of a court order, was married to the employee and that marriage has not ended by final decree of divorce, dissolution, or annulment.

§ 295.3 [Amended]

■ 4. Section 295.3, paragraph (d) is amended by removing all references to ''Deputy General Counsel'' and adding in their place references to ''General Counsel''.

■ 5. Section 295.4 is amended as follows:

■ a. By removing wherever they appear all references to ''Deputy General Counsel'' and adding in their place references to ''General Counsel''.

■ b. By removing all references to the ''Associate Executive Director for Retirement Claims'' and adding in their place references to the ''Director of Retirement Benefits''.

■ c. By removing ''bs'' and adding in its place ''be'' in the second to last sentence of paragraph (b)(2)(ii).

■ d. By adding the phrase ''pertaining to the employee'' at the end of the second sentence of the introductory paragraph of paragraph (c).

■ e. By adding the phrase ''pertaining to the employee'' at the end of the first sentence of paragraph (d)(2).

■ f. By capitalizing the word ''Board'' at the end of the last sentence in paragraph (d)(2).

■ g. By capitalizing the word ''Board'' in the last sentence of paragraph (d)(4).

■ h. By adding the following new paragraph (b)(4) to read as follows:

§ 295.4 Review of documentation.

* * * * *

(b) * * *

(4) Unless the order expressly provides otherwise, the Board will deduct the amount specified by the order from any annuity paid to the employee, whether the employee has retired based on age or on disability.

* * * * *

■ 6. Section 295.5 is amended as follows:

■ a. By adding in paragraph (a) the phrase '', except as provided in paragraph (f)(4) of this section,'' in the second sentence between the words ''and'' and ''shall''.

■ b. By removing the phrase ''in behalf'' and adding in its place the phrase ''on behalf'' in the first sentence of paragraph (d).

■ c. By adding the phrase ''Except as provided in paragraph (f)(4) of this section'' to the beginning of the first sentence of the introductory text to paragraph (f).

■ d. By removing references to ''Deputy General Counsel'' and adding in their place references to ''General Counsel'' in paragraph (g) and

■ e. By adding a new paragraph (f)(4) to read as follows:

§ 295.5 Limitations.

* * * * *

(f) * * *

(4) If the employee dies on or after August 17, 2007, a former spouse who is receiving a portion of the employee's annuity pursuant to a court decree or property settlement compliant with this part may continue to receive a portion of the employee's tier II benefit component unless the court decree or property settlement requires such payment to terminate upon the death of the employee.

* * * * *

§ 295.6 [Amended]

■ 7. Section 295.6 is amended as follows:

■ a. In paragraph (b) by removing ''Deputy General Counsel'' and adding in its place ''General Counsel'', and by removing all references to the ''Associate Executive Director for Retirement Claims'' and adding in their place references to ''Director of Retirement Benefits''.

■ b. By adding the word ''a'' to the first sentence of paragraph (b) before the word ''request''.

■ c. By adding the word ''a'' to the first sentence of paragraph (c) before the word ''signed''.

■ 8. Section 295.7 is amended by redesignating paragraph (e) as paragraph (e)(1) and adding a new paragraph (e)(2) to read as follows:

§ 295.7 Miscellaneous.

* * * * *

(e) * * *

(2) Where all documentation required by this part is in the Board's records pertaining to the employee prior to the time the employee annuity is awarded, but where the Board due to clerical oversight fails to withhold the amount awarded by the court order, then the Board shall begin deduction from the employee annuity with the month the error is discovered, and shall pay the amount which should have been withheld pursuant to this part to the spouse or former spouse. The amount paid to the spouse or former spouse representing months for which the amount under the order was not timely withheld shall be an erroneous payment to the employee within the meaning of section 10 of the Railroad Retirement Act. This section shall not apply where the Board has attempted to contact the spouse or former spouse at the time the employee annuity is awarded pursuant to § 295.4(d).

Dated: August 6, 2008.

By authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. E8–18439 Filed 8–12–08; 8:45 am]

BILLING CODE 7905–01–P

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 215

RIN 1215–AB58

Amendment to Guidelines for Processing Applications for Assistance To Conform to Sections 3013(h) and 3031 of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—A Legacy for Users and To Improve Processing for Administrative Efficiency

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (''Department''), through the Office of Labor-Management Standards (''OLMS''), issued proposed changes to its Guidelines for the Department's administration of the Secretary of Labor's (''Secretary'') responsibility under the Federal transit law, 49 U.S.C. 5333(b). This document sets forth the Department's review of and response to comments on the proposed revisions, as well as the changes made to the Guidelines in response to those comments.

Pursuant to section 5333(b) of the Federal transit law, the Department must certify that, as a condition of certain grants of Federal financial assistance, fair and equitable labor protective provisions are in place to protect the interests of employees affected by such Federal assistance. The Department administers this program through Guidelines set forth at 29 CFR Part 215. The Department's proposed changes are intended to conform the Guidelines to amendments to the Federal transit law made by sections 3013(h) and 3031 of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—A Legacy for Users (''SAFETEA–LU''), Public Law No. 109–59, 119 Stat. 1144 (2005). In addition to changes mandated by statute, the Department proposed revisions to the Guidelines that are intended to enhance the speed and

efficiency of the Department's processing of grant certifications. The revisions to existing procedures for processing grant applications under the Federal transit law are intended to ensure timely certifications in a predictable manner, while remaining consistent with the transit law's objectives. The Department invited written comments on the proposed revisions from members of the public.

EFFECTIVE DATE: This rule is effective October 1, 2008.

FOR FURTHER INFORMATION CONTACT: Ann Comer, Chief, Division of Statutory Programs, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5112, Washington, DC 20210, OLMS-*TransitGrant@dol.gov*, (202) 693–0126.

SUPPLEMENTARY INFORMATION:

I. Background

On September 14, 2007, the Department, through OLMS, issued proposed revisions to the Guidelines it employs to administer the Department's program under 49 U.S.C. 5333(b), which requires the Secretary to certify that labor protections are in place for employees who may be affected by certain grants of Federal financial assistance. *See* Amendment to Guidelines for Processing Applications for Assistance To Conform to Sections 3013(h) and 3031 of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act—A Legacy for Users and To Improve Processing for Administrative Efficiency (''NPRM''), 72 FR 52521. The Department invited written comments on the proposed revisions from interested parties. The written comment period closed on October 15, 2007, and the Department has considered all timely comments received in response to the proposed Guidelines revisions.

The Department received 10 timely comments in response to its proposed revisions, including five comments from various labor organizations (the Transportation Trades Department of the AFL–CIO; the Amalgamated Transit Union; a joint submission from the United Transportation Union and the Sheet Metal Workers International Association; the Transportation Communications International Union, and a joint submission by the American Train Dispatchers Association, the Brotherhood of Locomotive Engineers and Trainmen/IBT, the Brotherhood of Maintenance of Way Employees Division/IBT, the Brotherhood of Railroad Signalmen, the International Brotherhood of Boilermakers and Blacksmiths, the National Council of Firemen and Oilers/SEIU, the Sheet Metal Workers International Association, and the Transport Workers Union of America (rail division)); two comments from transit associations (American Public Transportation Association and Taxicab, Limousine & Paratransit Association); two public transit authorities (the Texas Department of Transportation and the Regional Transportation Commission of Southern Nevada); and one private consulting firm (Jim Seal Consulting Services).

Under 49 U.S.C. 5333(b), when Federal funds are used to acquire, improve, or operate a transit system, the Department must ensure that the recipient of those funds establishes arrangements to protect the rights of affected transit employees. Federal law requires such arrangements to be ''fair and equitable,'' and the Department must certify the arrangements before the U.S. Department of Transportation's Federal Transit Administration (FTA) can award certain funds to grantees. These employee protective arrangements must include provisions that may be necessary for the preservation of rights, privileges, and benefits under existing collective bargaining agreements or otherwise; the continuation of collective bargaining rights; the protection of individual employees against a worsening of their positions related to employment; assurances of employment to employees of acquired transportation systems; assurances of priority of reemployment of employees whose employment is ended or who are laid off; and paid training or retraining programs. 49 U.S.C. 5333(b)(2).

II. Summary of the Final Guidelines and Discussion of the Comments

The development of these Final Guidelines has included a careful review of the public's timely comments. All timely comments received are addressed in this Section. In those cases in which comments made suggestions that, in the Department's view, improved or corrected the proposed Guidelines, such changes have been incorporated. In some cases, no change to the proposed language was deemed necessary.

A. Processing of Grant Applications To Replace Equipment or Facilities of ''Like-kind''

In its NPRM, the Department proposed amending the guidelines to conform to section 3031 of SAFETEA–LU, which added a new subparagraph to section 5333(b) relating to grants for the purchase of ''like-kind'' equipment or facilities. As amended by SAFETEA–LU, section 5333(b)(4) now requires that employee protective arrangements for grants requesting assistance to purchase like-kind equipment or facilities be certified by the Department without referral to the parties. The current Guidelines, at section 215.3(b)(1), reflect this practice, except that the current provision creates an exception to non-referral if the Department determines that the grant application has a ''potentially material effect on employees.'' To conform the guidelines to the statutory mandate, the proposed guidelines, at section 215.3(a)(4)(iii), provided that employee protections relating to grants funding equipment and/or facilities of like-kind shall be certified without a referral, and deleted the ''material effect'' exception. Proposed Section 215.3(a)(4)(iii) also addressed the terms the Department will apply in like-kind grant applications. That section states that where ''application of the existing protective agreement(s) or the Unified Protective Arrangement would not satisfy the requirements of the statute in the circumstances presented, the Department will make any necessary modifications to the existing protections to ensure that the requirements of the statute are satisfied.''

The Department received five comments regarding its proposed change to its processing of grant applications to replace like-kind equipment or facilities, and the comments addressed the following three issues: Whether it is appropriate for the Department to eliminate its current exception to its practice of non-referral of grant applications for like-kind purchases in those cases in which the funding would result in a ''potentially material effect on employees'' under the current Section 215.3(b)(1); whether the Department appropriately included new language in Section 215.3(a)(4)(iii) permitting it to make ''any necessary modifications to the existing protections'' when certifying grant applications for like-kind purchases; and whether the Department will notify the labor organizations representing employees who may be affected by grant applications for like-kind purchases that the Department has received such an application but has made no referral. Addressing the last issue first, the Department has included a subsection in Section 215.3(a) to confirm its current practice that the Department will ''notify labor organizations representing potentially affected transit employees of the certification of grants without referral under paragraph (a)(4) and

inform them of their rights under the applicable protective arrangements.'' *See* Section 215.3(a)(5).

The Department has fully considered the first issue regarding the deletion of the current exception to the practice of non-referral of grant applications for like-kind purchases in those cases in which the funding would result in a ''potentially material effect on employees,'' currently found at Section 215.3(b)(1). The amendments to 49 U.S.C. 5333(b) enacted by SAFETEA–LU incorporate the following provision into the statute:

> Fair and equitable arrangements to protect the interests of employees utilized by the Secretary of Labor for assistance to purchase like-kind equipment or facilities, and grant amendments which do not materially revise or amend existing assistance agreements, shall be certified without referral.

49 U.S.C. 5333(b)(4). The Department interprets this statutory provision as permitting no exception for the referral of grants for like-kind purchases in any case, and no comments provide a persuasive reason for adopting a different interpretation. As a result, the Department, as proposed, is deleting the provision in the current guidelines permitting referral of grant applications for the purchase of like-kind equipment in cases in which the purchase may have a material effect on employees.

The remaining issue addressed by the comments dealing with the Department's non-referral of grants for like-kind purchases is the Department's proposal in Section 215.3(a)(4)(iii) to ''make any necessary modifications to the existing [non-referred] protections to ensure that the requirements of the statute are satisfied'' in those cases in which application of the existing protective agreement(s) or the Unified Protective Arrangement would not satisfy the requirements of the statute. One comment in particular noted that where changes to existing arrangements are ''deemed necessary [they] should be referred to the parties for resolution or, at a minimum, such imposed changes should be made without prejudice to any future objections or proposal by the parties.'' Comment submitted by Transportation Communications International Union in response to NPRM, October 15, 2007 (''TCU Comment''), page 2.

With one modification, the Department will retain the proposed language in Section 215.3(a)(4)(iii) to permit it to modify those non-referred arrangements to comply with the statute in the event that circumstances associated with a grant for a like-kind purchase indicate that application of the current protective arrangement would no longer satisfy the statute's requirements. Because referrals are not permitted for like-kind grants, and situations may arise where the existing protections are not statutorily sufficient, the Department must retain the authority to unilaterally apply protections as an alternative to referral. Situations that may give rise to the Department's need to make a unilateral change to existing protections include a change to the framework of state or local law, a court decision interpreting existing protections, or where the Department's periodic review of an agreement has disclosed that required protections are missing or inadequate based on current policies and standards. This retention of authority to unilaterally modify non-referred arrangements to ensure statutory sufficiency is consistent with the Department's treatment of other grant programs subject to non-referral, *see, e.g.* , 29 CFR 215.3(a)(4), 215.3(b)(3), and is necessary in order to ensure that the Department certifies only those arrangements that are statutorily sufficient. In some circumstances the Department will need to modify protections to simultaneously ensure satisfaction of the statutory requirements and to conform to the SAFETEA–LU requirement that certification be made without referral. However, in response to comments by labor organizations suggesting that the proposed language was too broad and created uncertainty, the Department will delete the word ''any,'' which may be broadly construed, from the proposed Section 215.3(a)(4)(iii) so that the final Guidelines limit the Department to ''make necessary modifications to the existing protections to ensure that the requirements of the statute are satisfied.'' *See* Section 215.3(a)(4)(iii).

The Department agrees with the comment, noted above, suggesting that imposed changes should be made without prejudice to any future objections or proposals by the parties. Therefore, should the Department determine unilaterally that changes are necessary to arrangements applicable to a particular like-kind grant in order to satisfy the requirements of the statute in the circumstances presented, those changes will be made without prejudice to future objections or proposals of either of the parties in response to subsequent referrals for new grants. Accordingly, where subsequent referrals contain the unilateral modifications made by the Department pursuant to Section 215.3(a)(4)(iii), parties to the referral may object at that time to the proposed terms, including any terms that had been unilaterally modified by the Department. This approach is consistent with the Department's practice, in which it fully considers any objections to referral terms, even when those terms have been previously imposed by the Department. Where objections are deemed sufficient in subsequent referred protections, the Department will require negotiations to permit the parties to develop alternative employee protections for application to the subsequently referred grant.

B. Processing of Amendatory Grant Applications

The Department has proposed amending section 215.5 of the guidelines to conform to section 3031 of SAFETEA–LU, which provides that ''grant amendments which do not materially amend existing assistance agreements'' will not be subject to the Department's referral procedures. *See* 49 U.S.C. 5333(b)(4). The proposed guidelines were designed to reflect this statutory provision, and to clarify the Department's treatment of grant amendments that, on the one hand, result in material changes to existing assistance agreements and those that, on the other hand, make only immaterial changes to such agreements. The proposed revision also identified as examples some types of grant amendments that would be certified without referral. As set out below, in response to certain comments from the public, the Department has made some revisions to proposed section 215.5.

As explained in the NPRM, the statutory change regarding certification of grant amendments essentially codifies the Department's current practice, and requires the Department to distinguish between ''material'' grant amendments that will be referred and ''immaterial'' grant amendments that will be certified without referral.[1] In

[1] Under the Department's current practice, the FTA first determines, pursuant to that agency's grant administration authority, whether a proposed change or modification to an existing assistance agreement (the contract of assistance) constitutes a budget revision, an administrative amendment, or a grant amendment, based on the FTA's own criteria it has established for such categories. *See* FTA Circular C 5010.1C: Grant Management Guidelines, Chapter 1.6 (Project Administration and Management: Grant Modifications), October 1, 1998; *see also* FTA Proposed Circular C 5010.1D: Grant Management Requirements, Chapter 3.4 (Grant Administration: Grant Modifications), September 28, 2007. Following that categorization, the FTA then transmits only grant amendments to the Department for processing, in accordance with the statute and the Department's guidelines. Once grant amendments are received from the FTA for processing, the Department reviews each grant amendment to determine whether, as the statute now explicitly requires, it ''materially amend[s] existing assistance agreements [,]'' which requires a

making the distinction in the NPRM, the Department focused on what constituted ''immaterial'' grant amendments, in large part because this term already appears in the Guidelines, which establish that the Department will certify ''immaterial'' grant revisions or amendments on the basis of the previously certified terms without referral. *See* current 29 CFR 215.5. In responding to the statute's now explicit requirement that the Department refer only those grant amendments that are ''material,'' and building on the presence of the term ''immaterial'' in the Guidelines text, the Department proposed in the NPRM to add to the Guidelines several circumstances in which it appeared that ''immaterial'' changes were present. For reasons explained here, the Department has rejected this approach, and has revised Section 215.5 accordingly.

Several comments raised concerns about the Department's distinction between grant amendments that make material changes and those that make immaterial changes to existing assistance agreements. Two comments objected to the Department's description of the nature of an immaterial grant amendment. Comments submitted by the Amalgamated Transit Union (ATU) in response to the NPRM, October 15, 2007 (''ATU Comment''), page 3; United Transportation Union, October 11, 2007 (''UTU Comment''), page 2. Additionally, one comment noted concern that ''the NPRM does not appropriately define the line between material and immaterial grant amendments'' and that ''the NPRM would actually allow material amendments without referral, which clearly violates the intent of Section 3031 of SAFETEA–LU.'' Comment submitted by Transportation Trades Department, AFL–CIO, October 15, 2007 (''TTD Comment''), page 2.

As is the Department's current practice, Section 5333(b)(4) now explicitly requires the Department to review and assess the potential impact on employees and existing protections in order to distinguish between those grant amendments that may ''materially revise or amend existing assistance agreements,'' which will be referred, and those that do not. In order to clearly incorporate the statutory mandate into the Guidelines, the Department has revised proposed Section 215.5(a)(2) (now Section 215.5(a)(1) in the final Guidelines) to indicate that material changes are those that ''make changes to a project that may necessitate alternative employee protections.'' If a grant amendment makes changes to a project that may necessitate alternative employee protections in the circumstances presented, a new referral will be made. Conversely, those grant amendments that do not materially revise a grant in such a way that they would potentially affect employees will not be referred. The Department's past practice and administrative experience, upon which the Department will rely to administer certification of grant amendments, suggests generally that material changes that may necessitate alternative employee protections include those that constitute a significant, important or sizeable change to items or elements in the federally funded project.

The Department agrees with those comments suggesting that the specific examples of ''immaterial changes'' included in the proposed guidelines did not provide useful guidance for either the Department or the regulated community in determining when referral would be necessary. The examples in the NPRM largely mirrored FTA criteria for categorizing the nature and type of grant modifications for that agency's determination of whether a change was, in fact, a ''grant amendment,'' and did not serve to assist with the concept of ''material'' grant amendments as that term is used in Section 5333(b)(4). Because conclusions regarding the impact of changes may vary in differing circumstances, those examples may not universally qualify as immaterial changes for the Department's statutory purposes. Moreover, the comments regarding the NPRM's examples of ''immaterial'' grant amendments reinforce the conclusion that the term itself is too dependent on specific facts to be capable of a more detailed definition in the abstract. Under these circumstances, hypothetical examples are more likely to result in confusion than clarity.

Upon reconsideration of the approach to this subject in the NPRM, the Department has made three modifications to Section 215.5 (in addition to the change noted above regarding ''material'' amendments) to clarify the procedures under which grant revisions or amendments will be certified. First, as an organizational matter, the order of the two sub-paragraphs in subsection 215.5(a) have been switched, so that the initial subparagraph of the subsection addresses the issue of ''material'' revisions or amendments. Second, the term ''immaterial'' has been deleted from Section 215.5, and final subparagraph (a)(2) instead addresses those cases in which ''an application amends in a manner that is not material'' a previously certified grant. Finally, those examples of immaterial changes to a grant have been deleted, and because each grant is fact-specific, the Department has concluded that including alternate examples of ''immaterial'' changes in the Guidelines would not assist in the administration of the program * * * *See* 29 CFR 215.5(a)(1) and (a)(2). As the Department does with all non-referred grants, informational copies of those grant amendments not referred will be sent to the affected labor organizations.

In addition, one comment notes that the proposed guidelines did not include a provision in this section for the Department to ''make any minimal modifications necessary to the protective terms where application of existing protective agreements would not satisfy the requirements of the statute in the circumstances presented.'' ATU Comment, page 3. Similar authority has been adopted for like-kind grants certified without referral, and comments suggested that such language would be appropriate in any instance where protections would be applied without referral. The Department has determined that such language is not necessary to ensure satisfaction of the requirements of the statute when grant amendments are processed by the Department. As noted above, where grants materially revise existing assistance agreements by making changes that may necessitate alternative employee protections in the circumstances presented, the Department will refer the grant amendment, and the parties will have the opportunity to address employee protective provisions that may not satisfy the statute in the circumstances presented. Where grant amendments make changes that require no alternate employee protections, then the Department need not retain authority to make unilateral modifications to employee protections. Under either process, the requirements of the statute will be assured, and there is no need for the Department's retention of this authority with regard to grant amendments.

Finally, several comments indicated that a copy of applications for grant amendments that result in no referral must be provided to labor organizations. Consistent with the proposed guidelines, the Department confirms that its ''processing of these applications will be expedited and copies will be forwarded to interested parties.'' *See* 215.5(a)(2). In addition, the Department

referral, or does not ''materially amend existing assistance agreements[,]'' which requires certification by the Department without referral.

will forward to service area unions any informational copies of budget revisions received from the Federal Transit Administration.

C. Special Warranty Procedures for Grant Applications for Other Than Urbanized Areas and Grant Applications for Over-the-Road Bus Accessibility Programs

For grant applications under 49 U.S.C. 5311 for funding of transit operations in Other Than Urbanized areas, SAFETEA–LU now requires the use of a warranty as the sole mechanism for certification of employee protections, and eliminates the Secretary of Labor's option to waive the required certification. *See* 49 U.S.C. 5311(i).[2] Prior to the enactment of SAFETEA–LU, the Department followed procedures contained in a ''Guidebook'' published in September 1979 governing the processing of small urban and rural grants. The Department is discontinuing use of the 1979 Guidebook, and has included in sections 215.3(a)(4)(i) and 215.7 procedures to be used for the application of a warranty without referral when processing Other Than Urbanized and Over-the-Road Bus (OTRB) grants.[3] The comments received by the Department raised several issues, and particularly addressed two primary issues concerning procedures used to bind State's subrecipients to terms of the Special Warranty and the application of alternative comparable arrangements when necessitated by requirements of the statute.

Regarding the subrecipients issue, the Department indicated in the NPRM that it will include a requirement in the new Special Warranty that the protective arrangements are binding upon any subrecipients assisted under the grant. Three comments expressed concern that the Department had eliminated the requirement contained in the Guidebook to have State agencies provide copies of assurances to the Department indicating each recipient had signed and understood the Special Warranty. One comment in particular noted that ''[e]nforcement of employee protections under such a provision would * * * be problematic at best and more likely a practical, or even legal, impossibility.'' ATU Comment, page 5. Another comment indicated that ''transportation labor urges the Department to establish procedures to guarantee that sub-recipients are bound to the protective arrangements, perhaps by continuing to require written assurances.'' TTD Comment, page 2. Still another comment indicated that the Department cannot ''bind third parties to arrangements simply by proclaiming they are bound in a Special Warranty that will be incorporated into the contract of assistance * * *.'' UTU Comment, page 3.

In response to these comments, the Department notes that the former Special Warranty procedures required only that a State agency ''certify to the Department of Labor that each Recipient designated to receive transportation assistance under the Project has indicated in writing acceptance of the terms and conditions of the Warranty.'' Rural Transportation Employee Protection Guidebook, September 1979, page 13. Thus, the Department did not require fully executed copies of the Special Warranty from each subrecipient, but instead required only that a State agency submit certified lists of recipients that it indicated had signed the Warranty. Accordingly, the obligation to ensure that recipients had signed and were thus bound by the Special Warranty has long rested with the State agencies. The Department has not altered the State agencies' responsibility to ensure that its subrecipients are equally bound to the terms of the Special Warranty.

In response to concerns noted above regarding a State's obligation to ensure that its subrecipients are bound to the terms of the Special Warranty, the Department clarifies its proposal in the NPRM that it will include language in the Special Warranty requiring the State agency (Grantee), which signs the contract of assistance, to obligate its subrecipients to the required protections as a condition precedent to the subrecipient's receipt of any funds under the contract of assistance. Thus, the requirement remains that a State agency must ensure that sub-recipients have agreed to be bound by the protective arrangements. That requirement will now be an explicit part of the Special Warranty, and the failure to comply with this provision may impact the State's eligibility for such funds. In addition, should a Grantee fail to bind a subrecipient, the alleged breach can be pursued in a state court. Therefore, the new procedure is an adequate, effective alternative to assuring that subrecipients are bound and their employees are aware that the protections of the Special Warranty are fully applicable.

Regarding the ''alternative comparable arrangement procedures'' issue, the Department stated in the NPRM that ''as required under SAFETEA–LU, the Department will eliminate waivers and procedures to request alternative comparable arrangements.'' This statement raised concerns among several commenters. Some noted that although SAFETEA–LU eliminated procedures to waive application of the Special Warranty, the amendment did not require that the alternative comparable arrangements provision be removed. In addition, comments noted, some State agencies and subrecipients may be deemed ineligible for assistance if alternative warranty arrangements were not available.

SAFETEA–LU specifies that employee protections will be applicable to Other Than Urbanized grants ''if the Secretary of Labor utilizes a special warranty that provides a fair and equitable arrangement to protect the interests of employees.'' 49 U.S.C. 5311(i). To clarify our statement in the NPRM, the Department interprets this statutory provision to preclude the development of alternate arrangements through special procedures established in the Guidelines. However, after considering comments, the Department has concluded that where a recipient is unable to satisfy the specific provisions in the Special Warranty because of a conflict with State or local law, the Department will make every effort to develop modifications to the Warranty that are necessary to ensure that the requirements of the statute are satisfied.

This approach is consistent with the Department's residual authority, noted above in reference to like-kind grants, to make modifications to non-referred arrangements where necessary. Therefore, as with all non-referred arrangements that present compliance problems for grantees as the result of conflict with State or local law, parties must notify the Department in writing in advance of the Department's certification that modification to the terms of the Special Warranty may be necessary. In instances in which the Department makes necessary modifications to the Special Warranty for specific recipients or subrecipients, a supplementary certification letter will be sent to the FTA setting forth the alternative provisions to be included in

[2] The Other Than Urbanized transit grant program authorized by 49 U.S.C. 5311 was previously known as the ''small urban and rural program.'' For clarity and consistency, this program is generally referred to in this document as the Other Than Urbanized program and not by its section number in Title 49 of the U.S. code.

[3] The OTRB program was first established by Congress in section 3038 of TEA–21, Public Law No. 105–178, 112 Stat. 107 (1998). It has been amended a number of times, most recently by section 3039 of SAFETEA–LU. The authority for the program currently appears in the Historical and Statutory Notes to 49 U.S.C. 5310. For clarity and consistency, the program is referred to in this document by its ''OTRB'' designation, rather than by citation to its public law number or the 49 U.S.C. 5310 note.

the contract of assistance between the recipient and FTA, by reference.

Other comments concerning the new Special Warranty procedures addressed the omission of a provision in the proposed guidelines to ensure that potentially affected transit employees in the service area of Other Than Urbanized grants, in addition to those employees who may be affected by Over-the-Road Bus grants, are notified of their rights under the Special Warranty and receive copies of grant applications to facilitate the unions' administration of protections. This inadvertent oversight has been corrected in the final guidelines, which now state that the ''Department will notify labor organizations representing potentially affected transit employees of the approval of Other Than Urbanized and OTRB grants and inform them of their rights under the Special Warranty Arrangement.'' *See* Section 215.7(d)(2).

Two comments note that proposed Section 215.7 states that the revised Special Warranty will be ''derived from the terms and conditions of the May 1979 Special Section 13(c) Warranty, and the Department's subsequent experience under 49 U.S.C. 5333(b).'' NPRM Section 215.7. These comments request that the Department clarify what it means to ''derive'' protections from the current Special Warranty, and that it also specify that the terms and conditions of any new Warranty Arrangement will be ''no less protective'' and ''offer no less protection'' than the version currently in place. ATU Comment, page 5; UTU Comment, page 3. While the terms and conditions of the Special Warranty will adopt much of the May 1979 Special Section 13(c) Warranty, some additional changes are needed to reflect processing differences under the new Guidelines, to create a self-contained document, and to update the language. Most of the planned changes are largely procedural and were previously described in the NPRM, such as the establishment of procedures necessary to bind subrecipients, the elimination of the need for unions to become a party to the Special Warranty, the elimination of the Department's finding of noncompliance in the Other Than Urbanized program, and the adoption of a dispute resolution procedure that ends the Department's involvement in claims arbitration. In response to concerns that the new Special Warranty must not be less protective than its predecessor, the Department will ensure that the provisions of the new Special Warranty provide appropriate protections for Other Than Urbanized and OTRB grants and continue to satisfy all the requirements of the statute.

Two comments note that the Department has indicated that it will no longer make findings of non-compliance and will instead include a dispute resolution procedure to address compliance issues that arise under the Special Warranty. One comment indicates that ''provisions must be made for the Department to honor an arbitrator's ruling of non-compliance and refuse further certifications to stop new funding from flowing to the recipient until evidence of compliance is presented to the arbitrator.'' ATU Comment, page 5. In the absence of such provisions, the commenter suggests that violators would be free of consequences resulting from the failure to abide by the Warranty. The Department has concluded that the inclusion of a standard labor arbitration dispute resolution procedure in the Special Warranty will ensure that there is a process in place to resolve disputes, and the arbitrator may direct compliance with the terms of the Warranty. A prevailing party to an arbitrator's ruling directing compliance with the terms of the Warranty can seek enforcement of that ruling in the appropriate state court.

Three comments indicate that it is unclear how the Special Warranty is to be included in the contract of assistance. The proposed guidelines specified in section 215.7(c) that ''[t]he Federal Transit Administration will include the current version of the Special Warranty, through reference in its Master Agreement.'' The Master Agreement is included in each contract of assistance with a Grantee receiving Federal assistance and the reference in the Master Agreement will include language which specifies that the recipient agrees to comply with the terms and conditions of the Special Warranty Arrangement which is most current as of the date of execution of the contract of assistance, and any alternative comparable arrangements specified by the Department of Labor for application to the recipient's grants.. Inclusion of this language in the Master Agreement will ensure that the protections are binding on the Grantee and the specific reference to Special Warranty Arrangement that is most current as of the date of the execution of the contract of assistance will eliminate confusion about which terms and conditions were applied if changes to the Warranty are made in the future.

Several comments raised concerns regarding the procedures the Department will use to identify relevant labor organizations as a result of the Department's notification provision in Section 215.7(d)(2) of the proposed guidelines (now Section 215.7(c)(2) of the final guidelines). In the past, the Department has relied on information contained in the grant applications to identify labor organizations that may be affected by grants and should be notified of Federal funding of projects, and such information has generally proven sufficient to make such identification. Accordingly, this information will be employed to make the notifications required in Section 215.7(c)(2). Other comments expressed doubt that, as asserted in the NPRM, the changes to the Special Warranty procedures will advance administrative efficiency. In response, the Department notes a variety of changes that it believes will improve the efficiency of the Special Warranty program and streamline the Department's processes: the provision establishing that the FTA will incorporate required employee protections into the contract of assistance through the Master Agreement and proceed with funding of Other Than Urbanized and Over the Road Bus grants without awaiting the Department's prior approval; the elimination of procedures to request to become a party to the warranty; the elimination of waiver procedures; and establishment of third-party neutral arbitration of disputes involving labor organizations, among others.

D. Unified Protective Arrangement

In the NPRM, the Department proposed amending section 215.3(b)(1) and (2) of the guidelines to implement use of a unified protective arrangement (UPA) for both operating and capital grants except in certain situations set forth in the guidelines.[4] The use of the UPA was primarily proposed because, over the past 12 years, administrative modifications to the Department's Operating and Capital Assistance Arrangements have rendered the two documents virtually identical to each other. As a result, the Department determined that two separate arrangements were no longer necessary, and administrative efficiency would be improved through the application of a single arrangement applicable to both operating and capital assistance. Application of a single UPA to future

[4] The NPRM indicated that the Department was proposing to amend sections 215.3(b)(2) and (b)(3) to address the UPA. The changes in the guidelines, however, are in sections (b)(1) and (b)(2), and the conflicting section (b)(3) has been deleted in the final guidelines. In addition, these changes require a corresponding revision to Section 215.3(d)(7), in order to delete references to ''§§ 215.3(b)(2) and 215.3(b)(3)'' and to substitute ''215.3(b)(1)'' for those references.

grants will simplify the preparation of referrals, expedite processing of grant applications, and, most importantly, continue to satisfy the requirements of the statute.

To clarify those circumstances in which previously certified arrangements will continue to be referred, and those circumstances in which the UPA will be referred, the Department has made organizational and substantive revisions to Sections 215.3(b)(1) and (b)(2). Section 215.3(b)(1) now sets forth the general proposition that the Department will refer to applicants with previously certified arrangements, and new applicants that develop and submit protections to the Department before applying for assistance, those protective terms and conditions that are appropriate to the new grant and are set by:

(1) A negotiated agreement developed and executed by the parties or the parties' adoption of the Model Agreement;

(2) Terms adopted by a state or local government based on agreement between the grantee and affected employees, where the grantee is a state or political subdivision subject to legal restrictions on bargaining collectively with employee organizations;

(3) A determination of protective terms by the Department that modifies in whole or in part negotiated or adopted protections; or

(4) A standardized arrangement (either the Operating or Capital Arrangement) that has been modified through agreement or determination to include provisions that are more protective than the UPA.

See 29 CFR 215.3(b)(1). In order to improve the logical flow of this paragraph in the guidelines, the placement of the third and fourth categories in Section 215.3(b)(1) have been switched from the order set out in the NPRM. The Department anticipates that applicants with previously certified arrangements that fall into the categories identified in 215.3(b)(1) will continue to constitute the majority of the Department's referrals. The Department further anticipates that there will be very few situations that fall under the fourth type of arrangement listed above. An additional organizational change made was to Section 215.3(b)(2), which now states that in all other circumstances, the Department will refer the UPA. *See* revised Section 215.3(b)(1) and (2).

In addition to the organizational change, the Department has concluded that a substantive revision was required to Section 215.3(b)(1) (formerly proposed 215.3(b)(2)) because the standard originally proposed—*i.e.*, whether a provision in an arrangement modified by negotiation or Department determination, was ''addressed by'' the UPA—was ambiguous and would permit the substitution of the UPA in those cases in which the parties' may have adopted unique provisions that may be ''more protective than'' the UPA. Similarly, the language may have permitted the substitution of the UPA for a negotiated agreement or adopted instrument where the Department had made a determination addressing one issue in that otherwise unique agreed upon document. This result was not intended, and so the standard for the use of the UPA in those cases in which the applicant has protective terms described in Section 215.3(b)(1)(iii) and (iv) has been modified accordingly.

A number of comments raised concerns regarding the continued application of previously certified arrangements, and whether they would be replaced in new grants by new arrangements. With the implementation of these guidelines revisions, in those cases in which the applicant has been previously certified on the basis of the Operating or Capital Arrangements, and there has been no modification to that previously certified arrangement through negotiation or Departmental determination, the UPA will be referred to the parties for the next grant. Section 215.3(b)(2). In those cases in which the applicant has been previously certified on the basis of the Operating or Capital Arrangement that has been modified either through negotiation or Departmental determination, and that modification contains a protective provision with an equivalent level of protection as a provision in the UPA, then the UPA will form the basis of the referral for the next grant. Section 215.3(b)(2). If the applicant has been previously certified on the basis of the Operating or Capital Arrangement, and any negotiated or Department-imposed modification thereto contains a protective provision that exceeds the level of protection established by a similar provision in the UPA, then the previously certified arrangement and not the UPA will be referred for the next grant because that arrangement is unique to those parties. Section 215.3(b)(1)(iv). The Department considers to be relatively rare those cases in which a grantee has been previously certified on the basis of Operating or Capital arrangement with more protective negotiated or Departmentally determined modifications. If the grantee has been previously certified based on protective terms and conditions that include, in whole or in part, a Departmental determination, then the previously certified terms and conditions and not the UPA will be referred for the next grant, again because those protections are unique to those parties. Section 215.3(b)(1)(iii). Finally, if the grantee's previous certifications are based on either a negotiated agreement, adoption of the Model Agreement, or adoption through resolution or other means by a state or local government of protective terms agreed to by the parties, those protections are unique to the parties and will form the basis of the Department's referral for the grantee's next grant. Section 215.3(b)(1)(i) and (ii). The same is true for new applicants that present to the Department proposed terms for certification based on either a negotiated agreement, adoption of the Model Agreement, or adoption through resolution or other means by a state or local government of protective terms agreed to by the parties—the Department's referral in those cases will be based on those proposed terms and not the UPA. Section 215.3(b)(1).

Three comments indicated that there was support for a UPA, and for elimination of the sole provider clause from the terms and conditions to be applied. The Department received no explicit objections to elimination of the sole provider clause, but we presume that labor organizations that objected to the development of the UPA in general objected *sub silentio* to the elimination of the sole provider clause. The primary goal addressed by the use of the UPA is to substitute one instrument in place of the two instruments previously used. In addition, the terms of the UPA are intended to uniformly apply statutorily sufficient terms and conditions to future grants, where warranted. As a result, the UPA will exclude the ''sole provider'' clause, which has been determined by the Department to be unnecessary in ensuring compliance with the statute.

Some comments indicated that certifying new arrangements for grant applicants that are already a party to Department of Labor-crafted arrangements would not create efficiencies in administration of the employee protections and would add to the number of arrangements to be administered, not reduce their proliferation. Currently, each time a new union is recognized, service is expanded to areas involving new unions, or a new project is proposed, additional operating and/or capital arrangements are put in place to accommodate the new unions or new service. Applying the UPA will reduce

this proliferation of operating and capital arrangements through application of the same arrangement to all those unions that are using standard Department of Labor-crafted arrangements. As new grant applications are submitted, the Department will refer the UPA rather than the various post-1996 Operating and Capital Arrangements. As a result, the administrative burden for the regulated community, as well as the Department, will decrease over time.

Several comments expressed concerns that the Department's proposed adoption of the UPA is not consistent with the policy that the Department adopted when it revised the guidelines in 1996. One comment indicated that the earlier guidelines ''sought to preserve all terms, including those never negotiated or in bilateral agreements.'' ATU Comment, page 7. Another comment indicated ''it is improper to unilaterally negate arrangements that were negotiated in good faith or developed by DOL determination following briefing by the parties.'' Comment submitted jointly by the American Train Dispatchers Association, *et al.* (''ATDA, *et al.* comment'') in response to NPRM, October 15, 2007, page 3. The Department recognizes that the approach of applying the UPA in lieu of previously certified standard protective arrangements, *i.e.*, the Operating or Capital Arrangements, departs from the practice established under the 1996 guidelines. Pursuant to the 1996 guidelines revisions, new applicants and applicants for which previously certified arrangements were not appropriate to the pending project received a referral based on either the Operating Arrangement or the Capital Arrangement, and that arrangement would continue to be applied to subsequent grants unless the parties objected and the provisions were renegotiated. This system led to the proliferation of multiple arrangements and created a system that is currently difficult to administer. The UPA was developed in order to consolidate protections into one document that satisfies all of the statutory requirements. This will eventually reduce the grantees' need to administer multiple sets of standard arrangements for unions representing affected employees in the service area of a project. Use of the UPA will also benefit International Unions, because their oversight of protections applied for their local unions should be substantially more uniform. Moreover, application of the UPA in lieu of existing standard arrangements does not ''unilaterally negate'' the existing protective arrangements, because those arrangements will continue to be in force for the projects for which they were certified. Only grantees with previous certifications that do not fall into one of the categories contained in Section 215.3(b)(1) will have the UPA referred as a standard protective arrangement.

The Department's administration of the program will also be improved using the UPA. Initially, as one comment suggested, the Department's decisions regarding referrals based on the UPA will ''call for a level of discretion in individual cases that will render the process more, rather than less complex.'' ATDA, *et al.* comment, p. 3. However, once the exceptions have been identified, processing of future grants will be expedited considerably. It will be easier to keep track of the appropriate protections to be included in future referrals and the parties to those protections. In the long run, there will be fewer arrangements for the Department and the regulated community to administer, and it will be easier to change a standard arrangement such as the UPA to reflect current program policies and statutory standards applicable to grants whenever necessary. As the Department previously indicated, it will also provide administrative certainty for the applicant and union because, with the exception of existing negotiated agreements and certain arrangements which are the product of negotiations or determinations, only the UPA will be applied to any particular grant.

Finally, one comment expressed concern about the referral of the UPA should one or more provisions within it conflict with State law. The Department has determined that a State law conflict with one or more provisions of the UPA's protective terms and conditions will not render the entire document ''inappropriate'' for referral. In the event that a State law conflict is raised in connection with the provisions in the UPA, the Department will resolve such a conflict in the same manner that it currently does—by negotiation or Departmental determination of a substitute term required as the result of a sufficient objection raised under Section 215.3(d)(3).

E. Exclusion of Over-the-Road Bus Accessibility Program From the Department's Referral Process

The Department proposed amending Section 215.3(a)(4) of the guidelines to specify that OTRB grants will no longer be subject to its referral process, but instead will be certified on the basis of the Special Warranty. The NPRM indicated that by eliminating referrals for OTRB grants and using the Special Warranty for certification, the Department intended to fully implement a requirement in the legislation establishing the OTRB program (Transportation Equity Act for the 21st Century ''TEA–21'', Public Law 105–178 (1998)) that OTRB grants ''shall be subject to all of the terms and conditions applicable to subrecipients who provide intercity bus transportation under section 5311(f) of title 49.'' Section 3038(f) of TEA–21. The Department reasoned that because grants under 49 U.S.C. 5311(f) are certified on the basis of the Special Warranty without referral to the parties, TEA–21 contemplated that OTRB grants would be certified on the basis of the Special Warranty without referral.

Three comments challenged the Department's stated interpretation of TEA–21. Commenters suggested that in the absence of specific exclusionary language, TEA–21 cannot be read to preclude the use of the referral process for OTRB grants, particularly in light of the fact that Congress subsequently employed specific exclusionary language in SAFETEA–LU with regard to the Other Than Urbanized grant program.

Upon reconsideration, the Department agrees with those comments stating that TEA–21 does not require OTRB grants to be certified without referral. Indeed, in 1999, when finalizing revisions to the Guidelines following the passage of TEA–21, the Department concluded that TEA–21 requires only that OTRB grants be subject to certification by the Secretary under Section 5333(b), and that ''neither th[at] statute nor [its] legislative history specify the procedures for processing these grants.'' *See* 64 FR 40,990, 40,992 (July 28, 1999). Accordingly, ''the Department has flexibility to develop and implement procedures appropriate to carry out its section 5333(b) responsibilities'' as to these grants. *Ibid.* In employing its administrative discretion under TEA–21, the Department at that time decided to employ the use of its referral procedures to OTRB grants.

Although the Department agrees that TEA–21 does not *require* OTRB grants to be certified without referral, the Department nevertheless adheres to its proposal in the NPRM that such grants will be processed in that manner. While one comment appears to argue that TEA–21 mandates the use of referral (ATU Comment, page 7), such an argument is premised on the incorrect

assumption, which the Department rejected in 1999, that the ''terms and conditions'' guaranteed by TEA–21 include the referral procedure. Thus, the comment has provided no basis for concluding that referral is required. As a result, in employing its discretion, the Department now concludes that use of the Special Warranty without referral is the preferred policy in the OTRB context. As explained in the NPRM, the Department's experience with the OTRB program has led to the conclusion that use of the Special Warranty will improve administration of the program. *See* 72 FR at 52,522. Use of the Warranty streamlines the Department's processing of grants that have limited potential for adversely affecting employees and historically have been the subject of very few objections, while continuing to ensure that the requirements of the statute are satisfied through application of a Special Warranty. Accordingly, the Department will administer grants under the OTRB program through application of the warranty arrangement set forth in Section 215.7, which also provides procedures to be followed for the Other Than Urbanized program. *See* Section 215.7.

F. Administrative Changes

Several adjustments were proposed in the NPRM to reflect current administrative practices.

First, the Department has eliminated language contained in Section 215.2 of the guidelines indicating that it will process applications that are in ''preliminary'' form. This section now requires that applications ''be in final form,'' based on the Department's determination that its administrative processes should not be engaged until the grant application reflects the actual project activities to be undertaken. Although all project activities must be firmly established, it is not necessary that project funding be available for the entire grant before the Department processes its certification of the grant. In addition, Section 215.8 will be modified to add an e-mail address and correct the room number of the Division of Statutory Programs office. Finally, the text of Section 5333(b) of the Federal transit law, which was set out in its entirety in Section 215.1 of the current Guidelines, has been removed from that section in the Final Guidelines so that modifications of the Guidelines will not be necessary each time statutory changes are enacted. The Department received no comments addressing these proposed administrative changes. As a result, the Final Guidelines will incorporate these revisions as proposed in the NPRM.

As part of its administrative changes, the Department proposed to amend Section 215.6 to further explain how interested parties may utilize the July 23, 1975 National (Model) Agreement. In particular, the Department proposed to add procedures in Section 215.6, comparable to those in paragraphs 26, 27, and 28 of the Model Agreement itself, by which applicants and unions may become a party to or withdraw from the Model Agreement. One comment objected to the inclusion of these National Agreement paragraphs as untimely and unnecessary, indicating that they provide an ''incomplete explanation containing only a *fraction* of the procedures under the National Agreement.'' ATU Comment, page 8. Furthermore, it was indicated that additional parties no longer sign on to the National Agreement, and that those that are a party require no additional explanation and have access to the National Agreement itself or can access it through the Department's *Web site.*

The Department's proposed guidelines were intended to increase awareness that the Model Agreement remains an appropriate instrument for the parties to agree to and apply to operating assistance projects. If grant recipients choose to do so, they, along with labor organizations representing employees in the service area, may continue to sign on to the Model Agreement and the Department will utilize this as a basis for referral of operating grants. Upon reconsideration, the Department concludes that it is not necessary to include in the Final Guidelines procedures regarding becoming a party to or withdrawing from the Model Agreement, particularly because the entire Model Agreement is available on the Department's *Web site.* Accordingly, section 215.6 of the guidelines will remain unchanged from its current version, except to make a technical correction so that this section accurately refers back to a revised portion of Section 215.3, and to reflect the current name of the American Public Transportation Association. *See* 29 CFR 215.6.

G. Las Vegas Decisions

Several comments addressed the Department's discussion of Section 3031 of SAFETEA–LU, which directs the Department to follow certain substantive principles enunciated in the Department's decisions for grant NV–90–X021 (decision of September 21, 1994, supplemented by decision of November 7, 1994, also called the ''Las Vegas decisions'') when making determinations involving assurances of employment when one private transit bus service contractor replaces another through competitive bidding. *See* 49 U.S.C. 5333(b)(5). The Department stated in the NPRM that because the Guidelines are procedural in nature, and do not encompass discussion governing the adjudication of substantive rights of parties, this provision of SAFETEA–LU would not be addressed in the revisions of the Guidelines.

In response to the NPRM, two comments requested that the Department address the *Las Vegas* decisions in its final rule, one suggested that the Department use only the precise language of the decisions, and the other suggested that the Department fully analyze and explain those decisions in the final rule. One comment in particular, submitted on behalf of the Regional Transportation Commission of Southern Nevada (''RTC''), took issue with the Department's very limited description of the *Las Vegas* decision in the NPRM and asserted that the Department had ''mischaracterized'' and ''fail[ed] to fairly and honestly explain the principles'' of the *Las Vegas* decisions. Comment of RTC submitted in Response to NPRM, Oct. 15, 2007, at 4. Although the RTC comment urges the Department to set forth a substantive interpretation of the Las Vegas decisions, the comment does not discuss the Department's primary justification for not addressing the decisions' principles in the guidelines—*i.e.,* the Department's guidelines have, since 1978, been intended only to establish procedures governing the efficient certification of transit grants and not substantive interpretation of 49 U.S.C. 5333(b) guarantees. Moreover, the Department's brief discussion of the *Las Vegas* decisions, in the context of explaining why the Department would not address them in its procedural guidelines, was not intended to constitute complete guidance on, or interpretation of, the principles articulated in those decisions. Thus, it is unnecessary to join issue on the question whether the Department mischaracterized those principles in the NPRM. Parties to Departmental determinations, in which the *Las Vegas* principles are relevant, will be free to present argument about the principles' meaning and application, and those arguments will be considered and resolved with reference to specific facts presented by that existing case or controversy. Thus, the Department adheres to its conclusion in the NPRM that these procedural guidelines should not address the *Las Vegas* decisions,

and that application of the *Las Vegas* principles is better carried out on a case by case basis. Although not incorporated in these Guidelines, the Department, of course, will adhere to the statutory mandate contained in 49 U.S.C. 5333(b)(5). The Department's *Las Vegas* determinations, and subsequent determinations made based on principles set forth in the *Las Vegas* determinations, will be available for review on the Department's *Web site.*

H. Other Comments Addressing Issues That Exceed the Scope of Revisions Proposed in the NPRM

The Department received comments on issues that exceed the scope and nature of the revisions made to the Guidelines in the NPRM. For instance, one commenter suggested that the Department revise the criteria used for the determination of sufficiency of objections under Section 215.3(d)(3), and include in those criteria ''court decisions, state law, or age of the referred protective arrangement.'' Comment submitted by Jim Seals Consulting Services in response to the NPRM, October 15, 2007, page 1.

Another comment requested that the Special Warranty be applied to Job Access and Reverse Commute (''JARC'') grants serving populations under 200,000 to expedite processing of these grants because of their similarity to grants under the Other than Urbanized program. The rural JARC program is processed by the Department under Section 215.3(a)(4)(ii) without referral to affected labor organizations on the basis of existing agreements or Department of Labor-crafted protective arrangements, as appropriate.

The Department appreciates guidance offered by these comments, but because no proposals were made regarding these topics, they are beyond the scope of the revisions contemplated by the NPRM, and will not be considered at this time.

III. Regulatory Procedures

Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. The Department has also determined that this rule is not ''economically significant'' as defined in Section 3(f)(1) of Executive Order 12866. Therefore, the information enumerated in section 6(a)(3)(C) of the order is not required.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601, *et seq.,* federal agencies must consider the impact of their rules on small entities. However, the requirements of the RFA apply only to rules that must be promulgated pursuant to notice and comment procedures under Section 553(b) of the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b). 5 U.S.C. 603(a). Section 553(a) of the APA exempts from notice and comment rulemaking interpretative rules, general statements of policy, or rules of agency organization, procedure or practice. 5 U.S.C. 553(a).

Under the Federal transit law, the Department is charged with the duty to administer the statutory grant certification process, and therefore must issue procedural rules to establish standards to effectuate this Congressionally delegated authority. This final rule establishes such procedural standards, and therefore is exempt from notice and comment rulemaking under Section 553(a) of the APA.[5] As a result, this rule is also exempt from the requirements of the RFA. The Assistant Secretary for Employment Standards has certified this conclusion to the Chief Counsel for Advocacy of the Small Business Administration.

Unfunded Mandates Reform

Executive Order 12875—This rule will not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more, or in increased expenditures by the private sector of $100 million or more.

Paperwork Reduction Act

These Guidelines contain no new information collection requirements for purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Small Business Regulatory Enforcement Fairness Act of 1996

A. This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

B. Consistent with the Small Business Regulatory Enforcement Fairness Act of 1996, the Department will, prior to the rule's Effective Date, submit to Congress a report regarding the issuance of today's final rule. The report will note the Office of Management and Budget's determination that this rule does not constitute a ''major rule'' under the Act. 5 U.S.C. 801, 805.

Congressional Review Act

Consistent with the Congressional Review Act, 5 U.S.C. 801, *et seq.,* the Department will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

List of Subjects in 29 CFR Part 215

Grant administration; Grants—transportation; Labor-management relations; Labor unions; Mass transportation.

■ In consideration of the foregoing, the Department of Labor, Office of Labor-Management Standards, hereby amends part 215 of title 29 of the Code of Federal Regulations as set forth below.

PART 215—GUIDELINES, SECTION 5333(b), FEDERAL TRANSIT LAW

■ 1. The authority citation for part 215 is revised to read as follows:

Authority: Secretary's Order No. 4–2007, 72 FR 26159, May 8, 2007.

■ 2. Section 215.1 is revised to read as follows:

§ 215.1 Purpose.

The purpose of these guidelines is to provide information concerning the Department of Labor's administrative procedures in processing applications for assistance under the Federal Transit law, as codified at 49 U.S.C. chapter 53.

§ 215.2 [Amended]

■ 3. Section 215.2 is amended by removing ''may be in either preliminary or final form'' and adding in its place ''must be in final form''.

■ 4. Section 215.3 is amended as follows:

■ a. Revise paragraphs (a)(3), (a)(4), and (b);

■ b. Amend paragraph (d)(7) by removing ''§§ 215.3(b)(2) and

[5] Although the rule need not be promulgated pursuant to notice and comment procedures, the Department has elected to use those procedures in order to obtain valuable input from the regulated community and to increase government transparency and accountability.

215.3(b)(3)'' and adding in its place ''215.3(b)(1)''.

The revisions read as follows:

§ 215.3 Employees represented by a labor organization.

(a) * * *

(3) If an application involves a grant to a state administrative agency or designated recipient that will pass assistance through to subrecipients, the Department will refer and process each subrecipient's respective portion of the project in accordance with this section. If a state administrative agency or designated recipient has previously provided employee protections on behalf of subrecipients in accordance with the terms of a negotiated agreement, the referral will be based on those terms and conditions.

(4) The referral procedures set forth in paragraphs (b) through (h) of this section are not applicable to the following grants:

(i) Grants to applicants for the Over-the-Road Bus Accessibility Program, and grant applications for the Other Than Urbanized Program; a special warranty will be applied to such grants under the procedures in § 215.7.

(ii) Grants to applicants serving populations under 200,000 under the Job Access and Reverse Commute Program or grants to capitalize State Infrastructure Bank accounts under the State Infrastructure Bank Program.

(iii) Grants involving only capital assistance for replacement of equipment and/or facilities of like-kind; these will be certified by the Department without referral on the basis of existing agreements or the Unified Protective Arrangement as referenced in paragraphs (b)(1) or (b)(2) of this section. Where application of the existing protective agreement(s) or the Unified Protective Arrangement would not satisfy the requirements of the statute in the circumstances presented, the Department will make necessary modifications to the existing protections to ensure that the requirements of the statute are satisfied.

(5) The Department will notify labor organizations representing potentially affected transit employees of the certification of grants without referral under paragraph (a)(4) of this section and inform them of their rights under the applicable protective arrangements.

(b) Upon receipt from the Federal Transit Administration of an application involving affected employees represented by a labor organization, the Department will refer a copy of the application and proposed terms for certification to that organization and to the applicant, and will also provide a copy to subrecipients with unions in their service area.

(1) For applicants with existing protections the Department's referral will be based on those protective terms and conditions that are appropriate to the grant and are set by:

(i) A signed negotiated agreement or formal acceptance of the July 23, 1975 National (Model) Agreement;

(ii) Agreed-upon terms adopted by a State or local government through a resolution or similar instrument;

(iii)) A determination of protective terms by the Department that modifies in whole or in part negotiated or adopted protections; or

(iv) A protective arrangement that has been modified to include provisions that are more protective than the Unified Protective Arrangement referred to in paragraph (b)(2) of this section.

(2) For applicants without protective terms and conditions set by an arrangement described in paragraph (b)(1) of this section, the referral will be based on the terms and conditions of the Unified Protective Arrangement.

* * * * *

■ 5. Section 215.5 is revised to read as follows:

§ 215.5 Processing of amendments.

(a) Grant modifications in the form of grant amendments will be transmitted by the Federal Transit Administration to the Department for review. Applications amending a grant for which the Department has already certified fair and equitable arrangements to protect the interests of transit employees affected by the project, will be processed by the Department following one of the two procedures described in paragraphs (a)(1) and (2) of this section.

(1) When an application amends a grant for which the Department has previously certified fair and equitable arrangements and the amendment makes changes to a project that may necessitate alternative employee protections, the Department will conclude that the amendment materially amends the existing assistance agreement. The Department will refer and/or process the labor certification provisions of such an amended grant according to procedures specified under §§ 215.3 and 215.4, as appropriate.

(2) When an application amends in a manner that is not material a grant for which the Department has already certified fair and equitable arrangements, the Department will, on its own initiative and without referral to the parties, certify the subject grant on the same terms and conditions as were certified for the project as originally constituted. The Department's processing of these applications will be expedited and copies will be forwarded to interested parties.

(b) Budget Revisions that make minor changes within the scope of the existing grant agreement and do not require a Federal Transit Administration grant amendment, as set forth in Federal Transit Administration guidance, will be covered under the Department's original certifications.

§ 215.6 [Amended]

■ 6. Section 215.6 is amended as follows:

■ a. Remove ''paragraph (b)(3)(i)'' and add in its place ''paragraphs (b)(1)(i) and (b)(2)'';

■ b. Following ''American Public Transit Association'' add ''(now known as the American Public Transportation Association)''.

■ 7. Section 215.7 is amended as follows:

■ a. Remove ''(b)(3)(ii)'' and add ''(b)(2)'' in its place;

■ b. Remove the phrase ''small urban and rural program under section 5311 of the Federal Transit Statute'' and add in its place ''Other Than Urbanized program''.

■ c. Designate the existing text as paragraph (a) and add two sentences to the end; and

■ d. Add new paragraphs (b) and (c).

The revisions and additions read as follows:

§ 215.7 The Special Warranty.

(a) * * * The Special Warranty Arrangement applicable to OTRB and Other Than Urbanized grants will be derived from the terms and conditions of the May 1979 Special Section 13(c) Warranty, and the Department's subsequent experience under 49 U.S.C. 5333(b). From time to time, the Department may update this Special Warranty Arrangement to reflect developments in the employee protection program.

(b) The requirements of 49 U.S.C. 5333(b) for OTRB and ''Other Than Urbanized'' grants are satisfied through application of a Special Warranty Arrangement certified by the Department of Labor; a copy of the current arrangement will be included on the OLMS *Web site.*

(c) The Federal Transit Administration will include the current version of the Special Warranty Arrangement, through reference in its Master Agreement, in each OTRB and Other Than Urbanized grant of assistance under the statute.

(1) The Federal Transit Administration will notify the

Department that it is funding an OTRB or Other Than Urbanized grant by transmitting to the Department an information copy of each grant application upon approval of the grant.

(i) Each grant of assistance for an Other Than Urbanized program will contain a labor section identifying labor organizations representing transit employees of each subrecipient, the labor organizations representing employees of other transit providers in the service area, and a list of those transit providers. A sample format is posted on the OLMS *Web site* to facilitate the inclusion of this information in the grant application.

(ii) OTRB grants of assistance will contain a labor section identifying labor organizations representing employees of the recipient.

(2) The Department will notify labor organizations representing potentially affected transit employees of the approval of Other Than Urbanized and OTRB grants and inform them of their rights under the Special Warranty Arrangement.

§ 215.8 [Amended]

■ 8. Section 215.8 is amended as follows:

■ a. Remove ''Director,'' and add in its place ''Chief, Division of'';

■ b. Remove ''Suite N5603,''; and

■ c. Add the phrase ''or e-mailed to *OLMS-TransitGrant@dol.gov''* at the end of the paragraph.

Signed at Washington, DC, this 4th day of August, 2008.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Donald Todd,

Deputy Assistant Secretary, Office of Labor-Management Standards.

[FR Doc. E8–18497 Filed 8–12–08; 8:45 am]

BILLING CODE 4510–CP–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0099; FRL–8360–2]

Flubendiamide; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of the insecticide flubendiamide *per se*, N^2-[1,1-Dimethyl-2-(methylsulfonyl)ethyl-3-iodo-N^1-[2-methyl-4-[1,2,2,2-tetrafluoro-1-(trifluoromethyl)ethyl]phenyl]-1,2-benzenedicarboxamide, in or on certain food and raw agricultural commodities. Bayer CropScience, LP in c/o Nichino America, Inc. (U.S. subsidiary of Nihon Nohyaku Co., Ltd.) requested these tolerances under the Federal Food, Drug and Cosmetic Act (FFDCA).

DATES: This regulation is effective August 13, 2008. Objections and requests for hearings must be received on or before October 14, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION)**.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0099. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Room S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA 22202–4501. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Carmen Rodia, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0001; telephone number: (703) 306–0327; e-mail address: *rodia.carmen@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to, those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*. To access the OPPTS Harmonized Guidelines referenced in this document, go directly to the guidelines at *http://www.epa.gpo/opptsfrs/home/guidelin.htm*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0099 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before October 14, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the