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Instructions: Direct your comments to Docket ID No. EPA-R08-RCRA-2006-0127. EPA's policy is that all comments received will be included in the public docket without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>, or e-mail. The federal Web site <http://www.regulations.gov> is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information may not be publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at: EPA Region 8, from 9 a.m. to 4 p.m., 1595 Wynkoop Street, Denver, Colorado, contact: Carl Daly, phone number (303) 312-6416, or the Utah Department of Environmental Quality

(UDEQ), from 8 a.m. to 5 p.m., 288 North 1460 West, Salt Lake City, Utah 84114-4880, contact: Susan Toronto, phone number (801) 538-6776.

FOR FURTHER INFORMATION CONTACT: Carl Daly, Solid and Hazardous Waste Program, U.S. Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202, (303) 312-6416, daly.carl@epa.gov.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this **Federal Register**.

Dated: February 22, 2008.

Robert E. Roberts,

Regional Administrator, Region 8.

[FR Doc. E8-4253 Filed 3-6-08; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 95

RIN 0970-AC33

State Systems Advance Planning Document (APD) Process

AGENCY: Administration for Children and Families, HHS.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Advance Planning Document (APD) process governs the procedure by which States obtain approval for Federal financial participation in the cost of acquiring automated data processing equipment and services. This NPRM reduces the submission requirements for lower-risk information technology (IT) projects and procurements and increases oversight over higher-risk IT projects and procurements by making technical changes, conforming changes and substantive revisions in the documentation required to be submitted by States, counties, and territories for approval of their Information Technology plans and acquisition documents.

DATES: Consideration will be given to comments received by May 6, 2008.

ADDRESSES: Send comments to: Office of Child Support Enforcement, Administration for Children and Families, 370 L'Enfant Promenade, SW., 4th floor, Washington, DC 20447. Attention: Director, Division of State and Tribal Systems; Mail Stop: ACF/OCSE/DSTS 4th floor West. Comments will be available for public inspection Monday through Friday from 8:30 a.m. to 5 p.m. on the 4th floor of the

Department's offices at the above address.

In addition, a copy of this regulation may be downloaded from www.regulations.gov. You may transmit written comments electronically via the Internet. To transmit comments electronically, via the Internet go to <http://regulations.acf.hhs.gov> and follow any instructions provided.

FOR FURTHER INFORMATION CONTACT: Robin Rushton, Director, Division of State and Tribal Systems, Office of Child Support Enforcement, (202) 690-1244. E-mail:

Robin.Rushton@acf.hhs.gov. Do not e-mail comments on the Proposed Rule to this address.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This notice of proposed rulemaking (NPRM) is published under the general authority of 5 U.S.C. 301, 42 U.S.C. 622(b), 629b(a), 652(a), 652(d) 654A, 671(a), 1302, and 1396a(a) of the Act. The notice of proposed rulemaking is published under the authority granted to the Secretary of the U.S. Department of Health and Human Services, (the Secretary) by Section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. This section authorizes the Secretary to publish regulations that may be necessary for the efficient administration of the functions for which he is responsible under the Act.

II. Background

State public assistance agencies acquire automated data processing (ADP) equipment and services for computer operations that support the Child Support Enforcement, Medicaid, Child Welfare, Foster Care and Adoption Assistance programs. Prior to the enactment of the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA), the Aid to Families with Dependent Children (AFDC) and Job Opportunities and Basic Skills (JOBS) programs were also covered by these rules. The references to these programs are being deleted from the rules. Additionally, the reference to the Office of Refugee Resettlement is no longer necessary, since the State Legalization Impact Assistance Grants program, which was subject to these regulations, was a time-limited program that has expired. The Department of Health and Human Services (HHS) provides national leadership and direction in planning, managing, and coordinating the nationwide administration and financing of these comprehensive State systems to support programs for children and families—to

ensure that they are being operated as intended by law and regulation and that the expenditure of Federal funds is made in accordance with Federal regulation.

The APD process was designed to mitigate financial risks, avoid incompatibilities among systems, and ensure that the system supports the program goals and objectives.

The regulations at 45 CFR part 95 require the States to submit three different types of documents for Federal approval. These three types of documents are Implementation Advance Planning Documents (APD), updates to these APDs, and acquisition documents.

Implementation Advance Planning Documents can include a statement of needs and objectives; a requirements analysis, feasibility study, a cost-benefit analysis; a statement of the alternatives considered; a project management plan, a proposed budget, and prospective cost allocations (if applicable). There are two major types of APD submissions, planning and implementation, which are used at different stages in the State development and acquisition process.

APD updates to the planning and implementation document are used to keep the agency informed of the project status and to request funding approval for the system development. There are two types of APD Updates, an Annual APD Update and an As-needed APD Update. The As-needed APD Update is required if there is a project cost increase of \$1 million or more for regular funded projects and \$100,000 or more for enhanced funded projects, a schedule extension of major milestones of more than 60 days, a significant change in the procurement approach, a change in system concept or scope, or a change to the approved cost allocation methodology.

Prior approval of Information Technology (IT) acquisition documents is required. States, counties, and territories must request prior approval of specific procurement documents related to IT system projects that exceed defined cost parameters. Contracts and contract amendments must be submitted to the Federal government for prior approval. Failure to obtain prior approval results in denial of the Federal match for that acquisition.

Need for Regulatory Revisions

The NPRM groups the discussion of the proposed revisions in the following manner:

- Part 1—Technical revisions that delete or update obsolete references,
- Part 2—Conforming revisions to regulations that previously cross-

referenced grant provisions in 45 CFR part 74, and

- Part 3—New or modified revisions that eliminate or reduce the documentation required to be submitted for Federal approval.

Technical revisions listed in part 1 of the Summary of Regulatory Revisions are prompted in part by changes made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which eliminated the JOBS program and replaced the AFDC program with a Temporary Assistance for Needy Families (TANF) block grant that is not subject to 45 CFR part 95. Other technical amendments are due to the name change from Health Care Financing Administration to Centers for Medicare & Medicaid Services.

The conforming revisions that are listed in part 2 were required by the transfer of HHS entitlement programs from 45 CFR part 74 to part 92. The final rule relating to the transfer was published in the **Federal Register** (68 FR 52843) and became effective on September 8, 2003. The affected programs must comply with part 95, which addresses program-specific rules that large State public assistance programs must follow. However, the current regulations at 45 CFR part 95 contain six references to part 74 that must be updated.

Part 3 provides substantive revisions prompted by a variety of studies and recommendations from a wide range of State, Federal and private organizations over the last decade. They include the following sources:

In March 1998, the U.S. General Accounting Office, now known as the Government Accountability Office (GAO), and the Nelson A. Rockefeller Institute of Government jointly established the GAO/Rockefeller Institute Working Seminar on Social Program Information Systems. The working seminar had about 30 members, including congressional staff, Federal and State program and information technology managers, and welfare researchers. The working seminar met eight times and discussed how shifting human services landscape had transformed States automated systems needs. The three key challenges identified by participants at this conference were: (1) Simplifying the approval process for obtaining Federal funding for information systems, (2) enhancing strategic collaboration among different levels of government and (3) obtaining staff expertise in project management and information technology.

On July 9, 2002, the Subcommittee on Technology and Procurement Policy,

House Government Reform Committee, held a congressional hearing on State and Local Information Technology Management. The hearing included testimony from State and Federal IT officials, the National Association of State Information Resource Executives (NASIRE), representatives from the IT vendor community, and GAO.

The National Association of State Chief Information Officers (NASCIO) and the American Public Human Services Association (APHSA) have also been actively involved in this issue and submitted proposals on how to reform the Federal oversight of State IT projects and procurement approval process.

In 2002, GAO reviewed the statutory and regulatory requirements for Federal approval and funding of State IT development and acquisition projects. The review examined how Agency processes for reviewing, approving, and funding State IT development acquisition projects for these programs hinder or delay States' efforts to obtain approval for these projects, and how Food and Nutrition Service (FNS), ACF and Centers for Medicare & Medicaid Services (CMS) ensure that they consistently apply the OMB Circular A-87 to fund IT development and acquisition projects. The GAO found that in fiscal years 2000 and 2001 States had submitted 866 planning and acquisition documents.

In their analysis of these submissions, GAO determined that 92 to 96 percent of the State requests submitted to child support enforcement, child welfare, and CMS were responded to within the required 60 days but only 74 percent of the State requests involving multiple programs were responded to within the 60 days.

The Office of Management and Budget (OMB) has also raised concerns about the information paperwork burden imposed on States by the APD prior approval process. Normally the renewal of the OMB Information Collection authority is granted for a three-year period, but in 2003 and 2004 OMB limited the renewal to one year increments and has asked to be kept informed of the Agencies' efforts to reduce or streamline the APD process. In April 2005, OMB approved the current APD process for an additional three years based partially on the progress that has been made on this reform effort.

The revisions to the regulations in Part 3 are designed to address the concerns of States and other parties that the APD regulations have not kept pace with advances in technology by redefining submission requirements to be based on risk, to develop risk criteria

other than just financial, and to revise the submission thresholds so they are based on the type of services or, in the case of acquisition documents, the risk associated with the type of procurement. For example, a project that has been developed and implemented and is currently in Operations and Software Maintenance mode is inherently less risky than a project in planning or implementation of new software application development. A procurement of IT hardware services involves less risk than a procurement of new software application development. Sole source procurement involves higher risk than a competitive procurement for the same IT services. The exercise of an option year on a multi-year contract involves less risk and needs less oversight than a contract amendment. A contract amendment that is within the initial scope and within a certain percentage of the costs associated with the base contract involves less risk than a contract that exceeds the scope of the original contract or substantially exceeds the initial contract amount.

These proposed regulations are intended to be consistent with OMB Circular A-87. However, if there is any inconsistency between the provisions and OMB A-87, the OMB A-87 would take precedent.

III. Summary of Regulatory Revisions

Part 1—Technical Updates

Many of the proposed revisions simply update terminology, such as replacing “Health Care Financing Administration (HCFA)” with “Centers for Medicare & Medicaid Services (CMS),” or deleting references to AFDC and JOBS. These revisions include:

- *Section 95.4 Definitions*—delete references to obsolete “Office of Human Development Services” and to the “Office of Child Support Enforcement” and replace with “Administration for Children and Families.”

- *Section 95.31 Waiver for good cause*—update names of components. Update reference from Health Care Financing Administration to “.” Delete references to “Office of Human Development Services”, “Social Security Administration”, “Office of Refugee Resettlement” and “Office of Child Support Enforcement” and replace with “Administration for Children and Families.”

- *Section 95.505 Definition of Operating Division*—update references to obsolete “Office of Human Development Services” and replace with “Administration for Children and Families.”

- *Section 95.601 Scope and applicability*—eliminate title IV–A, and title IV chapter 2 of the Immigration and Nationality Act as these programs are no longer subject to subpart F.

- *Section 95.605 Definitions*—replace the definition of “Advance Planning Document” in all its permutations with “Information Technology Document.” Therefore, “Planning Advance Planning Document” is now called “Planning Information Technology Document”; the “Implementation Advance Planning Document” is now called “Implementation Information Technology Document”; the “Annual and As-Needed Advance Planning Document Updates” are now called “Annual and As-Needed Information Technology Document Updates.” (These new terms now are addressed in a separate regulatory section, rather than in the Definitions section.) This change is proposed for the purpose of consistency with terminology used in the State approval process for information technology services and also to avoid any confusion with the abbreviation, ADP, which refers to Automated Data Processing.

- *Section 95.605 Definition of Automated Data Processing*—replace the word “Automatic” with “Automated,” so the phrase reads “Automated Data Processing.” The definition of ADP does not change.

- *Section 95.605 Definition of Approving components*—revise references in definition of approving components to remove obsolete terms.

- *Section 95.605 Definition of Project*—revise to eliminate reference to “AFDC.”

- *Section 95.611(a)(3) Prior approval conditions*—no change in intent, but reword section for better clarity.

- *Section 95.611(a)(4) Prior approval conditions*—replace reference to “Office of State Systems” with “Department’s Secretary and his/her designee,” and clarify how many copies should be sent to which offices.

- *Section 95.611(a)(5) Prior approval conditions, request submission*—explain that requests that affect the program of only one entity (CMS, OCSE, Children’s Bureau) should be sent to that applicable entity’s office and regional office.

- *Section 95.611(a)(6) Prior approval conditions, Information prior to approval*—replace the term “APD” with “ITD” and refer to the new section on the submission of the ITD.

- *Sections 95.611(b)(1)(i), (b)(1)(ii), (b)(2)(i), and (b)(2)(ii) Prior approval conditions, Specific prior approval*

requirements—replace the term “APD” with “ITD.”

- *Section 95.611(b)(1)(iii) Prior approval conditions, Specific prior approval requirements*—replace the terminology “RFP” with the broader term, “acquisition solicitation documents,” and move last sentence to a separate section. Delete language from paragraph (iii) and (iv) related to the threshold amounts for submitting acquisition documents and move to new § 95.611(b)(1)(v).

- *Section 95.611(c)(2)(ii)(B) Prior approval conditions, Specific approval requirements*—eliminate the “AFDC” reference.

- *Section 95.611 (c)(2)(ii)(B) Disallowance of Federal Financial participation (FFP)*—delete reference to suspension of APD for enhanced funding for AFDC, which is no longer applicable now that the AFDC program has been replaced with TANF, a block grant.

- *Section 95.621(e)(2) ADP review, service agreement*—delete all of paragraph (2) as it is no longer applicable.

- *Section 95.612 Disallowance of Federal Financial Participation (FFP)*—update terminology: “advance planning document” is changed to “information technology document”; “APD” is changed to “ITD”. Revise the last sentence of 95.612 related to suspension of approval of an APD to update the citations under child support and child welfare regulations related to enhanced funding for systems. Eliminate the reference to 45 CFR 205.37(c), which is no longer applicable because TANF systems are funded through a block grant and no longer subject to the Part 95. Eliminate the child support reference to 45 CFR 307.35(d), which is no longer valid. Add a reference to 45 CFR 1355.56, to reflect the authority under the child welfare regulations.

- *Section 95.623 Waiver of prior approval requirements*—remove the provisions of this section on waiver of prior approval requirements, which referred to a situation occurring prior to December 1, 1985. Create a new § 95.623 related to reconsideration of denied FFP for failure to obtain prior approval, described in Part 3 of this preamble summary of regulatory revisions.

- *Section 95.631 Cost identification for purpose of FFP claims*—replace the term “APD” with “ITD.”

- *Section 95.641 Applicability of rules for charging equipment in Subpart G of this part*—In the final sentence, replace the term “APD” with “ITD.”

Part 2—Conforming Amendments

These proposed changes reflect transfer of HHS grant authority from 45 CFR part 74 to part 92. Specifically:

- *Section 95.605 Definition of Service agreement*—in § 95.605(f) eliminate the phrase “and requires the provider to comply with 45 CFR part 74 Subpart P for procurements related to service agreement.” Subpart P was eliminated in 1996. This notice of proposed rulemaking revises the reference to make service agreements subject to 45 CFR 95.613.

- *Section 95.613 Procurement standards*—revise to incorporate much of the procurement language currently in 45 CFR part 74. Maintain the long-standing procurement standards for State information technology contracts, specifically for the definition of sole source justification, requiring all procurement transactions to be conducted in a manner to provide, to the maximum extent practical, open and free competition. Address grantee responsibilities, codes of conduct, competition, procurement procedures, and access to records.

- *Section 95.615 Access to systems and records*—eliminate the reference to 45 CFR part 74.

- *Section 95.621(d) ADP reviews (authority to conduct reviews on procurements under the submission threshold)*—eliminate the phrase “were made in accordance with 45 CFR part 74.” This notice of proposed rulemaking would replace reference to 45 CFR part 74 with 45 CFR 95.613.

- *Section 95.705 Equipment costs—FFP, General rule*—eliminate the references to cost principles in subpart Q of 45 CFR part 74. Substitutes the cost principles in 45 CFR part 92.

- *Section 95.707 Equipment management and disposition*—eliminate the reference to the property rules in subpart O of 45 CFR part 74. Substitutes the property rules in 45 CFR part 92.32.

Part 3—Revisions to the Current Requirements and New Regulatory Provisions Designed To Reduce the Amount of Federal Oversight and Monitoring Based on Risk

- *Section 95.605 Definitions*—

We add new definitions for Acquisition checklist, Alternative Approach to IT requirements, Base contract, Commercial off the shelf software (COTS), Grantee, Noncompetitive, Service Oriented Architecture, and Software maintenance, which are necessitated by proposed revisions to §§ 95.610 and 95.611.

The revision in 95.611(b)(1)(iii) to permit exemption from prior approval of certain acquisition solicitation documents requires a definition of Acquisition checklist, which can be utilized in lieu of State’s submittal of a competitive RFP. The revisions in § 95.611(a) and § 95.611(b)(1)(v)(B) to base submission thresholds on the type of information technology services requires a definition of Software maintenance and COTS software.

The revision to § 95.611(b)(1)(iv) to exempt contract amendments that cumulatively do not exceed 20 percent of the base contract requires a definition of Base contract.

The elimination of the cross reference to Part 74 in § 95.613 procurement standards requires a definition of Noncompetitive acquisitions.

The creation of a new section § 95.610(c)(3) on Operations and Software Maintenance ITDU requires a definition of Software maintenance.

- *Section 95.610 New section on Advance Planning Document requirements*—

Under the current regulations, the requirements of the Advance Planning Document, including Annual and As-Needed Updates, are contained in the Definition section, § 95.605. This notice of proposed rulemaking would move this regulatory authority to a newly created section, § 95.610, specifying the requirements for Planning, Implementation, Annual and As-Needed Information Technology Documents. In addition to moving the language on Advance Planning Documents from the definitions in § 95.605 to its own new section, there is a global change to replace Advance Planning Document with Information Technology Document, throughout the regulation. This change is proposed to make the terminology more consistent with the terminology used in the State Information Technology approval process. Almost all States called their similar State approval process, Information Technology review or Information Systems approval. No State or territory had an approval process called APD approval. In addition, the States indicated that APD was often confused with ADP or Automated Data Processing. Therefore, this notice of proposed rulemaking amends every section to replace the term “Advance Planning” with the term “Information Technology.”

We propose to change “Planning Advance Planning Document (PAPD)” at § 95.605 under Advance Planning Document (1) to a “Planning Information Technology Document (PITD)” at § 95.610(a).

We proposed to change “Implementation Advance Planning Document (IAPD)” at § 95.605 under Advance Planning Document (2) to an “Implementation Information Technology Document (IITD)” at § 95.610(b). We propose to insert the phrase “the use of service oriented architecture” into the description of a Feasibility Study to reflect Information Memorandum 05–04 which clarified that States and Territories are free to consider, along with new application development and system transfer, the use of service oriented architecture software in the development of automated human services systems.

We propose to change “Annual Advance Planning Document Update (AAPDU)” at § 95.605 under Advance Planning Document (3)(a) to an “Annual Information Technology Document Update (AITDU)” at § 95.610(c)(1).

We propose to change “As-Needed Advance Planning Document Update (AN-APDU)” at § 95.605(3)(b) under Advance Planning Document to “As-Needed Information Technology Document Update (AN-ITDU)” at § 95.610(3)(c)(2).

This notice of proposed rulemaking would transfer the requirements for Information Technology Document Updates (ITDU) from the definitions section and create a new § 95.610(c) that provides the requirements for ITD Updates. In keeping with the intent to base the degree of Federal oversight on the risk of the IT services, we propose to establish a new type of Annual Information Technology Document Update for Operations and Software Maintenance (O&SM). Instead of the detail required in an Annual or As-Needed ITD, if the project has transitioned to Operations and Software Maintenance mode with no system development, then the lower risk justifies a reduced level of Federal oversight and the requirements for submission would be limited to an annual report of as few as two pages, depending on the scope of the activities, which includes a summary of O&SM activities, acquisitions, and budget. This limited information is required to authorize funding in the Department’s financial system and track activities that may be of interest to other states or entities. This limited annual submission will also allow the identification of potential problems that could have an impact on the funding a state receives.

This NPRM proposes under § 95.610(c)(1)(viii) to amend current requirements for an annual report on cost benefits in the Annual ITD update and to change the requirement for an annual cost benefit analysis report. The

current regulations under Advance Planning Document Update at § 95.605(3)(a)(vii) require the submittal of an annual cost benefit analysis update. This notice of proposed rulemaking revises the requirements of an Annual ITD Update to eliminate the need for an annual cost benefit analysis report to be provided in the annual ITD update report. Consistent with other provisions designed to focus on high risk IT projects and procurements, we believe that the Independent Validation and Verification requirements in § 95.626 and disallowance of FFP provisions in § 95.612 provide the needed information and authority to encourage States to select the most cost effective methods for automating a program requirement. Nevertheless, we also propose to revise the requirements of the Annual ITD Update to require a close-out cost benefit report to be submitted no later than two years after full implementation and at three-year intervals until the cost benefit is achieved.

• *Section 95.611 Prior approval conditions—*

We propose adding a sentence to § 95.611(a)(1), General acquisition requirements, to clarify that acquisitions that are limited to only operations and software maintenance are exempt from prior approval.

This notice of proposed rulemaking would revise the language in § 95.611(b)(1)(iii) to make the technical amendments noted in Part I of this preamble. The current regulations at § 95.611(b)(1)(iii) contain language that requires Requests for Proposals (RFPs) and contracts to be submitted for prior approval, unless “specifically exempted by the Department.” However, during discussions with State systems representatives in 2003 and 2004, the State staff stated that this exemption authority is not well publicized, and different analysts in the different Federal programs often had different and sometimes conflicting interpretations of those requirements. Therefore, the agencies subject to 45 CFR part 95 and the Food and Nutrition Service, which has separate regulations regarding the Food Stamp automation, jointly developed an acquisition checklist that would standardize the type of information that needs to be submitted by the States seeking an exemption from prior approval of the RFP. While § 95.611(b)(1)(iii) retains authority for exemption from prior approval for contracts and contract amendments, the workgroup agreed to limit the initial use of the checklist to a competitively procured Request for Proposal (RFP) or Invitation for Bid

(IFB). This acquisition checklist enables the States to self-certify that they are in compliance with the Federal and State procurement requirements. The States retain the option of submitting the RFP or IFB to the Federal government for Federal review, analysis and prior approval. The information in the acquisition checklist in Information Memorandum 05–03 dated May 2, 2005, provides the Federal agency with essential information including the type of the procurement, estimated cost, and the competitive nature of the procurement, and the time frame for vendors to respond to the solicitation.

Although § 95.611 already provides the Federal agencies with discretion to exempt a RFP, contract or contract amendment from prior approval, we propose to add a new definition of “Acquisition checklist” to the definitions in § 95.605. Furthermore, we propose to modify § 95.611 to improve clarity and to move the last sentence about submission of acquisition documents under the submission threshold in § 95.611(b)(1)(iii) to a new § 95.611(b)(1)(v) to clarify that this provision applies to all acquisitions not otherwise subject to prior approval.

We propose to amend § 95.611(a)(1), General acquisition requirements, to eliminate the need to submit competitive acquisitions for Operations and Software Maintenance RFPs, contracts and contract amendments.

Current regulations at § 95.611(b)(1) base submission thresholds for IT acquisitions on only one risk category, the size of the acquisition, regardless of the type of IT service being acquired. This notice of proposed rulemaking would establish different dollar submission thresholds based on the different types of competitive procurements. The threshold in the current regulation is \$5 million for all types of acquisitions, and the proposed change would retain the \$5 million threshold for software application development, which continues to be the highest risk type. However it would establish a \$20 million threshold for hardware procurements and eliminate the requirement that competitively procured contracts limited to Operations and Software Maintenance be submitted for prior approval. If the procurement combines different types of activities, for example, hardware acquisition with software application development, then the lower threshold applies.

In addition, the current requirement for submission of contract amendments for prior Federal approval is \$1,000,000. We propose to amend § 95.611(b)(1)(vi) to permit contract amendments to a

competitively procured contract that do not exceed 20 percent of the base contract and are within the scope of the initial contract to be exempt from prior approval and sole source justification. We propose to add a new definition of “Base contract” to § 95.605. A Base contract is defined as the initial contract activity that is allowed during a defined period of time. The base contract does include option years but does not include amendments. This flexibility of 20 percent over the base contract applies to all types of IT services being procured such as hardware, software application development, additional Commercial off the Shelf (COTS) software licenses, but does not extend to situations where the amendment expands the scope of the contract nor does it permit a fragmentation of the amendments to circumvent the percentage threshold. The 20 percent over base contract is a cumulative amount. Whenever the cumulative amount of contract amendments exceeds 20 percent of the base contract, then we propose that submission to the Federal agency for prior approval is required. As specified earlier, competitively procured O&M contracts and contract amendments are exempted from prior approval.

We propose to amend § 95.611(b)(2)(iii) and (iv) to increase prior submission acquisition requirements for enhanced funded projects for RFPs, contracts, and contract amendments from \$100,000 to \$300,000. Section 95.611(c)(2) regarding enhanced funded As-Needed, would be changed from the current \$100,000 submission threshold to \$300,000.

We propose to amend § 96.611(c), Specific approval requirements for enhanced funded projects, the threshold for submitting an As-Needed APD Update, by raising the threshold from \$100,000 to \$300,000.

Both § 95.611(b)(1)(iii) Request for Proposal and Contract and § 95.611(b)(iv) Contract Amendments of the current regulations contain language that requires the State to submit RFP, contract and contract amendments under these threshold amounts on an exception basis or if the acquisition strategy is not adequately described and justified in an ITD. This NPRM proposes a new regulatory section to specify that this authority addresses not just acquisitions under the threshold, but ITD submissions including the new Operations and Software Maintenance ITDU. States will be required to submit acquisition documents, and ITDUs that were otherwise under the submission threshold amount if requested to do so in writing by the Department.

• *Section 95.623 New Section on Reconsideration of denied FFP for failure to obtain plan approval—*

Section 95.623, waiver of prior approval requirements, of the current regulations is limited to situations prior to December 1, 1985. We propose deleting this language and replacing it with new regulatory language that specifies the conditions for requesting reconsideration of FFP denial for failure to request prior approval. This codifies in regulation, the process and procedure that was outlined in Action Transmittal OSSP-00-01 dated March 13, 2000. Under proposed § 95.623, for ADP equipment and services acquired by a State without prior written approval, the Department may waive the prior approval requirement if the State requests reconsideration of a denial by request to the head of the grantor agency within 30 days of the initial written disallowance determination.

• *Section 95.626 New Section on Independent Validation and Verification—*

This notice of proposed rulemaking would also create a new § 95.626 to require Independent Validation and Verification (IV&V) Services for certain ITD projects. This regulatory provision is derived from existing authority and language in 45 CFR 307.15(b)(10) of the child support automation regulations. In addition to § 307.15(b)(10), other Federal programs have required IV&V services for troubled ITD projects based on the authority granted to them under 45 CFR 92.12.

• *Section 95.627 New Section on waiver authority—*

This notice of proposed rulemaking would create a new § 95.627 that

permits a waiver of any ITD requirement in 45 CFR part 95 by presenting an alternative approach. This authority currently exists in the child support automation regulations in 45 CFR 307.5(b) and is intended to give the Secretary increased authority to grant waivers of ITD and acquisition prior approvals beyond the authority specified in part 95.

Under the proposed rule, a State may apply for a waiver of any requirement in 45 CFR Subpart F by presenting an alternative approach. Waiver requests must be submitted and approved as part of a State's ITD or ITD Update. The Secretary may grant a State a waiver if the State demonstrates that it has an alternative approach to a requirement in this chapter that will safeguard the State and Federal governments' interest and that enables the State to be in substantial compliance with the other requirements of this chapter.

Under this proposed new section, the State's requests for approval of an alternative approach or waiver of a requirement in this chapter must demonstrate why meeting the condition is unnecessary, diminishes the State's ability to meet program requirements, or that the alternative approach leads to a more efficient, economical, and effective administration of the programs for which federal financial participation is provided, benefiting both the State and Federal Governments.

The Secretary, or his or her designee, will review waiver requests to assure that all necessary information is provided, that all processes provide for effective economical and effective program operation, and that the conditions for waiver in this section are

met. When a waiver is approved by an agency, it becomes part of the State's approved ITD and is applicable to the approving agency. A waiver is subject to the ITD suspension provisions in § 95.611(c)(3). When a waiver is disapproved, the entire ITD will be disapproved. The ITD disapproval is a final administrative decision and is not subject to administrative appeal.

• *Section 95.635 New Section on Disallowance of Federal Financial participation in automated systems that fail to comply substantially with program regulations—*

We propose to create a new section that permits the Federal agency to disallow all or part of any costs in systems projects that fail to comply substantially with applicable regulations for the applicable programs.

IV. Impact Analysis

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), HHS is required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record keeping requirements in a proposed or final rule. In April 2005, OMB approved the current APD process for three years based partially on the progress that has been made on this reform effort. The proposed revisions in this NPRM to the requirements at 45 CFR part 95 reduce the documentation required to be submitted by States and territories to the Federal government. The current information collection burden, before this proposed rule is implemented is as follows:

Instrument	Estimated number of respondents	Proposed frequency of response	Average burden per response	Total annual burden
Advance Planning Document	50	1.84	60	5,520
RFP and Contract	50	1.54	1.5	115.5
Emergency Funding Request	27	1	1	27
Service Agreements	14	1	1	14
Biennial Security reports	50	1	1.5	75

The NPRM will result in the following reductions:

In Advance Planning Documents—a reduction in the average burden hours for projects that are implemented and in Operations and Software Maintenance mode. Instead of having to submit a full Annual or As-Needed ITDU, States with projects in maintenance and operation mode will only have to submit a one- to two-page document. The Department also plans to develop a process for the states to submit this O&SM IT document

update electronically. Since the majority of States and territories appear to be continuing to do ongoing software enhancements as part of continuing performance, we are estimating only a small reduction in the average burden hours associated with reducing the documentation required for annual O&SM IT submissions. We estimate a reduction from 60 hours to 58 or 5,336 total burden hours for information technology Documents. The proposal to require a close-out cost benefit report

also is factored into this net burden reduction.

In RFP and contracts—a reduction is made in the average burden hours per RFP due to several revisions including: An increased use of the Acquisition Checklist, an elimination of maintenance and operation RFPs, higher submission thresholds for contracts and contract amendments, elimination of the need to submit hardware and commercial software acquisition documents under \$20 million if

competitively procured and an elimination of the need to submit contract amendments if within scope and cumulatively the amendments do

not exceed 20 percent of the base contract. We believe that this will reduce the average frequency of responses by half, from 1.54 to .75 and

reduce the total burden hours to 56.25 hours.
The revised annual burden estimates based on this NPRM is as follows:

Instrument	Estimated number of respondents	Proposed frequency of response	Average burden per response	Total annual burden
Advance Planning Document	50	1.84	58	5,336
RFP and Contract	50	.75	1.5	56.25
Emergency Funding Request	27	1	1	27
Service Agreements	14	1	1	14
Biennial Security reports	50	1	1.5	75

The respondents affected by this information collection are State agencies and territories.

The Department will consider comments by the public on this proposed collection of information in the following areas:

- Evaluating whether the proposed collection activity is necessary for the proper performance and function of the Department, including whether the information will have a practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used,
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technology, e.g. permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department of the proposed regulations. Written comments may be sent to OMB for the proposed information collection either by FAX to 202 395-6974 or by e-mail to OIRA_submission@omb.eop.gov. Please mark all comments "Attn: Desk Officer for ACF."

We are submitting this information collection to OMB for approval. Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447 ATTN: ACF Reports

Clearance Officer. All requests should be identified by the title of the information collection. The e-mail address is Robert.Sargis@acf.hhs.gov.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State and Territorial governments. State and Territorial governments are not considered small entities under the Act. The intent of these proposed rules is to reduce the submission requirements for lower-risk information technology (IT) projects and procurements and increase oversight over higher-risk IT projects and procurements by making technical changes, conforming changes and substantive revisions in the documentation required to be submitted by States, counties, and territories for approval of their Information Technology plans and acquisition documents.

Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this proposed rule is consistent with these priorities and principles. Since it significantly reduces the documentation required to be submitted by the States and Territories related to lower risk Information Technology projects and procurement, costs are reduced. Examples of documentation that is no longer required to be submitted for prior approval under this proposed rule are competitive hardware acquisitions under \$20 million instead of the current \$5 million threshold and instead of having to submit a full annual or As-Needed ITDU, States with projects in maintenance and operation mode will only have to submit a document with as few as 2 pages, depending on

the scope of activities. The current information collection burden is reduced to reflect these reduced costs to States and Territories. To estimate the savings we are utilizing the same methodology and State and contractor average annual rate as we recommend to the States to use for their costs estimates in our Planning Advance Planning Document training. In those training documents we recommend an average standard hourly rate of \$100 for state systems staff and \$175 for contractor state staff. So the reduction of 59.25 hours for APD's would translate to a cost savings of \$5,925 for State staff or \$10,368, if the RFP is prepared by a Quality Assurance contractor. The reduction of 184 hours for submission of RFP's would translate to a cost savings of \$18,400 if prepared by State staff and \$32,000 if prepared by contractor staff. So the estimate of cost savings related to the reduction in information collection budget would be \$24,325 to \$49,493.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations will not have an impact on family well-being as defined in the legislation.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of \$100 million adjusted for inflation, or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

We have determined that this rule will not result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of more than \$100 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

Congressional Review

This rule is not a major rule as defined in 5 U.S.C. chapter 8.

Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. We do not believe the regulation has federalism impact as defined in the Executive Order. Consistent with Executive Order 13132, the Department specifically solicits comments from State and local government officials on this proposed rule.

List of Subjects in 45 CFR Part 95

Administrative practice and procedure, Claims, Computer Technology, Grant programs—health, Grant programs, Social programs.

Approved: November 29, 2007.

Michael O. Leavitt,

Secretary of Health and Human Services.

For the reasons set forth above, HHS proposes to amend title 45 CFR part 95 as follows:

PART 95—GENERAL ADMINISTRATION—GRANT PROGRAMS (PUBLIC ASSISTANCE, MEDICAL ASSISTANCE AND STATE CHILDREN’S HEALTH INSURANCE PROGRAMS)

1. The authority citation for 45 CFR part 95 is revised to read as follows:

Authority: 5 U.S.C. 301, 42 U.S.C. 622(b), 629b(a), 652(a), 652(d), 654A, 671(a), 1302, and 1396a(a).

Subpart A—Time Limits for States to File Claims

2. In § 95.4 revise the definition of “We, our and us” to read as follows:

§ 95.4 Definitions.

* * * * *

We, our, and us refer to HHS’ Centers for Medicare & Medicaid Services and the Administration for Children and Families, depending on the program involved.

3. In § 95.31 revise paragraph (a) to read as follows:

§ 95.31 Where to send a waiver request for good cause.

(a) A request which affects the program(s) of only one HHS agency [(CMS), or the Administration for Children and Families (ACF)] and does not affect the programs of any other agency or Federal Department should be sent to the appropriate HHS agency.

* * * * *

Subpart E—Cost Allocation Plans

4. In § 95.505 revise the definition of “Operating Divisions” to read as follows:

§ 95.505 Definitions.

* * * * *

Operating Divisions means the Department of Health and Human Services (HHS) organizational components responsible for administering public assistance programs. These components are the Administration for Children and Families (ACF) and the Centers for Medicare & Medicaid Services (CMS).

* * * * *

Subpart F—Automated Data Processing Equipment and Services—Conditions for Federal Financial Participation (FFP)

5. Remove the authority citation for subpart F.

6. Revise § 95.601 to read as follows:

§ 95.601 Scope and applicability.

This subpart prescribes part of the conditions under which the Department of Health and Human Services will approve the Federal Financial Participation (FFP) at the applicable rates for the costs of automated data processing incurred under an approved State plan for titles IV–B, IV–D, IV–E, or XIX of the Social Security Act. The conditions of approval of this subpart add to the statutory and regulatory

requirements for acquisition of Automated Data Processing (ADP) equipment and services under the specified titles of the Social Security Act.

7. Amend § 95.605 to:

a. Remove the definitions of “Advance Planning Document,” including its sub-definitions “Planning APD,” “Implementation APD,” “Advance Planning Document Update.”

b. Add the definitions “Acquisition checklist,” “Alternative approach to IT requirements,” “Base contract,” “Commercial off the shelf software,” “Grantee,” “Noncompetitive,” “Service Oriented Architecture,” and “Software maintenance.”

c. Revise the definition of “Approving component.”

d. Remove the definition heading “Automatic data processing” and add in its place “Automated data processing.”

e. Remove the definition heading “Automatic data processing equipment” and add in its place “Automated data processing equipment.”

f. Remove the definition heading “Automatic data processing services” and add in its place “Automated data processing services.”

g. Revise the definition of “Project.”

h. Revise paragraphs (d), (e), and (f) under the definition of “Service agreement.”

§ 95.605 Definitions.

* * * * *

Acquisition checklist means the standard Department checklist that States can submit to meet prior written approval requirements instead of submitting the actual Request for Proposal (RFP). The Acquisition Checklist allows States to self-certify that their RFPs, or similar document, meet State and Federal procurement requirements, are competitive, contain appropriate language about software ownership and licensing rights in compliance with § 95.617, and provide access to documentation in compliance with § 95.615.

* * * * *

Alternative approach to IT requirements means that the State has developed an ITD that does not meet all conditions for ITD approval in § 95.610 resulting in the need for a waiver under § 95.627(a).

Approving component means an organization within the Department that is authorized to approve requests for the acquisition of ADP equipment or ADP services. The approving component is the Administration for Children and Families (ACF) for titles IV–B (child welfare services), IV–E (foster care and adoption assistance), and IV–D (child

support enforcement), and the Centers for Medicare & Medicaid Services (CMS) for title XIX (Medicaid) of the Social Security Act.

Base contract means the initial contractual activity, including all option years, allowed during a defined unit of time, for example, 2 years. The base contract includes option years but does not include amendments.

Commercial off the shelf (COTS) software means proprietary software products that are ready-made and available for sale to the general public at established catalog or market prices. Examples of COTS include: Standard word processing, database, and statistical packages.

Grantee means an organization receiving financial assistance directly from an HHS awarding agency to carry out a project or program.

* * * * *

Noncompetitive means solicitation of a proposal from only one source, or after solicitation of a number of sources, negotiation with selected sources based on a finding that competition is inadequate. Procurement by noncompetitive proposals may be used only when competitive award of a contract is infeasible and one of the following circumstances applies:

- (i) The item is available only from a single source;
- (ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (iii) The federal awarding agency authorizes noncompetitive proposals; or
- (iv) After solicitation of a number of sources, competition is determined inadequate.

Project means a defined set of information technology related tasks, undertaken by the State to improve the efficiency, economy and effectiveness of administration and/or operation of one or more of its human services programs. For example, a State may undertake a comprehensive, integrated initiative in support of its Child Support, Child Welfare and Medicaid programs' intake, eligibility and case management functions. A project may also be a less comprehensive activity such as office automation, enhancements to an existing system or an upgrade of computer hardware.

* * * * *

Service agreement * * *

(d) Includes assurances that services provided will be timely and satisfactory; preferably through a service level agreement;

(e) Includes assurances that information in the computer system as

well as access, use and disposal of ADP data will be safeguarded in accordance with provisions of all applicable federal statutes and regulations, including 45 CFR 205.50 and 307.13;

(f) Requires the provider to obtain prior approval pursuant to 45 CFR 95.611(a) from the Department for ADP equipment and ADP services that are acquired from commercial sources primarily to support the titles covered by this subpart and requires the provider to comply with 45 CFR 95.613 for procurements related to the service agreement. ADP equipment and services are considered to be primarily acquired to support the titles covered by this subpart when the human service programs may reasonably be expected to either: be billed for more than 50 percent of the total charges made to all users of the ADP equipment and services during the time period covered by the service agreement, or directly charged for the total cost of the purchase or lease of ADP equipment or services;

* * * * *

Service Oriented Architecture (SOA), also referred to as Service Component Based Architecture, describes a means of organizing and developing Information Technology capabilities as collaborating services that interact with each other based on open standards. Agency SOA artifacts may include models, approach documents, inventories of services or other descriptive documents.

Software maintenance means routine support activities that normally include corrective, adaptive, and perfective changes, without introducing additional functional capabilities. Corrective changes are tasks to correct minor errors or deficiencies in software. Adaptive changes are minor revisions to existing software to meet changing requirements. Perfective changes are minor improvements to application software so it will perform in a more efficient, economical, and/or effective manner. Software maintenance can include activities such as revising/creating new reports, making limited data element/data base changes, and making minor alterations to data input and display screen designs. Software maintenance that substantially increases risk or cost or functionality will require an as-needed ITD.

* * * * *

8. Add a new § 95.610 to read as follows:

§ 95.610 Submission of information technology documents.

Initial Information Technology document or Initial ITD is a written plan of action to request funding approval for

a project which will require the use of ADP services or equipment. The term ITD refers to a Planning ITD, or to a planning and/or development and implementation action document, i.e., Implementation ITD, or Information Technology Document Update. Requirements are detailed in paragraphs (a), (b), and (c) of this section.

(a) *Planning ITD.*

(1) A Planning ITD is a written plan of action which requests FFP to determine the need for, feasibility, and cost factors of an ADP equipment or services acquisition and to perform one or more of the following: Prepare a Functional Requirements Specification; assess other States' systems for transfer, to the maximum extent possible, of an existing system; prepare an Implementation ITD; prepare a request for proposal (RFP) and/or develop a General Systems Design (GSD).

(2) A separate planning effort and Planning ITD is optional, but highly recommended, and generally applies to large Statewide system developments and/or major hardware acquisitions. States with large, independent counties requesting funding at the regular match rate for county systems are strongly encouraged to engage in planning activities commensurate with the complexity of the projected IT project and to submit a Planning ITD to allow for time and to provide funding for its planning activities. Therefore, states must consider the scope and complexity of a project to determine whether to submit a Planning ITD as a separate document to HHS or whether to combine the two phases of planning and implementation into one ITD covering both the Planning ITD and the Implementation ITD requirements.

(3) The Planning ITD is a relatively brief document, usually not more than 6–10 pages, which must contain:

(i) A statement of the problem/need that the existing capabilities can not resolve, new or changed program requirements or opportunities for improved economies and efficiencies and effectiveness of program and administration and operations;

(ii) A project management plan that addresses the planning project organization, planning activities/deliverables, State and contractor resource needs, planning project procurement activities and schedule;

(iii) A specific budget for the planning phase of the project;

(iv) An estimated total project cost and a prospective State and Federal cost allocation/distribution, including planning and implementation;

(v) A commitment to conduct/prepare the problem(s) needs assessment,

feasibility study, alternatives analysis, cost benefit analysis, and to develop a Functional Requirements Specification and/or a General Systems Design (GSD);

(vi) A commitment to define the State's functional requirements, based on the state's business needs which may be used for the purpose of evaluating the transfer of an existing system, including the transfer of another State's General System Design that the State may adapt to meet State specific requirements; and

(vii) Additional Planning ITD content requirements, for enhanced funding projects as contained in 45 CFR 307.15 and 1355.50 through 1355.57.

(b) *Implementation ITD*. The Implementation ITD is a written plan of action to acquire the proposed ITD services or equipment. The Implementation ITD shall include:

(1) The results of the activities conducted under a Planning ITD, if any;

(2) A statement of problems/needs and outcomes/objectives;

(3) A requirements analysis, feasibility study and a statement of alternative considerations including, where appropriate, the use of service oriented architecture and a transfer of an existing system and an explanation of why such a transfer is not feasible if another alternative is identified;

(4) A cost benefit analysis;

(5) A personnel resource statement indicating availability of qualified and adequate numbers of staff, including a project director to accomplish the project objectives;

(6) A detailed description of the nature and scope of the activities to be undertaken and the methods to be used to accomplish the project;

(7) The proposed activity schedule for the project;

(8) A proposed budget (including an accounting of all possible Implementation ITD activity costs, e.g., system conversion, vendor and state personnel, computer capacity planning, supplies, training, hardware, software and miscellaneous ADP expenses) for the project;

(9) A statement indicating the duration the State expects to use the equipment and/or system;

(10) An estimate of the prospective cost allocation/distribution to the various State and Federal funding sources and the proposed procedures for distributing costs;

(11) A statement setting forth the security and interface requirements to be employed and the system failure and disaster recovery/business continuity procedures available or to be implemented; and

(12) Additional requirements, for acquisitions for which the State is requesting enhanced funding, as contained at 45 CFR 1355.54 through 1355.57, 45 CFR 307.15 and 42 CFR subchapter C, part 433.

(c) *Information Technology Document Update (ITDU)*. The Information Technology Document Update (ITDU) is a document submitted annually (Annual ITDU) to report project status and/or post implementation cost-savings, or, on an as needed (As Needed ITDU) basis, to request funding approval for project continuation when significant project changes are anticipated; for incremental funding authority and project continuation when approval is being granted by phase; or to provide detailed information on project and/or budget activities, as follows:

(1) The *Annual ITDU*, which is due 60 days prior to the anniversary date of the Planning ITD, Implementation ITD, or prior Annual ITD Update approved anniversary and includes:

(i) A reference to the approved ITD and all approved changes;

(ii) A project activity report which includes the status of the past year's major project tasks and milestones, addressing the degree of completion and tasks/milestones remaining to be completed, and discusses past and anticipated problems or delays in meeting target dates in the approved ITD and approved changes to it and provides a risk management plan that assesses project risk and identifies risk mitigation strategies;

(iii) A report of all project deliverables completed in the past year and degree of completion for unfinished products and tasks;

(iv) An updated project activity schedule for the remainder of the project;

(v) A revised budget for the life of the project's entire life-cycle, including operational and development cost categories;

(vi) A project expenditures report that consists of a detailed accounting of all expenditures for project development over the past year and an explanation of the differences between projected expenses in the approved ITD and actual expenditures for the past year;

(vii) A report of any approved or anticipated changes to the allocation basis in the ITD's approved cost allocation methodology; and

(viii) Once the State begins operation, either on a pilot basis or under a phased implementation, it must track costs, benefits and savings. The State will submit an initial cost-savings report no later than 2 years after initial implementation and every 3 years after

that until HHS determines projected cost savings and benefits have been achieved. The cost benefit report is not required if the project is limited to only O&M.

(2) The *As Needed ITDU* is a document that requests approval for additional funding and/or authority for project continuation when significant changes are anticipated, when the project is being funded on a phased implementation basis, or to clarify project information requested as an approval condition of the Planning ITD, Annual ITDU, or Implementation ITD. The *As Needed ITDU* may be submitted any time as a stand-alone funding or project continuation request, or may be submitted as part of the Annual ITDU. The *As Needed ITDU* is submitted:

(i) When the State anticipates incremental project expenditures (exceeding specified thresholds);

(ii) When the State anticipates a schedule extension of more than 60 days for major milestones;

(iii) When the State anticipates major changes in the scope of its project, e.g., a change in its procurement plan, procurement activities, system concept or development approach;

(iv) When the State anticipates significant changes to its cost distribution methodology or distribution of costs among Federal programs; and/or,

(v) When the State anticipates significant changes to its cost-benefit projections.

The *As needed ITDU* shall provide supporting documentation to justify the need for a change to the approved budget.

(3) The *Operations & Software Maintenance Information Technology Document Update, (O & M ITDU)* is an annual report of no more than two pages, including:

(i) Summary of activities;

(ii) Acquisitions and,

(iii) Annual budget by project/system receiving funding through the programs covered under this part.

9. In § 95.611 revise paragraphs (a)(1), (a)(3) through (a)(6), (b)(1)(i) through (b)(1)(iv), (b)(2)(i) through (b)(2)(iv), (c)(1)(i) through (c)(1)(ii), and (c)(2); and add paragraphs (b)(1)(v), (b)(1)(vi), and (e) to read as follows:

§ 95.611 Prior approval conditions.

(a) *General acquisition requirements.*

(1) A State shall obtain prior written approval from the Department as specified in paragraph (b) of this section, when the State plans to acquire ADP equipment or services with proposed FFP at the regular matching rate that it anticipates will have total

acquisition costs of \$5,000,000 or more in Federal and State funds. States will be required to submit Operations and Software Maintenance (O&M) only acquisitions if they are non-competitive and exceed the threshold requiring Federal approval, or for competitive procurements on an exception basis after the receipt of a written request from the Department. See definition of software maintenance under § 95.605.

* * * * *

(3) A State shall obtain prior written approval from the Department for a sole source/non-competitive acquisition, for ADP equipment or services, that has a total State and Federal acquisition cost of \$1,000,000 or more.

(4) Except as provided for in paragraph (a)(5) of this section, the State shall submit multi-program requests for Department approval, signed by the appropriate State official, to the Department's Secretary or his/her designee. For each HHS component that has federal funding participation in the project, an additional copy must be provided to the applicable program office and respective Regional Administrator(s).

(5) States shall submit requests for approval which affect only one entity of HHS (CMS, OCSE, or Children's Bureau), to the applicable entity's office and Regional Administrator.

(6) The Department will not approve any Planning or Implementation ITD that does not include all information required in § 95.610.

(b) * * *

(1) * * *

(i) For the Planning ITD subject to the dollar thresholds specified in paragraph (a) of this section.

(ii) For the Implementation ITD subject to the dollar thresholds specified in paragraph (a) of this section.

(iii) For acquisition solicitation documents, unless specifically exempted by the Department, prior to release when the resulting base contract is anticipated to exceed \$5,000,000 for competitive procurement and \$1,000,000 for noncompetitive procurements.

(iv) For noncompetitive acquisitions, including contract amendments, when the resulting contract is anticipated to exceed \$1,000,000, States will be required to submit a sole source justification in addition to the acquisition document.

(v) For the contract, prior to the execution, States will be required to submit the contract when it is anticipated to exceed the following thresholds, unless specifically exempted by the Department:

(A) Software application development—\$5,000,000 or more (competitive) and \$1,000,000 or more (noncompetitive);

(B) Hardware including Commercial Off the Shelf (COTS) software—\$20,000,000 or more (competitive) and \$1,000,000 or more (noncompetitive);

(C) Operations and Software Maintenance acquisitions combined with hardware, COTS or software application development—the thresholds stated in § 95.611(b)(1)(v)(A) and (B) would apply.

(vi) For contract amendments within the scope of the base contract, unless specifically exempted by the Department, prior to execution of the contract amendment involving contract cost increases which cumulatively exceed 20 percent of the base contract cost. For example: If the base contract is \$20 million with three option years of \$5 million each, the base contract value would be \$35 million. When a single contract amendment or the accumulated value of all contract amendments exceeds \$7 million (20 percent of the \$35 million base contract value), prior approval requirements would apply.

(2) * * *

(i) For the Planning ITD.

(ii) For the Implementation ITD.

(iii) For the acquisition solicitation documents and contract, unless specifically exempted by the Department, prior to release of the acquisition solicitation documents or prior to execution of the contract when the contract is anticipated to or will exceed \$300,000.

(iv) For contract amendments, unless specifically exempted by the Department, prior to execution of the contract amendment, involving contract cost increases exceeding \$300,000 or contract time extensions of more than 60 days.

* * * * *

(c) * * *

(1) * * *

(i) For an annual ITDU for projects with a total cost of more than \$5,000,000, when specifically required by the Department for projects with a total cost of less than \$5,000,000.

(ii) (A) For an As Needed ITDU when changes cause any of the following:

(1) A projected cost increase of \$1,000,000 or more.

(2) A schedule extension of more than 60 days for major milestones;

(3) A significant change in procurement approach, and/or scope of procurement activities beyond that approved in the ITD;

(4) A change in system concept, or a change to the scope of the project;

(5) A change to the approved cost allocation methodology.

(B) The State shall submit the As Needed ITDU to the Department, no later than 60 days after the occurrence of the project changes to be reported in the As Needed ITDU.

(2) For enhanced FFP requests.

(i) For an Annual ITDU.

(ii) For an "As needed" ITDU when changes cause any of the following:

(A) A projected cost increase of \$300,000 or 10 percent of the project cost, whichever is less;

(B) A schedule extension of more than 60 days for major milestones;

(C) A significant change in procurement approach, and/or a scope of procurement activities beyond that approved in the ITD;

(D) A change in system concept or scope of the project;

(E) A change to the approved cost methodology;

(F) A change of more than 10 percent of estimated cost benefits.

The State shall submit the "As Needed ITDU" to the Department, no later than 60 days after the occurrence of the project changes to be reported in the "As Needed ITDU".

* * * * *

(e) *Acquisitions not subject to prior approval.* States will be required to submit acquisition documents, contracts and contract amendments under the threshold amounts on an exception basis if requested to do so in writing by the Department.

10. Revise § 95.612 to read as follows:

§ 95.612 Disallowance of Federal Financial Participation (FFP).

If the Department finds that any ADP acquisition approved or modified under the provisions of § 95.611 fails to comply with the criteria, requirements, and other activities described in the approved information technology document to the detriment of the proper, efficient, economical and effective operation of the affected program, payment of FFP may be disallowed. In the case of a suspension of the approval of a Child Support ITD for enhanced funding, see 45 CFR 307.40(a). In the case of a suspension of an ITD for a State Automated Child Welfare Information System (SACWIS) project, see 45 CFR 1355.56.

11. Revise § 95.613 to read as follows:

§ 95.613 Procurement Standards.

(a) *General.* Procurements of ADP equipment and services are subject to the following procurement standards in paragraphs (b), (c), (d), (e), and (f) of this section regardless of any conditions for prior approval. These standards include

a requirement for maximum practical open and free competition regardless of whether the procurement is formally advertised or negotiated. These standards are established to ensure that such materials and services are obtained in a cost effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. The standards apply where the cost of the procurement is treated as a direct cost of an award.

(b) *Grantee responsibilities.* The standards contained in this section do not relieve the Grantee of the contractual responsibilities arising under its contract(s). The grantee is the responsible authority, without recourse to the HHS awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, and protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

(c) *Codes of conduct.* The grantee shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, or any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the grantee shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, grantees may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employers, or agents of the grantees.

(d) *Competition.* All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The grantee shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or

eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft grant applications, or contract specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the grantee, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the grantee. Any and all bids or offers may be rejected when it is in the grantee's interest to do so.

(e) *Procurement procedures.* (1) All grantees shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(i) Grantees avoid purchasing unnecessary items;

(ii) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the grantee and the Federal Government; and

(iii) Solicitations for goods and services provide for all of the following:

(A) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(B) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(C) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(D) The specific features of brand name or equal descriptions that bidders are required to meet when such items are included in the solicitation.

(E) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(F) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(2) Positive efforts shall be made by grantees to utilize small businesses, minority-owned firms, and women's

business enterprises, whenever possible. Grantees of HHS awards shall take all of the following steps to further this goal.

(i) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(ii) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(iii) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(iv) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(v) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(3) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the grantee but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(4) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, "Debarment and Suspension." (See 45 CFR part 76.)

(5) Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to

determine reasonableness, allocability and allowability.

(6) Procurement records and files for purchases in excess of the simplified acquisition threshold shall include the following at a minimum:

(i) Basis for contractor selection;

(ii) Justification for lack of competition when competitive bids or offers are not obtained; and

(iii) Basis for award cost or price.

(7) A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Grantees shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

(8) The grantee shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts, which shall also be applied to subcontracts:

(i) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(ii) All contracts in excess of the simplified acquisition threshold (currently \$100,000) shall contain suitable provisions for termination by the grantee, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(f) All negotiated contracts (except those for less than the simplified acquisition threshold) awarded by grantees shall include a provision to the effect that the grantee, the HHS awarding agency, the U.S. Comptroller General, or any of their duly authorized representatives, shall have access to any books, documents, papers and records and staff of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

12. Revise § 95.615 to read as follows:

§ 95.615 Access to systems and records.

The State agency must allow the Department access to the system in all of its aspects, including pertinent state

staff, design developments, operation, and cost records of contractors and subcontractors at such intervals as are deemed necessary by the Department to determine whether the conditions for approval are being met and to determine the efficiency, economy and effectiveness of the system.

13. In § 95.621 revise paragraphs (d) and (e) to read as follows:

§ 95.621 ADP Reviews.

* * * * *

(d) *Acquisitions not subject to prior approval.* Reviews will be conducted on an audit basis to assure that system and equipment acquisition costing less than \$200,000 were made in accordance with 45 CFR 95.613 and the conditions of this subpart and to determine the efficiency, economy and effectiveness of the equipment or service.

(e) *State Agency Maintenance of Service Agreements.* The State agency will maintain a copy of each service agreement in its files for Federal review.

* * * * *

14. Revise § 95.623 to read as follows:

§ 95.623 Reconsideration of denied FFP for failure to obtain prior approval.

For ADP equipment and services acquired by a State without prior written approval, the State may request reconsideration of the disallowance of FFP by written request to the head of the grantor agency within 30 days of the initial written disallowance determination. In such a reconsideration, the agency may take into account overall federal interests.

15. Add new § 95.626 to read as follows:

§ 95.626 Independent Validation and Verification.

(a) Independent Verification and Validation (IV&V), refers to a well-defined standard process for examining the organizational, management, and technical aspects of a project to determine the effort's adherence to industry standards and best practices, to identify risks, and make recommendations for remediation, where appropriate. These activities will be performed by an agency that is not under the control of the organization that is developing the software.

(b) An assessment for independent validation and verification (IV&V) analysis of a State's system development effort may be required in the case of ITD projects that:

- (1) Miss statutory or regulatory deadlines for automation that is intended to meet program requirements;
- (2) Fail to meet a critical milestone;
- (3) Indicate the need for a new project or total system redesign;

(4) Are developing systems under waivers pursuant to sections 452(d)(3) or 627 of the Social Security Act;

(5) Are at risk of failure, significant delay, or significant cost overrun in their systems development efforts; or

(6) Fail to timely and completely submit ITD updates or other required systems documentation.

(c) Independent validation and verification efforts must be conducted by an entity that is independent from the State (unless the State receives an exception from the Department) and the entity selected must:

(1) Develop a project workplan. The plan must be provided directly to the Department at the same time it is given to the State.

(2) Review and make recommendations on both the management of the project, both State and vendor, and the technical aspects of the project. The IV&V provider must give the results of its analysis directly to the federal agencies that required the IV&V at the same time it reports to the State.

(3) Consult with all stakeholders and assess the user involvement and buy-in regarding system functionality and the system's ability to support program business needs.

(4) Conduct an analysis of past project performance sufficient to identify and make recommendations for improvement.

(5) Provide risk management assessment and capacity planning services.

(6) Develop performance metrics which allow tracking project completion against milestones set by the State.

(d) The RFP and contract for selecting the IV&V provider (or similar documents if IV&V services are provided by other State agencies) must include requirements regarding the experience and skills of the key personnel proposed for the IV&V analysis. The contract (or similar document if the IV&V services are provided by other State agencies) must specify by name the key personnel who actually will work on the project. The RFP and contract for required IV&V services must be submitted to the Department for prior written approval.

16. Add new § 95.627 to read as follows:

§ 95.627 Waivers.

(a) *Application for a waiver.* A State may apply for a waiver of any requirement in 45 CFR subpart F by presenting an alternative approach. Waiver requests must be submitted and approved as part of the State's ITD or ITD Update.

(b) *Waiver approvals.* The Secretary may grant a State a waiver if the State demonstrates that it has an alternative approach to a requirement in this chapter that will safeguard the State and Federal governments' interest and that enables the State to be in substantial compliance with the other requirements of this chapter.

(c) *Contents of waiver request.* The State's request for approval of an alternative approach or waiver of a requirement in this chapter must demonstrate why meeting the condition is unnecessary, diminishes the State's ability to meet program requirements, or that the alternative approach leads to a more efficient, economical, and effective administration of the programs for which federal financial participation is provided, benefiting both the State and Federal Governments.

(d) *Review of waiver requests.* The Secretary, or his or her designee, will review waiver requests to assure that all necessary information is provided, that all processes provide for effective economical and effective program operation, and that the conditions for waiver in this section are met.

(e) *Agency's response to a waiver request.* When a waiver is approved by an agency, it becomes part of the State's approved ITD and is applicable to the approving agency. A waiver is subject to the ITD suspension provisions in § 95.611(c)(3). When a waiver is disapproved, the entire ITD will be disapproved. The ITD disapproval is a final administrative decision and is not subject to administrative appeal.

17. Amend § 95.631 by removing "APD" and adding in its place "ITD" in the introductory text, and by revising paragraph (a) to read as follows:

§ 95.631 Cost identification for purpose of FFP claims.

* * * * *

(a) *Development costs.* (1) Using its normal departmental accounting system to the extent consistent with the cost principles set forth in OMB Circular A-87, the State agency shall specifically identify what items of costs constitute development costs, assign these costs to specific project cost centers, and distribute these costs to funding sources based on the specific identification, assignment and distribution outlined in the approved ITD;

(2) The methods for distributing costs set forth in the ITD should provide for assigning identifiable costs, to the extent practicable, directly to program/ functions. The State agency shall amend the cost allocation plan required by subpart E of this part to include the approved ITD methodology for the

identification, assignment and distribution of the development costs.

* * * * *

18. Add new § 95.635 to read as follows:

§ 95.635 Disallowance of Federal financial participation automated systems that failed to comply substantially with requirements.

(a) Federal financial participation at the applicable matching rate is available for automated data processing (ADP) system expenditures that meet the requirements specified under the approved ITD including the approved cost allocation plan.

(b) All or part of any costs for system projects that fail to comply substantially with an ITD approved under applicable regulation at 45 CFR part 95.611, or for the Title IV-D program contained in 45 CFR part 307, the applicable regulations for the Title IV-E and Title IV-B programs contained in Chapter 13, subchapter G, 45 CFR 1355.55, or the applicable regulations for the Title XIX program contained in 42 CFR chapter 4 subchapter C, part 433, are subject to disallowance by the Department.

19. Amend § 95.641 by removing "APD" and adding in its place "ITD" wherever it appears.

Subpart G—Equipment Acquired Under Public Assistance Programs

20. Revise paragraph (a) of § 95.705 to read as follows:

§ 95.705 Equipment costs—Federal financial participation.

(a) *General rule.* In computing claims for Federal financial participation, equipment having a unit acquisition cost of \$25,000 or less may be claimed in the period acquired or depreciated, at the option of the State agency. Equipment having a unit acquisition cost of more than \$25,000 shall be depreciated. For purposes of this section, the term depreciate also includes use allowances computed in accordance with the cost principles prescribed in 45 CFR part 92.

* * * * *

21. Revise paragraph (a) and the introductory text of paragraph (b) of § 95.707 to read as follows:

§ 95.707 Equipment management and disposition.

(a) Once equipment, whose costs are claimed for Federal financial participation (i.e., equipment that is capitalized and depreciated or is claimed in the period acquired), has reached the end of its useful life (as defined in an approved ITD), the equipment shall be subject to the property disposal rules in 45 CFR 92.32.

(b) The State agency is responsible for adequately managing the equipment, maintaining records on the equipment, and taking periodic physical inventories. Physical inventories may be made on the basis of statistical sampling.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards No. 121; Air Brake Systems

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Denial of petition for rulemaking.

SUMMARY: This Notice denies a petition by Mr. Wayne Walch of TP Trucking in which the petitioner requested three changes to Federal Motor Vehicle Safety Standard (FMVSS) No. 121, *Air brake systems*, related to the air compressor operation and low air pressure warning system. After reviewing the petition and the available real world data, the agency has decided to deny it in its entirety because one of the suggested changes is already in the standard, the second would not result in any measurable safety benefit, and the third was, among other things, not described in sufficient detail for the agency to evaluate its function or purpose.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact Mr. Jeff Woods, Office of Crash Avoidance Standards, NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-6206) (FAX: 202-366-7002). For legal issues, you may contact Mr. Ari Scott, Office of the Chief Counsel, NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-2992) (FAX: 202-366-3820).

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. General Description of Air Brake Systems and FMVSS No. 121 Requirements
- III. Function of Low Air Pressure Warning and Gauges in Normal and Emergency Braking Conditions
- IV. Real World Data
- V. Agency Analysis and Decision
- VI. Conclusion