the Act.

(c) The Act contains a number of provisions and imposes a number of requirements on operators which differ in varying degrees from traditional workmen's compensation concepts. To avoid unnecessary administrative delays and expense which might be occasioned by the drafting of an entirely new standard workmen's compensation policy specially tailored to the Act, the Office has determined that the existing standard workmen's compensation policy subject to the endorsement provisions contained in paragraph (a) of this section shall be acceptable for purposes of writing commercial insurance coverage under the Act. However, to avoid undue disputes over the meaning of certain policy provisions and in accordance with the authority contained in section 423(b)(3) of the Act, the Office has determined that the following requirements shall be applicable to all commercial insurance policies obtained by an operator for the purpose of insuring any liability incurred pursuant to the Act:

(1) *Operator liability*. (i) Section 415 and part C of title IV of the Act provide coverage for total disability or death due to pneumoconiosis to all claimants who meet the eligibility requirements imposed by the Act. Section 422 of the Act and the regulations duly promulgated thereunder (part 725 of this subchapter) set forth the conditions under which a coal mine operator may be adjudicated liable for the payment of benefits to an eligible claimant for any period subsequent to December 31, 1973.

(ii) Section 422(c) of the Act prescribes that except as provided in 422(i)

(see paragraph (c)(2) of this section) an operator may be adjudicated liable for the payment of benefits in any case if the total disability or death due to pneumoconiosis upon which the claim is predicated arose at least in part out of employment in a mine in any period during which it was operated by such operator. The Act does not require that such employment which contributed to or caused the total disability or death due to pneumoconiosis occur subsequent to any particular date in time. The Secretary in establishing a formula for determining the operator liable for the payment of benefits (see subpart D of part 725 of this subchapter) in respect of any particular claim, must therefore, within the framework and intent of title IV of the Act find in appropriate cases that an operator is liable for the payment of benefits for some period after December 31, 1973, even though the employment upon which an operator's liability is based occurred prior to July 1, 1973, or prior to the effective date of the Act or the effective date of any amendments thereto, or prior to the effective date of any policy or contract of insurance obtained by such operator. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(2) *Successor liability*. Section 422(i) of part C of title IV of the Act requires that a coal mine operator who after December 30, 1969, acquired his mine or substantially all of the assets thereof from a person who was an operator of such mine on or after December 30, 1969, shall be liable for and shall secure the payment of benefits which would have been payable by the prior operator with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine. In the case of an operator who is determined liable for the payment of benefits under section 422(i) of the Act and part 725 of this subchapter, such liability shall accrue to such operator regardless of the fact that the miner on whose total disability or death the claim is predicated was never employed by such operator in any capacity. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate this requirement in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(3) *Medical eligibility*. Pursuant to section 422(h) of part C of title IV of the Act and the regulations described therein (see subpart D of part 410 of this title) benefits shall be paid to eligible claimants on account of total disability or death due to pneumoconiosis and in cases where the miner on whose death a claim is predicated was totally disabled by pneumoconiosis at the time of his death regardless of the cause of such death. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these requirements in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(4) *Payment of benefits, rates*. Section 422(c) of the Act by incorporating section 412(a) of the Act requires the payment of benefits at a rate equal to 50 per centum of the minimum monthly payment to which a Federal employee in grade GS–2, who is totally disabled is entitled at the time of payment under Chapter 81 of title 5, United States Code. These benefits are augmented on account of eligible dependents as appropriate (see section 412(a) of part B of title IV of the Act). Since the dollar amount of benefits payable to any beneficiary is required to be computed at the time of payment such amounts may be expected to increase from time to time as changes in the GS–2 grade are enacted into law. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act, the requirement that the payment of benefits to eligible beneficiaries shall be made in such dollar amounts as are prescribed by section 412(a) of the Act computed at the time of payment.

(5) *Compromise and waiver of benefits.* Section 422(a) of part C of title IV of the Act by incorporating sections 15(b) and 16 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 915(b) and 916) prohibits the compromise and/or waiver of claims for benefits filed or benefits payable under section 415 and part C of title IV of the Act. The endorsement provisions contained in paragraph (a) of this section shall be construed to incorporate these prohibitions in any policy or contract of insurance obtained by an operator to meet the obligations imposed on such operator by section 423 of the Act.

(6) *Additional requirements.* In addition to the requirements described in paragraph (c)(1) through (5) of this section, the endorsement provisions contained in paragraph (a) of this section shall, to the fullest extent possible, be construed to bring any policy or contract of insurance entered into by an operator for the purpose of insuring such operator's liability under part C of title IV of the Act into conformity with the legal requirements placed upon such operator by section 415 and part C of title IV of the Act and parts 720 and 725 of this subchapter.

(d) Nothing in this section shall relieve any operator or carrier of the duty to comply with any State workmen's compensation law, except insofar as such State law is in conflict with the provisions of this section.

§ 726.204 Statutory policy provisions.

Pursuant to section 423(b) of part C of title IV of the Act each policy or contract of insurance obtained to comply with the requirements of section 423(a) of the Act must contain or shall be construed to contain—

(a) A provision to pay benefits required under section 422 of the Act, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments; and,

(b) A provision that insolvency or bankruptcy of the operator or discharge therein (or both) shall not relieve the carrier from liability for such payments.

§ 726.205 Other forms of endorsement and policies.

Forms of endorsement or policies other than that described in § 726.203 may be entered into by operators to insure their liability under the Act. However, any form of endorsement or policy which materially alters or attempts to materially alter an operator's liability for the payment of any benefits under the Act shall be deemed insufficient to discharge such operator's duties and responsibilities as prescribed in part C of title IV of the Act. In any event, the failure of an operator to obtain an adequate policy or contract of insurance shall not affect such operator's liability for the payment of any benefits for which he is determined liable.

§ 726.206 Terms of policies.

A policy or contract of insurance shall be issued for the term of 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 726.207 Discharge by the carrier of obligations and duties of operator.

Every obligation and duty in respect of payment of benefits, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by the Act and in respect of the carrying out of the administrative procedure required or imposed by the Act or the regulations in this part or part 725 of this subchapter upon an operator shall be discharged and carried out by the carrier as appropriate. Notice to or knowledge of an operator of the occurrence of total disability or death due to pneumoconiosis shall be notice to or knowledge of such carrier. Jurisdiction of the operator by a district director, administrative law judge, the Office, or appropriate appellate authority under the Act shall be jurisdiction of such carrier. Any requirement under any benefits order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the operator.

REPORTS BY CARRIER

§ 726.208 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the Office each policy and endorsement issued, canceled, or renewed by it to an operator. The report shall be made in such manner and on such form as the Office may require.

§ 726.209 Report; by whom sent.

The report of issuance, cancellation, or renewal of a policy and endorsement provided for in § 726.208 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies to make such reports to the Office.

§ 726.210 Agreement to be bound by report.

Every carrier seeking to write insurance under the provisions of the Act shall be deemed to have agreed that the acceptance by the Office of a report of the issuance or renewal of a policy of insurance, as provided for by § 726.208 shall bind the carrier to full liability for the obligations under the Act of the operator named in said report. It shall be no defense to this agreement that the carrier failed or delayed to issue, cancel, or renew the policy to the operator covered by this report.

§ 726.211 Name of one employer only shall be given in each report.

A separate report of the issuance or renewal of a policy and endorsement, provided for by § 726.208, shall be made for each operator covered by a policy. If a policy is issued or renewed insuring more than one operator, a separate report for each operator so covered shall be sent to the Office with the name of only one operator on each such report.

§ 726.212 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of the Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the Office and to the operator in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective (see section 422(a) of part C of title IV of the Act).

§ 726.213 Reports by carriers concerning the payment of benefits.

Pursuant to 33 U.S.C. 914(c) as incorporated by section 422(a) of part C of title IV of the Act and § 726.207 each carrier issuing a policy or contract of insurance under the Act shall upon making the first payment of benefits and upon the suspension of any payment in any case, immediately notify the Office in accordance with a form prescribed by the Office that payment of benefit has begun or has been suspended as the case may be. In addition, each such carrier shall at the request of the Office submit to the Office such additional information concerning policies or contracts of insurance issued to guarantee the payment of benefits under the Act and any benefits paid thereunder, as the Office may from time to time require to carry out its responsibilities under the Act.

Subpart D—Civil Money Penalties

§ 726.300 Purpose and scope.

Any operator which is required to secure the payment of benefits under section 423 of the Act and § 726.4 and which fails to secure such benefits, shall be subject to a civil penalty of not more than $1,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, for each day during which such failure occurs. If the operator is a corporation, the president, secretary, and treasurer of the operator shall also be severally liable for the penalty based on the operator's failure to secure the payment of benefits. This subpart defines those terms necessary for administration of the civil money penalty provisions, describes the criteria for determining the amount of penalty to be assessed, and sets forth applicable procedures for the assessment and contest of penalties.

[81 FR 43449, July 1, 2016]

§ 726.301 Definitions.

In addition to the definitions provided in part 725 of this subchapter and § 726.8, the following definitions apply to this subpart:

(a) *Division Director* means the Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, or such other official authorized by the Division Director to perform any of the functions of the Division Director under this subpart.

(b) *President, secretary, or treasurer* means the officers of a corporation as designated pursuant to the laws and regulations of the state in which the corporation is incorporated or, if that state does not require the designation of such officers, the employees of a company who are performing the work usually performed by such officers in the state in which the corporation's principal place of business is located.

(c) *Principal* means any person who has an ownership interest in an operator that is not a corporation, and shall include, but is not limited to, partners, sole proprietors, and any other person who exercises control over the operation of a coal mine.

[65 FR 80097, Dec. 20, 2000, as amended at 77 FR 37287, June 21, 2012]

§ 726.302 Determination of penalty.

(a) The following method shall be used for determining the amount of any penalty assessed under this subpart.

(b) The penalty shall be determined by multiplying the daily base penalty amount or amounts, determined in accordance with the formula set forth in this section, by the number of days in the period during which the operator is subject to the security requirements of section 423 of the Act and § 726.4, and fails to secure its obligations under the Act. The period during which an operator is subject to liability for a penalty for failure to secure its obligations shall be deemed to commence on the first day on which the operator met the definition of the term ''operator'' as set forth in § 725.101 of this subchapter. The period shall be deemed to continue even where the operator has ceased coal mining and any related activity, unless the operator secured its liability for all previous periods through a policy or policies of insurance obtained in accordance with subpart C of this part or has obtained a certification of exemption in accordance with the provisions of § 726.114.

(c)(1) A daily base penalty amount shall be determined for all periods up to and including the 10th day after the operator's receipt of the notification sent by the Director pursuant to § 726.303, during which the operator failed to secure its obligations under section 423 of the Act and § 726.4.

(2)(i) The daily base penalty amount shall be determined based on the number of persons employed in coal mine employment by the operator, or engaged in coal mine employment on behalf of the operator, on each day of the period defined by this section.

For penalties assessed after January 13, 2017, the daily base penalty amount shall be computed as follows:

Employees	Penalty (per day)
Less than 25	$136
25–50	272
51–100	409
More than 100	544

(ii) For any period after the operator has ceased coal mining and any related activity, the daily penalty amount shall be computed based on the largest number of persons employed in coal mine employment by the operator, or engaged in coal mine employment on behalf of the operator, on any day while the operator was engaged in coal mining or any related activity. For purposes of this section, it shall be presumed, in the absence of evidence to the contrary, that any person employed by an operator is employed in coal mine employment.

(3) In any case in which the operator had prior notice of the applicability of the Black Lung Benefits Act to its operations, the daily base penalty amounts set forth in paragraph (c)(2)(i) of this section shall be doubled. Prior notice may be inferred where the operator, or an entity in which the operator or any of its principals had an ownership interest, or an entity in which the operator's president, secretary, or treasurer were employed:

(i) Previously complied with section 423 of the Act and § 726.4;

(ii) Was notified of its obligation to comply with section 423 of the Act and § 726.4; or

(iii) Was notified of its potential liability for a claim filed under the Black Lung Benefits Act pursuant to § 725.407 of this subchapter.

(4) Commencing with the 11th day after the operator's receipt of the notification sent by the Director pursuant to § 726.303, for penalties assessed after January 13, 2017, the daily base penalty amounts set forth in paragraph (c)(2)(i) shall be increased by $136.

(5) In any case in which the operator, or any of its principals, or an entity in which the operator's president, secretary, or treasurer were employed, has been the subject of a previous penalty assessment under this part, for penalties assessed after January 13, 2017, the daily base penalty amounts shall be increased by $409.

(6) The maximum daily base penalty amount applicable to any violation of § 726.4 for which penalties are assessed after January 13, 2017, shall be $2,795.

(d) The penalty shall be subject to reduction for any period during which the operator had a reasonable belief that it was not required to comply with section 423 of the Act and § 726.4 or a reasonable belief that it had obtained insurance coverage to comply with section 423 of the Act and § 726.4. A notice of contest filed in accordance with § 726.307 shall not be sufficient to establish a reasonable belief that the operator was not required to comply with the Act and regulations.

[65 FR 80097, Dec. 20, 2000, as amended at 81 FR 43449, July 1, 2016; 82 FR 5381, Jan. 18, 2017]

§ 726.303 Notification; investigation.

(a) If the Director determines that an operator has violated the provisions of section 423 of the Act and § 726.4, he or she shall notify the operator of its violation and request that the operator immediately secure the payment of benefits. Such notice shall be sent by certified mail.

(b) The Director shall also direct the operator to supply information relevant to the assessment of a penalty. Such information, which shall be supplied within 30 days of the Director's request, may include:

(1) The date on which the operator commenced its operation of a coal mine;

(2) The number of persons employed by the operator since it began operating a coal mine and the dates of their employment; and

(3) The identity and last known address:

(i) In the case of a corporation, of all persons who served as president, secretary, and treasurer of the operator since it began operating a coal mine; or

(ii) In the case of an operator which is not incorporated, of all persons who were principals of the operator since it began operating a coal mine;

(c) In conducting any investigation of an operator under this subpart, the Division Director shall have all of the powers of a district director, as set forth at § 725.351(a) of this subchapter. For purposes of § 725.351(c), the Division Director shall be considered to sit in the District of Columbia.

§ 726.304 Notice of initial assessment.

(a) After an operator receives notification under § 726.303 and fails to secure its obligations for the period defined in § 726.302(b), and following the completion of any investigation, the Director may issue a notice of initial penalty assessment in accordance with the criteria set forth in § 726.302.

(b)(1) A copy of such notice shall be sent by certified mail to the operator. If the operator is a corporation, a copy shall also be sent by certified mail to each of the persons who served as president, secretary, or treasurer of the operator during any period in which the operator was in violation of section 423 of the Act and § 726.4.

(2) Where service by certified mail is not accepted by any person, the notice shall be deemed received by that person on the date of attempted delivery. Where service is not accepted, the Director may exercise discretion to serve the notice by regular mail.

§ 726.305 Contents of notice.

The notice required by § 726.304 shall:

(a) Identify the operator against whom the penalty is assessed, as well as the name of any other person severally liable for such penalty;

(b) Set forth the determination of the Director as to the amount of the penalty and the reason or reasons therefor;

(c) Set forth the right of each person identified in paragraph (a) of this section to contest the notice and request a hearing before the Office of Administrative Law Judges;

(d) Set forth the method for each person identified in paragraph (a) to contest the notice and request a hearing before the Office of Administrative Law Judges; and

(e) Inform any affected person that in the absence of a timely contest and request for hearing received within 30 days of the date of receipt of the notice, the Director's assessment will become final and unappealable as to that person.

§ 726.306 Finality of administrative assessment.

Except as provided in § 726.307(c), if any person identified as potentially liable for the assessment does not, within 30 days after receipt of notice, contest the assessment, the Director's assessment shall be deemed final as to that person, and collection and recovery of the penalty may be instituted pursuant to § 726.320.

§ 726.307 Form of notice of contest and request for hearing.

(a) Any person desiring to contest the Director's notice of initial assessment shall request an administrative hearing pursuant to this part. The notice of contest shall be made in writing to the Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, United States Department of Labor. The notice of contest must be received no later than 30 days after the date of receipt of the notice issued under § 726.304. No additional time shall be added where service of the notice is made by mail.

(b) The notice of contest shall:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) State the specific issues to be contested. In particular, the person must indicate his agreement or disagreement with:

(i) The Director's determination that the person against whom the penalty is assessed is an operator subject to the requirements of section 423 of the Act and § 726.4, or is the president, secretary, or treasurer of an operator, if the operator is a corporation.

(ii) The Director's determination that the operator violated section 423 of the Act and § 726.4 for the time period in question; and

(iii) The Director's determination of the amount of penalty owed;

(4) Be signed by the person making the request or an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) A notice of contest filed by the operator shall be deemed a notice of contest on behalf of all other persons to the Director's determinations that the operator is subject to section 423 of the Act and § 726.4 and that the operator violated those provisions for the time period in question, and to the Director's determination of the amount of penalty owed. An operator may not contest the Director's determination that a person against whom the penalty is assessed is the president, secretary, or treasurer of the operator.

(d) Failure to specifically identify an issue as contested pursuant to paragraph (b)(3) of this section shall be deemed a waiver of the right to contest that issue.

[65 FR 80097, Dec. 20, 2000, as amended at 77 FR 37287, June 21, 2012]

§ 726.308 Service and computation of time.

(a) Service of documents under this part shall be made by delivery to the person, an officer of a corporation, or attorney of record, or by mailing the document to the last known address of the person, officer, or attorney. If service is made by mail, it shall be considered complete upon mailing. Unless otherwise provided in this subpart, service need not be made by certified mail. If service is made by delivery, it shall be considered complete upon actual receipt by the person, officer, or attorney; upon leaving it at the person's, officer's or attorney's office with a clerk or person in charge; upon leaving it at a conspicuous place in the office if no one is in charge; or by leaving it at the person's or attorney's residence.

(b) If a complaint has been filed pursuant to § 726.309, two copies of all documents filed in any administrative proceeding under this subpart shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Black Lung Benefits Division, Room N–2117, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, and one copy on the attorney representing the Department in the proceeding.

(c) The time allowed a party to file any response under this subpart shall be computed beginning with the day following the action requiring a response, and shall include the last day of the period, unless it is a Saturday, Sunday, or federally-observed holiday, *see* § 725.311 of Part 725 of this subchapter, in which case the time period shall include the next business day.

§ 726.309 Referral to the Office of Administrative Law Judges.

(a) Upon receipt of a timely notice of contest filed in accordance with § 726.307, the Director, by the Associate Solicitor for Black Lung Benefits or the Regional Solicitor for the Region in which the violation occurred, may file a complaint with the Office of Administrative Law Judges. The Director may, in the complaint, reduce the total penalty amount requested. A copy of the notice of initial assessment issued by the Director and all notices of contest filed in accordance with § 726.307 shall be attached. A notice of contest shall be given the effect of an answer to the complaint for purposes of the administrative proceeding, subject to any amendment that may be permitted under this subpart and 29 CFR part 18.

(b) A copy of the complaint and attachments thereto shall be served by counsel for the Director on the person who filed the notice of contest.

(c) The Director, by counsel, may withdraw a complaint filed under this section at any time prior to the date upon which the decision of the Department becomes final by filing a motion with the Office of Administrative Law Judges or the Secretary, as appropriate. If the Director makes such a motion prior to the date on which an administrative law judge renders a decision in accordance § 726.313, the dismissal shall be without prejudice to further assessment against the operator for the period in question.

§ 726.310 Appointment of Administrative Law Judge and notification of hearing date.

Upon receipt from the Director of a complaint filed pursuant to § 726.309, the Chief Administrative Law Judge shall appoint an Administrative Law Judge to hear the case. The Administrative Law Judge shall notify all interested parties of the time and place of the hearing.

§ 726.311 Evidence.

(a) Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

(b) Notwithstanding 29 CFR 18.1101(b)(2), subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges shall apply to administrative proceedings under this part, except that documents contained in Department of Labor files and offered on behalf of the Director shall be admissible in proceedings under this subpart without regard to their compliance with the Rules of Practice and Procedure.

§ 726.312 Burdens of proof.

(a) The Director shall bear the burden of proving the existence of a violation, and the time period for which the violation occurred. To prove a violation, the Director must establish:

(1) That the person against whom the penalty is assessed is an operator, or is the president, secretary, or treasurer of an operator, if such operator is a corporation.

(2) That the operator violated section 423 of the Act and § 726.4. The filing of a complaint shall be considered *prima facie* evidence that the Director has searched the records maintained by OWCP and has determined that the operator was not authorized to self-insure

its liability under the Act for the time period in question, and that no insurance carrier reported coverage of the operator for the time period in question.

(b) The Director need not produce further evidence in support of his burden of proof with respect to the issues set forth in paragraph (a) if no party contested them pursuant to § 726.307(b)(3).

(c) The Director shall bear the burden of proving the size of the operator as required by § 726.302, except that if the Director has requested the operator to supply information with respect to its size under § 726.303 and the operator has not fully complied with that request, it shall be presumed that the operator has more than 100 employees engaged in coal mine employment. The person or persons liable for the assessment shall thereafter bear the burden of proving the actual number of employees engaged in coal mine employment.

(d) The Director shall bear the burden of proving the operator's receipt of the notification required by § 726.303, the operator's prior notice of the applicability of the Black Lung Benefits Act to its operations, and the existence of any previous assessment against the operator, the operator's principals, or the operator's officers.

(e) The person or persons liable for an assessment shall bear the burden of proving the applicability of the mitigating factors listed in § 726.302(d).

§ 726.313 Decision and order of Administrative Law Judge.

(a) The Administrative Law Judge shall render a decision on the issues referred by the Director.

(b) The decision of the Administrative Law Judge shall be limited to determining, where such issues are properly before him or her:

(1) Whether the operator has violated section 423 of the Act and § 726.4;

(2) Whether other persons identified by the Director as potentially severally liable for the penalty were the president, treasurer, or secretary of the corporation during the time period in question; and

(3) The appropriateness of the penalty assessed by the Director in light of the factors set forth in § 726.302. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and bases therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, reverse, or modify, in whole or in part, the determination of the Director.

(d) The Administrative Law Judge shall serve copies of the decision on each of the parties by certified mail.

(e) The decision of the Administrative Law Judge shall be deemed to have been issued on the date that it is rendered, and shall constitute the final order of the Secretary unless there is a request for reconsideration by the Administrative Law Judge pursuant to paragraph (f) of this section or a petition for review filed pursuant to § 726.314.

(f) Any party may request that the Administrative Law Judge reconsider his or her decision by filing a motion within 30 days of the date upon which the decision of the Administrative Law Judge is issued. A timely motion for reconsideration shall suspend the running of the time for any party to file a petition for review pursuant to § 726.314.

(g) Following issuance of the decision and order, the Chief Administrative Law Judge shall promptly forward the complete hearing record to the Director.

§ 726.314 Review by the Secretary.

(a) The Director or any party aggrieved by a decision of the Administrative Law Judge may petition the Secretary for review of the decision by filing a petition within 30 days of the date on which the decision was issued. Any other party may file a cross-petition for review within 15 days of its receipt of a petition for review or within 30 days of the date on which the decision was issued, whichever is later. Copies of any petition or cross-petition shall be served on all parties and on the Chief Administrative Law Judge.

(b) A petition filed by one party shall not affect the finality of the decision with respect to other parties.

(c) If any party files a timely motion for reconsideration, any petition for review, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. The 30-day time limit for filing a petition for review by any party shall commence upon issuance of a decision on reconsideration.

§ 726.315 Contents.

Any petition or cross-petition for review shall:

(a) Be dated;

(b) Be typewritten or legibly written;

(c) State the specific reason or reasons why the party petitioning for review believes the Administrative Law Judge's decision is in error;

(d) Be signed by the party filing the petition or an authorized representative of such party; and

(e) Attach copies of the Administrative Law Judge's decision and any other documents admitted into the record by the Administrative Law Judge which would assist the Secretary in determining whether review is warranted.

§ 726.316 Filing and service.

(a) *Filing.* All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, 200 Constitution Ave., N.W., Washington, DC 20210.

(b) *Number of copies.* An original and four copies of all documents shall be filed.

(c) *Computation of time for delivery by mail.* Documents are not deemed filed with the Secretary until actually received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time was made by mail.

(d) *Manner and proof of service.* A copy of each document filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 726.317 Discretionary review.

(a) Following receipt of a timely petition for review, the Secretary shall determine whether the decision warrants review, and shall send a notice of such determination to the parties and the Chief Administrative Law Judge. If the Secretary declines to review the decision, the Administrative Law Judge's decision shall be considered the final decision of the agency. The Secretary's determination to review a decision by an Administrative Law Judge under this subpart is solely within the discretion of the Secretary.

(b) The Secretary's notice shall specify:

(1) The issue or issues to be reviewed; and

(2) The schedule for submitting arguments, in the form of briefs or such other pleadings as the Secretary deems appropriate.

(c) Upon receipt of the Secretary's notice, the Director shall forward the record to the Secretary.

§ 726.318 Final decision of the Secretary.

The Secretary's review shall be based upon the hearing record. The findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record as a whole. The Secretary's review of conclusions of law shall be *de novo*. Upon review of the decision, the Secretary may affirm, reverse, modify, or vacate the decision, and may remand the case to the Office of Administrative Law Judges for further proceedings. The Secretary's final decision shall be served upon all parties and the Chief Administrative Law Judge, in person or by mail to the last known address.

§ 726.319 Retention of official record.

The official record of every completed administrative hearing held pursuant to this part shall be maintained and filed under the custody and control of the Director.

§ 726.320 Collection and recovery of penalty.

(a) When the determination of the amount of any civil money penalty provided for in this part becomes final, in accordance with the administrative

assessment thereof, or pursuant to the decision and order of an Administrative Law Judge, or following the decision of the Secretary, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor on behalf of the Black Lung Disability Trust Fund. The person against whom such penalty has been assessed or imposed shall promptly remit the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of U.S. Department of Labor, Black Lung Program. Such remittance shall be delivered or mailed to the Director.

(b) If such remittance is not received within 30 days after it becomes due and payable, it may be recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor.

PARTS 727–799 [RESERVED]

CHAPTER VII—BENEFITS REVIEW BOARD, DEPARTMENT OF LABOR

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PART 800 [RESERVED]

PART 801—ESTABLISHMENT AND OPERATION OF THE BOARD

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AUTHORITY: 5 U.S.C. 301; 30 U.S.C. 901 *et seq.*; 33 U.S.C. 901 *et seq.*; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 38–72, 38 FR 90, January 3, 1973.

SOURCE: 52 FR 27290, July 20, 1987, unless otherwise noted.

INTRODUCTORY

§ 801.1 Purpose and scope of this part.

This part 801 describes the establishment and the organizational structure of the Benefits Review Board of the Department of Labor, sets forth the general rules applicable to operation of the Board, and defines terms used in this chapter.

§ 801.2 Definitions and use of terms.

(a) For purposes of this chapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) *Acts* means the several Acts listed in §§ 801.102 and 802.101 of this chapter, as amended and extended, unless otherwise specified.

(2) *Board* means the Benefits Review Board established by section 21 of the LHWCA (33 U.S.C. 921) as described in § 801.101, and as provided in this part and Secretary of Labor's Order No. 38–72 (38 FR 90). Mention in these regulations of the ''permanent Board'' refers to the five permanent Board members only.

(3) *Chairman* or *Chairman of the Board* means Chairman of the Benefits Review Board. The Chairman of the Board is officially entitled Chief Administrative Appeals Judge.

(4) *Secretary* means the Secretary of Labor.

(5) *Department* means the Department of Labor.

(6) *Judge* means an administrative law judge appointed as provided in 5 U.S.C. 3105 and subpart B of 5 CFR part 930, who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings whenever necessary in respect of any claim for benefits or compensation arising under the Acts.

(7) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Department of Labor.

(8) *Director* means the Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter OWCP).

(9) *Deputy commissioner* means a person appointed as provided in sections 39 and 40 of the LHWCA or his designee, authorized by the Director to make decisions and orders in respect to claims arising under the Acts.

(10) *Party* or *Party in Interest* means the Secretary or his designee and any person or business entity directly affected by the decision or order from which an appeal to the Board is taken.

(11) *Day* means calendar day.

(12) *Member* means a member of the Benefits Review Board. Unless specifically stated otherwise, the word ''member'' shall apply to permanent, temporary and interim members. Permanent Board members are officially entitled Administrative Appeals Judges. Temporary and interim Board members are designated as Acting Administrative Appeals Judges.

(b) The definitions contained in this part shall not be considered to derogate from the definitions of terms in the respective Acts.

(c) The definitions pertaining to the Acts contained in the several parts of chapter VI of this title 20 shall be applicable to this chapter as is appropriate.

[52 FR 27290, July 20, 1987, as amended at 52 FR 28640, July 31, 1987]

§ 801.3 Applicability of this part to 20 CFR part 802.

Part 802 of title 20, Code of Federal Regulations, contains the rules of practice and procedure of the Board. This part 801, including the definitions and usages contained in § 801.2, is applicable to part 802 of this chapter as appropriate.

ESTABLISHMENT AND AUTHORITY OF THE BOARD

§ 801.101 Establishment.

By Pub. L. 92–576, 82 Stat. 1251, in an amendment made to section 21 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 921), there was established effective November 26, 1972, a Benefits Review Board, which is composed of members appointed by the Secretary of Labor.

§ 801.102 Review authority.

(a) The Board is authorized, as provided in 33 U.S.C. 921(b), as amended, to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions or orders with respect to claims for compensation or benefits arising under the following Acts, as amended and extended:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.;*

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.;*

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 *et seq.* (1973);

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.;*

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 *et seq.;*

(6) Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977, Public Law 95–164, 91 Stat. 1290 (formerly the Federal Coal Mine Health and Safety Act, hereinafter, FCMHSA, of 1969) as amended by the Black Lung Benefits Reform Act of 1977, Public Law 92–239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95–227, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97–119, 95 Stat. 1643 (30 U.S.C. 901 *et seq.*).

§ 801.103 Organizational placement.

As prescribed by the statute, the functions of the Benefits Review Board are quasi-judicial in nature and involve review of decisions made in the course of the administration of the above statutes by the Employment Standards Administration in the Department of Labor. It is accordingly found appropriate for organizational purposes to place the Board in the Office of the Deputy Secretary and it is hereby established in that Office, which shall be responsible for providing necessary funds, personnel, supplies, equipment, and records services for the Board.

§ 801.104 Operational rules.

The Deputy Secretary of Labor may promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Benefits Review Board as an independent quasi-judicial body in accordance with the provisions of the statute.

MEMBERS OF THE BOARD

§ 801.201 Composition of the Board.

(a) The Board shall be composed of five permanent members appointed by the Secretary from among individuals who are especially qualified to serve thereon. Each permanent member shall serve an indefinite term subject to the discretion of the Secretary.

(b) The member designated by the Secretary as Chairman of the Board shall serve as chief administrative officer of the Board and shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(c) The four remaining members shall be the associate members of the Board.

(d) Upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve as temporary Board members in addition to the five permanent Board members. Up to four such temporary members may serve at any one time. The term of any temporary Board member shall not exceed 1 year from date of appointment.

§ 801.202 Interim appointments.

(a) *Acting Chairman*. In the event that the Chairman of the Board is temporarily disabled or unavailable to perform his or her duties as prescribed in this chapter VII, he or she shall designate a permanent member to serve as Acting Chairman until such time as the Secretary designates an Acting Chairman. In the event that the Chairman is physically unable to make such designation, the next senior permanent member shall serve as Acting Chairman until such time as the Secretary of Labor designates an Acting Chairman.

(b) *Interim members*. In the event that a permanent member of the Board is temporarily unable to carry out his or her responsibilities because of disqualification, illness, or for any other reason, the Secretary of Labor may, in his or her discretion, appoint a qualified individual to serve in the place of such permanent member for the duration of that permanent member's inability to serve.

§ 801.203 Disqualification of Board Members.

(a) During the period in which the Chairman or the other members serve on the Board, they shall be subject to the Department's regulations governing ethics and conduct set forth at 20 CFR part 0.

(b) Notice of any objection which a party may have to any Board member who will participate in the proceeding shall be made by such party at the earliest opportunity. The Board member shall consider such objection and shall, in his or her discretion, either proceed with the case or withdraw.

ACTION BY THE BOARD

§ 801.301 Quorum and votes of the permanent Board; panels within the Board.

(a) For the purpose of carrying out its functions under the Acts, whenever action is taken by the entire permanent Board sitting en banc, three permanent members of the Board shall constitute a quorum, and official action of the permanent Board can be taken only on the concurring vote of at least three permanent members.

(b) The Board may delegate any or all of its powers except en banc review to panels of three members. Each panel shall consist of at least two permanent members. Two members of the panel shall constitute a quorum and official panel action can be taken only on the concurring vote of two members of the panel.

(c) A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting en banc.

(d) En banc action is not available in cases arising under the District of Columbia Workmen's Compensation Act.

§ 801.302 Procedural rules.

Procedural rules for performance by the Board of its review functions and for insuring an adequate record for any judicial review of its orders, and such amendments to the rules as may be necessary from time to time, shall be promulgated by the Deputy Secretary. Such rules shall incorporate and implement the procedural requirements of section 21(b) of the Longshore and Harbor Workers' Compensation Act.

§ 801.303 Location of Board's proceedings.

The Board shall hold its proceedings at 200 Constitution Avenue, NW., Room N–5101, Washington, DC 20210, unless for good cause the Board orders that proceedings in a particular matter be held in another location.

[62 FR 10666, Mar. 7, 1997]

§ 801.304 Business hours.

The office of the Clerk of the Board at Washington, DC shall be open from 8:30 a.m.-5:00 p.m. on all days, except

Saturdays, Sundays, and legal holidays, for the purpose of receiving notices of appeal, petitions for review, other pleadings, motions, and other papers.

REPRESENTATION

§ 801.401 Representation before the Board.

On any issues requiring representation of the Secretary, the Director, Office of Workers' Compensation Programs, a deputy commissioner, or an administrative law judge before the Board, such representation shall be provided by attorneys designated by the Solicitor of Labor. Representation of all other persons before the Board shall be as provided by the rules of practice and procedure promulgated under § 801.302 (see part 802 of this chapter).

§ 801.402 Representation of Board in court proceedings.

Except in proceedings in the Supreme Court of the United States, any representation of the Benefits Review Board in court proceedings shall be by attorneys designated by the Solicitor of Labor.

PART 802—RULES OF PRACTICE AND PROCEDURE

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AUTHORITY: 5 U.S.C. 301; 30 U.S.C. 901 *et seq.*; 33 U.S.C. 901 *et seq.*; Reorganization Plan No. 6 of 1950, 15 FR 3174; Secretary of Labor's Order 38–72, 38 FR 90, January 3, 1973.

SOURCE: 52 FR 27292, July 20, 1987, unless otherwise noted.

Subpart A—General Provisions

INTRODUCTORY

§ 802.101 Purpose and scope of this part.

(a) The purpose of part 802 is to establish the rules of practice and procedure governing the operation of the Benefits Review Board.

(b) Except as otherwise provided, the rules promulgated in this part apply to all appeals taken by any party from decisions or orders with respect to claims for compensation or benefits under the following Acts:

(1) The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.;*

(2) The Defense Base Act (DBA), 42 U.S.C. 1651 *et seq.;*

(3) The District of Columbia Workmen's Compensation Act (DCWCA), 36 D.C. Code 501 *et seq.* (1973);

(4) The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.;*

(5) The Nonappropriated Fund Instrumentalities Act (NFIA), 5 U.S.C. 8171 *et seq.;*

(6) Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977, Public Law 95–164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Public Law 95–239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95–229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97–119, 95 Stat. 1643 (30 U.S.C. 901 *et seq.*).

§ 802.102 Applicability of part 801 of this chapter.

Part 801 of this chapter VII sets forth rules of general applicability covering the composition, authority, and operation of the Benefits Review Board and definitions applicable to this chapter. The provisions of part 801 of this chapter are fully applicable to this part 802.

§ 802.103 Powers of the Board.

(a) *Conduct of proceedings.* Pursuant to section 27(a) of the LHWCA, the Board shall have power to preserve and enforce order during any proceedings for determination or adjudication of entitlement to compensation or benefits or for liability for payment thereof, and to do all things in accordance with law which may be necessary to enable the Board to effectively discharge its duties.

(b) *Contumacy.* Pursuant to section 27(b) of the LHWCA, if any person in proceedings before the Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, the Board shall certify the facts to the Federal district court having jurisdiction in the place in which it is sitting (or to the U.S. District Court for the District of Columbia if it is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

§ 802.104 Consolidation; severance.

(a) Cases may, in the sole discretion of the Board, be consolidated for purposes of an appeal upon the motion of any party or upon the Board's own motion where there exist common parties, common questions of law or fact or both, or in such other circumstances as justice and the administration of the Acts require.

(b) Upon its own motion, or upon motion of any party, the Board may, for good cause, order any proceeding severed with respect to some or all issues or parties.

§ 802.105 Stay of payment pending appeal.

(a) As provided in section 14(f) of the LHWCA and sections 415 and 422 of the Black Lung Benefits Act, the payment of the amounts required by an award of compensation or benefits shall not be stayed or in any way delayed beyond ten days after it becomes due pending final decision in any proceeding before the Board unless so ordered by the

Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer, coal mine operator or insurance carrier. Any order of the Board permitting any stay shall contain a specific finding, based upon evidence submitted to the Board and identified by reference thereto, that irreparable injury would result to such employer, operator or insurance carrier, and specify the nature and extent of the injury.

(b) When circumstances require, the Board, in its discretion, may issue a temporary order not to exceed 30 days granting a motion for stay of payment prior to the expiration of the ten-day period allowed for filing responses to motions pursuant to § 802.219(e). Following receipt of a response to the motion or expiration of the response time provided in § 802.219(e), the Board will issue a subsequent order ruling on the motion for stay of payment.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

Subpart B—Prereview Procedures

COMMENCING APPEAL: PARTIES

§ 802.201 Who may file an appeal.

(a) *A party*. (1) Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an administrative law judge or deputy commissioner to the Board by filing a notice of appeal pursuant to this subpart. (See § 802.205(b) and (c) for exceptions to this general rule.) A party who files a notice of appeal shall be deemed the petitioner. The Director, OWCP, when acting as a representative of the Special Fund established under the Longshore and Harbor Workers' Compensation Act or the Black Lung Disability Trust Fund established by the Black Lung Benefits Act, or, when appealing a decision or order which affects the administration of one of the Acts, shall be considered a party adversely affected.

(2) When a decision or order is favorable to a party (*i.e.*, the prevailing party), the prevailing party may file a cross-appeal pursuant to § 802.205(b) to challenge any adverse findings of fact or conclusions of law in the same proceeding.

(b) *Representative parties*. In the event that a party has not attained the age of 18, is not mentally competent, or is physically unable to file and pursue or defend an appeal, the Board may permit any legally appointed guardian, committee, or other appropriate representative to file and pursue or defend the appeal, or it may in its discretion appoint such representative for purposes of the appeal. The Board may require any legally appointed representative to submit evidence of that person's authority.

§ 802.202 Appearances by attorneys and other authorized persons; denial or authority to appear.

(a) *Appearances*. Any party or intervenor or any representative duly authorized pursuant to § 802.201(b) may appear before and/or submit written argument to the Board by attorney or any other person, including any representative of an employee organization, duly authorized pursuant to paragraph (d)(2) of this section.

(b) Any individual petitioner or respondent or his duly authorized representative pursuant to § 802.201(b) or an officer of any corporate party or a member of any partnership or joint venture which is a party may participate in the appeal on his or her own behalf, or on behalf of such business entity.

(c) For each instance in which appearance before the Board is made by an attorney or duly authorized person other than the party or his legal guardian, committee, or representative, there shall be filed with the Board a notice of appearance. Any attorney or other duly authorized person of record who intends to withdraw from representation shall file prior written notice of intent to withdraw from representation of a party or of substitution of counsel or other representative.

(d) *Qualifications*—(1) *Attorneys*. An attorney at law who is admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Board

unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C), or unless authority to appear has been denied pursuant to § 802.202(e)(1) and (3). An attorney's own representation that he or she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise ordered by the Board.

(2) *Persons not attorneys.* Any person who is not an attorney at law may be admitted to appear in a representative capacity unless he or she has been disqualified from representing claimants under the Act pursuant to 33 U.S.C. 931(b)(2)(C). An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Board at the time such person's appearance is entered. The application shall state such person's name, address, telephone number, general education, any special training or experience in claims representation, and such person's relationship, if any, to the party being represented. The Board may, at any time, make further inquiry as to the qualification or ability of such person to render assistance. In the event of a failure to make application for admission to appear, the Board shall issue an order to show cause why admission to appear should not be denied. Admission to appear in a particular case shall not be deemed a blanket authorization to appear in other cases.

(e) *Denial of authority to appear*—(1) *Attorneys.* The Board may deny the privilege of appearing to any attorney, within applicable statutory constraints, e.g., 5 U.S.C. 555, who has been disbarred or suspended from the practice of law; who has surrendered his or her license while under investigation or under threat of disciplinary action; or who, after notice of an opportunity for hearing in the matter is found by the Board to have engaged in any conduct which would result in the loss of his or her license. No provision hereof shall apply to any attorney who appears on his or her own behalf.

(2) *Persons not attorneys.* The Board may deny the privilege of appearing to any person who, in the Board's judgment, lacks sufficient qualification or ability to render assistance. No provision hereof shall apply to any person who appears on his or her own behalf.

(3) Denial of authority to appear may be considered, after notice of and opportunity for a hearing, by the panel (constituted pursuant to § 801.301) which is assigned to decide the appeal in which the attorney or other person has entered an appearance. If such proceeding reveals facts suggesting that one of the circumstances described in 33 U.S.C. 931(b)(2)(C) exists, the Board shall refer that information to the Director, OWCP, for further proceedings pursuant to 33 U.S.C. 931(b)(2)(C) and 907(j). An attorney or other person may appeal a panel's decision to deny authority to appear to the entire permanent Board sitting en banc.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

§ 802.203 Fees for services.

(a) No fee for services rendered on behalf of a claimant in the successful pursuit or successful defense of an appeal shall be valid unless approved pursuant to 33 U.S.C. 928, as amended.

(b) All fees for services rendered in the successful pursuit or successful defense of an appeal on behalf of a claimant shall be subject to the provisions and prohibitions contained in 33 U.S.C. 928, as amended.

(c) Within 60 days of the issuance of a decision or non-interlocutory order by the Board, counsel or, where appropriate, representative for any claimant who has prevailed on appeal before the Board may file an application with the Board for a fee. Where the Board remands the case and the administrative law judge on remand issues an award, a fee petition may be filed within 60 days of the decision on remand. In the event that a claimant who was unsuccessful before the Board prevails on appeal to the court of appeals, his or her representative may within 60 days of issuance of the court's judgment file a fee application with the Board for services performed before the Board.

(d) A fee application shall include only time spent on services performed while the appeal was pending before the Board and shall be complete in all respects, containing all of the following specific information:

(1) A complete statement of the extent and character of the necessary work done;

(2) The professional status of each person for whom a fee is claimed who performed services on behalf of the claimant (if such professional status is other than attorney, a definition of the professional status of such individual must be included in the fee petition, including a statment of that individual's professional training, education and experience) and a statement that the attorney was a member in good standing of a state bar at the time the services were performed;

(3) The number of hours, in ¼ hour increments, devoted by each person who performed services on behalf of the claimant and the dates on which such services were performed in each category of work;

(4) The normal billing rate for each person who performed services on behalf of the claimant. The rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status.

(e) Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, the amount of benefits awarded, and, when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant. A fee shall not necessarily be computed by multiplying time devoted to work by an hourly rate.

(f) No contract pertaining to the amount of a fee shall be recognized.

(g) A fee application shall be served on all other parties and accompanied by a certificate of service. The Board will not take action on the fee application until such service is effected. Any party may respond to the application within 10 days of receipt of the application. The response shall be filed with the Board and served on all other parties.

NOTICE OF APPEAL

§ 802.204 Place for filing notice of appeal.

Any notice of appeal shall be sent by mail to the U.S. Department of Labor, Benefits Review Board, P.O. Box 37601, Washington, DC 20013–7601, or otherwise presented to the Clerk of the Board at 200 Constitution Avenue, NW., Room S–5220, Washington, DC 20210. A copy shall be served on the deputy commissioner who filed the decision or order being appealed and on all other parties by the party who files a notice of appeal. Proof of service of the notice of appeal on the deputy commissioner and other parties shall be included with the notice of appeal.

[52 FR 27292, July 20, 1987, as amended at 56 FR 54538, Oct. 22, 1991; 62 FR 10666, Mar. 7, 1997]

§ 802.205 Time for filing.

(a) A notice of appeal, other than a cross-appeal, must be filed within 30 days from the date upon which a decision or order has been filed in the Office of the Deputy Commissioner pursuant to section 19(e) of the LHWCA or in such other office as may be established in the future (see §§ 702.349 and 725.478 of this title).

(b) If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

(c) Failure to file within the period specified in paragraph (a) or (b) of this section (whichever is applicable) shall foreclose all rights to review by the Board with respect to the case or matter in question. Any untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.

§ 802.206 Effect of motion for reconsideration on time for appeal.

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.

(b)(1) In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see § 802.101(b)(1)–(5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the Deputy Commissioner.

(2) In a case involving a claim filed under title IV of the Federal Mine Safety and Health Act, as amended (see § 802.101(b)(6)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 30 days from the date the decision or order was served on all parties by the administrative law judge and considered filed in the Office of the Deputy Commissioner (see §§ 725.478 and 725.479(b), (c) of this title).

(c) If the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service and affidavits may also be used to establish the mailing date.

(d) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in § 802.205.

(e) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in § 802.205.

(f) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature. Following decision by the administrative law judge or deputy commissioner pursuant to either paragraph (d) or (e) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. During the pendency of an appeal to the Board, any party having knowledge that a motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner has been filed shall notify the Board of such filing.

§ 802.207 When a notice of appeal is considered to have been filed in the office of the Clerk of the Board.

(a) *Date of receipt.* (1) Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received in the office of the Clerk of the Board.

(2) Notices of appeal submitted to any other agency or subdivision of the Department of Labor or of the U.S. Government or any State government shall be promptly forwarded to the office of the Clerk of the Board. The notice shall be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.

(b) *Date of mailing.* If the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

§ 802.208 Contents of notice of appeal.

(a) A notice of appeal shall contain the following information:

(1) The full name and address of the pettioner;

(2) The full name of the injured, disabled, or deceased employee;

(3) The full names and addresses of all other parties, including, among others, beneficiaries, employers, coal mine operators, and insurance carriers where appropriate;

(4) The case file number which appears on the decision or order of the administrative law judge;

(5) The claimant's OWCP file number;

(6) The date of filing of the decision or order being appealed;

(7) Whether a motion for reconsideration of the decision or order of the administrative law judge has been filed by any party, the date such motion was filed, and whether the administrative law judge has acted on such motion for reconsideration (see § 802.206);

(8) The name and address of the attorney or other person, if any, who is representing the petitioner.

(b) Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.

(c) In the event that identification of the case is not possible from the information submitted, the Clerk of the Board shall so notify the petitioner and shall give the petitioner a reasonable time to produce sufficient information to permit identification of the case. For purposes of § 802.205, the notice shall be deemed to have been filed as of the date the insufficient information was received.

§ 802.209 Transmittal of record to the Board.

Upon receipt of a copy of the notice of appeal or upon request of the Board, the deputy commissioner or other office having custody of such record shall immediately forward to the Clerk of the Board the official record of the case, which record includes the transcript or transcripts of all formal proceedings with exhibits, all decisions and orders rendered in the case.

INITIAL PROCESSING

§ 802.210 Acknowledgment of notice of appeal.

Upon receipt by the Board of a notice of appeal, the Clerk of the Board shall as expeditiously as possible notify the petitioner and all other parties and the Solicitor of Labor, in writing, that a notice of appeal has been filed.

§ 802.211 Petition for review.

(a) Within 30 days after the receipt of an acknowledgment of a notice of appeal issued pursuant to § 802.210, the petitioner shall submit a petition for review to the Board which petition lists the specific issues to be considered on appeal.

(b) Each petition for review shall be accompanied by a supporting brief, memorandum of law or other statement which: Specifically states the issues to be considered by the Board; presents, with appropriate headings, an argument with respect to each issue presented with references to transcripts, pieces of evidence and other parts of the record to which the petitioner wishes the Board to refer; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result. The Longshore Desk Book and Black Lung Desk Book are not intended as final legal authorities and should not be cited or relied upon as such.

(c) Copies of the petition for review and accompanying documents must be served upon all parties and the Solicitor of Labor.

(d) Failure to submit a petition for review and brief within the 30-day period or to comply with any part of this section may, in the discretion of the Board, cause the appeal to be deemed abandoned (see § 802.402).

(e) When a party appears pro se the Board may, in its discretion, waive formal compliance with the requirements of this section and may, depending upon the particular circumstances, prescribe an alternate method of furnishing such information as may be necessary for the Board to decide the merits of any such appeal.

§ 802.212 Response to petition for review.

(a) Within 30 days after the receipt of a petition for review, each party upon whom it was served may submit to the Board a brief, memorandum, or other statement in response to it.

(b) Arguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (see § 802.205(b)).

§ 802.213 Reply briefs.

(a) Within 20 days after the receipt of a brief, memorandum, or statement submitted in response to the petition for review pursuant to § 802.212, any party upon whom it was served may file a brief, memorandum, or other statement in reply to it.

(b) Arguments in reply briefs shall be limited to those which reply to arguments made in the response brief. Any other arguments in a reply brief will not be considered by the Board.

§ 802.214 Intervention.

(a) If a person or legal entity shows in a written petition to intervene that his, her, or its rights are affected by any proceeding before the Board, the Board may permit that person or legal entity to intervene in the proceeding and to participate within limits prescribed by the Board.

(b) The petition to intervene shall state precisely:

(1) The rights affected, and

(2) The nature of any argument the person or legal entity intends to make.

§ 802.215 Additional briefs.

Additional briefs may be filed or ordered in the discretion of the Board and shall be submitted within time limits specified by the Board.

§ 802.216 Service and form of papers.

(a) All papers filed with the Board, including notices of appeal, petitions for review, briefs and motions, shall be secured at the top and shall have a caption, title, signature of the party (or his attorney or other representative), date of signature, and certificate of service.

(b) For each paper filed with the Board, the original and two legible copies shall be submitted.

(c) A copy of any paper filed with the Board shall be served on each party and the Solicitor of Labor, by the party submitting the paper.

(d) Any paper required to be given or served to or by the Board or any party shall be served by mail or otherwise presented. All such papers served shall be accompanied by a certificate of service.

(e) All papers (exclusive of documentary evidence) submitted to the Benefits Review Board shall conform to standard letter dimensions (8.5 × 11 inches).

§ 802.217 Waiver of time limitations for filing.

(a) The time periods specified for submitting papers described in this part, except that for submitting a notice of appeal, may be enlarged for a reasonable period when in the judgment of the Board an enlargement is warranted.

(b) Any request for an enlargement of time pursuant to this section shall be directed to the Clerk of the Board and must be received by the Clerk on or prior to the date on which the paper is due.

(c) Any request for an enlargement of time pursuant to this section shall be submitted in writing in the form of a motion, shall specify the reasons for the request, and shall specify the date to which an enlargement of time is requested.

(d) Absent exceptional circumstances, no more than one enlargement of time shall be granted to each party.

(e) Absent a timely request for an enlargement of time pursuant to this section and the Board's granting that request, any paper submitted to the Board outside the applicable time period specified in this part shall be accompanied by a separate motion stating the reasons therefor and requesting that the Board accept the paper although filed out of time.

(f) When a paper filed out of time is accepted by the Board, the time for filing a response shall begin to run from the date of a party's receipt of the Board's order disposing of the motion referred to in paragraph (e) of this section.

§ 802.218 Failure to file papers; order to show cause.

(a) Failure to file any paper when due pursuant to this part, may, in the discretion of the Board, constitute a waiver of the right to further participation in the proceedings.

(b) When a petition for review and brief has not been submitted to the Board within the time limitation prescribed by § 802.211, or within an enlarged time limitation granted pursuant to § 802.217, the petitioner shall be ordered to show cause to the Board why his or her appeal should not be dismissed pursuant to § 802.402.

§ 802.219 Motions to the Board; orders.

(a) An application to the Board for an order shall be by motion in writing. A motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

(b) A motion shall be a separate document and shall not be incorporated in the text of any other paper filed with the Board, except for a statement in support of the motion. If this paragraph is not complied with, the Board will not consider and dispose of the motion.

(c) If there is no objection to a motion in whole or in part by another party to the case, the absence of an objection shall be stated on the motion.

(d) The rules applicable to service and form of papers, § 802.216, shall apply to all motions.

(e) Within 10 days of the receipt of a copy of a motion, a party may file a written response with the Board.

(f) As expeditiously as possible following receipt of a response to a motion or expiration of the response time provided in paragraph (e) of this section, the Board shall issue a dispositive order.

(g) *Orders granted by Clerk.* The Clerk of the Board may enter orders on behalf of the Board in procedural matters, including but not limited to:

(1) First motions for extensions of time for filing briefs and any papers other than notices of appeal or cross-appeal;

(2) Motions for voluntary dismissals of appeals;

(3) Orders to show cause why appeals should not be dismissed for failure to timely file a petition for review and brief (see § 802.218(b)); and

(4) Unopposed motions which are ordinarily granted as of course, except that the Clerk may, in his or her discretion, refer such motions for disposition to a motions panel as provided by paragraph (h) of this section.

(h) *All other motions.* All other motions will be referred for disposition to a panel of three members constituted pursuant to § 801.301. Any member may request that any motion be considered by the entire permanent Board en banc except as provided in § 801.301(d).

(i) *Reconsideration of orders.* Any party adversely effected by any interlocutory order issued under paragraph (g) or (h) may file a motion to reconsider, vacate or modify the order within 10 days from its filing, stating the grounds for such request. Any motion for reconsideration, vacation or modification of an interlocutory order shall be referred to a three-member panel that may include any member who previously acted on the matter. Suggestions for en banc reconsideration of interlocutory orders shall not be accepted. Reconsideration of all other orders will be treated under § 802.407 of this part.

§ 802.220 Party not represented by an attorney; informal procedure.

A party to an appeal who is not represented by an attorney shall comply with the procedural requirements contained in this part, except as otherwise specifically provided in § 802.211(e). In its discretion, the Board may prescribe additional informal procedures to be followed by such party.

§ 802.221 Computation of time.

(a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from which the designated period of time begins to run

shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(b) Whenever a paper is served on the Board or on any party by mail, paragraph (a) of this section will be deemed complied with if the envelope containing the paper is postmarked by the U.S. Postal Service within the time period allowed, computed as in paragraph (a) of this section. If there is no such postmark, or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

(c) A waiver of the time limitations for filing a paper, other than a notice of appeal, may be requested by proper motion filed in accordance with §§ 802.217 and 802.219.

Subpart C—Procedure for Review

ACTION BY THE BOARD

§ 802.301 Scope of review.

(a) The Benefits Review Board is not empowered to engage in a *de novo* proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

(b) Parties shall not submit new evidence to the Board. Any evidence submitted by a party which is not part of the record developed at the hearing before the administrative law judge will be returned without being considered by the Board.

(c) Any party who considers new evidence necessary to the adjudication of the claim may apply for modification pursuant to section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. A party who files a petition for modification shall promptly notify the Board of such filing. Upon receipt of such notification, the Board shall dismiss the case without prejudice. Should the petition for modification be declined, the petitioner may file a request for reinstatement of his or her appeal with the Board within 30 days of the date the petition is declined. Should the petition for modification be accepted, any party adversely affected by the decision or order granting or denying modification may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed.

[52 FR 27292, July 20, 1987, as amended at 53 FR 16519, May 9, 1988]

§ 802.302 Docketing of appeals.

(a) *Maintenance of dockets.* A docket of all proceedings shall be maintained by the Board. Each proceeding shall be assigned a number in chronological order upon the date on which a notice of appeal is received. Correspondence or further applications in connection with any pending case shall refer to the docket number of that case.

(b) *Inspection of docket; publication of decision.* The docket of the Board shall be open to public inspection. The Board shall publish its decisions in a form which is readily available for inspection, and shall allow the public to inspect its decisions at the permanent location of the Board.

ORAL ARGUMENT BEFORE THE BOARD

§ 802.303 Decision; no oral argument.

(a) In the event that no oral argument is ordered pursuant to § 802.306, the Board shall proceed to review the record of the case as expeditiously as possible after all briefs, supporting statements, and other pertinent documents have been received.

(b) Each case shall be considered in the order in which it becomes ready for decision, regardless of docket number, although for good cause shown, upon the filing of a motion to expedite by a party, the Board may advance the order in which a particular case is to be considered.

(c) The Board may advance an appeal on the docket on its own motion if the interests of justice would be served by so doing.

§ 802.304 Purpose of oral argument.

Oral argument may be held by the Board in any case:

(a) When there is a novel issue not previously considered by the Board; or

(b) When in the interests of justice oral argument will serve to assist the Board in carrying out the intent of any of the Acts; or

(c) To resolve conflicting decisions by administrative law judges on a substantial question of law.

§ 802.305 Request for oral argument.

(a) During the pendency of an appeal, but not later than the expiration of 20 days from the date of receipt of the response brief provided by § 802.212, any party may request oral argument. The Board on its own motion may order oral argument at any time.

(b) A request for oral argument shall be submitted in the form of a motion, specifying the issues to be argued and justifying the need for oral argument (see § 802.219).

(c) The party requesting oral argument shall set forth in the motion suggested dates and alternate cities convenient to the parties when and where they would be available for oral argument.

§ 802.306 Action on request for oral argument.

As expeditiously as possible after the date upon which a request for oral argument is received, the Board shall determine whether the request shall be granted or denied.

§ 802.307 Notice of oral argument.

(a) In cases where a request for oral argument has been approved or where oral argument has been ordered, the Board shall give all parties a minimum of 30 days' notice, in writing, by mail, of the scope of argument and of the time when, and place where, oral argument will be held.

(b) Once oral argument has been scheduled by the Board, continuances shall not be granted except for good cause shown by a party, such as in cases of extreme hardship or where attendance of a party or his or her representative is mandated at a previously scheduled judicial proceeding. Unless the ground for the request arises thereafter, requests for continuances must be received by the Board at least 15 days before the scheduled date of oral argument, must be served upon the other parties and must specify good cause why the requesting party cannot be available for oral argument.

(c) The Board may cancel or reschedule oral argument on its own motion at any time.

§ 802.308 Conduct of oral argument.

(a) Oral argument shall be held in Washington, DC, unless the Board orders otherwise, and shall be conducted at a time reasonably convenient to the parties. For good cause shown, the presiding judge of the panel may, in his or her discretion, postpone an oral argument to a more convenient time.

(b) The proceedings shall be conducted under the supervision of the Chairman or, if the Chairman is not on the panel, the senior judge, who shall regulate all procedural matters arising during the course of the argument.

(c) Within the discretion of the Board, oral argument shall be open to the public and may be presented by any party, representative, or duly authorized attorney. Presentation of oral argument may be denied by the Board to a party who has not significantly participated in the appeal prior to oral argument.

(d) The Board shall determine the scope of any oral argument presented and shall so inform the parties in its notice scheduling oral argument pursuant to § 802.307.

(e) The Board in its discretion shall determine the amount of time allotted to each party for argument and rebuttal.

§ 802.309 Absence of parties.

The unexcused absence of a party or his or her authorized representative at the time and place set for argument shall not be the occasion for delay of the proceeding. In such event, argument on behalf of other parties may be heard and the case shall be regarded as submitted on the record by the absent party. The presiding judge may, with the consent of the parties present, cancel the oral argument and treat the appeal as submitted on the written record.

Subpart D—Completion of Board Review

DISMISSALS

§ 802.401 Dismissal by application of party.

(a) At any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. If granted, such motion for dismissal shall be granted with prejudice to the petitioner.

(b) At any time prior to the issuance of a decision by the Board, any party or representative may move that the appeal be dismissed.

§ 802.402 Dismissal by abandonment.

(a) Upon motion by any party or representative or upon the Board's own motion, an appeal may be dismissed upon its abandonment by the party or parties who filed the appeal. Within the discretion of the Board, a party may be deemed to have abandoned an appeal if neither the party nor his representative participates significantly in the review proceedings.

(b) An appeal may be dismissed on the death of a party only if the record affirmatively shows that there is no person who wishes to continue the action and whose rights may be prejudiced by dismissal.

DECISION OF THE BOARD

§ 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under section 21(c) of the LHWCA when appropriate.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate deputy commissioner for filing.

(c) Proof of service of Board decisions shall be certified by the Clerk of the Board or by another employee in the office of the Clerk of the Board who is authorized to certify proof of service.

§ 802.404 Scope and content of Board decisions.

(a) In its decision the Board shall affirm, modify, vacate or reverse the decision or order appealed from, and may remand the case for action or proceedings consistent with the decision of the Board. The consent of the parties shall not be a prerequisite to a remand ordered by the Board.

(b) In appropriate cases, such as where the issues raised on appeal have been thoroughly discussed and disposed of in prior cases by the Board or the courts, or where the findings of fact and conclusions of law are both correct and adequately discussed, the Board in its discretion may issue a brief, summary decision in writing, disposing of the appeal.

(c) In cases which cannot be disposed of as in paragraph (b) of this section, a full, written decision discussing the issues and applicable law shall be issued.

§ 802.405 Remand.

(a) *By the Board*. Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.

(b) *By a court*. Where a case has been remanded by a court, the Board may proceed in accordance with the court's mandate to issue a decision or it may in turn remand the case to an administrative law judge or deputy commissioner with instructions to take such action as is ordered by the court and any additional necessary action.

§ 802.406 Finality of Board decisions.

A decision rendered by the Board pursuant to this subpart shall become final 60 days after the issuance of such decision unless a written petition for review praying that the order be modified or set aside, pursuant to section 21(c) of the LHWCA, is filed in the appropriate U.S. court of appeals prior to

the expiration of the 60-day period herein described, or unless a timely request for reconsideration by the Board has been filed as provided in § 802.407. If a timely request for reconsideration has been filed, the 60-day period for filing such petition for review will run from the issuance of the Board's decision on reconsideration.

RECONSIDERATION

§ 802.407 Reconsideration of Board decisions.

(a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chariman shall designate a new panel member.

(b) Except as provided in § 801.301(d), a party may, within 30 days from the filing of a decision or non-interlocutory order by a panel of the Board pursuant to § 802.403(b), suggest the appropriateness of reconsideration by the permanent members sitting en banc. Such suggestion, however, must accompany a motion for reconsideration directed to the panel which rendered the decision. The suggestion for reconsideration en banc must be clearly marked as such.

(c) Except as provided in § 801.301(d), even where no party has suggested reconsideration en banc, any permanent member may petition the permanent Board for reconsideration en banc of a panel decision.

(d) Reconsideration en banc shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

§ 802.408 Notice of request for reconsideration.

(a) In the event that a party requests reconsideration of a decision or order, he or she shall do so in writing, in the form of a motion, stating the supporting rationale for the request, and include any material pertinent to the request.

(b) The request shall be sent by mail, or otherwise presented, to the Clerk of the Board. Copies shall be served on all other parties.

§ 802.409 Grant or denial of request.

All requests for reconsideration shall be reviewed by the Board and shall be granted or denied in the discretion of the Board.

JUDICIAL REVIEW

§ 802.410 Judicial review of Board decisions.

(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

§ 802.411 Certification of record for judicial review.

The record of a case including the record of proceedings before the Board shall be transmitted to the appropriate court pursuant to the rules of such court.

PARTS 803–899 [RESERVED]

CHAPTER VIII—JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

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PART 900—STATEMENT OF ORGANIZATION

Sec.
900.1 Basis.
900.2 Establishment.
900.3 Composition.
900.4 Meetings.
900.5 Staff.
900.6 Offices.
900.7 Delegations of authority.

AUTHORITY: Sec. 3041–2, Pub. L. 93–406, 88 Stat. 829, 1002 (29 U.S.C. 1241–2).

SOURCE: 40 FR 18776, Apr. 30, 1975, unless otherwise noted.

§ 900.1 Basis.

This statement is issued by the Joint Board for the Enrollment of Actuaries (the Joint Board) pursuant to the requirement of section 552 of title 5 of the United States Code that every agency shall publish in the FEDERAL REGISTER a description of its central and field organization.

§ 900.2 Establishment.

The Joint Board has been established by the Secretary of Labor and the Secretary of the Treasury pursuant to section 3041 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1241). Bylaws of the Board have been issued by the two Secretaries.[1]

§ 900.3 Composition.

Pursuant to the Bylaws, the Joint Board consists of three members appointed by the Secretary of the Treasury and two members appointed by the Secretary of Labor. The Board elects a Chairman and a Secretary from among the Department of the Treasury and the Department of Labor members. The Pension Benefit Guaranty Corporation may designate a non-voting representative to sit with, and participate in, the discussions of the Board. All decisions of the Board are made by simple majority vote.

[81 FR 8833, Feb. 23, 2016]

§ 900.4 Meetings.

The Joint Board meets on the call of the Chairman at such times as are necessary in order to consider matters requiring action. Minutes are kept of each meeting by the Secretary.

§ 900.5 Staff.

(a) The Executive Director advises and assists the Joint Board directly in carrying out its responsibilities under the Act and performs such other functions as the Board may delegate to him.

(b) Members of the staffs of the Departments of the Treasury and of Labor, by arrangement with the Joint Board, perform such services as may be appropriate in assisting the Board in the discharge of its responsibilities.

§ 900.6 Offices.

The Joint Board does not maintain offices separate from those of the Departments of the Treasury and Labor. Its post office address is Joint Board for the Enrollment of Actuaries, c/o Department of the Treasury, Washington, D.C. 20220.

§ 900.7 Delegations of authority.

As occasion warrants, the Joint Board may delegate functions to the Chairman or the Executive Director, including the authority to receive applications and to give notice of actions. Any such delegation of authority is conferred by resolution of the Board.

PART 901—REGULATIONS GOVERNING THE PERFORMANCE OF ACTUARIAL SERVICES UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Sec.
901.0 Scope.

Subpart A—Definitions and Eligibility To Perform Actuarial Services

901.1 Definitions.
901.2 Eligibility to perform actuarial services.

Subpart B—Enrollment of Actuaries

901.10 Application for enrollment.
901.11 Enrollment procedures.
901.12 Eligibility for enrollment.

[1] Copy filed with the Office of the Federal Register. Copies may also be obtained from the Executive Director of the Board.

Subpart C—Standards of Performance for Enrolled Actuaries

901.20 Standards of performance of actuarial services.

Subpart D—Suspension or Termination of Enrollment

901.30 Authority to suspend or terminate enrollment.
901.31 Grounds for suspension or termination of enrollment.
901.32 Receipt of information concerning enrolled actuaries.
901.33 Initiation of proceeding.
901.34 Conferences.
901.35 Contents of complaint.
901.36 Service of complaint and other papers.
901.37 Answer.
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901.39 Reply to answer.
901.40 Proof; variance; amendment of pleadings.
901.41 Motions and requests.
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901.43 Administrative Law Judge.
901.44 Hearings.
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901.49 Decision of the Administrative Law Judge.
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901.51 Decision of the Joint Board.
901.52 Effect of suspension, termination or resignation of enrollment; surrender of enrollment certificate.
901.53 Notice of suspension, termination or resignation of enrollment.
901.54 Petition for reinstatement.

Subpart E—General Provisions

901.70 Records.
901.71 Special orders.
901.72 Additional rules.

AUTHORITY: Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974. (88 Stat. 1002, 29 U.S.C. 1241, 1242), unless otherwise noted.

SOURCE: 42 FR 39200, Aug. 3, 1977, unless otherwise noted.

§ 901.0 Scope.

This part contains rules governing the performance of actuarial services under the Employee Retirement Income Security Act of 1974, hereinafter also referred to as ERISA. Subpart A of this part sets forth definitions and eligibility to perform actuarial services; subpart B of this part sets forth rules governing the enrollment of actuaries; subpart C of this part sets forth standards of performance to which enrolled actuaries must adhere; subpart D sets forth rules applicable to suspension and termination of enrollment; and subpart E of this part sets forth general provisions.

[42 FR 39200, Aug. 3, 1977, as amended at 76 FR 17769, Mar. 31, 2011]

Subpart A—Definitions and Eligibility To Perform Actuarial Services

§ 901.1 Definitions.

As used in this part, the term:

(a) *Actuarial experience* means the performance of, or the direct supervision of, services involving the application of principles of probability and compound interest to determine the present value of payments to be made upon the fulfillment of certain specified conditions or the occurrence of certain specified events.

(b) *Responsible actuarial experience* means actuarial experience:

(1) Involving participation in making determinations that the methods and assumptions adopted in the procedures followed in actuarial services are appropriate in the light of all pertinent circumstances, and

(2) Demonstrating a thorough understanding of the principles and alternatives involved in such actuarial services.

(c) *Month of responsible actuarial experience* means a month during which the actuary spent a substantial amount of time in responsible actuarial experience.

(d) *Responsible pension actuarial experience* means responsible actuarial experience involving valuations of the liabilities of pension plans, wherein the performance of such valuations requires the application of principles of life contingencies and compound interest in the determination, under one or more standard actuarial cost methods, of such of the following as may be appropriate in the particular case:

(1) Normal cost.

(2) Accrued liability.

(3) Payment required to amortize a liability or other amount over a period of time.

(4) Actuarial gain or loss.

(e) *Month of responsible pension actuarial experience* means a month during which the actuary spent a substantial amount of time in responsible pension actuarial experience.

(f) *Applicant* means an individual who has filed an application to become an enrolled actuary.

(g) *Enrolled actuary* means an individual who has satisfied the standards and qualifications as set forth in this part and who has been approved by the Joint Board for the Enrollment of Actuaries (the Joint Board), or its designee, to perform actuarial services required under ERISA or regulations thereunder.

(h) *Actuarial services* means performance of actuarial valuations and preparation of any actuarial reports.

(i) *Certified responsible actuarial experience* means responsible actuarial experience of an individual that has been certified in writing by the individual's supervisor.

(j) *Certified responsible pension actuarial experience* means responsible pension actuarial experience of an individual that has been certified in writing by the individual's supervisor if the supervisor is an enrolled actuary. If the individual's supervisor is not an enrolled actuary, the pension actuarial experience must be certified in writing by both the supervisor and an enrolled actuary with knowledge of the individual's pension actuarial experience.

(k) *Enrollment cycle* means the three-year period from January 1, 2011, to December 31, 2013, and every three-year period thereafter.

[42 FR 39200, Aug. 3, 1977, as amended at 76 FR 17769, Mar. 31, 2011]

§ 901.2 Eligibility to perform actuarial services.

(a) *Enrolled actuary*. Subject to the standards of performance set forth in subpart C of this part, any individual who is an enrolled actuary as defined in § 901.1(g) may perform actuarial services required under ERISA or regulations thereunder. Where a corporation, partnership, or other entity is engaged to provide actuarial services, such services may be provided on its behalf only by an enrolled actuary who is an employee, partner or consultant.

(b) *Government officers and employees*. No officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, may perform actuarial services required under ERISA or regulations thereunder if such services would be in violation of 18 U.S.C. 205. No Member of Congress or Resident Commissioner (elect or serving) may perform such actuarial services if such services would be in violation of 18 U.S.C. 203 or 205.

(c) *Former government officers and employees*—(1) *Personal and substantial participation in the performance of actuarial services*. No former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, shall perform actuarial services required under ERISA or regulations thereunder or aid or assist in the performance of such actuarial services, in regard to particular matters, involving a specific party or parties, in which the individual participated personally and substantially as such officer or employee.

(2) *Official responsibility*. No former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, shall, within 1 year after his employment has ceased, perform actuarial services required under ERISA or regulations thereunder in regard to any particular matter involving a specific party or parties which was under the individual's official responsibility as an officer or employee of the Government at any time within a period of 1 year prior to the termination of such responsibility.

Subpart B—Enrollment of Actuaries

§ 901.10 Application for enrollment.

(a) *Form*. As a requirement for enrollment, an applicant shall file with the Executive Director of the Joint Board a properly executed application on a form or forms specified by the Joint

Board, and shall agree to comply with these regulations and any other guidance as required by the Joint Board. A reasonable non-refundable fee may be charged for each application for enrollment filed.

(b) *Additional information.* The Joint Board or Executive Director, as a condition to consideration of an application for enrollment, may require the applicant to file additional information and to submit to written or oral examination under oath or otherwise.

(c) *Denial of application.* If the Joint Board proposes to deny an application for enrollment, the Executive Director shall notify the applicant in writing of the proposed denial and the reasons therefor, of his rights to request reconsideration, of the address to which such request should be made and the date by which such request must be made. The applicant may, within 30 days from the date of the written proposed denial, file a written request for reconsideration therefrom, together with his reasons in support thereof, to the Joint Board. The Joint Board may afford an applicant the opportunity to make a personal appearance before the Joint Board. A decision on the request for reconsideration shall be rendered by the Joint Board as soon as practicable. In the absence of a request for reconsideration within the aforesaid 30 days, the proposed denial shall, without further proceeding, constitute a final decision of denial by the Joint Board.

[42 FR 39200, Aug. 3, 1977, as amended at 76 FR 17769, Mar. 31, 2011]

§ 901.11 Enrollment procedures.

(a) *Enrollment.* The Joint Board shall enroll each applicant it determines has met the requirements of these regulations, and any other guidance as required by the Joint Board, and shall so notify the applicant. Subject to the provisions of subpart D of this part, an individual must renew his or her enrollment in the manner described in paragraph (d) of this section.

(b) *Enrollment certificate.* The Joint Board (or its designee) shall issue a certificate of enrollment to each actuary who is duly enrolled under this part.

(c) *Rosters*—(1) *Maintenance of rosters.* The Executive Director shall maintain rosters of—

(i) All actuaries who are duly enrolled under this part;

(ii) All individuals whose enrollment has been suspended or terminated; and

(iii) All individuals who are in inactive status.

(2) *Publication of rosters.* The Executive Director may publish any or all of the rosters, including display on the Joint Board's Web site, to the extent permitted by law.

(d) *Renewal of enrollment.* To maintain active enrollment to perform actuarial services under ERISA, each enrolled actuary is required to have his/her enrollment renewed as set forth herein.

(1) Each enrolled actuary must file an application for renewal of enrollment on the prescribed form no earlier than October 1, 2010, and no later than March 1, 2011, and no earlier than October 1 and no later than March 1 of every third year thereafter. If March 1 is a Saturday, Sunday, or holiday, the due date shall be the next day that is not a Saturday, Sunday, or holiday.

(2) The effective date of renewal of enrollment for an individual who files a complete renewal application within the time period described in paragraph (d)(1) of this section is the April 1 immediately following the date of application. The effective date of renewal of enrollment for an individual who files a complete renewal application after the due date described in paragraph (d)(1) of this section is the later of the April 1 immediately following the due date of application and the date of the notice of renewal.

(3) Forms required for renewal may be obtained from the Executive Director.

(4) A reasonable non-refundable fee may be charged for each application for renewal of enrollment filed.

(e) *Condition for renewal: Continuing professional education.* To qualify for renewal of enrollment, an enrolled actuary must certify, on the form prescribed by the Executive Director, that he/she has completed the applicable minimum number of hours of continuing professional education credit

required by this paragraph (e) and satisfied the recordkeeping requirements of paragraph (j) of this section.

(1) *Transition rule for renewal of enrollment effective April 1, 2011.* (i) A minimum of 36 hours of continuing professional education credit must be completed between January 1, 2008 and December 31, 2010. Of the 36 hours, at least 18 must consist of core subject matter; the remainder may be non-core subject matter.

(ii) An individual who received initial enrollment in 2008 must complete 24 hours of continuing professional education by December 31, 2010. An individual who received initial enrollment in 2009 must complete 12 hours of continuing professional education by December 31, 2010. In either case, at least one-half of the applicable hours must consist of core subject matter; the remainder may consist of non-core subject matter. For purposes of this paragraph (e)(1)(ii), credit will be awarded for continuing professional education completed after January 1 of the year in which initial enrollment was received.

(iii) An individual who receives initial enrollment during 2010 is exempt from the continuing professional education requirements during 2010, but must file a timely application for renewal during the time period described in paragraph (d)(1) of this section.

(2) *For renewal of enrollment effective April 1, 2014, and every third year thereafter.* (i) A minimum of 36 hours of continuing professional education credit must be completed between January 1, 2011 and December 31, 2013, and between January 1 and December 31 for each three-year period subsequent thereto.

(ii) An individual who receives initial enrollment during the first or second year of an enrollment cycle must satisfy the following requirements by the end of the enrollment cycle: Those enrolled during the first year of an enrollment cycle must complete 24 hours of continuing education; those enrolled during the second year of an enrollment cycle must complete 12 hours of continuing education. At least one-half of the applicable hours must be comprised of core subject matter; the remainder may be comprised of non-core subject matter. For purposes of this paragraph (e)(2)(ii), credit will be awarded for continuing professional education completed after January 1 of the year in which initial enrollment was received.

(iii) An individual who receives initial enrollment during the third year of an enrollment cycle is exempt from the continuing education requirements until the next enrollment cycle, but must file a timely application for renewal.

(iv) For an individual who was initially enrolled before January 1, 2008 (and who has therefore completed at least one full enrollment cycle as of January 1, 2011), at least 12 hours of the 36 hours of continuing professional education required for each enrollment cycle must consist of core subject matter; the remainder may consist of non-core subject matter.

(v) For an individual who was initially enrolled on or after January 1, 2008, at least 18 hours of his or her 36 hours of continuing professional education required for the first full enrollment cycle must consist of core subject matter. Thereafter, for such individuals, for each subsequent enrollment cycle at least 12 hours of the 36 hours must consist of core subject matter. In each instance, the remainder may consist of non-core subject matter.

(vi) When core subject matter hours are required (including when an individual seeks to return to active status from inactive status), an individual must complete a minimum of two hours of continuing professional education credit relating to ethical standards, regardless of the total number of core hours required.

(f) *Qualifying continuing professional education*—(1) *In general.* To qualify for continuing professional education credit an enrolled actuary must complete his/her hours of continuing professional education credit under a qualifying program, within the meaning of paragraph (f)(2) of this section, consisting of core and/or non-core subject matter. In addition, a portion of the continuing professional education credit may be earned under the provisions of paragraph (g) of this section. In any event, no less than ⅓ of the total hours of continuing professional education credit required for an enrollment cycle

must be obtained by participation in a formal program or programs, within the meaning of paragraph (f)(2)(ii)(A) of this section.

(i) Core subject matter is program content and knowledge that is integral and necessary to the satisfactory performance of pension actuarial services and actuarial certifications under ERISA and the Internal Revenue Code. Such core subject matter includes the characteristics of actuarial cost methods under ERISA, actuarial assumptions, minimum funding standards, titles I, II, and IV of ERISA, requirements with respect to the valuation of plan assets, requirements for qualification of pension plans, maximum deductible contributions, tax treatment of distributions from qualified pension plans, excise taxes related to the funding of qualified pension plans and standards of performance (including ethical standards) for actuarial services. Core subject matter includes all materials included on the syllabi of any of the pension actuarial examinations offered by the Joint Board during the current enrollment cycle and the enrollment cycle immediately preceding the current enrollment cycle.

(ii) Non-core subject matter is program content designed to enhance the knowledge of an enrolled actuary in matters related to the performance of pension actuarial services. Examples include economics, computer programming, pension accounting, investment and finance, risk theory, communication skills, and business and general tax law.

(iii) The Joint Board may publish other topics or approve other topics which may be included in a qualifying program as core or non-core subject matter.

(iv) The same course of study cannot be used more than once within a given 36-month period to satisfy the continuing professional education requirements of these regulations. A program or session bearing the same or a similar title to a previous one may be used to satisfy the requirements of these regulations if the major content of the program or session differs substantively from the previous one.

(2) *Qualifying program*—(i) *In general.* A qualifying program is a course of learning that—

(A) Is conducted by a qualifying sponsor, within the meaning of paragraph (f)(3) of this section, who identifies the program as a qualifying program;

(B) Is developed by individual(s) qualified in the subject matter;

(C) Covers current subject matter;

(D) Includes written outlines or textbooks;

(E) Is taught by instructors, discussion leaders, and speakers qualified with respect to the course content;

(F) Includes means for evaluation by the Joint Board of technical content and presentation;

(G) Provides a certificate of completion, within the meaning of paragraph (f)(3)(iv) of this section, to each person who successfully completed the program; and

(H) Provides a certificate of instruction, within the meaning of paragraph (f)(3)(v) of this section, to each person who served an instructor, discussion leader, or speaker.

(ii) *Formal programs*—(A) *Participants.* Formal programs are programs that meet all of the requirements of this paragraph (f)(2)(ii) and paragraph (f)(2)(i) of this section. Whether a program qualifies as a formal program is determined on a participant-by-participant basis. A qualifying program qualifies as a formal program with respect to a participant if the participant simultaneously participates in the program in the same physical location with at least two other participants engaged in substantive pension service, and the participants have the opportunity to interact with another individual qualified with respect to the course content who serves as an instructor, whether or not the instructor is in the same physical location. Groups of three or more participants who are in the same physical location may participate in a formal program in person or via the Internet, videoconferencing, or teleconferencing. If the qualifying program is pre-recorded, to qualify as a formal program, there must be a qualified individual who serves as the instructor and is

available to answer questions immediately following the pre-recorded program.

(B) *Instructor*. A qualifying program is a formal program with respect to the instructor only if the program is a formal program under paragraph (f)(2)(ii)(A) of this section with respect to at least three participants and the instructor is in the physical presence of at least three other individuals engaged in substantive pension service.

(3) *Qualifying sponsors*—(i) *In general*. Qualifying sponsors are organizations recognized by the Executive Director whose programs offer opportunities for continuing professional education in subject matter within the scope of this section.

(ii) *Recognition by the Executive Director*. An organization requesting qualifying sponsor status shall file a sponsor agreement request with the Executive Director and furnish information in support of such request as deemed necessary for approval by the Executive Director. Such information shall include sufficient information to establish that all programs designated as qualifying programs offered by the qualifying sponsor will satisfy the requirements of paragraph (f)(2) of this section. Recognition as a qualifying sponsor by the Executive Director shall be effective when approved, unless the Executive Director provides that it shall be effective on a different date, and shall terminate at the end of the sponsor enrollment cycle. The Executive Director may publish the names of such sponsors on a periodic basis.

(iii) *Sponsor enrollment cycle*—(A) *Transition sponsor enrollment cycle*. The transition sponsor enrollment cycle is the period beginning on January 1, 2008 and ending December 31, 2011.

(B) *Subsequent sponsor enrollment cycles*. After the transition sponsor enrollment cycle, the sponsor enrollment cycle means the three-year period from January 1, 2012, to December 31, 2014, and every three-year period thereafter.

(iv) *Certificates of completion*. Upon verification of successful completion of a qualifying program, the program's qualifying sponsor shall furnish each individual who successfully completed the qualifying program with a certificate listing the following information:

(A) The name of the participant.

(B) The name of the qualifying sponsor.

(C) The title, location, and speaker(s) of each session attended.

(D) The dates of the program.

(E) The total credit hours earned, the total core and non-core credit hours earned, and how many of those hours relate to ethics.

(F) Whether or not the program is a formal program with respect to the participant.

(v) *Certificates of instruction*. The program's qualifying sponsor shall furnish to each instructor, discussion leader, or speaker, a certificate listing the following information:

(A) The name of the instructor, discussion leader, or speaker.

(B) The name of the qualifying sponsor.

(C) The title and location of the program.

(D) The dates of the program.

(E) The total credit hours earned and the total core and non-core credit hours earned for the program, and how many of those hours relate to ethics.

(F) Whether or not the program is a formal program with respect to the instructor.

(g) *Alternative means for completion of credit hours*—(1) *In general*. In addition to credit hours completed under paragraph (f) of this section, an enrolled actuary may be awarded continuing professional education credit under the provisions of this paragraph (g).

(2) *Serving as an instructor, discussion leader or speaker*. (i) Four credit hours (that is, 200 minutes) of continuing professional education credit will be awarded for each 50 minutes completed as an instructor, discussion leader, or speaker at a qualifying program which meets the continuing professional education requirements of paragraph (f) of this section. If the qualifying program is a formal program with respect to the instructor, only the time spent during the actual program is counted toward satisfaction of the formal program requirement.

(ii) The credit for instruction and preparation may not exceed 50 percent of the continuing professional education requirement for an enrollment cycle.

(iii) Presentation of the same material as an instructor, discussion leader, or speaker more than one time in any 36-month period will not qualify for continuing professional education credit. A program will not be considered to consist of the same material if a substantial portion of the content has been revised to reflect changes in the law or practices relative to the performance of pension actuarial service.

(iv) Credit as an instructor, discussion leader, or speaker will not be awarded to panelists, moderators, or others who are not required to prepare substantive subject matter for their portion of the program. However, such individuals may be awarded credit for attendance, provided the other provisions of this section are met.

(v) The nature of the subject matter will determine if credit will be of a core or non-core nature.

(3) *Credit for publications.* (i) Continuing professional education credit will be awarded for the creation of peer-reviewed materials for publication or distribution with respect to matters directly related to the continuing professional education requirements of this section. Credit will be awarded to the author, co-author, or a person listed as a major contributor.

(ii) One hour of credit will be allowed for each hour of preparation time of the material. It will be the responsibility of the person claiming the credit to maintain records to verify preparation time.

(iii) Publication or distribution may utilize any available technology for the dissemination of written, visual or auditory materials.

(iv) The materials must be available on reasonable terms for acquisition and use by all enrolled actuaries.

(v) The credit for the creation of materials may not exceed 25 percent of the continuing professional education requirement of any enrollment cycle.

(vi) The nature of the subject matter will determine if credit will be of a core or non-core nature.

(vii) Publication of the same material more than one time will not qualify for continuing professional education credit. A publication will not be considered to consist of the same material if a substantial portion has been revised to reflect changes in the law or practices relative to the performance of pension actuarial service.

(4) *Service on Joint Board advisory committee(s).* Continuing professional education credit may be awarded by the Joint Board for service on (any of) its advisory committee(s), to the extent that the Joint Board considers warranted by the service rendered.

(5) *Preparation of Joint Board examinations.* Continuing professional education credit may be awarded by the Joint Board for participation in drafting questions for use on Joint Board examinations or in pretesting its examinations, to the extent the Joint Board determines suitable. Such credit may not exceed 50 percent of the continuing professional education requirement for the applicable enrollment cycle.

(6) *Examinations sponsored by professional organizations or societies.* Individuals may earn continuing professional education credit for achieving a passing grade on proctored examinations sponsored by a professional organization or society recognized by the Joint Board. Such credit is limited to the number of hours scheduled for each examination and may be applied only as non-core credit provided the content of the examination is core or non-core. No credit may be earned for hours attributable to any content that is neither core nor non-core.

(7) *Joint Board pension examination.* Individuals may establish eligibility for renewal of enrollment for any enrollment cycle by—

(i) Achieving a passing score on the Joint Board pension examination, as described in § 901.12(d)(1)(i), administered under this part during the applicable enrollment cycle; and

(ii) Completing a minimum of 12 hours of qualifying continuing professional education by attending formal program(s) during the same applicable enrollment cycle. This option of satisfying the continuing professional education requirements is not available to those who receive initial enrollment during the enrollment cycle.

(h) *Measurement of continuing education course work.* (1) All continuing education programs will be measured in terms of credit hours. The shortest

recognized program will be one credit hour.

(2) A credit hour is 50 minutes of continuous participation in a program. Each session in a program must be at least one full credit hour, *i.e.*, 50 minutes. For example, a single-session program lasting 100 minutes will count as two credit hours, and a program comprised of three 75 minute sessions (225 minutes) constitutes four credit hours. However, at the end of an enrollment cycle, an individual may total the number of minutes of sessions of at least one credit hour in duration attended during the cycle and divide by fifty. For example, attending three 75 minute segments at two separate programs will accord an individual nine credit hours (450 minutes divided by 50) toward fulfilling the minimum number of continuing professional education hours. It will not be permissible to merge non-core hours with core hours.

(i) [Reserved]

(j) *Recordkeeping requirements*—(1) *Qualifying sponsors*. A qualifying sponsor must maintain records to verify that each program it sponsors is a qualifying program within the meaning of paragraph (f)(2) of this section, including the certificates of completion, certificates of instruction, and outlines and course material. In the case of programs of more than one session, records must be maintained to verify each session of the program that is completed by each participant. Records required to be maintained under this paragraph must be retained by the qualifying sponsor for a period of six years following the end of the sponsor enrollment cycle in which the program is held.

(2) *Enrolled actuaries*—(i) *Qualifying program credits as a participant*. To receive continuing professional education credit for completion of hours of continuing professional education under paragraph (f) of this section, an enrolled actuary must retain all certificates of completion evidencing completion of such hours for the three-year period following the end of the enrollment cycle in which the credits are earned.

(ii) *Qualifying program credits as an instructor, discussion leader, or speaker*. To receive continuing professional education credit for completion of hours earned under paragraph (g)(2) of this section, an enrolled actuary must retain all certificates of instruction evidencing completion of such hours for the three-year period following the end of the enrollment cycle in which the credits are earned.

(iii) *Credit for publications*. To receive continuing professional education credit for a publication under paragraph (g)(3) of this section, the following information must be maintained by the enrolled actuary for the three-year period following the end of the enrollment cycle in which the credits are earned:

(A) The name of the publisher.

(B) The title and author of the publication.

(C) A copy of the publication.

(D) The date of the publication.

(E) The total credit hours earned, and the total core and non-core credit hours earned, and how many of those hours relate to ethics.

(iv) *Other credits*. To receive continuing professional education credit for hours earned under paragraphs (g)(4) through (g)(7) of this section, an enrolled actuary must retain sufficient documentation to establish completion of such hours for the three-year period following the end of the enrollment cycle in which the credits are earned.

(k) *Waivers*. (1) Waiver from the continuing professional education requirements for a given period may be granted by the Executive Director only under extraordinary circumstances, and upon submission of sufficient evidence that every effort was made throughout the enrollment cycle to participate in one or more qualifying programs that would have satisfied the continuing professional education requirements.

(2) A request for waiver must be accompanied by appropriate documentation. The individual will be required to furnish any additional documentation or explanation deemed necessary by the Executive Director.

(3) The individual will be notified by the Executive Director of the disposition of the request for waiver. If the waiver is not approved, and the individual does not otherwise satisfy the

continuing professional education requirements within the allotted time, the individual will be placed on the roster of inactive enrolled individuals.

(4) Individuals seeking to rely on a waiver of the continuing professional education requirements must receive the waiver from the Executive Director before filing an application for renewal of enrollment.

(l) *Failure to comply*. (1) Compliance by an individual with the requirements of this part shall be determined by the Executive Director. An individual who applies for renewal of enrollment but who fails to meet the requirements of eligibility for renewal will be notified by the Executive Director at his/her last known address by first class mail. The notice will state the basis for the non-compliance and will provide the individual an opportunity to furnish in writing, within 60 days of the date of the notice, information relating to the matter. Such information will be considered by the Executive Director in making a final determination as to eligibility for renewal of enrollment.

(2) The Executive Director may require any individual, by first class mail sent to his/her mailing address of record with the Joint Board, to provide copies of any records required to be maintained under this section. The Executive Director may disallow any continuing professional education hours claimed if the individual concerned fails to comply with such requirements.

(3) An individual whose application for renewal is not approved may seek review of the matter by the Joint Board. A request for review and the reasons in support of the request must be filed with the Joint Board within 30 days of the date of the notice of failure to comply.

(4) *Inactive status*—(i) *Automatic placement on the inactive roster*. To remain on the roster of active enrolled actuaries, an enrolled actuary must submit a timely application for renewal showing satisfaction of the requirements for reenrollment, including completion of the required continuing professional education hours, within the appropriate time frame. The Executive Director will move an enrolled actuary who does not submit such an application for reenrollment from the roster of enrolled actuaries to the roster of inactive enrolled actuaries as of April 1 following the March 1 due date for the application. However, if an enrolled actuary completes the required number of continuing professional education hours after the close of the enrollment cycle, submits an application for reenrollment, and is informed by the Executive Director before April 1st that the enrollment has been renewed, then the Executive Director will not move such individual to the roster of inactive enrolled actuaries at that time.

(ii) *Placement on the inactive roster after notice and right to respond*. The Executive Director will move an enrolled actuary who does not submit a timely application of renewal that shows timely completion of the required continuing professional education to the inactive roster only after giving the enrolled actuary 60 days to respond as described in paragraph (l)(1) of this section.

(iii) *Length on time on inactive roster*. An individual may remain on the roster of inactive enrolled actuaries for a period up to three enrollment cycles from the date renewal would have been effective.

(iv) *Consequence of being on the inactive roster*. An individual in inactive status will be ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code. During such time in inactive status or at any other time an individual is ineligible to perform pension actuarial services as an enrolled actuary, the individual shall not in any manner, directly or indirectly, indicate he or she is so enrolled, or use the term ''enrolled actuary,'' the designation ''E.A.,'' or other form of reference to eligibility to perform pension actuarial services as an enrolled actuary.

(v) *Returning to active status*. An individual placed in inactive status may return to active status by filing an application for renewal of enrollment (with the appropriate fee) and providing evidence of the completion of all required continuing professional education hours and of satisfaction of any applicable requirements for qualifying experience under paragraph (l)(7) of

this section. If an application for return to active status is approved, the individual will be eligible to perform services as an enrolled actuary effective with the date the notice of approval is mailed to that individual by the Executive Director.

(5) *Time for return to active enrollment.* (i) An individual placed in inactive status must file an application for return to active enrollment, and satisfy the requirements for return to active enrollment as set forth in this section, within three enrollment cycles of being placed in inactive status. Otherwise, the name of such individual will be removed from the inactive enrollment roster and his/her enrollment will terminate.

(ii) For purposes of paragraph (l)(5)(i) of this section, an individual who is in inactive or retired status as of April 1, 2010, will be deemed to have been placed in inactive status on April 1, 2010.

(6) An individual in inactive status may satisfy the requirements for return to active enrollment at any time during his/her period of inactive enrollment. If only completion of the continuing professional education requirement is necessary, the application for return to active enrollment may be filed immediately upon such completion. If qualifying experience is also required, the application for return to active enrollment may not be filed until the completion of both the continuing professional education and qualifying experience requirements set forth in this subsection. Continuing professional education credits applied to meet the requirements for reenrollment under this paragraph (l)(6) may not be used to satisfy the requirements of the enrollment cycle in which the individual has been placed back on the active roster.

(7) *Continuing professional education requirements for return to active enrollment from inactive status.* (i) During the first inactive enrollment cycle; 36 hours of qualifying continuing professional education as set forth in paragraph (e)(2) of this section, without regard to paragraph (e)(2)(ii) or (e)(2)(iii) of this section, must be completed. Any hours of continuing professional education credit earned during the immediately prior enrollment cycle may be applied in satisfying this requirement.

(ii) During the second inactive enrollment cycle; four-thirds of the qualifying continuing professional education requirements as set forth in paragraph (e)(2) of this section (that is, 48 hours), without regard to paragraph (e)(2)(ii) or (e)(2)(iii) of this section, plus eighteen months of certified responsible pension actuarial experience, must be completed since the start of the first inactive enrollment cycle. Any hours of continuing professional education credit earned during the first inactive enrollment cycle may be applied in satisfying this requirement.

(iii) During the third inactive enrollment cycle: Five-thirds of the qualifying continuing professional education requirements as set forth in paragraph (e)(2) of this section, (that is, 60 hours), without regard to paragraph (e)(2)(ii) or (e)(2)(iii) of this section plus eighteen months of certified responsible pension actuarial experience, must be completed since the start of the second inactive enrollment cycle. Any hours of continuing professional education credit earned during the second inactive enrollment cycle may be applied in satisfying this requirement. No hours earned during the first inactive enrollment cycle may be applied in satisfying this requirement.

(8) An individual in inactive status remains subject to the jurisdiction of the Joint Board and/or the Department of the Treasury with respect to disciplinary matters.

(9) An individual who has certified in good faith that he/she has satisfied the continuing professional education requirements of this section will not be considered to be in non-compliance with such requirements on the basis of a program he/she has attended later being found inadequate or not in compliance with the requirements for continuing professional education. Such individual will be granted renewal, but the Executive Director may require such individual to remedy the resulting shortfall by earning replacement credit during the cycle in which renewal was granted or within a reasonable time period as determined by the Executive Director. For example, if six of the credit hours claimed were disallowed,

the individual may be required to present 42 credit hours instead of the minimum 36 credit hours to qualify for renewal related to the next cycle.

(m) *Renewal while under suspension or disbarment.* An individual who is ineligible to perform actuarial services and/or to practice before the Internal Revenue Service by virtue of disciplinary action is required to meet the requirements for renewal of enrollment during the period of such ineligibility.

(n) *Verification.* The Executive Director or his/her designee may request and review the continuing professional education records of an enrolled actuary, including programs attended, in a manner deemed appropriate to determine compliance with the requirements and standards for the renewal of enrollment as provided in this section. The Executive Director may also request and review the records of any qualifying sponsor in a manner deemed appropriate to determine compliance with the requirements of paragraphs (f)(3) and (j)(1) of this section.

(o) *Examples.* The following examples illustrate the application of the rules of paragraph (l)(7) of this section and the effective date of an enrolled actuary's renewal:

Example 1. Individual E, who was initially enrolled before January 1, 2008, completes 12 hours of core continuing professional education credit and 24 hours of non-core continuing professional education credit between January 1, 2011, and December 31, 2013. E files a complete application for reenrollment on February 28, 2014. E's reenrollment is effective as of April 1, 2014.

Example 2. Individual F, who was initially enrolled before January 1, 2008, also completes 12 hours of core continuing professional education credit and 24 hours of noncore continuing professional education credit between January 1, 2011, and December 31, 2013. However, F does not file an application for reenrollment until March 20, 2014. The Joint Board notifies F that it has granted F's application on June 25, 2014. Accordingly, effective April 1, 2014, F is placed on the roster of inactive enrolled actuaries. F returns to active status as of June 25, 2014. F is ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code from April 1 through June 24, 2014.

Example 3. Individual G, who was initially enrolled before January 1, 2008, completes only 8 hours of core continuing professional education credit and 24 hours of non-core continuing professional education credit between January 1, 2011, and December 31, 2013. G completes another 6 hours of core continuing professional education on January 15, 2014, and files an application for return to active status on January 20, 2014. G's application shows the timely completion of 32 hours of continuing professional education plus the additional 4 hours of continuing professional education earned after the end of the enrollment cycle. The Joint Board notifies G that it has granted the application on April 20, 2014. Accordingly, effective April 1, 2014, G is placed on the roster of inactive enrolled actuaries. G returns to active status as of April 20, 2014. G is ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code from April 1 through April 19, 2014. Of the 6 hours of continuing professional education earned by G on January 15, 2014, only 2 hours may be applied to the enrollment cycle that ends December 31, 2016.

Example 4. (i) Individual H, who was initially enrolled before January 1, 2008, completes 5 hours of core continuing professional education credit and 10 hours of non-core continuing professional education credit between January 1, 2011, and December 31, 2013. Accordingly, effective April 1, 2014, H is placed on the roster of inactive enrolled actuaries and is ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code.

(ii) H completes 7 hours of core continuing professional education credit and 14 hours of noncore continuing professional education credit between January 1, 2014, and May 24, 2016. Because H has completed 12 hours of core continuing professional education and 24 hours of non-core continuing professional education during the last active enrollment period and the initial period when on inactive status, H has satisfied the requirements for reenrollment during the first inactive cycle. Accordingly, H may file an application for return to active enrollment on May 24, 2016. If this application is approved, H will be eligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code, effective with the date of such approval.

(iii) Because H used the 21 hours of continuing professional education credit earned after January 1, 2014, for return from inactive status, H may not apply any of these 21 hours of core and non-core continuing professional education credits towards the requirements for renewed enrollment effective April 1, 2017. Accordingly, H must complete an additional 36 hours of continuing professional education (12 core and 24 non-core) prior to December 31, 2016, to be eligible for renewed enrollment effective April 1, 2017.

Example 5. (i) The facts are the same as in *Example 4* except H completes 2 hours of core continuing professional education credit and

8 hours of non-core continuing professional education credit between January 1, 2014, and December 31, 2016. Thus, because H did not fulfill the requirements for return to active status during his first inactive cycle, H must satisfy the requirements of paragraph (l)(7)(ii) of this section in order to return to active status.

(ii) Accordingly, in order to be eligible to file an application for return to active status on or before December 31, 2019, H must complete an additional 38 hours of continuing professional education credit (of which at least 14 hours must consist of core subject matter) between January 1, 2017, and December 31, 2019, and have 18 months of certified responsible pension actuarial experience during the period beginning on January 1, 2014.

(iii) Note that the 5 hours of core continuing professional education credit and the 10 hours of non-core continuing professional education credit that H completes between January 1, 2011, and December 31, 2013, are not counted toward H's return to active status and are also not taken into account toward the additional hours of continuing professional education credit that H must complete between January 1, 2017, and December 31, 2019, in order to apply for renewal of enrollment effective April 1, 2020.

Example 6. (i) The facts are the same as in *Example 4* except H completes 2 hours of core continuing professional education credit and 8 hours of non-core continuing professional education credit between January 1, 2014, and December 31, 2016, and 12 hours of core continuing professional education credit and 24 hours of non-core continuing professional education credit between January 1, 2017, and December 31, 2019. Thus, because H did not fulfill the requirements for return to active status during his first or second inactive cycles, H must satisfy the requirements of paragraph (l)(7)(iii) of this section in order to return to active status.

(ii) Accordingly, in order to be eligible to file an application for return to active status on or before December 31, 2022, H must complete an additional 24 hours of continuing professional education credit (of which, at least 8 hours must consist of core subject matter) between January 1, 2020 and December 31, 2022, and have at least 18 months of certified responsible pension actuarial experience during the period beginning on January 1, 2017.

(iii) Note that the total of 15 hours of continuing professional education credit that H completes between January 1, 2011, and December 31, 2013, as well as the 10 hours of continuing professional education credit between January 1, 2014, and December 31, 2016, are not counted toward H's return to active status and are not taken into account toward the additional hours of continuing professional education credit that H must complete between January 1, 2020, and December 31, 2022, in order to be eligible to file an application for renewal of enrollment active status effective April 1, 2023.

Example 7. (i) Individual J, who was initially enrolled July 1, 2012, completes 1 hour of core continuing professional education credit and 2 hours of non-core continuing professional education credit between January 1, 2012, and December 31, 2013. Accordingly, effective April 1, 2014, J is placed on the roster of inactive enrolled actuaries and is ineligible to perform pension actuarial services as an enrolled actuary under ERISA and the Internal Revenue Code.

(ii) J completes 5 hours of core continuing professional education credit and 4 hours of non-core continuing professional education credit between January 1, 2014, and October 6, 2014. Because J did not complete the required 12 hours of continuing professional education (of which at least 6 hours must consist of core subject matter) during J's initial enrollment cycle, J is not eligible to file an application for a return to active enrollment on October 6, 2014, notwithstanding the fact that had J completed such hours between January 1, 2012, and December 31, 2013, J would have satisfied the requirements for renewed enrollment effective April 1, 2014.

(iii) Accordingly, J must complete an additional 24 hours of continuing professional education (of which at least 12 hours must consist of core subject matter) during his/her first inactive enrollment cycle before applying for renewal of enrollment.

Example 8. The facts are the same as in *Example 7* except that J completes 17 hours of core continuing professional education credit and 16 hours of non-core continuing professional education credit between January 1, 2014, and February 12, 2015. Accordingly, because as of February 12, 2015, J satisfied the continuing professional education requirements as set forth in paragraph (e)(2) of this section without regard to paragraph (e)(2)(ii) thereof, J may file an application for return to active enrollment status on February 12, 2015.

(p) With the exception of paragraphs (e)(1) and (f)(3)(iii) of this section, this section applies to the enrollment cycle beginning January 1, 2011, and all subsequent enrollment cycles.

[42 FR 39200, Aug. 3, 1977, as amended at 53 FR 34484, Sept. 7, 1988; 76 FR 17769, Mar. 31, 2011; 76 FR 81363, Dec. 28, 2011]

§ 901.12 Eligibility for enrollment.

(a) *In general*. An individual applying to be an enrolled actuary must fulfill

the experience requirement of paragraph (b) of this section, the basic actuarial knowledge requirement of paragraph (c) of this section, and the pension actuarial knowledge requirement of paragraph (d) of this section.

(b) *Qualifying experience.* Within the 10-year period immediately preceding the date of application, the applicant shall have completed either—

(1) A minimum of 36 months of certified responsible pension actuarial experience; or

(2) A minimum of 60 months of certified responsible actuarial experience, including at least 18 months of certified responsible pension actuarial experience.

(c) *Basic actuarial knowledge.* The applicant shall demonstrate knowledge of basic actuarial mathematics and methodology by one of the following:

(1) *Joint Board basic examination.* Successful completion, to a score satisfactory to the Joint Board, of an examination, prescribed by the Joint Board, in basic actuarial mathematics and methodology including compound interest, principles of life contingencies, commutation functions, multiple-decrement functions, and joint life annuities.

(2) *Organization basic examinations.* Successful completion, to a score satisfactory to the Joint Board, of one or more proctored examinations which are given by an actuarial organization and which the Joint Board has determined cover substantially the same subject areas, have at least a comparable level of difficulty, and require at least the same competence as the Joint Board basic examination referred to in paragraph (c)(1) of this section.

(3) *Qualifying formal education.* Receipt of a bachelor's or higher degree from an accredited college or university after the satisfactory completion of a course of study:

(i) In which the major area of concentration was actuarial mathematics, or

(ii) Which included at least as many semester hours or quarter hours each in mathematics, statistics, actuarial mathematics and other subjects as the Board determines represent equivalence to paragraph (c)(3)(i) of this section.

(d) *Pension actuarial knowledge.* (1) The applicant shall demonstrate pension actuarial knowledge by one of the following:

(i) *Joint Board pension examination.* Successful completion, within the 10-year period immediately preceding the date of the application, to a score satisfactory to the Joint Board, of an examination prescribed by the Joint Board in actuarial mathematics and methodology relating to pension plans, including the provisions of ERISA relating to the minimum funding requirements and allocation of assets on plan termination.

(ii) *Organization pension examinations.* Successful completion, within the 10-year period immediately preceding the date of the application, to a score satisfactory to the Joint Board, of one or more proctored examinations which are given by an actuarial organization and which the Joint Board has determined cover substantially the same subject areas, have at least a comparable level of difficulty, and require at least the same competence as the Joint Board pension examination referred to in paragraph (d)(1)(i) of this section.

(2) For purposes of this section, the date of successful completion of an examination is generally the date a candidate sits for the examination, provided that the candidate receives a passing grade on that examination. However, an applicant who sat for an examination prior to the effective date of these regulations will be deemed to have sat for such examination on the effective date.

(e) *Form; fee.* An applicant who wishes to take an examination administered by the Joint Board under paragraph (c)(1) or (d)(1) of this section shall file an application on a form prescribed by the Joint Board. Such application shall be accompanied by payment in the amount set forth on the application form. The amount represents a fee charged to each applicant for examination and is designed to cover the costs for the administration of the examination. The fee shall be retained whether or not the applicant successfully completes the examination or is enrolled.

(f) *Denial of enrollment.* An applicant may be denied enrollment if:

(1) The Joint Board finds that the applicant, during the 15-year period immediately preceding the date of application and on or after the applicant's eighteenth birthday has engaged in disreputable conduct. The term disreputable conduct includes, but is not limited to:

(i) An adjudication, decision, or determination by a court of law, a duly constituted licensing or accreditation authority (other than the Joint Board), or by any federal or state agency, board, commission, hearing examiner, administrative law judge, or other official administrative authority, that the applicant has engaged in conduct evidencing fraud, dishonesty or breach of trust.

(ii) Giving false or misleading information, or participating in any way in the giving of false or misleading information, to the Department of the Treasury or the Department of Labor or the Pension Benefit Guaranty Corporation or any officer or employee thereof in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading.

(iii) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any federal tax or payment thereof, knowingly counseling or suggesting to a client or prospective client an illegal plan to evade federal taxes or payment thereof, or concealing assets of himself or another to evade federal taxes or payment thereof.

(iv) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Department of the Treasury or the Department of Labor or the Pension Benefit Guaranty Corporation by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor, or thing of value.

(v) Disbarment or suspension from practice as an actuary, attorney, certified public accountant, public accountant, or an enrolled agent by any duly constituted authority of any state, possession, territory, Commonwealth, the District of Columbia, by any Federal Court of record, or by the Department of the Treasury.

(vi) Contemptuous conduct in connection with matters before the Department of the Treasury, or the Department of Labor, or the Pension Benefit Guaranty Corporation including the use of abusive language, making false accusations and statements knowing them to be false, or circulating or publishing malicious or libelous matter.

(2) The applicant has been convicted of any of the offenses referred to in section 411 of ERISA.

(3) The applicant has submitted false or misleading information on an application for enrollment to perform actuarial services or in any oral or written information submitted in connection therewith or in any report presenting actuarial information to any person, knowing the same to be false or misleading.

(Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974 (88 Stat. 1002, 29 U.S.C. 1241, 1242), and the Act of August 31, 1951, ch. 376, title V, section 501, 65 Stat. 290, 31 U.S.C. 483a)

[44 FR 11751, Mar. 2, 1979, as amended at 44 FR 68458, Nov. 29, 1979. Redesignated and amended at 76 FR 17774, Mar. 31, 2011]

Subpart C—Standards of Performance for Enrolled Actuaries

§ 901.20 Standards of performance of actuarial services.

In the discharge of duties required by ERISA of enrolled actuaries with respect to any plan to which the Act applies:

(a) *In general.* An enrolled actuary shall undertake an actuarial assignment only when qualified to do so.

(b) *Professional duty.* (1) An enrolled actuary shall perform actuarial services only in a manner that is fully in accordance with all of the duties and requirements for such persons under applicable law and consistent with relevant generally accepted standards for professional responsibility and ethics.

(2) An enrolled actuary shall not perform actuarial services for any person

or organization which he/she believes, or has reasonable grounds to believe, may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

(c) *Advice or explanations.* An enrolled actuary shall provide to the plan administrator upon appropriate request, supplemental advice or explanation relative to any report signed or certified by such enrolled actuary.

(d) *Conflicts of interest.* (1) Except as provided in paragraph (d)(2) of this section, an enrolled actuary shall not perform actuarial services for a client if the representation involves a conflict of interest. A conflict of interest exists if—

(i) The representation of one client will be directly adverse to another client; or

(ii) There is a significant risk that the representation of one or more clients will be materially limited by the enrolled actuary's responsibilities to another client, a former client, or by a personal interest of the enrolled actuary.

(2) Notwithstanding the existence of a conflict of interest under paragraph (d)(1) of this section, the enrolled actuary may represent a client if—

(i) The enrolled actuary reasonably believes that he or she will be able to provide competent and diligent representation to each affected client;

(ii) The representation is not prohibited by law; and

(iii) Each affected client waives the conflict of interest and gives informed consent at the time the existence of the conflict of interest is known by the enrolled actuary.

(e) *Assumptions, calculations and recommendations.* (1) The enrolled actuary shall exercise due care, skill, prudence and diligence when performing actuarial services under ERISA and the Internal Revenue Code. In particular, in the course of preparing a report or certificate stating actuarial costs or liabilities, the enrolled actuary shall ensure that—

(i) Except as mandated by law, the actuarial assumptions are reasonable individually and in combination, and the actuarial cost method and the actuarial method of valuation of assets are appropriate;

(ii) The calculations are accurately carried out and properly documented; and

(iii) The report, any recommendations, and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(2) An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(f) *Due diligence.* (1) An enrolled actuary must exercise due diligence—

(i) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity;

(ii) In determining the correctness of oral or written representations made by the enrolled actuary to the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity; and

(iii) In determining the correctness of oral or written representations made by the enrolled actuary to clients.

(2) An enrolled actuary advising a client to take a position on any document to be filed with the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity (or preparing or signing such a return or document) generally may rely in good faith without verification upon information furnished by the client. The enrolled actuary may not, however, ignore the implications of information furnished to, or actually known by, the enrolled actuary, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

(g) *Solicitations regarding actuarial services.* An enrolled actuary may not in any way use or participate in the use of any form of public communication or private solicitation related to

the performance of actuarial services containing a false, fraudulent, or coercive statement or claim, or a misleading or deceptive statement or claim. An enrolled actuary may not make, directly or indirectly, an uninvited written or oral solicitation of employment related to actuarial services if the solicitation violates Federal or State law, nor may such person employ, accept employment in partnership form, corporate form, or any other form, or share fees with, any individual or entity who so solicits. Any lawful solicitation related to the performance of actuarial services made by or on behalf of an enrolled actuary must clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

(h) *Prompt disposition of pending matters.* An enrolled actuary may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation, or any other applicable Federal or State entity.

(i) [Reserved]

(j) *Return of client's records.* (1) In general, an enrolled actuary must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply with his or her legal obligations. The enrolled actuary may retain copies of the records returned to a client. The existence of a dispute over fees generally does not relieve the enrolled actuary of his or her responsibility under this section. Nevertheless, if applicable State law allows or permits the retention of a client's records by an enrolled actuary in the case of a dispute over fees for services rendered, the enrolled actuary need only return those records that must be attached to the client's required forms under ERISA and the Internal Revenue Code. The enrolled actuary, however, must provide the client with reasonable access to review and copy any additional records of the client retained by the enrolled actuary under State law that are necessary for the client to comply with his or her obligations under ERISA and the Internal Revenue Code.

(2) For purposes of this section, records of the client include all documents or written or electronic materials provided to the enrolled actuary, or obtained by the enrolled actuary in the course of the enrolled actuary's representation of the client, that preexisted the retention of the enrolled actuary by the client. The term ''records of the client'' also includes materials that were prepared by the client or a third party (not including an employee or agent of the enrolled actuary) at any time and provided to the enrolled actuary with respect to the subject matter of the representation. The term ''records of the client'' also includes any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the enrolled actuary, or his or her employee or agent, that was presented to the client with respect to a prior representation if such document is necessary for the taxpayer to comply with his or her current obligations under ERISA and the Internal Revenue Code. The term ''records of the client'' does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the enrolled actuary or the enrolled actuary's firm, employees or agents if the enrolled actuary is withholding such document pending the client's performance of its contractual obligation to pay fees with respect to such document.

(k) *Notification.* An enrolled actuary shall provide written notification of the non-filing of any actuarial document he/she has signed upon discovery of the non-filing. Such notification shall be made to the office of the Internal Revenue Service, the Department of Labor, or the Pension Benefit Guaranty Corporation where such document should have been filed.

(l) The rules of this section apply to all actuarial services and related acts performed on or after May 2, 2011.

[40 FR 18776, Apr. 30, 1975, as amended at 43 FR 39757, Sept. 7, 1978; 76 FR 17775, Mar. 31, 2011]

Subpart D—Suspension or Termination of Enrollment

AUTHORITY: Sec. 3042(b), ERISA, 29 U.S.C. 1242(b).

SOURCE: 43 FR 39757, Sept. 7, 1978, unless otherwise noted.

§ 901.30 Authority to suspend or terminate enrollment.

Under section 3042(b) of ERISA the Joint Board may, after notice and opportunity for a hearing, suspend or terminate the enrollment of an enrolled actuary if the Joint Board finds that such enrolled actuary

(a) Has failed to discharge his/her duties under ERISA, or

(b) Does not satisfy the requirements for enrollment in effect at the time of his/her enrollment.

§ 901.31 Grounds for suspension or termination of enrollment.

(a) *Failure to satisfy requirements for enrollment*. The enrollment of an actuary may be terminated if it is found that the actuary did not satisfy the eligibility requirements set forth in § 901.11 or § 901.12.

(b) *Failure to discharge duties*. The enrollment of an actuary may be suspended or terminated if it is found that the actuary, following enrollment, failed to discharge his/her duties under ERISA. Such duties include those set forth in § 901.20.

(c) *Disreputable conduct*. The enrollment of an actuary may be suspended or terminated if it is found that the actuary has, at any time after he/she applied for enrollment, engaged in any conduct set forth in § 901.12(f) or other conduct evidencing fraud, dishonesty, or breach of trust. Such other conduct includes, but is not limited to, the following:

(1) Conviction of any criminal offense under the laws of the United States (including section 411 of ERISA, 29 U.S.C. 1111), any State thereof, the District of Columbia, or any territory or possession of the United States, which evidences fraud, dishonesty, or breach of trust.

(2) Knowingly filing false or altered documents, affidavits, financial statements or other papers on matters relating to employee benefit plans or actuarial services.

(3) Knowingly making false or misleading representations, either orally or in writing, on matters relating to employee benefit plans or actuarial services, or knowingly failing to disclose information relative to such matters.

(4) The use of false or misleading representations with intent to deceive a client or prospective client, or of intimations that the actuary is able to obtain special consideration or action from an officer or employee of any agency or court authorized to determine the validity of pension plans under ERISA.

(5) Willful violation of any of the regulations contained in this part.

[43 FR 39757, Sept. 7, 1978, as amended at 76 FR 17776, Mar. 31, 2011]

§ 901.32 Receipt of information concerning enrolled actuaries.

If an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or a member of the Joint Board has reason to believe that an enrolled actuary has violated any provision of this part, or if any such officer, employee or member receives information to that effect, he/she may make a written report thereof, which report or a copy thereof shall be forwarded to the Executive Director. If any other person has information of any such violation, he/she may make a report thereof to the Executive Director.

[43 FR 39757, Sept. 7, 1978, as amended at 76 FR 17776, Mar. 31, 2011]

§ 901.33 Initiation of proceeding.

Whenever the Executive Director has reason to believe that an enrolled actuary has violated any provision of the laws or regulations governing enrollment, such individual may be reprimanded or a proceeding may be initiated for the suspension or termination of such individual's enrollment. A reprimand as used in this paragraph is a

statement informing the enrolled actuary that, in the opinion of the Executive Director, his/her conduct is in violation of the regulations and admonishing the enrolled actuary that repetition of the conduct occasioning the reprimand may result in the institution of a proceeding for the suspension or termination of the actuary's enrollment. A proceeding for suspension or termination of enrollment shall be initiated by a complaint naming the respondent actuary, signed by the Executive Director and filed in the Executive Director's office. Except in cases where the nature of the proceeding or the public interest does not permit, a proceeding will not be initiated under this section until the facts which may warrant such a proceeding have been called to the attention of the actuary in writing and he/she has been given an opportunity to respond to the allegations of misconduct.

§ 901.34 Conferences.

(a) *In general*. The Executive Director may confer with an enrolled actuary concerning allegations of his/her misconduct whether or not a proceeding for suspension or termination has been initiated against him/her. If the conference results in agreement as to certain facts or other matters in connection with such a proceeding, such agreement may be entered in the record at the request of the actuary or the Executive Director.

(b) *Voluntary suspension or termination of enrollment*. An enrolled actuary, in order to avoid the initiation or conclusion of a suspension or termination proceeding, may offer his/her consent to suspension or termination of enrollment or may offer his/her resignation. The Executive Director may accept the offered resignation or may suspend or terminate enrollment in accordance with the consent offered.

§ 901.35 Contents of complaint.

(a) *Charges*. A complaint initiating a suspension or termination proceeding shall describe the allegations which are the basis for the proceeding, and fairly inform the respondent of the charges against him/her.

(b) *Answer*. In the complaint, or in a separate paper attached to the complaint, notice shall be given of the place at, and time within which the respondent shall file an answer, which time shall not be less than 15 days from the date of service of the complaint. Notice shall be given that a decision by default may be rendered against the respondent if an answer is not filed as required.

§ 901.36 Service of complaint and other papers.

(a) *Complaint*. The complaint or a copy thereof may be served upon the respondent by certified mail, or first-class mail as hereinafter provided, by delivering it to the respondent, or the respondent's attorney or agent of record either in person or by leaving it at the office or place of business of the respondent, the attorney or agent, or in any other manner which may have been agreed to in writing by the respondent. Where the service is by certified mail, the return post office receipt signed by or on behalf of the respondent shall be proof of service. If the certified matter is not claimed or accepted by the respondent and is returned undelivered, complete service may be made upon the respondent by mailing the complaint to him/her by first-class mail, addressed to the respondent at the last address known to the Executive Director. If service is made upon the respondent or his/her attorney or agent in person or by leaving the complaint at the office or place of business of the respondent, attorney, or agent, the verified return by the person making service, setting forth the manner of service, shall be proof of such service.

(b) *Service of papers other than complaint*. Any paper other than the complaint may be served upon the respondent as provided in paragraph (a) of this section or by mailing the paper by first-class mail to the respondent at the last address known to the Executive Director or by mailing the paper by first-class mail to the respondent's attorney or agent. Such mailing shall constitute complete service. Notices may also be served upon the respondent or his/her attorney or agent by telegraph.

(c) *Filing of papers*. Whenever the filing of a paper is required or permitted

in connection with a suspension or termination proceeding, and the place of filing is not specified by this subpart or by rule or order of the Administrative Law Judge, the paper shall be filed with the Executive Director of the Joint Board for the Enrollment of Actuaries, Treasury Department, Washington, D.C. 20220. All papers shall be filed in duplicate.

§ 901.37 Answer.

(a) *Filing.* The respondent's answer shall be filed in writing within the time specified in the complaint or notice of initiation of the proceeding, unless, on application, the time is extended by the Executive Director or the Administrative Law Judge. The answer shall be filed in duplicate with the Executive Director.

(b) *Contents.* The answer shall contain a statement of facts which constitute the grounds of defense and it shall specifically admit or deny each allegation set forth in the complaint, except that the respondent shall not deny a material allegation in the complaint which he/she knows to be true, or state that he/she is without sufficient information to form a belief when in fact the respondent possesses such information. The respondent may also state affirmatively special matters of defense.

(c) *Failure to deny or answer allegations in the complaint.* Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proven, and no further evidence in respect of such allegation need be adduced at a hearing. Failure to file an answer within the time prescribed in the notice to the respondent, except as the time for answer is extended by the Executive Director or the Administrative Law Judge, shall constitute an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make a decision by default, without a hearing or further procedure.

§ 901.38 Supplemental charges.

If it appears to the Executive Director that the respondent in his/her answer falsely and in bad faith denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief when he/she in fact possesses such knowledge, or if it appears that the respondent has knowingly introduced false testimony during proceedings for suspension or termination of his/her enrollment, the Executive Director may file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense thereto.

§ 901.39 Reply to answer.

No reply to the respondent's answer shall be required, but the Executive Director may file a reply at his/her discretion or at the request of the Administrative Law Judge.

§ 901.40 Proof; variance; amendment of pleadings.

In the case of a variance between the allegations in a pleading and the evidence adduced in support of the pleading, the Administrative Law Judge may order or authorize amendment of the pleading to conform to the evidence, provided that the party who would otherwise be prejudiced by the amendment is given reasonable opportunity to meet the allegations of the pleading as amended. The Administrative Law Judge shall make findings on any issue presented by the pleadings as so amended.

§ 901.41 Motions and requests.

Motions and requests may be filed with the Executive Director or with the Administrative Law Judge.

§ 901.42 Representation.

A respondent or proposed respondent may appear at conference or hearing in person or may be represented by counsel or other representative. The Executive Director may be represented by an attorney or other employee of the Treasury Department.

§ 901.43 Administrative Law Judge.

(a) *Appointment.* An administrative law judge, appointed as provided by section 11 of the Administrative Procedure Act, 60 Stat. 244 (5 U.S.C. 3105),

shall conduct proceedings upon complaints for the suspension or termination of enrolled actuaries.

(b) *Powers of Administrative Law Judge.* Among other powers, the Administrative Law Judge shall have authority, in connection with any suspension or termination proceeding of an enrolled actuary, to do the following:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and requests, which may not be appealed before the close of a hearing except at the discretion of the Administrative Law Judge;

(3) Determine the time and place of hearing and regulate its course of conduct;

(4) Adopt rules of procedure and modify the same as required for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make initial decisions.

§ 901.44 Hearings.

(a) *In general.* The Administrative Law Judge shall preside at the hearing on a complaint for the suspension or termination of an enrolled actuary. Hearings shall be stenographically recorded and transcribed and the testimony of witnesses shall be taken under oath or affirmation. Hearings will be conducted pursuant to section 7 of the Administrative Procedure Act, 60 Stat. 241 (5 U.S.C. 556).

(b) *Failure to appear.* If either party to the proceeding fails to appear at the hearing, after due notice thereof has been sent to the parties, the Administrative Law Judge may make a decision against the absent party by default.

§ 901.45 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints for the suspension or the termination of the enrollment of enrolled actuaries. However, the Administrative Law Judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to § 901.46 may be admitted.

(c) *Proof of documents.* Official documents, records, and papers of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, the Joint Board for the Enrollment of Actuaries or the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries shall be admissible into evidence without the production of an officer or employee to authenticate them. Any such documents, records, and papers may be evidenced by a copy attested to or identified by an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, the Joint Board for the Enrollment of Actuaries, or the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries, as the case may be.

(d) *Exhibits.* If any document, record, or other paper is introduced into evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions which he/she deems proper.

(e) *Objections.* Objections to evidence shall state the grounds relied upon, and the record shall not include argument thereon, except as ordered by the Administrative Law Judge. Rulings on such objections shall be part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

§ 901.46 Depositions.

Depositions for use at a hearing may, with the written approval of the Administrative Law Judge, be taken by either the Executive Director or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories,

upon not less than 10 days written notice to the other party, before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or the Joint Board who is authorized to administer an oath. Such notice shall state the names of the witnesses and the time and place where the depositions are to be taken. The requirement of 10 days notice may be waived by the parties in writing, and depositions may then be taken from the persons and at the times and places mutually agreed upon by the parties. When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and the copies of any written cross-interrogatories shall be mailed or delivered to the opposing party at least five days before the date of taking the depositions, unless the parties mutually agree otherwise. A party upon whose behalf a deposition is taken must file it with the Administrative Law Judge and serve one copy upon the opposing party. Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken.

§ 901.47 Transcript.

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, or the Joint Board, a copy thereof will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking of depositions will be supplied to parties upon the payment of a reasonable fee (31 U.S.C. 9701).

[43 FR 39757, Sept. 7, 1978, as amended at 76 FR 17776, Mar. 31, 2011]

§ 901.48 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the Administrative Law Judge, before making his/her decision, shall give the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor.

§ 901.49 Decision of the Administrative Law Judge.

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge shall make the initial decision in the case. The decision should be based solely upon the pleading, the testimony and exhibits received in evidence at the hearing or specifically authorized to be subsequently submitted under the applicable laws and regulations. The decision shall include (a) a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact or law presented on the record, and (b) an order of suspension, termination or reprimand or an order of dismissal of the complaint. The Administrative Law Judge shall file the decision with the Executive Director and shall transmit a copy thereof to the respondent or his/her attorney or agent of record. In the absence of an appeal to the Joint Board or review of the decision upon motion of the Joint Board, the decision of the Administrative Law Judge shall without further proceedings become the decision of the Joint Board 30 days from the date of the Administrative Law Judge's decision.

§ 901.50 Appeal to the Joint Board.

Within 30 days from the date of the Administrative Law Judge's decision, either party may appeal to the Joint Board for the Enrollment of Actuaries. The appeal shall be filed with the Executive Director in duplicate and shall

include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. If an appeal is filed by the Executive Director, a copy thereof shall be transmitted to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief in duplicate with the Executive Director. If the reply brief is filed by the Executive Director, a copy of it shall be transmitted to the respondent. Upon the filing of an appeal and a reply brief, if any, the Executive Director shall transmit the entire record to the joint board.

§ 901.51 Decision of the Joint Board.

On appeal from or review of the initial decision of the Administrative Law Judge, the Joint Board for the Enrollment of Actuaries will make the final decision. In making its decision the Joint Board will review the record of such portions thereof as may be cited by the parties to permit limiting of the issues. A copy of the Joint Board's decision shall be transmitted to the respondent by the Executive Director.

§ 901.52 Effect of suspension, termination or resignation of enrollment; surrender of enrollment certificate.

If the respondent's enrollment is suspended, the respondent shall not thereafter be permitted to perform actuarial services under ERISA during the period of suspension. If the respondent's enrollment is terminated, the respondent shall not thereafter be permitted to perform actuarial serv- ices under ERISA unless and until authorized to do so by the Executive Director pursuant to § 901.54. The respondent shall surrender his/her enrollment certificate to the Executive Director for cancellation in the case of a termination or resignation of enrollment or for retention during a period of suspension.

§ 901.53 Notice of suspension, termination or resignation of enrollment.

Upon the resignation or the issuance of a final order suspending or terminating the enrollment of an actuary, the Executive Director shall give notice thereof to appropriate officers and employees of the Department of the Treasury, the Department of Labor, the Pension Benefit Guaranty Corporation, and to other interested departments and agencies of the Federal Government.

§ 901.54 Petition for reinstatement.

Any individual whose enrollment has been terminated may petition the Executive Director for reinstatement after the expiration of five years following such termination. Reinstatement may not be granted unless the Executive Director, with the approval of the Joint Board, is satisfied that the petitioner is not likely to conduct himself/herself thereafter contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

Subpart E—General Provisions

AUTHORITY: Sec. 3042(b), ERISA, 29 U.S.C. 1242(b).

SOURCE: 43 FR 39761, Sept. 7, 1978, unless otherwise noted.

§ 901.70 Records.

(a) *Availability*. There are made available for public inspection at the Office of the Executive Director of the Joint Board for the Enrollment of Actuaries a roster of all persons enrolled to perform actuarial services under ERISA and a roster of all persons whose enrollments to perform such services have been suspended or terminated. Other records may be disclosed upon specific request, in accordance with the applicable disclosure and privacy statutes.

(b) *Disciplinary procedures*. A request by an enrolled actuary that a hearing in a disciplinary proceeding concerning him/her be public, and that the record thereof be made available for inspection by interested persons may be granted if written agreement is reached in advance to protect from disclosure tax information which is confidential, in accordance with applicable statutes and regulations.

§ 901.71 Special orders.

The Joint Board reserves the power to issue such special orders as it may deem proper in any case within the purview of this part.

§ 901.72 Additional rules.

The Joint Board may, in notice or other guidance of general applicability, provide additional rules regarding the enrollment of actuaries.

[76 FR 17776, Mar. 31, 2011]

PART 902—RULES REGARDING AVAILABILITY OF INFORMATION

Sec.
902.1 Scope.
902.2 Definitions.
902.3 Published information.
902.4 Access to records.
902.5 Appeal.

AUTHORITY: Sec. 3042, subtitle C, title 3, Employee Retirement Income Security Act of 1974 (88 Stat. 1002, 29 U.S.C. 1241, 1242).

SOURCE: 42 FR 39204, Aug. 3, 1977, unless otherwise noted.

§ 902.1 Scope.

This part is issued by the Joint Board for the Enrollment of Actuaries (the ''Joint Board'') pursuant to the requirements of section 552 of title 5 of the United States Code, including the requirements that every Federal agency shall publish in the FEDERAL REGISTER, for the guidance of the public, descriptions of the established places at which, the officers from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions.

§ 902.2 Definitions.

(a) *Records of the Joint Board*. For purposes of this part, the term ''records of the Joint Board'' means rules, statements, opinions, orders, memoranda, letters, reports, accounts, and other papers containing information in the possession of the Joint Board that constitute part of the Joint Board's official files.

(b) *Unusual Circumstances*. For purposes of this part, ''unusual circumstances'' means, but only to the extent reasonably necessary for the proper processing of the particular request:

(1) The need to search for and collect the requested records from other establishments that are separate from the Joint Board's office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request.

§ 902.3 Published information.

(a) *Federal Register*. Pursuant to sections 552 and 553 of title 5 of the United States Code, and subject to the provisions of § 902.5, the Joint Board publishes in the FEDERAL REGISTER for the guidance of the public, in addition to this part, descriptions of its organization and procedures, substantive rules of general applicability, and, as may from time to time be appropriate, statements of general policy, and interpretations of general applicability.

(b) *Other published information*. From time to time, the Joint Board issues statements to the press relating to its operations.

(c) *Obtaining printed information*. If not available through the Government Printing Office, printed information released by the Joint Board may be obtained without cost from the Executive Director of the Joint Board (''Executive Director'').

§ 902.4 Access to records.

(a) *General rule*. All records of the Joint Board, including information set forth in section 552(a)(2) of title 5 of the United States Code, are made available to any person, upon request, for inspection and copying in accordance with the provisions of this section and subject to the limitations stated in section 552(b) of title 5 of the United States Code. Records falling within such limitations may nevertheless be made available in accordance with this section to the extent consistent, in the judgment of the Chairman of the Joint Board (''Chairman''), with the effective performance of the Joint Board's statutory responsibilities and with the avoidance of injury to a public or private interest intended to be protected by such limitations.

(b) *Obtaining access to records*. Records of the Joint Board subject to

this section are available by appointment for public inspection or copying during regular business hours on regular business days at the office of the Executive Director. Every request for access to such records, other than published records described in § 902.3, shall be signed and submitted in writing to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o Department of the Treasury, Washington, DC 20220, shall state the name and address of the person requesting such access, and shall describe such records in a manner reasonably sufficient to permit their identification without undue difficulty.

(c) *Fees.* A fee at the rate of $5.00 per hour or fraction thereof or the time required to locate such records, plus ten cents per standard page for any copying thereof, shall be paid by any person requesting records other than published records described in § 902.3. In addition, the cost of postage and any packaging and special handling shall be paid by the requester. Documents shall be provided without charge or at a reduced charge where the Chairman determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(d) *Actions on requests.* The Executive Director shall, within ten days (excepting Saturdays, Sundays and legal public holidays) from receipt of request, determine whether to comply with such request for records and shall immediately notify in writing the person making such request of such determination and the reason therefor, and of the right of such person to appeal any adverse determination, as provided in § 902.5. In unusual circumstances, the time limit for the determination may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which the determination is expected to be dispatched. No such notice shall specify a date that will result in an extension of more than ten working days.

§ 902.5 Appeal.

(a) Any person denied access to records requested under § 902.4, may within thirty days after notification of such denial, file a signed written appeal to the Joint Board. The appeal shall provide the name and address of the appellant, the identification of the records denied, and the dates of the original request and its denial.

(b) The Joint Board shall act upon any such appeal within twenty days (excepting Saturdays, Sundays and legal public holidays) of its receipt, unless for unusual circumstances the time for such action is deferred, subject to § 902.4(b), for not more than ten days. If action upon any such appeal is so deferred, the Joint Board shall notify the requester of the reasons for such deferral and the date on which the final reply is expected to be dispatched. If it is determined that the appeal from the initial denial shall be denied (in whole or in part), the requester shall be notified in writing of the denial, of the reasons therefor, of the fact the Joint Board is responsible for the denial, and of the provisions of section 552(a)(4) of title 5 of the United States Code for judicial review of the determination.

(c) Any extension or extensions of time under §§ 902.4(d) and 902.5(b) shall not cumulatively total more than ten days (excepting Saturdays, Sundays and legal public holidays). If an extension is invoked in connection with an initial determination under § 902.4(d), any unused days of such extension may be invoked in connection with the determination on appeal under § 902.5(a), by written notice from the Joint Board.

PART 903—ACCESS TO RECORDS

Subpart A—Records Pertaining to Individuals

Sec.

903.1 Purpose and scope of regulations.
903.2 Definitions.
903.3 Procedures for notification with respect to records regarding individuals.
903.4 Procedures for access to records and accountings of disclosures from records, regarding individuals.
903.5 Procedures for amendment of records regarding individual—format, agency review and appeal from initial adverse agency determination.
903.6 Fees.
903.7 Guardianship.
903.8 Exemptions.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 41 FR 1493, Jan. 8, 1976, unless otherwise noted.

Subpart A—Records Pertaining to Individuals

§ 903.1 Purpose and scope of regulations.

The regulations in this subpart are issued to implement the provisions of the Privacy Act of 1974 (5 U.S.C. 552a). The regulations relate to all records maintained by the Joint Board for the Enrollment of Actuaries (Joint Board) which are identifiable by individual name or identifier and all systems of such records which are retrievable by name or other identifier. They do not relate to personnel records of Government employees, which are under the jurisdiction of the Civil Service Commission, and, thus, subject to regulations issued by such Commission. The regulations set forth the procedures by which individuals may request notification of whether the Joint Board maintains or has disclosed a record pertaining to them or may seek access to such records maintained in any nonexempt system of records, request amendment of such records, and appeal any initial adverse determination with respect to any such request.

§ 903.2 Definitions.

(a) The term *agency* includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency (see 5 U.S.C. 552(e));

(b) The term *individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(c) The term *maintain* includes maintain, use, collect or disseminate;

(d) The term *record* means any item, collection, or grouping of information about an individual that is maintained by the Joint Board, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual such as a finger or voice print or a photograph;

(e) The term *system of records* means a group of any records under the control of the Joint Board from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(f) The term *routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

§ 903.3 Procedures for notification with respect to records regarding individuals.

(a) *Procedures for notification.* The systems of records maintained by the Joint Board are listed annually as required by the Privacy Act of 1974. Any individual, who wishes to know whether a system of records contains a record regarding him, may write to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220. Requests may also be delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington, D.C. between the hours of 9 a.m. and 5 p.m. on workdays. Any such inquiry will be acknowledged in writing within 10 days (excluding Saturdays, Sundays and legal public holidays) of receipt of the request.

(b) *Requests.* A request for notification of whether a record exists shall:

(1) Be made in writing and signed by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative (see § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a, or the regulations contained in this part;

(3) Furnish the name of the system of records with respect to which notification is sought, as specified in the systems notices published in the FEDERAL REGISTER, Volume 40, No. 167;

(4) Mark ''Privacy Act Request'' on the request and on the envelope in which the request is contained;

(5) Be addressed as specified in paragraph (a) of this section, unless personally delivered; and

(6) Meet the requirements set forth in paragraph (c) of this section.

(c) *Verification of identity*. Notification of the existence of records in certain systems maintained by the Joint Board will not be made unless the individual requester's identity is verified. Where applicable, requirements for verification of identity are specified in the notices of systems published in the FEDERAL REGISTER, Volume 40, No. 167.

(d) *Date of receipt of request*. A request for notification with respect to records shall be considered to have been received on the date on which the requirements of paragraphs (a), (b) and (c) of this section have been satisfied. Requests for notification shall be stamped with the date of receipt by the Office of the Executive Director.

(e) *Exemptions*. The procedures prescribed under paragraphs (a), (b) and (c) of this section shall not apply to: (1) Systems of records exempted pursuant to 5 U.S.C. 552a(k); (2) information compiled in reasonable anticipation of a civil action or proceeding (see 5 U.S.C. 552a(d) (5); or (3) information regarding an individual which is contained in, and inseparable from, another individual's record.

(f) *Notification of determination*—(1) *In general*. The Executive Director shall, except as otherwise provided in this paragraph, notify an individual requester as to whether or not a system of records contains a record regarding such individual. Such notification shall be made within 30 days (excluding Saturdays, Sundays and legal public holidays) after the date of receipt of the request, as determined in accordance with paragraph (d) of this section. If it is not possible to respond within 30 days, the Executive Director will inform the requester, stating the reasons for the delay (e.g., volume of records involved, need to consult other agencies, or the difficulty of the legal issues involved) and when a response will be dispatched.

(2) *Denial of request*. When it is determined that a request for notification with respect to records will be denied (whether in whole or in part or subject to conditions or exceptions), the person making the request shall be so notified by mail in accordance with paragraph (f)(1) of this section. The letter of notification shall set forth the name and title or position of the responsible official.

(3) *Records exempt in whole or in part*. (i) When an individual requests notification with respect to records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding either in a court or before an administrative tribunal, the Executive Director will neither confirm nor deny the existence of the record but shall advise the individual only that no record with respect to the existence of which he is entitled to be notified pursuant to the Privacy Act of 1974 has been identified.

(ii) Requests for records which have been exempted from the requirement of notification pursuant to 5 U.S.C. 552a(k)(2) shall be responded to in the manner provided in paragraph (f)(3)(i) of this section.

§ 903.4 Procedures for access to records and accountings of disclosures from records, regarding individuals.

(a) *Access*. The Executive Director of the Joint Board shall, upon request by any individual to gain access to a record regarding him which is contained in a system of records maintained by the Joint Board, or to an accounting of a disclosure from such record made pursuant to 5 U.S.C. 552a(c)(1), permit that individual, and, upon his/her request, a person he/she chooses to accompany him/her, to review the record or any such accounting and have a copy made of all or any portion thereof in a form comprehensible to the individual, except that the Executive Director may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence. Such request may be addressed to the Executive Director, Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220. Requests may also be delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington,

DC, between the hours of 9 a.m. and 5 p.m. on workdays. Any such inquiry will be acknowledged in writing within 10 days (excluding Saturdays, Sundays and legal public holidays) of receipt of the request (see paragraph (e) of this section).

(b) *Requests.* A request for access to records or accountings of disclosure from records, shall:

(1) Be signed in writing by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative (see § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a, or the regulations contained in this part;

(3) Furnish the name of the system of records to which access is sought, or the name of the system for a disclosure from which an accounting is sought, as specified in the systems notices published in the FEDERAL REGISTER, Volume 40, No. 167;

(4) Mark ''Privacy Act Request'' on the request and on the envelope in which the request is contained;

(5) Be addressed as specified in paragraph (a) of this section, unless personally delivered;

(6) State whether the requester wishes to inspect the records and/or accountings of disclosures therefrom, or desires to have a copy made and furnished without inspecting them;

(7) State, if the requester desires to have a copy made, the requester's agreement to pay the fees for duplication as ultimately determined in accordance with § 903.6; and

(8) Meet the requirements set forth in paragraph (c) of this section.

(c) *Verification of identity.* Access to records contained in certain systems maintained by the Joint Board and/or accountings of disclosures from such records, will not be granted unless the individual requester's identity is verified. Where applicable, requirements for verification of identity are specified in the notices of systems published in the FEDERAL REGISTER, Volume 40, No. 167.

(d) *Exemptions.* The procedures specified in paragraphs (a), (b) and (c) of this section shall not apply to: (1) Systems of records exempted pursuant to 5 U.S.C. 552a(k); (2) information compiled in reasonable anticipation of a civil action or proceeding (see 5 U.S.C. 552a(d)(5)); or (3) information regarding an individual which is contained in, and inseparable from, another individual's record.

(e) *Date of receipt of request.* A request for access to records and/or accountings shall be considered to have been received on the date on which the requirements of paragraphs (a), (b) and (c) of this section have been satisfied. Requests for access, and any separate agreement to pay, shall be stamped with the date of receipt by the Office of the Executive Director. The latest of such stamped dates will be deemed to be the date of receipt of the request.

(f) *Notification of determination*—(1) *In general.* Notification of determinations as to whether to grant access to records and/or accountings requested will be made by the Executive Director of the Joint Board. The notification of the determination shall be made within 30 days (excluding Saturdays, Sundays and legal public holidays) after the date of receipt of the request, as determined in accordance with paragraph (g) of this section. If it is not possible to respond within 30 days, the Executive Director will inform the requester, stating the reason(s) for the delay (e.g., volume of records requested, need to consult other agencies, or the difficulty of the legal issues involved) and when a response will be dispatched (See 5 U.S.C. 552a (d) and (f)).

(2) *Granting of access.* (i) When it has been determined that the request for access will be granted—(A) and a copy requested; such copy in a form comprehensible to him shall be furnished promptly, together with a statement of the applicable fees for duplication as set forth elsewhere in these regulations (See § 903.6); and (B) and the right to inspect has been requested, the requester shall be promptly notified in writing of the determination, and when and where the requested records and/or accountings may be inspected.

(ii) An individual seeking to inspect records concerning himself and/or accountings of disclosure from such records may be accompanied by another individual of his own choosing. The individual seeking access shall be

required to sign the required form indicating that the Joint Board is authorized to discuss the contents of the subject record in the accompanying person's presence. If, after making the inspection, the individual making the request desires a copy of all or portion of the requested records, such copy in a form comprehensible to him shall be furnished upon payment of the applicable fees for duplication as prescribed by § 903.6. Fees shall not be charged where they would amount, in the aggregate, to less than $53.00. (See 5 U.S.C. 552a (d) and (f):

(3) *Denial of request.* (i) When it is determined that the request for access to records will be denied (whether in whole or in part or subject to conditions or exceptions), the person making the request shall be so notified by mail in accordance with paragraph (f)(1) of this section. The letter of notification shall contain a statement of the reasons for not granting the request as made, set forth the name and title or position of the responsible official and advise the individual making the request of the right to file suit in accordance with 5 U.S.C. 552a(g)(1)(B).

(ii) When it is determined that a request for access to accountings will be denied, the person making the request shall be so notified by mail in accordance with paragraph (f)(1)(4)(iii) of this section.

(4) *Records exempt in whole or in part.* (i) When an individual requests records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding either in a court or before an administrative tribunal, the Executive Director will neither confirm nor deny the existence of the record but shall advise the individual only that no record available to him pursuant to the Privacy Act of 1974 has been identified.

(ii) Requests for records which have been exempted from disclosure pursuant to 5 U.S.C. 552a(k)(2) shall be responded to in the manner provided in paragraph (f)(4)(i) of this section unless a review of the information indicates that the information has been used or is being used to deny the individual any right, privilege or benefit for which he is eligible or to which he would otherwise be entitled under Federal law. In that event, the individual shall be advised of the existence of the information but such information as would identify a confidential source shall be extracted or summarized in a manner which protects the source to the maximum degree possible and the summary extract shall be provided to the requesting individual.

(iii) When an individual requests access to accountings of disclosure from records concerning himself which have been compiled in reasonable anticipation of a civil action or proceeding, either in a court or before an administrative tribunal, or which have been exempted from disclosure pursuant to 5 U.S.C. 552a(k)(2), the Executive Director will neither confirm nor deny the existence of the record or accountings of disclosure therefrom, but shall advise the individual that no accounting available to him pursuant to the Privacy Act of 1974 has been identified.

§ 903.5 Procedures for amendment of records regarding individual—format, agency review and appeal from initial adverse agency determination.

(a) *In general.* Subject to the application of exemptions promulgated by the Joint Board, in accordance with 5 U.S.C. 552a(k), the Executive Director shall, in conformance with 5 U.S.C. 552a(d)(2), permit an individual to request amendment of a record pertaining to him. Any such request shall be addressed to the Executive Director, Joint Board for the Enrollment of Actuaries, U.S. Department of the Treasury, Washington, DC 20220 or delivered personally to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street, NW., suite 1537, Washington, DC. Any request for amendment of records or any appeal from the initial denial of a request which does not fully comply with the requirements of this section will not be deemed subject to the time constraints of paragraph (e) of this section, unless and until amended so as to comply. However, the Executive Director shall forthwith advise the requester in what respect the request or appeal is deficient so that it may be resubmitted or amended. (See 5 U.S.C. 552a (d) and (f)).

(b) *Form of request to amend records.* In order to be subject to the provisions of

this section, a request to amend records shall:

(1) Be made in writing and signed by the person making the request, who must be the individual about whom the record is maintained, or his duly authorized representative. (See § 903.7);

(2) State that it is made pursuant to the Privacy Act, 5 U.S.C. 552a or these regulations;

(3) Mark ''Privacy Act Amendment Request'' on the request and on the envelope; and

(4) Reasonably describe the records which the individual desires to have amended, including, to the best of the requester's knowledge, dates of letters requesting access to such records previously and dates of letters in which notification concerning access was made, if any, and the individual's documentation justifying the correction. (See 5 U.S.C. 552a (d) and (f)).

(c) *Date of receipt of request.* A request for amendment of records pertaining to an individual shall be deemed to have been received for purposes of this subpart when the requirements of paragraphs (a) and (b) of this section have been satisfied. The Office of the Executive Director shall stamp the date of receipt of the request thereon. (See 5 U.S.C. 552a (d) and (f)).

(d) *Review of requests to amend records.* The Executive Director shall:

(1) Not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(2) Promptly, either—(i) make any correction of any portion of a record which the individual believes and the Executive Director agrees is not accurate, relevant, timely, or complete; or (ii) inform the individual of the refusal to amend the record in accordance with his request, the reason for the refusal, and that he may request that the Joint Board review such refusal. (See 5 U.S.C. 552a (d) and (f)).

(e) *Administrative appeal*—(1) *Ingeneral.* The Joint Board shall permit individuals to request a review of initial decisions made under paragraph (d) of this section when an individual disagrees with a refusal to amend his record. (See 5 U.S.C. 552a(d), and (g)(1)).

(2) *Form of request for administrative review of refusal to amend record.* At any time within 35 days after the date of the notification of the initial decision described in paragraph (d)(2)(ii) of this section, the requester may submit a request for review of such refusal to the official specified in the notification of the initial decision. The appeal shall:

(i) Be made in writing stating any arguments in support thereof and be signed by the person to whom the record pertains, or his duly authorized representative (See § 903.7);

(ii) Within 35 days of the date of the initial decision: (A) Be addressed and mailed to the Joint Board for the Enrollment of Actuaries, c/o U.S. Department of the Treasury, Washington, DC 20220; or (B) be personally delivered to the Executive Director, Joint Board for the Enrollment of Actuaries, 2401 E Street NW., suite 1537, Washington, DC on workdays between the hours of 9 a.m. and 5 p.m.;

(iii) Have clearly marked on the appeal and on the envelope, ''Privacy Act Amendment Appeal'';

(iv) Reasonably describe the records requested to be amended; and

(v) Specify the date of the initial request to amend records, and the date of the letter giving notification that the request was denied. (See 5 U.S.C. 552a (d) and (f)).

(3) *Date of Receipt.* Appeals shall be promptly stamped with the date of their receipt by the Office of the Executive Director and such stamped date will be deemed to be the date of receipt for all purposes of this section. The receipt of the appeal shall be acknowledged within 10 days from the date of receipt (unless the determination on appeal is dispatched in 10 days, in which case, no acknowledgment is required) by the Joint Board and the requester is advised of the date of receipt established by the foregoing and when a response is due in accordance with this paragraph. (See 5 U.S.C. 552a (d) and (f)).

(4) *Review of administrative appeals from denial of requests to amend records.* The Joint Board shall complete the review and notify the requester of the final agency decision within 30 days (exclusive of Saturdays, Sundays and legal public holidays) after the date of

receipt of such appeal, unless it extends the time for good cause shown. If such final agency decision is to refuse to amend the record, in whole or in part, the requester shall also be advised of his right; (i) to file a concise ''Statement of Disagreement'' setting forth the reasons for his disagreement with the decision which shall be filed within 35 days of the date of the notification of the final agency decision and (ii) to seek judicial review of the final agency decision under 5 U.S.C. 552a(g)(1)(A). (See 5 U.S.C. 552a (d), (f) and (g)(1)).

(5) *Notation on record and distribution of statements of disagreement.* (i) The Executive Director is responsible, in any disclosure containing information about which an individual has filed a ''Statement of Disagreement,'' occurring after the filing of the statement under paragraph (e)(4) of this section, for clearly noting any portion of the record which is disputed and providing copies of the statement and, if deemed appropriate, a concise statement of the Joint Board's reasons for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed. (See 5 U.S.C. 552a(d)(4)).

(ii) In addition, when a ''Statement of Disagreement'' is filed regarding information previously disclosed to a person or other agency and when, for such disclosure, an accounting was made pursuant to 5 U.S.C. 552(c)(1). then the Executive Director shall provide such person or other agency with the following:

(A) Copy of the ''Statement of Disagreement'';

(B) Copy of the portion of the previously disclosed in dispute clearly noted as disputed and;

(C) If deemed approprirate, a concise statement of the Joint Board's reasons for not making requested amendments.

(f) *Records not subject to correction.* The following records are not subject to correction or amendment by individuals:

(1) Transcripts or written statements made under oath;

(2) Transcripts of Grand Jury proceedings, judicial or quasi-judicial proceedings which form the official record of those proceedings;

(3) Pre-sentence reports comprising the property of the courts but maintained in agency files;

(4) Records pertaining to the determination, the collection and the payment of federal taxes; and

(5) Records duly exempted from correction by notice published in the FEDERAL REGISTER.

[41 FR 1493, Jan. 8, 1976, as amended at 45 FR 84994, Dec. 24, 1980]

§ 903.6 Fees.

Charges for copies of records made pursuant to part 903 of this chapter will be at the rate of $0.10 per copy. For records not susceptible to photocopying, e.g., over-size materials, photographs, etc., the amount charged will be the actual cost of copying. Only one copy of each record requested will be provided. No charge will be made unless the charge as computed above would exceed $3 for each request or related series of requests. If a fee in excess of $25 is required, the requester will be notified that the fee must be tendered before the records will be copied.

§ 903.7 Guardianship.

The guardian of a person judicially determined to be incompetent shall, in addition to establishing the identity of the person he represents, establish his own guardianship by furnishing a copy of a court order establishing the guardianship and may thereafter act on behalf of such individual. (See 5 U.S.C. 552a(h)).

§ 903.8 Exemptions.

(a) *Names of systems:* JBEA–2, Enrolled Actuary Disciplinary Records; and JBEA–4, Enrolled Actuary Enrollment Records.

(b) *Provisions from which exempted:* These systems contain records described in section (k)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(k)(2). Exemptions are claimed for such records only where appropriate from the following provisions: sections (c)(3); (d); (e)(1); (e)(4)(G), (e)(4)(H), and (e)(4)(I); and (f) of 5 U.S.C. 552a.

(c) *Reasons for claimed exemptions:* (1) The Privacy Act of 1974 creates several methods by which individuals may learn of and obtain records containing

information on such individuals and consisting of investigatory material compiled for law enforcement purposes. These methods are as follows: Subsection (c)(3) allows individuals to discover if other agencies are investigating such individuals; subsections (d)(1), (e)(4)(H) and (f)(2), (3) and (5) establish the ability of individuals to gain access to investigatory material compiled on such individuals; subsections (d)(2), (3) and (4), (e)(4)(H) and (f)(4) presuppose access and enable individuals to contest the contents of investigatory material compiled on these individuals; and subsections (e)(4)(G) and (f)(1) allow individuals to determine whether or not they are under investigation. Because these subsections are variations upon the individual's ability to ascertain whether his civil or criminal misconduct has been discovered, these subsections have been grouped together for purposes of this notice.

(2)(i) The Joint Board believes that imposition of the requirements of subsection (c)(3), which requires that accountings of disclosures be made available to individuals, would impair the ability of the Joint Board and other investigative entities to conduct investigations of alleged or suspected violations of the regulations governing the performance of actuarial services with respect to plans to which the Employee Retirement Income Security Act (ERISA) applies, and of civil or criminal laws. Making the accountings of disclosures available to individuals enables such individuals to identify entities investigating them and thereby to determine the nature of the violations of which they are suspected. With such knowledge, individuals would be able to alter their illegal activities, destroy or alter evidence of such activities and seriously impair the successful completion of investigations. For these reasons, the Joint Board claims exemption from the requirements of subsection (c)(3) of the Act.

(ii) With respect to subsections (d)(1), (e)(4)(H), and (f)(2), (3) and (5), the Joint Board believes that access to investigatory material would prevent the successful completion of investigations. Individuals who gain access to investigatory material involving them discover the nature and extent of the violations of regulations, and of civil and criminal laws, of which they are suspected. By gaining access, such individuals also learn the facts developed during investigations. Knowledge of these matters enables these individuals to destroy or alter evidence which would otherwise have been used against them. In addition, knowledge of the facts and suspected violations gives individuals, who are committing ongoing violations, or who are about to commit violations of regulations, or of civil or criminal laws, the opportunity to temporarily postpone the commission of the violations or to effectively disguise the commission of these violations. Material compiled on investigated individuals reveals investigative techniques and procedures, disclosure of which enables such individuals to structure their illegal activities so as to escape detection. Further, such material may contain, or by its very nature reveal, the identity of confidential sources. When the identities of confidential sources are revealed, they may be subjected to various forms of reprisal. If confidential sources of information are subjected to actual reprisals or fear thereof, they may become reluctant to provide information necessary to identify or prove the guilt of persons who violate regulations, or civil or criminal laws. Further, the protections afforded by the above-referenced subsections are unnecessary because the Joint Board may not deny enrollment or suspend or terminate the enrollment of an individual to perform actuarial services until it has provided such individual with due process safeguards. For these reasons, the Joint Board claims exemptions from the requirements of subsections (d)(1), (e)(4)(H), and (f)(2), (3), and (5) of the Act.

(iii) With respect to subsections (d)(2), (3) and (4), (e)(4)(H), and (f)(4), the Joint Board believes that the imposition of these requirements, which presuppose access and provide for amending records, would impair the ability to conduct investigations and would be unnecessary for the same reasons stated in the preceding subsection (2)(ii). These reasons herein are incorporated by reference. Therefore, the Joint

Board claims exemptions from the requirements of subsections (d)(2), (3), and (4), (e)(4)(H), and (f)(4).

(iv) With respect to subsections (e)(4)(G) and (f)(1), the Joint Board believes that informing individuals that they are the subjects of a particular system or systems of records would impair the ability of the Joint Board and its agents to successfully complete investigations of suspected or alleged violators of the regulations governing the performance of actuarial services with respect to plans to which ERISA applies. Individuals who learn that they are suspected of violating said regulations are given the opportunity to destroy or alter evidence needed to prove the alleged violations. Such individuals may also be able to impair investigations by temporarily suspending or restructuring the activities which place them in violation of said regulations. Further, as noted in the preceding subsection (2)(ii) and incorporated by reference herein, the procedural requirements imposed on the Joint Board by ERISA make the protections afforded by subsections (e)(4)(G) and (f)(1) unnecessary. For these reasons, the Joint Board claims exemptions from the requirements of subsections (e)(4)(G) and (f)(1).

(v) Subsection (e)(1) of the Privacy Act of 1974 requires that the Joint Board maintain in its records only information that is relevant and necessary to accomplish a purpose of the Office required to be accomplished by statute or by executive order of the President. The Joint Board believes that imposition of said requirement would seriously impair its ability, and the abilities of its agents and other investigative entities to effectively investigate suspected or alleged violations of regulations and of civil or criminal laws. The Joint Board does not initiate inquires into individuals' conduct unless it receives information evidencing violation by such individuals of the regulations governing performance of actuarial services with respect to plans to which ERISA applies. Sources of such information may be unfamiliar with the Joint Board's interpretations of said regulations and, therefore, may not always provide only relevant and necessary information. Therefore, it may often be impossible to determine whether or not information is relevant and necessary. For these reasons, the Joint Board claims exemption from the requirements of subsection (e)(1).

(vi) Subsection (e)(4)(I) of the Privacy Act of 1974 requires the publication of the categories of sources of records in each system of records. The Joint Board believes that imposition of said requirement would seriously impair its ability to obtain information from such sources for the following reasons. Revealing such categories of sources could disclose investigative techniques and procedures and could cause sources to decline to provide information because of fear of reprisal, or fear of breaches of promises of confidentiality. For these reasons, the Joint Board claims exemption from the requirements of subsection (e)(4)(I).

[41 FR 1493, Jan. 8, 1976, as amended at 75 FR 81455, Dec. 28, 2010]

PARTS 904–999 [RESERVED]

CHAPTER IX—OFFICE OF THE ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING SERVICE, DEPARTMENT OF LABOR

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PART 1000 [RESERVED]

PART 1001—SERVICES FOR VETERANS

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AUTHORITY: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42.

Subpart A—Purpose and Definitions

§ 1001.100 Purpose and scope of subpart.

(a) This subpart contains the Department of Labor's regulations for implementing 38 U.S.C. 2001–2012, chapters 41 and 42, which require the Secretary of Labor to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through the public employment service system established pursuant to the Wagner-Peyser Act, as amended.

(b) This subpart describes the roles and responsibilities of the Assistant Secretary for Veterans' Employment and Training (ASVET) and the staff of the Veterans' Employment and Training Service (VETS).

(c) This subpart describes the performance standards for determining compliance of State agencies in carrying out the provisions of 38 U.S.C., chapters 41 and 42 with respect to:

(1) Providing services to eligible veterans and eligible persons to enhance their employment prospects,

(2) Priority referral of special disabled veterans and veterans of the Vietnam era to job openings listed by

Federal contractors pursuant to 38 U.S.C. 2012(a), and

(3) Reporting of services provided to eligible veterans and eligible persons pursuant to 38 U.S.C. 2007(c) and 2012(c).

(d) Performance standards are contained in this part at §§ 1001.140–1001.142 on the conduct of the Disabled Veterans Outreach Program (DVOP) in accordance with 38 U.S.C. 2003A.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.101 Definitions of terms used in subpart.

Assistant Secretary for Veterans' Employment and Training (ASVET) shall mean the official of the Department of Labor as described in § 1001.110 of this part.

Assistant State Director for Veterans' Employment and Training Service (ASDVETS) shall mean a Federal employee who is designated as an assistant to a State Director for Veterans' Employment and Training Service (SDVETS).

Disabled Veteran shall mean a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration and whos not classified as a Special Disabled Veteran.

Eligible person shall mean:

(1) The spouse of any person who died of a service-connected disability; or

(2) The spouse of any member of the armed forces serving on active duty who at the time of application for assistance under this subpart, is listed, pursuant to 37 U.S.C. 556 and the regulations issued thereunder, by the Secretary concerned, in one or more of the following categories and has been so listed for a total of more than 90 days: (i) Missing in action, (ii) captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line of duty by a foreign government or power; or

(3) The spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.

Eligible veteran shall mean a person who (1) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (2) was discharged or released from active duty because of a service-connected disability.

Local Veterans' Employment Representative (LVER) shall mean a member of the State agency staff designated and assigned by the State agency administrator to serve veterans and eligible persons pursuant to this subpart.

Regional Director for Veterans' Employment and Training Service (RDVETS) is the representative of the ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the regional level; supervises all other VETS staff within the region to which assigned; and shall report to, be responsible to, and be under the administrative direction of the ASVET.

Service Delivery Point (SDP) shall mean a designated local employment service office which serves an area that may also contain extended service locations.

Special disabled veteran shall mean (1) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration for a disability rated at 30 percent or more, or (2) a person who was discharged or released from active duty because of a service-connected disability.

State agency means the State governmental unit designated pursuant to section 4 of the Wagner-Peyser Act, as amended, to cooperate with the United States Employment Service in the operation of the public employment service system.

State Director for Veterans' Employment and Training Service (SDVETS) is the representative of ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the State level.

United States Employment Service (USES) shall mean the component of the Employment and Training Administration of the Department of Labor, established under the Wagner-Peyser

Act, as amended, to maintain and coordinate a national system of public employment service agencies.

Veteran of the Vietnam era shall mean an eligible veteran who (1) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era (August 5, 1964, through May 7, 1975) and was discharged or released therefrom with other than a dishonorable discharge; or (2) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era.

Veterans' Employment and Training Service (VETS) shall mean the organizational component of the Department of Labor administered by the Assistant Secretary of Labor for Veterans' Employment and Training established to promulgate and administer policies and regulations to provide eligible veterans and eligible persons the maximum of employment and training opportunities according to 38 U.S.C. 2002.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

Subpart B—Federal Responsibilities

§ 1001.110 Role of the Assistant Secretary for Veterans' Employment and Training (ASVET).

(a) As the principal veterans' advisor to the Secretary of Labor, the ASVET shall formulate, promulgate, and administer policies, regulations, grant procedures, grant agreements and administrative guidelines and administer them through the Veterans' Employment and Training Service (VETS) so as to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through existing programs, coordination, and merger of programs and implementation of new programs.

(b) ASVET shall oversee activities carried out by State agencies pursuant to 38 U.S.C., chapters 41 and 42.

(c) ASVET shall ensure that appropriate records and reports are maintained by State agencies within their management information systems to fulfill their obligations under this subpart.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989]

Subpart C—Standards of Performance Governing State Agency Services to Veterans and Eligible Persons

SOURCE: 49 FR 12919, Mar. 30, 1984, unless otherwise noted. Redesignated at 54 FR 39353, Sept. 26, 1989.

§ 1001.120 Standards of performance governing State agency services.

(a) To the extent required by 38 U.S.C. 2002 and other applicable law, each State agency shall assure that all of its SDPs, using LVERs and other staff, shall provide maximum employment and training opportunities to eligible veterans and eligible persons with priority given to disabled veterans and veterans of the Vietnam-era, by giving them preference over non-veterans in the provision of employment and training services available at the SDP involved. Services are those activities or efforts including but not limited to registration, counseling, referral to supportive services, job development, etc., which are directed to help applicants find jobs or training. When making referrals from the group of applicants meeting the specific eligibility criteria for a particular program, State agencies shall observe the priority order to referral in paragraph (b).

(b) In making referrals of qualified applicants to job openings and training opportunities, to provide maximum employment and training opportunities under 38 U.S.C., SDPs shall observe the following order of priority:

(1) Special disabled veterans;

(2) Veterans of the Vietnam era;

(3) Disabled veterans other than special disabled veterans;

(4) All other veterans and eligible persons; and

(5) Nonveterans.

§ 1001.121 Performance standard on facilities and support for Veterans' Employment and Training Service (VETS) staff.

Each State agency shall provide adequate and appropriate facilities and administrative support such as office space, furniture, telephone, equipment, and supplies to VETS staff.

§ 1001.122 Reporting and budget requirements.

(a) State agencies shall provide RDVETS, SDVETS, and ASDVETS with access to regular and special internal State agency reports which relate in whole or in part with services to veterans and/or eligible persons.

(b) Each State agency shall make reports and prepare budgets pursuant to instructions issued by the ASVET and in such format as the ASVET shall prescribe.

§ 1001.123 Performance standards governing the assignment and role of Local Veterans' Employment Representatives (LVERs).

(a) To carry out the requirements of 38 U.S.C. 2004, at least one member of each State agency staff, preferably an eligible veteran, shall be designated and assigned by each State agency administrator as a full-time or part-time LVER in each SDP in accordance with terms/requirements of a grant agreement approved by the ASVET. The ASVET intends to use the following criteria in establishing the terms and requirements of grant agreements:

(1) At least one full-time LVER shall be assigned in each SDP which has had 1,000 new or renewed applications from veterans and eligible persons during the most recent twelve-month report period unless a waiver based on demonstrated lack of need is granted by the ASVET, and

(2) At least one part-time LVER whose time shall be devoted to veterans' services in proportion to the full-time criteria shall be assigned to each SDP not meeting the criteria for full-time LVERs in paragraph (a)(1) of this section.

(b) Additional full-time or part-time LVERs may be assigned based on a determination of need by the State agency administrator and in accordance with terms/requirements of a grant agreement approved by the ASVET.

(c) Each LVER shall perform, at the SDP level, the duties prescribed at 38 U.S.C. 2003(c) required by 38 U.S.C. 2004.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.124 Standards of performance governing State agency cooperation and coordination with other agencies and organizations.

(a) Each State agency shall establish cooperative working relationships through written agreements with the Veterans Administration (VA) offices serving the State to maximize the use of VA employment and training programs for veterans and eligible persons.

(b) All programs and activities governed by this subpart will be coordinated to the maximum extent feasible with other programs and activities under 38 U.S.C., the Wagner-Peyser Act, the Job Training Partnership Act, and other employment and training programs at the State and local level.

(c) Such relationships or agreements may be described in the Governor's Coordination and Special Services Plan prepared according to section 121(b) of the Job Training Partnership Act (Pub. L. 97–300).

§ 1001.125 Standards of performance governing complaints of veterans and eligible persons.

Each SDP shall display information on the various complaint systems to advise veterans and eligible persons about procedures for filing employment service, Federal contractor, equal opportunity, and other complaints.

Subpart D—State Employment Service Agency Compliance

§ 1001.130 Determination of compliance.

(a) The ASVET shall have authority for applying the requirements and remedial actions necessary to implement 20 CFR part 658, subpart H. In the event of such application, references in 20 CFR part 658, subpart H, to ''ETA'' shall read instead ''OASVET''; references to ''Regional Administrator''

shall read instead ''RDVETS''; and references to ''JS regulations'' shall include this part.

(b) The ASVET shall establish appropriate program and management measurement and appraisal mechanisms to ensure that the standards of performance set forth in §§1001.120–1001.125 of this part are met. Specific performance standards designed to measure State agency services provided to veterans and eligible persons required by §1001.120(a) of this part will be developed administratively through negotiations between State agency administrators and SDVETS and numerical values of the standards will be published as public notices in the FEDERAL REGISTER. A full report of those State agencies in noncompliance with the standards of performance and their corrective action plans shall be incorporated into the Secretary's annual report to the Congress cited at §1001.131 of this part.

(c) Every effort should be made by the State agency administrator and the SDVETS to resolve all issues informally before proceeding with the formal process.

(d) If it is determined by the ASVET that certain State agencies are not complying with the performance standards at §§1001.120–1001.125 of this part, such State agencies shall be required to provide documentary evidence to the ASVET that their failure is based on good cause. If good cause is not shown, the ASVET, pursuant to subpart H of 20 CFR part 658, shall formally designate the State agency as out of compliance, shall require it to submit a corrective action plan for the following program year, and may take other action against the State agency pursuant to subpart H of 20 CFR part 658.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§1001.131 Secretary's annual report to Congress.

The Secretary shall report, after the end of each program year, on the success of the Department and State agencies in carrying out the provisions of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

Subpart E—Standards of Performance Governing the Disabled Veterans Outreach Program (DVOP)

SOURCE: 49 FR 12919, Mar. 30, 1984, unless otherwise noted. Redesignated at 54 FR 39353, Sept. 26, 1989.

§1001.140 Administration of DVOP.

(a) The ASVET shall negotiate and enter into grant agreements within each State to carry out the requirements of 38 U.S.C. 2003A for support of a Disabled Veterans Outreach Program (DVOP) to meet the employment needs of veterans, especially disabled veterans of the Vietnam era.

(b) The ASVET shall be responsible forthe supervision and monitoring of the DVOP program, including monitoring of the appointment of DVOP specialists.

(c) DVOP specialists shall be in addition to and shall not supplant local veterans' employment representatives assigned under §1001.123 of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

§1001.141 Functions of DVOP staff.

Each DVOP specialist shall carry out the duties and functions for providing services to eligible veterans according to provisions of 38 U.S.C. 2003A (b) and (c).

§1001.142 Stationing of DVOP staff.

DVOP specialists shall be stationed at various locations in accordance with 38 U.S.C. 2003A(b)(2).

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

SOURCE: 70 FR 28406, May 17, 2005, unless otherwise noted.

§ 1001.150 Method of calculating State basic grant awards.

(a) In determining the amount of funds available to each State, the ratio of the number of veterans seeking employment in the State to the number of veterans seeking employment in all States will be used.

(b) The number of veterans seeking employment will be determined based on the number of veterans in the civilian labor force and the number of unemployed persons. The civilian labor force data will be obtained from the Current Population Survey (CPS) and the unemployment data will be obtained from the Local Area Unemployment Statistics (LAUS), both of which are compiled by the Department of Labor's Bureau of Labor Statistics.

(c) Each State's basic grant allocation will be determined by dividing the number of unemployed persons in each State by the number of unemployed persons across all States (LAUS for the individual States / LAUS for all States) and by dividing the number of veterans in the civilian labor force in each State by the number of veterans in the civilian labor force across all States (CPS for the individual States / CPS for all States). The result of these two ratios will be averaged and converted to a percentage of veterans seeking employment in the State compared to the percentage of veterans seeking employment in all States. Three-year averages of the CPS and LAUS data will be used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid undue fluctuations in the annual basic grant amounts allocated to States.

(d) State Plans are prepared in response to estimated basic grant allocation amounts prepared by the Department of Labor, based upon a projection of the appropriation. Variations from Department of Labor projections will be treated as follows:

(1) If the actual appropriation varies from the projection, the Secretary will make every reasonable effort to avoid recalculating the estimated basic grant allocation amounts, in order to maintain the delivery of services to veterans and to minimize the administrative workload required to recalculate grant allocations and to revise State Plans. Therefore upon enactment and allotment of an appropriated amount, it is the Department's intent to proceed by awarding the estimated basic grant allocation amounts to State agencies, unless the difference between the projection and the appropriation creates a compelling reason to do otherwise.

(2) If the actual appropriation exceeds the projection, the Secretary will determine whether the appropriation and the projection is large enough to warrant recalculating the State basic grant amounts. In such case, state basic grant amounts will be recalculated in accordance with paragraphs (a) through (c) of this section. If it is determined that no compelling reason to recalculate exists, the increased amount available for basic grants will be retained as undistributed funds. These undistributed basic grant funds will be retained separately from the funds retained for TAP workload and other exigencies, as established by § 1001.151(a). The intent will be to award these undistributed basic grant funds to States as basic grant supplements, in response to circumstances arising during the applicable fiscal year.

(3) If the actual appropriation falls below the projection, the Secretary will determine whether the lower appropriation creates a compelling reason to recalculate the State basic grant amounts. If it is determined that not recalculating the State basic grant amounts would jeopardize the availability of sufficient funding for TAP workload and other exigencies, a compelling reason to recalculate would exist. In that case, the State basic grant amounts will be recalculated under paragraphs (a) through (c) of this section in response to the reduced appropriation, to the extent required to assure that sufficient funding is available for TAP workload and other exigencies.

§ 1001.151 Other funding criteria.

(a) Up to four percent of the total amount available for allocation will be available for distribution based on Transition Assistance Program (TAP) workload and other exigencies.

(b) Funding for TAP workshops will be allocated on a per workshop basis.

Funding to the States will be provided pursuant to the approved State Plan.

(c) Funds for exigent circumstances, such as unusually high levels of unemployment, surges in the demand for transitioning services, including the need for TAP workshops, will be allocated based on need.

§ 1001.152 Hold-harmless criteria and minimum funding level.

(a) A hold-harmless rate of 90 percent of the prior year's funding level will be applied after the funding formula phase-in period is completed (beginning fiscal year 2006 and subsequent years).

(b) A hold-harmless rate of 80 percent of the prior year's funding level will be applied for fiscal year 2005.

(c) A minimum funding level is established to ensure that in any year, no State will receive less than 0.28 percent (.0028) of the previous year's total funding for all States.

(d) If the appropriation for a given fiscal year does not provide sufficient funds to comply with the hold-harmless provision, the Department will:

(1) Update, as appropriate, the States' estimates of TAP workload and reserve sufficient funds for that purpose from the total amount available for allocation to the States. Beyond TAP workload, no funds will be reserved for exigent circumstances because the shortfall in the appropriation will be the primary exigent circumstance to be addressed.

(2) Apply proportionally the remaining balance available for basic grant allocations to the States for that fiscal year. The proportion will be calculated by dividing the remaining balance available for allocation by the total estimated State basic grant allocations for that fiscal year. The proportion resulting from that calculation will be applied to each State's estimated basic grant allocation to calculate the amount to be awarded.

Subpart G—Purpose and Definitions

SOURCE: 78 FR 15290, Mar. 11, 2013, unless otherwise noted.

§ 1001.160 What is the purpose and scope of this part?

(a) The purpose of this part is to fulfill the requirement of 38 U.S.C. 4102A(c)(3)(B) to establish a uniform national threshold entered employment rate (UNTEER) achieved for veterans and eligible persons by the State employment service delivery systems. We will use the UNTEER as part of the review process for determining whether a State's program year EER is deficient and a Corrective Action Plan (CAP) is required of that State employment service delivery system.

(b) This part is applicable to all State agencies that are recipients of Wagner-Peyser State Grants, and/or Jobs for Veterans State Grants.

§ 1001.161 What definitions apply to this part?

Department means the United States Department of Labor, including its agencies and organizational units and their representatives.

Eligible person, as defined at 38 U.S.C. 4101(5), means:

(1) The spouse of any person who died of a service-connected disability;

(2) The spouse of any member of the Armed Forces serving on active duty who, at the time of application for assistance under this chapter, is listed, pursuant to 37 U.S.C. 556 and regulations issued thereunder by the Secretary concerned, in one or more of the following categories and has been so listed for a total of more than ninety days:

(i) Missing in action,

(ii) Captured in line of duty by a hostile force, or

(iii) Forcibly detained or interned in line of duty by a foreign government or power; or

(3) The spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.

Employment service delivery system, as defined at 38 U.S.C. 4101(7), means a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.

Jobs for Veterans Act (JVA) means Public Law 107–288, 116 Stat. 2033 (2002), codified at 38 U.S.C. chapters 41 and 42.

Jobs for Veterans State Grant (JVSG) means an award of Federal financial assistance by the Department to a State for the purposes of the Disabled Veterans' Outreach Program or the Local Veterans' Employment Representative Program.

Program year is the period from July 1 of a year through June 30 of the following year and is numbered according to the calendar year in which it begins.

§ 1001.162 How does the Department define veteran for purposes of this subpart?

The Department applies two definitions of veteran for the purposes of this subpart and has established two stages for the implementation of these definitions.

(a) The first stage of implementation begins with application of this subpart G to the first program year following May 10, 2013. As of that date, veteran is defined as it is in 38 U.S.C. 4211(4), as a person who:

(1) Served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge;

(2) Was discharged or released from active duty because of a service-connected disability;

(3) As a member of a reserve component under an order to active duty pursuant to 10 U.S.C. 12301(a), (d), or (g), 12302, or 12304, served on active duty during a period of war or in a campaign or expedition for which a campaign badge is authorized and was discharged or released from such duty with other than a dishonorable discharge; or

(4) Was discharged or released from active duty by reason of a sole survivorship discharge (as that term is defined in 10 U.S.C.1174(i)).

(b) The second stage of implementation begins with the first day of the program year that begins two years after the first day of the program year that State grantees begin collecting and maintaining data as required by 20 CFR 1010.330(c). As of that date, veteran will be defined as it is in 20 CFR 1010.110:

(1) A person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable, as specified in 38 U.S.C. 101(2).

(2) Active service includes full-time Federal service in the National Guard or a Reserve component, other than full-time duty for training purposes.

(c) During the second stage of implementation, any veteran who meets the definition specified in paragraph (a) of this section will be considered to meet the definition specified in paragraph (b) of this section.

(d) We will notify State grantees when they are required to begin implementing 20 CFR 1010.330(c).

§ 1001.163 What is the national entered employment rate (EER) and what is a State's program year EER for purposes of this part?

(a) For purposes of this part, we use the EER for veterans and eligible persons. This is the EER as applied to veterans (as defined in § 1001.162) and eligible persons (as defined in § 1001.161) who are participants in State employment service delivery systems.

(b) The EER for veterans and eligible persons measures the number of the participants described in paragraph (a) of this section who are employed after exiting an employment service delivery system compared to the total number of those participants who exited. We will issue policy guidance to establish the method of calculating the EER.

(c) The national EER for veterans and eligible persons is the EER achieved by the national State employment service delivery system for those veterans and eligible persons who are participants in all of the State employment service delivery systems for the program year under review. The national EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

(d) A State's program year EER is the EER for veterans and eligible persons (as calculated in paragraph (b) of this section) achieved by a single State's employment service delivery system for those veterans and eligible persons who are included in the EER measure for that State's employment

service delivery system for the program year under review. The program year EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

§ 1001.164 What is the uniform national threshold EER, and how will it be calculated?

(a) The uniform national threshold EER for a program year is equal to 90 percent of the national EER for veterans and eligible persons (as defined in § 1001.163(c)).

(b) The uniform national threshold EER resulting from this calculation is expressed as a percentage that is rounded to the nearest tenth of a percent.

§ 1001.165 When will the uniform national threshold EER be published?

When practicable, the Veterans' Employment and Training Service (VETS) will publish the uniform national threshold EER for a given program year by the end of December of the calendar year in which that program year ends.

§ 1001.166 How will the uniform national threshold EER be used to evaluate whether a State will be required to submit a Corrective Action Plan (CAP)?

(a) *Comparison*. Each State's program year EER will be compared to the uniform national threshold EER for that program year. State agencies that do not achieve a program year EER that equals or exceeds the uniform national threshold EER (90 percent of the national EER) for the year under review will be subject to a review by VETS, with input from the Employment and Training Administration (ETA), to determine whether the program year EER is deficient.

(b) *Review*. For each State whose program year EER is subject to review to determine deficiency, the review will consider the degree of difference between the State's program year EER and the uniform national threshold EER for that program year, as well as the annual unemployment data for the State as compiled by the Bureau of Labor Statistics.

(1) The review also may consider other relevant measures of prevailing economic conditions and regional economic conditions, as well as other measures of the performance of workforce programs and/or any information the State may submit.

(2) The review will include consultation with VETS and ETA field staff about findings from their on-site reviews and desk audits of State agency implementation of policies and procedures for services to veterans and also may include consultation with staff affiliated with other agencies of the Department, as appropriate.

(c) *Requirement of a CAP*. After review, a State whose program year EER is determined not to be deficient will be notified that a CAP will not be required; a State whose program year EER is determined to be deficient will be required to submit a CAP to improve the State's performance in assisting veterans to meet their employment needs as a condition of receiving its next-due JVSG.

(1) Any State whose program year EER has been determined to be deficient will be notified by March 31 of the year following the calendar year in which the program year under review ended.

(2) For any State that is required to submit a CAP, VETS will provide technical assistance (TA), with input from ETA, on the development of the CAP. The CAP must be submitted to the Grant Officer's Technical Representative by June 30 of the year following the calendar year in which the program year under review ended.

(3) We will review the CAP submitted by the State and determine, with input from ETA, whether to approve it or to provide additional TA to the State.

(i) If we approve the CAP, the State must expeditiously implement it.

(ii) If we do not approve the CAP, we will take such steps as are necessary to implement corrective actions to improve the State's EER for veterans and eligible persons.

(4) If a State fails to take the actions we impose under paragraph (c)(3)(ii) of this section, the Assistant Secretary for Veterans' Employment and Training may take any actions available to remedy non-compliance under 20 CFR

1001.130(a) (referring to the compliance measures discussed in 20 CFR part 658, subpart H).

§ 1001.167 In addition to the procedures specified in this part, will the Department be conducting any other monitoring of compliance regarding services to veterans?

Yes. We will continue to monitor compliance with the regulations on veterans' priority of service at 20 CFR 1010.240(b) jointly with the ETA. If a State's program year EER is determined to be deficient for a given program year, that deficiency would constitute information to be considered in monitoring priority of service, since failure to fully implement priority of service could be one of the contributors to a deficient program year EER.

PART 1002—REGULATIONS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

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APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

AUTHORITY: Section 4331(a) of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4331(a) (Pub. L. 103–353, 108 Stat. 3150).

SOURCE: 70 FR 75292, Dec. 19, 2005, unless otherwise noted.

Subpart A—Introduction to the Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994

GENERAL PROVISIONS

§ 1002.1 What is the purpose of this part?

This part implements the Uniformed Services Employment and Reemployment Rights Act of 1994 (''USERRA'' or ''the Act''). 38 U.S.C. 4301–4334. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Department of Labor in enforcing and giving assistance under USERRA. These regulations implement USERRA as it applies to States, local governments, and private employers. Separate regulations published by the Federal Office of Personnel Management implement USERRA for Federal executive agency employers and employees.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

§ 1002.3 When did USERRA become effective?

USERRA became law on October 13, 1994. USERRA's reemployment provisions apply to members of the uniformed services seeking civilian reemployment on or after December 12, 1994. USERRA's anti-discrimination and anti-retaliation provisions became effective on October 13, 1994.

§ 1002.4 What is the role of the Secretary of Labor under USERRA?

(a) USERRA charges the Secretary of Labor (through the Veterans' Employment and Training Service) with providing assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under the Act. More information about the Secretary's role in providing this assistance is contained in Subpart F.

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to States, local governments, and private employers. These regulations are issued under this authority.

(c) The Secretary of Labor delegated authority to the Assistant Secretary

for Veterans' Employment and Training for administering the veterans' reemployment rights program by Secretary's Order 1–83 (February 3, 1983) and for carrying out the functions and authority vested in the Secretary pursuant to USERRA by memorandum of April 22, 2002 (67 FR 31827).

§ 1002.5 What definitions apply to USERRA?

(a) *Attorney General* means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under USERRA.

(b) *Benefit, benefit of employment, or rights and benefits* means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employer policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or the location of employment.

(c) *Employee* means any person employed by an employer. The term also includes any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States. ''Employee'' includes the former employees of an employer.

(d)(1) *Employer*, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities, including—

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

(iv) Any successor in interest to a person, institution, organization, or other entity referred to in this definition; and,

(v) A person, institution, organization, or other entity that has denied initial employment in violation of 38 U.S.C. 4311, USERRA's anti-discrimination and anti-retaliation provisions.

(2) In the case of a National Guard technician employed under 32 U.S.C. 709, the term ''employer'' means the adjutant general of the State in which the technician is employed.

(3) An employee pension benefit plan as described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA)(29 U.S.C. 1002(2)) is considered an employer for an individual that it does not actually employ only with respect to the obligation to provide pension benefits.

(e) *Health plan* means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) *National Disaster Medical System (NDMS)* is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188. The NDMS provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are participating in authorized training. See 42 U.S.C. 300hh–11(e).

(g) *Notice*, when the employee is required to give advance notice of service, means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

(h) *Qualified*, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(i) *Reasonable efforts*, in the case of actions required of an employer, means actions, including training provided by an employer that do not place an undue hardship on the employer.

(j) *Secretary* means the Secretary of Labor or any person designated by the Secretary of Labor to carry out an activity under USERRA and these regulations, unless a different office is expressly indicated in the regulation.

(k) *Seniority* means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.

(l) *Service in the uniformed services* means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System (NDMS) or as a participant in an authorized training program is deemed ''service in the uniformed services.'' 42 U.S.C. 300hh–11(e)(3).

(m) *State* means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof); however, for purposes of enforcement of rights under 38 U.S.C. 4323, a political subdivision of a State is a private employer.

(n) *Undue hardship*, in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of—

(1) The nature and cost of the action needed under USERRA and these regulations;

(2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,

(4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(o) *Uniformed services* means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed ''service in the uniformed services,'' although such appointee is not a member of the ''uniformed services'' as defined by USERRA.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?

USERRA's definition of ''service in the uniformed services'' covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B—Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

§ 1002.18 What status or activity is protected from employer discrimination by USERRA?

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?

An employer must not retaliate against an individual by taking any adverse employment action against him or her because the individual has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation: or, exercised a right provided for by USERRA.

§ 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?

Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services.

§ 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?

The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and .38) and employment positions, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, nonrecurrent positions of employment.

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

(a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:

(1) Membership or application for membership in a uniformed service;

(2) Performance of service, application for service, or obligation for service in a uniformed service;

(3) Action taken to enforce a protection afforded any person under USERRA;

(4) Testimony or statement made in or in connection with a USERRA proceeding;

(5) Assistance or participation in a USERRA investigation; or,

(6) Exercise of a right provided for by USERRA.

(b) If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.

Subpart C—Eligibility For Reemployment

GENERAL ELIGIBILITY REQUIREMENTS FOR REEMPLOYMENT

§ 1002.32 What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?

(a) In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

(1) The employer had advance notice of the employee's service;

(2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

(3) The employee timely returns to work or applies for reemployment; and,

(4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for

reemployment unless the employer establishes one of the defenses described in § 1002.139. The employment position to which the employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?

No. The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment.

COVERAGE OF EMPLOYERS AND POSITIONS

§ 1002.34 Which employers are covered by USERRA?

(a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.

(b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.

(c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.

§ 1002.35 Is a successor in interest an employer covered by USERRA?

USERRA's definition of ''employer'' includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

(a) Whether there has been a substantial continuity of business operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.

§ 1002.36 Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment claim at the time of merger, acquisition, or other form of succession.

§ 1002.37 Can one employee be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign the employee to a job because of a uniformed service obligation (for example, National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes the employee's removal from the job position because of his or her uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.

§ 1002.38 Can a hiring hall be an employer?

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of ''employer'' includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.

§ 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?

Yes. States and their political subdivisions, such as counties, parishes, cities, towns, villages, and school districts, are considered employers under USERRA. The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and territories of the United States, are also considered employers under the Act.

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?

Yes. The Act's definition of employer includes a person, institution, organization, or other entity that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her ''employer'' under the Act, if it has denied initial employment on the basis of the individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

(a) If an employee is laid off with recall rights, on strike, or on a leave of absence, he or she is an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services, or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service. Similar principles

apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she still remains an employee for purposes of the Act. Therefore, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

(c) If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. Reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in the civilian employment position.

§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?

Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?

(a) No. USERRA does not provide protections for an independent contractor.

(b) In deciding whether an individual is an independent contractor, the following factors need to be considered:

(1) The extent of the employer's right to control the manner in which the individual's work is to be performed;

(2) The opportunity for profit or loss that depends upon the individual's managerial skill;

(3) Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;

(4) Whether the service the individual performs requires a special skill;

(5) The degree of permanence of the individual's working relationship; and,

(6) Whether the service the individual performs is an integral part of the employer's business.

(c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"

Yes. USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine an employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not ''service in the uniformed services.''

§ 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42

U.S.C. 300hh 11(e)(3), ''service in the uniformed services'' includes service performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the individual is not a member of the uniformed services.

§ 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or these regulations.

§ 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Service in the commissioned corps of the Public Health Service (PHS) is ''service in the uniformed services'' under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency the President has authority to designate any category of persons as a ''uniformed service'' for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be ''service in the uniformed services'' under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions.

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not ''service in the uniformed services.'' However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered ''service in the uniformed services,'' and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under

USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a ''uniformed service'' for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered ''service in the uniformed services'' for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

§ 1002.73 Does service in the uniformed services have to be an employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?

No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if the employee is required to report to an out of State location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

REQUIREMENT OF NOTICE

§ 1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an ''appropriate officer'' can give notice on the employee's behalf. An ''appropriate officer'' is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department ''strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.''

§ 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?

The employee is required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of ''military necessity,'' and such a determination is not subject to judicial review. Guidelines for defining ''military necessity'' appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by ''military necessity.'' See 42 U.S.C. 300hh–11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee's employer or the employer's representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to

seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?

Yes. In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?

No. An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment.

§ 1002.102 Does the five-year service limit include periods of service that the employee performed before USERRA was enacted?

It depends. USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or

to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the employee was called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

APPLICATION FOR REEMPLOYMENT

§ 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) *Period of service less than 31 days or for a period of any length for the purpose of a fitness examination.* If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, *i.e.*, no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.

(b) *Period of service more than 30 days but less than 181 days.* If the employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or verbal) with the employer not later than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of his or her own, he or she must submit the application not later than the next full calendar day after it becomes possible to do so.

(c) *Period of service more than 180 days.* If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

§ 1002.116 Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?

Yes. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the employee fails to report for or submit a timely application for reemployment?

(a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

(b) If reporting or submitting an employment application to the employer is impossible or unreasonable through no fault of the employee, he or she may report to the employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and the employee will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.

§ 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

§ 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;

(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;

(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;

(4) Certificate of completion from military training school;

(5) Discharge certificate showing character of service; and,

(6) Copy of extracts from payroll documents showing periods of service;

(7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an employee to be entitled to reemployment under USERRA?

USERRA does not require any particular form of discharge or separation from service. However, even if the employee is otherwise eligible for reemployment, he or she will be disqualified if the characterization of service falls within one of four categories. USERRA requires that the employee not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

Reemployment rights are terminated if the employee is:

(a) Separated from uniformed service with a dishonorable or bad conduct discharge;

(b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;

(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,

(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?

The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?

Yes. A military review board has the authority to prospectively or retroactively upgrade a disqualifying discharge or release. A retroactive upgrade would restore reemployment rights providing the employee otherwise meets the Act's eligibility criteria.

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

No. A retroactive upgrade allows the employee to obtain reinstatement with the former employer, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employer in this situation.

EMPLOYER STATUTORY DEFENSES

§ 1002.139 Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?

(a) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

(b) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that assisting the employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(n) and discussed in § 1002.198, on the employer; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

Subpart D—Rights, Benefits, and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

FURLOUGH AND LEAVE OF ABSENCE

§ 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as ''terminated'' during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave

of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be ''comparable'' to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

§ 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

§ 1002.153 If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employer may not require the employee to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

HEALTH PLAN COVERAGE

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which the employee's health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those

sponsored by State or local governments or religious organizations for their employees.

(c) USERRA covers multiemployer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to multiemployer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multiemployer plans in certain situations.

§ 1002.164 What health plan coverage must the employer provide for the employee under USERRA?

If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

(b) USERRA does not require the employer to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employer to permit the employee to initiate new health plan coverage at the beginning of a period of service if he or she did not previously have such coverage.

§ 1002.165 How does the employee elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that the employee give advance notice of service in the uniformed services. For example, the employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the employee pay in order to continue health plan coverage?

(a) If the employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employer's share plus the employee's share, plus 2% for administrative costs.

(c) USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) *No notice of service and no election of continuation coverage:* If an employer

provides employment-based health coverage to an employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an employee must first be excused from giving notice of service under the statute.

(b) *Notice of service but no election of continuing coverage:* Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan;

(2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) *Election of continuation coverage without timely payment:* Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that

are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?

USERRA requires the employer to reinstate health plan coverage upon request at reemployment. USERRA permits but does not require the employer to allow the employee to delay reinstatement of health plan coverage until a date that is later than the date of reemployment.

§ 1002.170 In a multiemployer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multiemployer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multiemployer plan that provides health plan coverage through a health benefits account system?

(a) Some employees receive health plan benefits provided pursuant to a multiemployer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as ''dollar bank,'' ''credit bank,'' and ''hour bank'' plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:

(1) The employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an employee entitled to be reemployed by his or her civilian employer?

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?

''Prompt reemployment'' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the employee entitled to upon reemployment?

As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

§ 1002.192 How is the specific reemployment position determined?

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then

the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine the reemployment position?

Once the employee's escalator position is determined, other factors may allow, or require, the employer to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the employee's most recent period of uniformed service;

(b) The employee's qualifications; and,

(c) Whether the employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the employee's reemployment position if the period of service was less than 91 days?

Following a period of service in the uniformed services of less than 91 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the employee's period of service in the uniformed services was more than 90 days?

Following a period of service of more than 90 days, the employee must be reemployed according to the following priority:

(a) The employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

§ 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(a)(1) ''Qualified'' means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employer makes reasonable efforts, as defined in § 1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

§ 1002.199 What priority must the employer follow if two or more returning employees are entitled to reemployment in the same position?

If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an employee have when reemployed following a period of uniformed service?

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example,

under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

§ 1002.211 Does USERRA require the employer to use a seniority system?

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;

(b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,

(c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified

for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:

(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(b) ''Qualified'' has the same meaning here as in § 1002.198.

RATE OF PAY

§ 1002.236 How is the employee's rate of pay determined when he or she returns from a period of service?

The employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:

(a) If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employer must compensate

him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause—

(a) For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,

(b) For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

(a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

(b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an employee's pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

(a) Depending on the length of the employee's period of service, he or she is entitled to take from one to ninety days following service before reporting back to work or applying for reemployment (See § 1002.115). This period of time must be treated as continuous service with the employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employer for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by the employer or employers is covered under USERRA. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees.

(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee's period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee contributions, if any; and his or her elective deferrals, if any; in the same manner and to the same extent that it allocates the amounts for other employees during the period of service. In the case of a defined benefit plan, the employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?

(a) The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Make-up contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution because the employer is required to make contributions that are contingent on or attributable to the employee's contributions or elective deferrals only to the extent that the employee makes up his or her payments to the plan. Any employer contributions that are contingent on or attributable to the employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals the employee will be able to make to the pension plan for any employee contributions or elective deferrals he or she actually made to the plan during the period of service.

§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been withdrawn. The employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

§ 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

(b) In a contributory defined benefit plan, the employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service.

(c) In a defined contribution plan, the benefit may not be the same as if the employee had remained continuously employed, even though the employee and the employer make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?

A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:

(a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

(b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

(c) The employee is entitled to the same employer contribution whether

he or she is reemployed by the preservice employer or by a different employer contributing to the same multiemployer plan, provided that the preservice employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

§ 1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

(b)(1) Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

§ 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Secretary, through the Veterans' Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at *http://www.dol.gov/elaws/userra.htm*), the e-VETS Resource Advisor and other web-based materials (located at *http://www.dol.gov/vets*), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an individual file a USERRA complaint?

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (*see* § 1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 (instructions and the forms can be accessed at *http://www.dol.gov/elaws/vets/userra/1010.asp*). A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

§ 1002.289 How will VETS investigate a USERRA complaint?

(a) In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.

(b) VETS may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of or resistance to the subpoena, the Attorney General may, at VETS' request, apply to any district court of the United States in whose jurisdiction such disobedience or resistance occurs for an order enforcing the subpoena. The district courts of the United States have jurisdiction to order compliance with the subpoena, and to punish failure to obey a subpoena as a contempt of court. This paragraph does not authorize VETS to seek issuance of a subpoena to the legislative or judicial branches of the United States.

§ 1002.290 Does VETS have the authority to order compliance with USERRA?

No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act.

If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

(a) The results of the investigation; and,

(b) The person's right to proceed under the enforcement of rights provisions in 38 U.S.C. 4323 (against a State or private employer), or 38 U.S.C. 4324 (against a Federal executive agency or the Office of Personnel Management (OPM)).

§ 1002.291 What actions may an individual take if the complaint is not resolved by VETS?

If an individual receives a notification from VETS of an unsuccessful effort to resolve his or her complaint relating to a State or private employer, the individual may request that VETS refer the complaint to the Attorney General.

§ 1002.292 What can the Attorney General do about the complaint?

(a) If the Attorney General is reasonably satisfied that an individual's complaint is meritorious, meaning that he or she is entitled to the rights or benefits sought, the Attorney General may appear on his or her behalf and act as the individual's attorney, and initiate a legal action to obtain appropriate relief.

(b) If the Attorney General determines that the individual's complaint does not have merit, the Attorney General may decline to represent him or her.

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST A STATE OR PRIVATE EMPLOYER

§ 1002.303 Is an individual required to file his or her complaint with VETS?

No. The individual may initiate a private action for relief against a State or private employer if he or she decides not to apply to VETS for assistance.

§ 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?

Yes. If VETS notifies an individual that it is unable to resolve the complaint, the individual may pursue the claim on his or her own. The individual may choose to be represented by private counsel whether or not the Attorney General decides to represent him or her as to the complaint.

§ 1002.305 What court has jurisdiction in an action against a State or private employer?

(a) If an action is brought against a State or private employer by the Attorney General, the district courts of the United States have jurisdiction over the action. If the action is brought against a State by the Attorney General, it must be brought in the name of the United States as the plaintiff in the action.

(b) If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State.

(c) If an action is brought against a private employer or a political subdivision of a State by a person, the district courts of the United States have jurisdiction over the action.

(d) An action brought against a State Adjutant General, as an employer of a civilian National Guard technician, is considered an action against a State for purposes of determining which court has jurisdiction.

§ 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?

A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.

§ 1002.307 What is the proper venue in an action against a State or private employer?

(a) If an action is brought by the Attorney General against a State, the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(b) If an action is brought against a private employer, or a political subdivision of a State, the action may proceed in the United States district court for any district in which the employer maintains a place of business.

§ 1002.308 Who has legal standing to bring an action under USERRA?

An action may be brought only by the United States or by the person, or representative of a person, claiming rights or benefits under the Act. An employer, prospective employer or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?

In an action under USERRA only an employer or a potential employer, as the case may be, is a necessary party respondent. In some circumstances, such as where terms in a collective bargaining agreement need to be interpreted, the court may allow an interested party to intervene in the action.

§ 1002.310 How are fees and court costs charged or taxed in an action under USERRA?

No fees or court costs may be charged or taxed against an individual if he or she is claiming rights under the Act. If the individual obtains private counsel for any action or proceeding to enforce a provision of the Act, and prevails, the court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?

USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. At least one court, however, has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. *Rogers* v. *City of San Antonio,* 2003 WL 1566502 (W.D. Texas), *reversed on other grounds,* 392 F.3d 758 (5th Cir. 2004). But see *Akhdary* v. *City of Chattanooga,* 2002 WL 32060140 (E.D. Tenn.). In addition, if an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of *laches* to bar a claim under USERRA. Accordingly, individuals asserting rights under USERRA should determine whether the issue of the applicability of the Federal statute of limitations has been resolved and, in any event, act promptly to preserve their rights under USERRA.

§ 1002.312 What remedies may be awarded for a violation of USERRA?

In any action or proceeding the court may award relief as follows:

(a) The court may require the employer to comply with the provisions of the Act;

(b) The court may require the employer to compensate the individual for any loss of wages or benefits suffered by reason of the employer's failure to comply with the Act;

(c) The court may require the employer to pay the individual an amount equal to the amount of lost wages and benefits as liquidated damages, if the court determines that the employer's failure to comply with the Act was willful. A violation shall be considered to be willful if the employer either knew or showed reckless disregard for

whether its conduct was prohibited by the Act.

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

§ 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?

Yes. In an action brought in the name of the United States, for which the relief includes compensation for lost wages, benefits, or liquidated damages, the compensation must be held in a special deposit account and must be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the individual because of the Federal Government's inability to do so within a period of three years, the compensation must be converted into the Treasury of the United States as miscellaneous receipts.

§ 1002.314 May a court use its equity powers in an action or proceeding under the Act?

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed under the Act.

APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

Pursuant to 38 U.S.C. 4334(a), each employer shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. The requirement for the provision of notice under this section may be met by posting the following notice where employers customarily place notices for employees. Posting one of the original notices published in 70 FR 75316 (Dec. 19, 2005) will also satisfy this requirement. The following text is provided by the Secretary of Labor to employers pursuant to 38 U.S.C. 4334(b).

TEXT FOR USE BY ALL EMPLOYERS

Your Rights Under USERRA

A. The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

B. Reemployment Rights

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- You ensure that your employer receives advance written or verbal notice of your service;
- You have five years or less of cumulative service in the uniformed services while with that particular employer;
- You return to work or apply for reemployment in a timely manner after conclusion of service; and
- You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

C. Right To Be Free From Discrimination and Retaliation

If you:

- Are a past or present member of the uniformed service;
- Have applied for membership in the uniformed service; or
- Are obligated to serve in the uniformed service; then an employer may not deny you
- Initial employment;
- Reemployment;
- Retention in employment;
- Promotion; or
- Any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

D. Health Insurance Protection

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.

• Even if you do not elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

E. Enforcement

• The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1–866–4–USA–DOL or visit its Web site at *http://www.dol.gov/vets*. An interactive online USERRA Advisor can be viewed at *http://www.dol.gov/elaws/userra.htm*.

• If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, as applicable, for representation.

• You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the Internet at this address: *http://www.dol.gov/vets/programs/userra/poster.htm*. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees. U.S. Department of Labor, Veterans' Employment and Training Service, 1–866–487–2365.

[73 FR 63632, Oct. 27, 2008]

PART 1010—APPLICATION OF PRIORITY OF SERVICE FOR COVERED PERSONS

Subpart A—Purpose and Definitions

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1010.110 What definitions apply to this part?

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AUTHORITY: Pub. L. 109–461 (Dec. 22, 2006), section 605 [38 U.S.C. 4215 Note]; 38 U.S.C. 4215.

SOURCE: 73 FR 78142, Dec. 19, 2008, unless otherwise noted.

Subpart A—Purpose and Definitions

§ 1010.100 What is the purpose and scope of this part?

(a) Part 1010 contains the Department regulations implementing priority of service for covered persons. Priority of service for covered persons is authorized by section 2(a)(1) of JVA (38 U.S.C. 4215). These regulations fulfill section 605 of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. 109–461 (Dec. 22, 2006), which requires the Department to implement priority of service via regulation.

(b) As provided in § 1010.210, this part applies to all qualified job training programs.

§ 1010.110 What definitions apply to this part?

The following definitions apply to this part:

Covered person as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means a veteran or eligible spouse.

Department or DOL means the United States Department of Labor, including its agencies and organizational units and their representatives.

Eligible spouse as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means the spouse of any of the following:

(1) Any veteran who died of a service-connected disability;

(2) Any member of the Armed Forces serving on active duty who, at the time of application for the priority, is listed in one or more of the following categories and has been so listed for a total of more than 90 days:

(i) Missing in action;

(ii) Captured in line of duty by a hostile force; or

(iii) Forcibly detained or interned in line of duty by a foreign government or power;

(3) Any veteran who has a total disability resulting from a service-connected disability, as evaluated by the Department of Veterans Affairs;

(4) Any veteran who died while a disability, as indicated in paragraph (3) of this section, was in existence.

Grant means an award of Federal financial assistance by the Department of Labor to an eligible recipient.

Jobs for Veterans Act (JVA) means Public Law 107–288 (2002). Section 2(a) of the JVA, codified at 38 U.S.C. 4215(a), provides priority of service for covered persons.

Non-covered person means any individual who meets neither the definition of ''veteran,'' as defined in this section, nor the definition of ''eligible spouse'' as defined in this section.

Qualified job training program means any program or service for workforce preparation, development, or delivery that is directly funded, in whole or in part, by the Department of Labor.

Recipient means an entity to which federal financial assistance, in whole or in part, is awarded directly from the Department or through a sub-award for any qualified job training program.

Secretary means the Secretary of the Department of Labor.

Veteran means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, as specified in 38 U.S.C. 101(2). Active service includes full-time duty in the National Guard or a Reserve component, other than full-time duty for training purposes.

Subpart B—Understanding Priority of Service

§ 1010.200 What is priority of service?

(a) As defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) ''priority of service'' means, with respect to any qualified job training program, that a covered person shall be given priority over a non-covered person for the receipt of employment, training, and placement services provided under that program, notwithstanding any other provision of the law.

(b) Priority in the context of providing priority of service to veterans and other covered persons in qualified job training programs covered by this regulation means the right to take precedence over non-covered persons in obtaining services. Depending on the type of service or resource being provided, taking precedence may mean:

(1) The covered person receives access to the service or resource earlier in time than the non-covered person; or

(2) If the service or resource is limited, the covered person receives access to the service or resource instead of or before the non-covered person.

§ 1010.210 In which Department job training programs do covered persons receive priority of service?

(a) Priority of service applies to every qualified job training program funded, in whole or in part, by the Department, including:

(1) Any such program or service that uses technology to assist individuals to access workforce development programs (such as job and training opportunities, labor market information, career assessment tools, and related support services); and

(2) Any such program or service under the public employment service system, One-Stop Career Centers, the Workforce Investment Act of 1998, a demonstration or other temporary program; any workforce development program targeted to specific groups; and those programs implemented by States or local service providers based on Federal block grants administered by the Department.

(b) The implementation of priority of service does not change the intended

function of a program or service. Covered persons must meet all statutory eligibility and program requirements for participation in order to receive priority for a program or service.

§ 1010.220 How are recipients required to implement priority of service?

(a) An agreement to implement priority of service, as described in these regulations and in any departmental guidance, is a condition for receipt of all Department job training program funds.

(b) All recipients are required to ensure that priority of service is applied by all sub-recipients of Department funds. All program activities, including those obtained through requests for proposals, solicitations for grant awards, sub-grants, contracts, sub-contracts, and (where feasible) memoranda of understanding or other service provision agreements, issued or executed by qualified job training program operators, must be administered in compliance with priority of service.

§ 1010.230 In addition to the responsibilities of all recipients, do States and political subdivisions of States have any particular responsibilities in implementing priority of service?

(a) Pursuant to their responsibility under the Workforce Investment Act of 1998, States are required to address priority of service in their comprehensive strategic plan for the State's workforce investment system. Specifically, States must develop policies for the delivery of priority of service by the State Workforce Agency or Agencies, Local Workforce Investment Boards, and One-Stop Career Centers for all qualified job training programs delivered through the State's workforce system. The policy or policies must require that processes are in place to ensure that covered persons are identified at the point of entry and given an opportunity to take full advantage of priority of service. These processes shall be undertaken to ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

(b) The State's policy or policies must require Local Workforce Investment Boards to develop and include in their strategic local plan, policies implementing priority of service for the local One-Stop Career Centers and for service delivery by local workforce preparation and training providers. These policies must establish processes to ensure that covered persons are identified at the point of entry so that covered persons are able to take full advantage of priority of service. These processes shall ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

§ 1010.240 Will the Department be monitoring for compliance with priority of service?

(a) The Department will monitor recipients of funds for qualified job training programs to ensure that covered persons are made aware of and afforded priority of service.

(b) Monitoring priority of service will be performed jointly between the Veterans' Employment and Training Service (VETS) and the DOL agency responsible for the program's administration and oversight.

(c) A recipient's failure to provide priority of service to covered persons will be handled in accordance with the program's established compliance review processes. In addition to the remedies available under the program's compliance review processes, a recipient may be required to submit a corrective action plan to correct such failure.

§ 1010.250 Can priority of service be waived?

No, priority of service cannot be waived.

Subpart C—Applying Priority of Service

§ 1010.300 What processes are to be implemented to identify covered persons?

(a) Recipients of funds for qualified job training programs must implement processes to identify covered persons who physically access service delivery points or who access virtual service delivery programs or Web sites in order to provide covered persons with timely and useful information on priority of service at the point of entry. Point of entry may include reception through a One-Stop Career Center established pursuant to the Workforce Investment Act of 1998, as part of an application process for a specific program, or through any other method by which covered persons express an interest in receiving services, either in-person or virtually.

(b)(1) The processes for identifying covered persons at the point of entry must be designed to:

(i) Permit the individual to make known his or her covered person status; and

(ii) Permit those qualified job training programs specified in § 1010.330(a)(2) to initiate data collection for covered entrants.

(2) The processes for identifying covered persons are not required to verify the status of an individual as a veteran or eligible spouse at the point of entry unless they immediately undergo eligibility determination and enrollment in a program.

(c) The processes for identifying covered persons must ensure that:

(1) Covered persons are identified at the point of entry to allow covered persons to take full advantage of priority of service; and

(2) Covered persons are to be made aware of:

(i) Their entitlement to priority of service;

(ii) The full array of employment, training, and placement services available under priority of service; and

(iii) Any applicable eligibility requirements for those programs and/or services.

§ 1010.310 How will priority of service be applied?

(a) Recipients of funds for qualified job training programs must implement processes in accordance with § 1010.300 to identify covered persons at the point of entry, whether in person or virtual, so the covered person can be notified of their eligibility for priority of service. Since qualified job training programs may offer various types of services including staff-assisted services as well as self-services or informational activities, recipients also must ensure that priority of service is implemented throughout the full array of services provided to covered persons by the qualified job training program.

(b) Three categories of qualified job training programs affect the application of priority of service: universal access, discretionary targeting and statutory targeting. To obtain priority, a covered person must meet the statutory eligibility requirement(s) applicable to the specific program from which services are sought. For those programs that also have discretionary or statutory priorities or preferences pursuant to a Federal statute or regulation, recipients must coordinate providing priority of service with applying those other priorities, as prescribed in paragraphs (b)(2) and (b)(3) of this section.

(1) *Universal access programs* operate or deliver services to the public as a whole; they do not target specific groups. These programs are required to provide priority of service to covered persons.

(2) *Discretionary targeting programs* focus on a particular group, or make efforts to provide a certain level of service to such a group, but do not specifically mandate that the favored group be served before other eligible individuals. Whether these provisions are found in a Federal statute or regulation, priority of service will apply. Covered persons must receive the highest priority for the program or service, and non-covered persons within the discretionary targeting will receive priority over non-covered persons outside the discretionary targeting.

(3) *Statutory targeting programs* are programs derived from a Federal statutory mandate that requires a priority

or preference for a particular group of individuals or requires spending a certain portion of program funds on a particular group of persons receiving services. These are mandatory priorities. Recipients must determine each individual's covered person status and apply priority of service as described below:

(i) Covered persons who meet the mandatory priorities or spending requirement or limitation must receive the highest priority for the program or service;

(ii) Non-covered persons within the program's mandatory priority or spending requirement or limitation, must receive priority for the program or service over covered persons outside the program-specific mandatory priority or spending requirement or limitation; and,

(iii) Covered persons outside the program-specific mandatory priority or spending requirement or limitation must receive priority for the program or service over non-covered persons outside the program-specific mandatory priority or spending requirement or limitation.

§ 1010.320 Will recipients be required to collect information and report on priority of service?

Yes. Every recipient of funds for qualified job training programs must collect such information, maintain such records, and submit reports containing such information and in such formats as the Secretary may require related to the provision of priority of service.

§ 1010.330 What are the responsibilities of recipients to collect and maintain data on covered and non-covered persons?

(a) *General requirements.* Recipients must collect information in accordance with instructions issued by the Department.

(1) Recipients must collect two broad categories of information:

(i) For the qualified job training programs specified in paragraph (a)(2) of this section, information must be collected on covered persons from the point of entry, as defined in § 1010.300(a), and as provided in paragraph (b) of this section; and,

(ii) For all qualified job training programs, including the programs specified in paragraph (a)(2) of this section, information must be collected on covered and non-covered persons who receive services, as prescribed by the respective qualified job training programs, as provided in paragraph (c) of this section.

(2) For purposes of paragraph (a)(1) of this section, qualified job training programs that served, at the national level, 1,000 or more veterans per year for the three most recent years of program operations (currently the Wagner-Peyser, WIA Adult, WIA Dislocated Worker, WIA National Emergency Grant, and Senior Community Service Employment Programs) must collect information and report on covered entrants. The Trade Adjustment Assistance Program must collect information and report on covered entrants on the effective date of the next information collection requirement applicable to that program, whether that is for a renewal of an existing approved information collection or for approval of a new information collection.

(3) For purposes of this section, covered persons at the point of entry are referred to as ''covered entrants.'' This group includes two further subgroups: veterans and eligible spouses as defined in § 1010.110.

(b) *Collection and maintenance of data on covered entrants.* In accordance with instructions issued by the Department, recipients of assistance for the programs specified in paragraph (a)(2) of this section must collect and report individual record data for all covered entrants from the point of entry.

(c) *Collection and maintenance of data on covered and non-covered persons who receive services.* In accordance with instructions issued for individual qualified job training programs, all recipients must collect and maintain data on covered and non-covered persons who receive services, including individual record data for those programs that require establishment and submission of individual records for persons receiving services.

(1) The information to be collected shall include, but is not limited to:

(i) The covered and non-covered person status of all persons receiving services;

(ii) The types of services provided to covered and non-covered persons;

(iii) The dates that services were received by covered and non-covered persons; and;

(iv) The employment outcomes experienced by covered and non-covered persons receiving services.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, for persons receiving services, recipients must apply the definitions set forth in § 1010.110 to distinguish covered from non-covered persons receiving services and, within covered persons, to distinguish veterans from eligible spouses.

(ii) Until qualified job training programs adopt the definitions for covered and non-covered persons set forth at § 1010.110 through the publication of requirements pursuant to the Paperwork Reduction Act, recipients must collect data on the services provided to and the outcomes experienced by veterans (however defined) and non-veterans receiving services in accord with regulations, policies and currently approved information collections.

(d) All information must be stored and managed in a manner that ensures confidentiality.

PARTS 1011–1099 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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702.261 Revised; eff. 6-10-15 12929
702.272 (a) amended; (b) revised; eff. 6-10-15 12929
702.281 (a) introductory text revised; (b) amended; eff. 6-10-15 12930
702.315 Revised; eff. 6-10-15 12930
702.317 Revised; eff. 6-10-15 12930
702.319 Revised; eff. 6-10-15 12930
702.321 (a)(1), (b) and (c) revised; eff. 6-10-15 12930
702.349 Revised; eff. 6-10-15 12931
702.372 Revised; eff. 6-10-15 12932
702.432 (b) introductory text, (6) and (e) revised; eff. 6-10-15 12932
702.433 (a), (b), (e) and (f) revised; eff. 6-10-15 12932
703 Authority citation revised 12932
703.2 (a) introductory text revised; eff. 6-10-15 12932
703.113 Revised; eff. 6-10-15 12933
703.114 Revised; eff. 6-10-15 12933
703.116 Revised; eff. 6-10-15 12933
703.117 Revised; eff. 6-10-15 12933
703.118 Revised; eff. 6-10-15 12933
703.119 Removed; eff. 6-10-15 12933
703.120 Revised; eff. 6-10-15 12933
703.502 Removed; eff. 6-10-15 12933

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658 Revised 56352
675 Added 56368
676 Added 55997
677 Added 56002
678 Added 56008
679 Added 56371
680 Added 56385
681 Added 56398
682 Added 56406
683 Added 56410
684 Added 56428
685 Added 56438

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686 Added 56443
687 Added 56457
688 Added 56460

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702 Authority citation revised 43449
702.204 Revised 43449
702.236 Revised 43449
702.271 (a)(2) revised 43449
725 Authority citation revised 43449
725.310 (b), (c) and (d) revised; (e) added 24479
725.413 Added 24480
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725.414 (a)(1) through (5), (c) and (d) revised 24480
725.601 (b) and (c) revised 24481
725.607 Revised 24482
725.621 (d) revised 43449
726 Authority citation revised 43449

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726.300 Revised 43449
726.302 (c)(2)(i), (4) and (5) revised; (c)(6) added 43449
900.3 Revised; eff. 4-25-16 8833

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702.204 Amended 5380
702.236 Amended 5380
702.271 (a)(2) amended 5380
725.621 (d) amended 5380
726.302 (c)(2)(i), (4), (5) and (6) amended 5381