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DRAFT TITLE 45--PUBLIC WELFARE DRAFT

**With changes from Final Rule on the State Systems Advance Planning Document (APD)
Process published 75 FR 66319–66341, October 28, 2010**

SUBTITLE A--DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

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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).

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Subpart A—Time Limits for States To File Claims

Source: 46 FR 3529, Jan. 15, 1981, unless otherwise noted.

§ Sec. 95.1 Scope.

(a) This subpart establishes a two year time limit (15 months in some cases) for a State to claim Federal financial participation in expenditures under State plans approved under the following titles of the Social Security Act:

Title I--Grants to States for Old-Age Assistance and Medical Assistance for the Aged.

Title IV-A--Grants to States for Aid and Services to Needy Families with Dependent Children (except for Section 402(a)(19)(G) of the Act).

Title IV-B--Child Welfare Services.

Title IV-D--Child Support and Establishment of Paternity.

Title IV-E--Foster Care and Adoption Assistance.

Title X--Grants to States for Aid to the Blind.

Title XIV--Grants to States for Aid to the Permanently and Totally Disabled.

Title XVI--Grants to States for Aid to the Aged, Blind, or Disabled (AABD), or for Such Aid and Medical Assistance for the Aged.

Title XIX--Grants to States for Medical Assistance Programs.

Title XX--Grants to States for Services.

Title XXI--Grants to States for State Children's Health Insurance Programs.

(b) This subpart also applies to claims for Federal financial participation by any State which are based on any provision of the Act that is enacted after issuance of these regulations and that provides, on an entitlement basis, for Federal financial participation in expenditures made under State plans or programs.

(c) This subpart explains under what conditions the Secretary may decide to extend the time limit for filing claims when a State believes it has good cause for not meeting the time limit.

§ Sec. 95.4 Definitions.

In this subpart—

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Adjustment to prior year costs means an adjustment in the amount of a particular cost item that was previously claimed under an interim rate concept and for which it is later determined that the cost is greater or less than that originally claimed.

Audit exception means a proposed adjustment by the responsible Federal agency to any expenditure claimed by a State by virtue of an audit.

Claim means a request for Federal financial participation in the manner and format required by our program regulations, and instructions or directives issued thereunder.

Court-ordered retroactive payment means either a retroactive payment the State makes to an assistance recipient or an individual, under a Federal or State court order or a retroactive payment we make to a State under a Federal court order. Although we may accept these claims as timely, this provision does not mean that we necessarily agree to be bound by a State or Federal decision when we were not a party to the action.

Federal financial participation means the Federal government's share of an expenditure made by a State agency under any of the programs listed in Sec. 95.1.

State means the 50 States, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa and the Trust Territories of the Pacific.

State agency for the purposes of expenditures for financial assistance under title IV-A and for support enforcement services under title IV-D means any agency or organization of the State or local government which is authorized to incur matchable expenses; for purposes of expenditures under titles XIX and XXI, means any agency of the State, including the State Medicaid agency or State Child Health Agency, its fiscal agents, a State health agency, or any other State or local organization which incurs matchable expenses; for purposes of expenditures under all other titles, see the definitions in the appropriate program's regulations.

The Act means the Social Security Act, as amended.

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

[46 FR 3529, Jan. 15, 1981, as amended at 65 FR 33632, May 24, 2000 and 75 FR 66319, October 28, 2010]

§ Sec. 95.7 Time limit for claiming payment for expenditures made after September 30, 1979.

Under the programs listed in Sec. 95.1, we will pay a State for a State agency expenditure made after September 30, 1979, only if the State files a claim with us for that expenditure within 2 years after the calendar quarter in which the State agency made the expenditure. Section 95.19 lists the exceptions to this rule.

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§ Sec. 95.10 Time limit for claiming payment for expenditures made before October 1, 1979.

Under the programs listed in Sec. 95.1, we will pay a State for a State agency expenditure made before October 1, 1979, only if the State filed or files a claim with us for that expenditure before January 1, 1981. Section 95.19 lists the exceptions to this rule.

§ Sec. 95.11 Payment of claims subject to appropriations restrictions.

Notwithstanding any other provision of this subpart, we will pay States' otherwise allowable claims for Federal financial participation under the programs covered by this Subpart, subject to the availability of funds (as provided in Acts appropriating funds to the Department in effect at the time in which such claims are being considered for payment), and subject to conditions or restrictions applicable to payments out of such funds, including provisions of the first and second continuing resolutions for FY 1981 (Pub. L. 96-369 and Pub. L. 96-536) and the Supplemental Appropriations and Rescission Act, 1981 (Pub. L. 97-12) that make funds under those Acts available to pay for a State agency expenditure made before September 30, 1978, only if the State had filed a claim for that expenditure with us within one year of the expenditure.

(Pub. L. 96-369, 94 Stat. 1351; Pub. L. 96-536, 94 Stat. 3166; and Pub. L. 97-12, 95 Stat. 14)

[46 FR 46136, Sept. 17, 1981]

§ Sec. 95.13 In which quarter we consider an expenditure made.

In this subpart--

(a) We consider a State agency's expenditure for assistance payments under title I, IV-A, IV-E, X, XIV, or XVI (AABD) to have been made in the quarter in which a payment was made to the assistance recipient, his or her protective payee, or a vendor payee, even if the payment was for a month in a previous quarter.

(b) We consider a State agency's expenditure for services under title I, IV-A, IV-B, IV-D, IV-E, X, XIV, XVI (AABD), XIX, or XXI to have been made in the quarter in which any State agency made a payment to the service provider.

(c) For purposes of title XX, the date of expenditure is governed by 45 CFR 1396.52(d).

(d) We consider a State agency's expenditure for administration or training under titles I, IV-A, IV-B, IV-D, IV-E, X, XIV, XVI (AABD), XIX, or XXI to have been made in the quarter payment was made by a State agency to a private agency or individual; or in the quarter to which the costs were allocated in accordance with the regulations for each program. We consider a State agency's expenditure under these titles for non-cash expenditures such as depreciation to have been made in the quarter the expenditure was recorded in the accounting records of any State agency in accordance with generally accepted accounting principles.

[46 FR 3529, Jan. 15, 1981, as amended at 65 FR 33632, May 24, 2000]

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§ Sec. 95.19 Exceptions to time limits.

The time limits in Sec. Sec. 95.7 and 95.10 do not apply to any of the following--

- (a) Any claim for an adjustment to prior year costs.
- (b) Any claim resulting from an audit exception.
- (c) Any claim resulting from a court-ordered retroactive payment.
- (d) Any claim for which the Secretary decides there was good cause for the State's not filing it within the time limit.

§ Sec. 95.22 Meaning of good cause.

- (a) Good cause for the late filing of a claim is lateness due to circumstances beyond the State's control.
- (b) Examples of circumstances beyond the State's control include:
 - (1) Acts of God;
 - (2) Documented action or inaction of the Federal government.
- (c) Circumstances beyond the State's control do not include neglect or administrative inadequacy on the part of the State, State agencies, the State legislature or any of their offices, officers, or employees.

§ Sec. 95.25 When to request a waiver for good cause.

The State should request a waiver in writing as soon as the State recognizes that it will be unable to submit a claim within the appropriate time limit.

§ Sec. 95.28 What a waiver request for good cause must include.

The State's request for waiver must include a specific explanation, justification or documentation of why the claim is or will be late. This request must establish that the lateness in filing the claim is for good cause as defined in Sec. 95.22 and not due to neglect or administrative inadequacy. If the claim has not been filed, the State must also tell us when the claim will be filed.

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§ Sec. 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 ACF and does not affect the programs of any other agency or Federal Department should be sent to the appropriate HHS agency.

(b) A request which affects programs of more than one HHS agency or Federal Department should be sent to the Director, Division of Cost Allocation in the appropriate HHS Regional Office.

[75 FR 66319, October 28, 2010]

§ Sec. 95.34 The decision to waive the time limit for good cause.

The Secretary will make a decision after reviewing the State's request for waiver. If the Secretary decides that good cause exists, the State will be notified of the extended due date. If the Secretary decides that good cause does not exist or that the request for waiver does not provide enough information to make a decision, the State will be so advised.

Subparts B-D [Reserved]

Subpart E—Cost Allocation Plans

Source: 47 FR 17509, Apr. 23, 1982, unless otherwise noted.

§ Sec. 95.501 Purpose.

This subpart establishes requirements for:

- (a) Preparation, submission, and approval of State agency cost allocation plans for public assistance programs; and
- (b) Adherence to approved cost allocation plans in computing claims for Federal financial participation.

§ Sec. 95.503 Scope.

This subpart applies to all State agency costs applicable to awards made under titles I, IV-A, IV-B, IV-C, IV-D, IV-E, X, XIV, XVI (AABD), XIX, and XXI, of the Social Security Act, and under the Refugee Act of 1980, title IV, Chapter 2 of the Immigration and Nationality Act (8 U.S.C. 1521 et seq.), and under title V of Pub. L. 96-422, the Refugee Education Assistance Act of 1980.

[65 FR 33633, May 24, 2000]

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§ Sec. 95.505 Definitions.

As used in this subpart:

State agency costs include all costs incurred by or allocable to the State agency except expenditures for financial assistance, medical vendor payments, and payments for services and goods provided directly to program recipients such as day care services, family planning services or household items as provided for under the approved State program plan.

Cost allocation plan means a narrative description of the procedures that the State agency will use in identifying, measuring, and allocating all State agency costs incurred in support of all programs administered or supervised by the State agency.

FFP or Federal financial participation means the Federal Government's share of expenditures made by a State agency under any of the programs cited in Sec. 95.503.

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).

Public assistance programs means the programs cited in Sec. 95.503.

State means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Northern Mariana Islands, and Guam.

State agency means the State agency administering or supervising the administration of the State plan for any program cited in Sec. 95.503. A State agency may be an organizational part of a larger State department that also contains other components and agencies. Where that occurs, the expression State agency refers to the specific component or agency within the State department that is directly responsible for the administration of, or supervising the administration of, one or more programs identified in Sec. 95.503.

State Plan means a comprehensive written commitment by the State agency to administer or supervise the administration of any of the public assistance programs cited in Sec. 95.503 in accordance with all Federal requirements.

[75 FR 66319, October 28, 2010]

§ Sec. 95.507 Plan requirements.

(a) The State shall submit a cost allocation plan for the State agency as required below to the Director, Division of Cost Allocation (DCA), in the appropriate HHS Regional Office. The plan shall:

(1) Describe the procedures used to identify, measure, and allocate all costs to each of the programs operated by the State agency;

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(2) Conform to the accounting principles and standards prescribed in Office of Management and Budget Circular A-87, and other pertinent Department regulations and instructions;

(3) Be compatible with the State plan for public assistance programs described in 45 CFR Chapter II, III and XIII, and 42 CFR Chapter IV Subchapters C and D; and

(4) Contain sufficient information in such detail to permit the Director, Division of Cost Allocation, after consulting with the Operating Divisions, to make an informed judgment on the correctness and fairness of the State's procedures for identifying, measuring, and allocating all costs to each of the programs operated by the State agency.

(b) The cost allocation plan shall contain the following information:

(1) An organizational chart showing the placement of each unit whose costs are charged to the programs operated by the State agency.

(2) A listing of all Federal and all non-Federal programs performed, administered, or serviced by these organizational units.

(3) A description of the activities performed by each organizational unit and, where not self-explanatory an explanation of the benefits provided to Federal programs.

(4) The procedures used to identify, measure, and allocate all costs to each benefiting program and activity (including activities subject to different rates of FFP).

(5) The estimated cost impact resulting from the proposed changes to a previously approved plan. These estimated costs are required solely to permit an evaluation of the procedures used for identifying, measuring, and allocating costs. Therefore, approval of the cost allocation plan shall not constitute approval of these estimated costs for use in calculating claims for FFP. Where it is impractical to obtain this data, an alternative approach should then be negotiated with the Director, DCA, prior to submission of the cost allocation plan.

(6) A statement stipulating that wherever costs are claimed for services provided by a governmental agency outside the State agency, that they will be supported by a written agreement that includes, at a minimum (i) the specific service(s) being purchased, (ii) the basis upon which the billing will be made by the provider agency (e.g. time reports, number of homes inspected, etc.) and (iii) a stipulation that the billing will be based on the actual cost incurred. This statement would not be required if the costs involved are specifically addressed in a State-wide cost allocation plan, local-wide cost allocation plan, or an umbrella/department cost allocation plan.

(7) If the public assistance programs are administered by local government agencies under a State supervised system, the overall State agency cost allocation plan shall also include a cost allocation plan for the local agencies. It shall be developed in accordance with the requirements set forth above. More than one local agency plan shall be submitted if the accounting systems or other conditions at the local agencies preclude an equitable allocation of costs by the submission of a single plan for all local agencies. Prior to submitting multiple plans for local agencies, the State should consult with the Director, DCA.

Where more than one local agency plan is submitted, the State shall identify the specific local agencies covered by each plan.

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(8) A certification by a duly authorized official of the State stating:

(i) That the information contained in the proposed cost allocation plan was prepared in conformance with Office of Management and Budget Circular A-87.

(ii) That the costs are accorded consistent treatment through the application of generally accepted accounting principles appropriate to the circumstances.

(iii) That an adequate accounting and statistical system exists to support claims that will be made under the cost allocation plan; and

(iv) That the information provided in support of the proposed cost allocation plan is accurate.

(9) Other information as is necessary to establish the validity of the procedures used to identify, measure, and allocate costs to all programs being operated by the State agency.

[47 FR 17509, Apr. 23, 1982, as amended at 65 FR 33633, May 24, 2000]

§ Sec. 95.509 Cost allocation plan amendments and certifications.

(a) The State shall promptly amend the cost allocation plan and submit the amended plan to the Director, DCA if any of the following events occur:

(1) The procedures shown in the existing cost allocation plan become outdated because of organizational changes, changes in Federal law or regulations, or significant changes in program levels, affecting the validity of the approved cost allocation procedures.

(2) A material defect is discovered in the cost allocation plan by the Director, DCA or the State.

(3) The State plan for public assistance programs is amended so as to affect the allocation of costs.

(4) Other changes occur which make the allocation basis or procedures in the approval cost allocation plan invalid.

(b) If a State has not submitted a plan or plan amendment during a given State fiscal year, an annual statement shall be submitted to the Director, DCA certifying that its approved cost allocation plan is not outdated. This statement shall be submitted within 60 days after the end of that fiscal year.

§ Sec. 95.511 Approval of the cost allocation plan or plan amendment.

(a) The Director, DCA, after consulting with the affected Operating Divisions, shall notify the State in writing of his/her findings. This notification will be made within 60 days after receipt of the proposed plan or amendment and shall either: (1) Advise the State that the plan or plan amendment is approved or disapproved, (2) advise the State of the changes required to make the plan or amendment acceptable, or (3) request the State to provide additional information needed to evaluate the proposed plan or

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amendment. If the DCA cannot make a determination within the 60-day period, it shall so advise the State.

(b) For purpose of this subpart, State agency cost allocation plans which have been approved by an authorized official of the Department of HHS prior to the effective date of this regulation are considered approved until such time as a new plan or plan amendment is required by Sec. 95.509(a).

§ Sec. 95.515 Effective date of a cost allocation plan amendment.

As a general rule, the effective date of a cost allocation plan amendment shall be the first day of the calendar quarter following the date of the event that required the amendment (See Sec. 95.509). However, the effective date of the amendment may be earlier or later under the following conditions:

(a) An earlier date is needed to avoid a significant inequity to either the State or the Federal Government.

(b) The information provided by the State which was used to approve a previous plan or plan amendment is later found to be materially incomplete or inaccurate, or the previously approved plan is later found to violate a Federal statute or regulation. In either situation, the effective date of any required modification to the plan will be the same as the effective date of the plan or plan amendment that contained the defect.

(c) It is impractical for the State to implement the amendment on the first day of the next calendar quarter. In these instances, a later date may be established by agreement between the State and the DCA.

§ Sec. 95.517 Claims for Federal financial participation.

(a) A State must claim FFP for costs associated with a program only in accordance with its approved cost allocation plan. However, if a State has submitted a plan or plan amendment for a State agency, it may, at its option claim FFP based on the proposed plan or plan amendment, unless otherwise advised by the DCA. However, where a State has claimed costs based on a proposed plan or plan amendment the State, if necessary, shall retroactively adjust its claims in accordance with the plan or amendment as subsequently approved by the Director, DCA. The State may also continue to claim FFP under its existing approved cost allocation plan for all costs not affected by the proposed amendment.

§ Sec. 95.519 Cost disallowance.

If costs under a Public Assistance program are not claimed in accordance with the approved cost allocation plan (except as otherwise provided in Sec. 95.517), or if the State failed to submit an amended cost allocation plan as required by Sec. 95.509, the costs improperly claimed will be disallowed.

(a)(1) If the issue affects the program(s) of only one Operating Division and does not affect the programs of other Operating Divisions or Federal departments, that Operating Division will determine the

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amount of the disallowance and will also inform the State of its opportunity for reconsideration of the determination in accordance with the Operating Division's procedures. Prior to issuing the notification, however, the Operating Division shall consult with the DCA to ensure that the issue does not affect the programs of other Operating Divisions or Federal departments.

(2) If the State wishes to request a reconsideration of the Operating Division's determination, it must submit the request in accordance with the Operating Division's procedures.

(b) If the issue affects the programs of more than one Operating Division, or Federal department or the State, the Director, DCA, after consulting with the Operating Divisions, shall determine the amount inappropriately claimed under each program. The Director, DCA will notify the State of this determination, of the dollar affect of the determination on the claims made under each program, and will inform the State of its opportunity for appeal of the determination under 45 CFR part 16. The State will subsequently be notified by the appropriate Operating Division as to the disposition of the funds in question.

[47 FR 17509, Apr. 23, 1982, as amended at 62 FR 38218, July 17, 1997]

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

Source: 51 FR 45326, Dec. 18, 1986, unless otherwise noted.

General

§ Sec. 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, XIX or XXI 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.

[65 FR 33633, May 24, 2000, as amended at 75 FR 66319, October 28, 2010]

§ Sec. 95.605 Definitions.

As used in this part, the term:

Acceptance documents means a record of satisfactory completion of an approved phase of work or contract, and acceptance thereof by the State agency.

Acquisition means acquiring ADP equipment or services from commercial sources or from State or local government resources.

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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), contracts or contract amendments. The Acquisition Checklist allows States to self-certify that their acquisition documents, which include RFPs, contracts, contract amendments or similar documents, meet State and Federal procurement requirements, contain appropriate language about software ownership and licensing rights in compliance with § 95.617, and provide access to documentation in compliance with § 95.615.

Advance Planning Document (APD), Initial advance automated data processing planning or Initial APD means a recorded plan of action to request funding approval for a project which will require the use of ADP service or equipment. The term APD refers to a Planning APD, or to a planning and/or development and implementation action document, i.e., Implementation APD, or to an Advance Planning Document Update. Requirements are detailed in § 95.610, paragraphs (a), (b), and (c).

Advance Planning Document Update (APDU) is a document or record submitted annually (Annual APDU) to report project status and/or post implementation cost-savings, or, on an as-needed (As-Needed APDU) 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 specified in § 95.610(c).

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

Automated data processing or *ADP* means data processing performed by a system of electronic or electrical machines so interconnected and interacting as to minimize the need for human assistance or intervention.

Automated data processing equipment or *ADP equipment* or *Hardware* means automatic equipment that accepts and stores data, performs calculations and other processing steps, and produces information. This includes:

- (a) Electronic digital computers;
- (b) Peripheral or auxiliary equipment used in support of electronic computers;
- (c) Data transmission or communications equipment, and
- (d) Data input equipment.

Automatic Data Processing Services or ADP Services means:

(a) Services to operate ADP equipment, either by agency, or by State or local organizations other than the State agency; and/or

(b) Services provided by private sources or by employees of the State agency or by State and local organizations other than the State agency to perform such tasks as feasibility studies, system studies, system design efforts, development of system specifications, system analysis, programming, system conversion and system implementation and include, for example, the following:

- (1) Systems Training,

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(2) Systems Development,

(3) Site Preparation,

(4) Data Entry, and

(5) Personal services related to automated systems development and operations that are specifically identified as part of a *Planning ADP* or *Implementation ADP*. As an example, a personal service would be the service of an *expert individual* to provide advice on the use of ADP software or hardware in developing a State automated management information system.

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.

Data processing means the preparation of source media containing data or basic elements of information and the use of such source media according to precise rules or procedures to accomplish such operations as classifying, sorting, calculating, summarizing, recording and transmitting.

Department means the Department of Health and Human Services.

Design or *system design* means a combination of narrative and diagrams describing the structure of a new or more efficient automatic data processing system. This includes the use of hardware to the extent necessary for the design phase.

Development means the definition of system requirements, detailing of system and program specifications, programming and testing. This includes the use of hardware to the extent necessary for the development phase.

Emergency situation is defined as a situation where:

(a) A State can demonstrate to the Department an immediate need to acquire ADP equipment or services in order to continue the operation of one or more of the Social Security Act programs covered by Subpart F, and

(b) The State can clearly document that the need could not have been anticipated or planned for and the State was prevented from following the prior approval requirements of Sec. 95.611.

Enhanced matching rate means the higher than regular rate of FFP authorized by Title IV-D, IV-E, and XIX of the Social Security Act for acquisition of services and equipment that conform to specific requirements designed to improve administration of the Child Support Enforcement, Foster Care and Adoption Assistance, and Medicaid programs.

Enhancement means modifications which change the functions of software and hardware beyond their original purposes, not just to correct errors or deficiencies which may have been present in the software or hardware, or to improve the operational performance of the software or hardware.

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Feasibility study means a preliminary study to determine whether it is sufficiently probable that effective and efficient use of ADP equipment or systems can be made to warrant a substantial investment of staff, time, and money being requested and whether the plan is capable of being accomplished successfully.

Federal program office means the Federal program office within the Department that is authorized to approve requests for the acquisition of ADP equipment or ADP services. The Federal program offices within the Administration for Children and Families (ACF) are the Children’s Bureau for titles IV–B (child welfare services) and IV–E (foster care and adoption assistance), the Office of Child Support Enforcement for title IV–D (child support enforcement), and the Centers for Medicare & Medicaid Services (CMS) for titles XIX (Medicaid) and XXI (the Children’s Health Insurance Program) of the Social Security Act.

FFP means Federal financial participation.

Functional Requirements Specification is defined as an initial definition of the proposed system, which documents the goals, objectives, user or programmatic requirements, management requirements, the operating environment, and the proposed design methodology, e.g., centralized or distributed. This document details what the new system and or hardware should do, not how it is to do it. The Specifications document shall be based upon a clear and accurate description of the functional requirements for the project, and shall not, in competitive procurements, lead to requirements which unduly restrict competition. The Specification document is the user's definition of the requirements the system must meet.

General Systems Design means a combination of narrative and graphic description of the generic architecture of a system as opposed to the detailed architecture of the system. A general systems design would include a systems diagram and narrative identifying overall logic flow and systems functions; a description of equipment needed (including processing data transmission and storage requirements); a description of other resource requirements which will be necessary to operate the system; a description of system performance requirements; and a description of the physical and organizational environment in which the system will operate including how the system will function within that environment (e.g. how workers will interface with the system).

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

Implementation means design, development and installation and does not include operation.

Implementation APD means a recorded plan of action to request Federal Financial Participation (FFP) in the costs of designing, developing, and implementing the system.

Independent Verification and Validation—(IV&V) means 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.

Installation means the integrated testing of programs and subsystems, system conversion, and turnover to operation status. This includes the use of hardware to the extent necessary for the installation phase.

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Medicaid Management Information System (MMIS) is a commonly accepted term for *Mechanized Claim Processing and Information Retrieval System* as provided by Section 1903(a)(3) and 1903(r) of the Social Security Act and at 42 CFR 433.110 et seq.

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.

Operation means the automated processing of data used in the administration of State plans for titles I, IV-A, IV-B, IV-D, IV-E, X, XIV, XVI(AABD), XIX, and XXI of the Social Security Act. Operation includes the use of supplies, software, hardware, and personnel directly associated with the functioning of the mechanized system. See 45 CFR 205.38 and 307.10 for specific requirements for titles IV-A and IV-D, and 42 CFR 433.112 and 42 CFR 433.113 for specific requirements for title XIX.

Operational APD—An operational APD is a record of no more than two pages to be submitted annually by State programs whose system is not in development. The Operational APD provides a short summary of the activities, method of acquisition, and annual budget for operations and software maintenance.

Planning APD is a plan of action in a record 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 State’s systems for transfer, to the maximum extent possible, of an existing system; prepare a request for proposal (RFP) and/or develop a General Systems Design (GSD).

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 program’s 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.

Regular matching rate means the normal rate of FFP authorized by titles IV-A, IV-B, IV-D, IV-E, X, XIV, XVI(AABD), XIX, and XXI of the Social Security Act for State and local agency administration of programs authorized by those titles.

Requirements Analysis means determining and documenting the information needs and the functional and technical requirements the proposed computerized system must meet.

Service agreement means the document signed by the State or local agency and the State or local Central Data Processing facility whenever the latter provides data processing services to the former and:

- (a) Identifies those ADP services the Central Data Processing facility will provide;
- (b) Includes, preferably as an amendable attachment, a schedule of charges for each identified ADP service, and a certification that these charges apply equally to all users;
- (c) Includes a description of the method(s) of accounting for the services rendered under the agreement and computing services charges;

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(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 §§ 205.50 and 307.13;

(f) Requires the provider to obtain prior approval pursuant to § 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 § 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;

(g) Includes the beginning and ending dates of the period of time covered by the service agreement; and

(h) Includes a schedule of expected total charges to the title covered by this subpart for the period of the service agreement.

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 means a set of computer programs, procedures, and associated documentation used to operate the hardware.

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.

State agency means the State agency administering or supervising the administration of the State plan under titles I, IV, X, XIV, XVI(AABD), XIX or XXI of the Social Security Act.

System specifications means information about the new ADP system—such as workload descriptions, input data, information to be maintained and processed, data processing techniques, and output data—which is required to determine the ADP equipment and software necessary to implement the system design.

System study means the examination of existing information flow and operational procedures within an organization. The study essentially consists of three basic phases: Data gathering investigation of the present system and new information requirements; analysis of the data gathered in the investigation; and

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synthesis, or refitting of the parts and relationships uncovered through the analysis into an efficient system.

Total Acquisition Cost means all anticipated expenditures (including State staff costs) for planning and implementation for the project. For purposes of this regulation total acquisition cost and project cost are synonymous.

[51 FR 45326, Dec. 18, 1986, as amended at 55 FR 4375, Feb. 7, 1990, 59 FR 30708, June 15, 1994, 65 FR 33633, May 24, 2000 and 75 FR 66319, October 28, 2010]

Specific Conditions for FFP

§ Sec. 95.610 Submission of advance planning documents.

Advance Planning Document (APD) refers to an Initial advance automated data processing planning document or Initial APD, providing a recorded plan of action to request funding approval for a project which will require the use of ADP services or equipment, including the use of shared or purchased services in lieu of State acquired stand-alone resources. Requirements are detailed in paragraph (a), (b) and (c) of this section.

(a) *Planning APD.*

(1) A separate planning effort and Planning APD 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 ADP project and to submit a Planning APD 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 APD as a separate document to HHS or whether to combine the two phases of planning and implementation into one APD covering both the Planning APD and the Implementation APD requirements.

(2) The Planning APD 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;

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(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;

(vii) Additional Planning APD content requirements, for enhanced funding projects as contained in § 307.15 and §§ 1355.50 through 1355.57; and

(viii) An acquisition summary for the upcoming year or development phase that provides the following information on proposed acquisitions:

(A) Type and scope of contract

(B) Procurement strategy

(C) Estimated cost or not to exceed amount

(D) Timeframe of contract

(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(b) *Implementation APD.* The Implementation APD shall include:

(1) The results of the activities conducted under a Planning APD, 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-orientated 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 APD activity costs, e.g., system conversion, vendor and state personnel, computer capacity planning, supplies, training, hardware, software and miscellaneous ADP expenses) for the project;

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(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 §§ 1355.54 through 1355.57, § 307.15 and 42 CFR subchapter C, part 433.

(c) *Advance Planning Document Update (APDU)*.

(1) The Annual APDU, which is due 60 days prior to the expiration of the FFP approval, includes:

(i) A reference to the approved APD 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 APD 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 entirety of the project’s 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 APD and actual expenditures for the past year;

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

(viii) An acquisition summary for the upcoming year or development phase that provides the following information on proposed acquisitions:

(A) Type and scope of contract

(B) Procurement strategy

(C) Estimated cost or not to exceed amount

(D) Timeframe of contract

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(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(2) The As-Needed APDU 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 APD, Annual APDU, or Implementation APD. The As-Needed APDU may be submitted any time as a stand-alone funding or project continuation request, or may be submitted as part of the Annual APDU. The As-Needed APDU 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 APDU shall provide supporting documentation to justify the need for a change to the approved budget.

(vi) Changes to the acquisition summary in the following areas:

- (A) Type and scope of contract
- (B) Procurement strategy
- (C) Estimated cost or not to exceed amount
- (D) Timeframe of contract

(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(F) New acquisitions not summarized in the Annual APDU.

(3) The Operational Advance Planning Document Update (OAPDU) is an annual submission 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.

[75 FR 66336, October 28, 2010]

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§ Sec. 95.611 Prior approval conditions.

(a) General acquisition requirements.

(1) A State shall obtain prior approval from the Department which is reflected in a record, 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 an Operational APDU only if they exceed the threshold requiring Federal approval, and only upon the receipt of a submission request, which is reflected in a record, from the Department. See definition of software maintenance under § 95.605.

(2) A State shall obtain prior approval from the Department which is reflected in a record, as specified in paragraph (b) of this section, when the State plans to acquire ADP equipment or services with proposed FFP at the enhanced matching rate authorized by § 205.35, Part 307, § 1355.52 or 42 CFR part 433, subpart C, regardless of the acquisition cost.

(3) A State shall obtain prior approval from the Department, which is reflected in a record, for a sole source/noncompetitive acquisition, of ADP equipment or services with 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 agency that has federal funding participation in the project, an additional copy must be provided to the applicable Federal program office and respective Regional Offices.

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

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

(b) Specific prior approval requirements. The State agency shall obtain approval of the Department in a record, prior to the initiation of project activity.

(1) For regular FFP requests.

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

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

(iii) For acquisition documents, an exemption from prior Federal prior approval shall be assumed in the approval of the Planning, Annual or As-Needed APDU provided that:

(A) The acquisition summary provides sufficient detail to base an exemption request;

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(B) The acquisition does not deviate from the terms of the exemption; and

(C) The acquisition is not the initial acquisition for a high risk activity, such as software application development. Acquisitions, whether exempted from prior Federal approval or not, must comply with the Federal provisions contained in § 95.610(c)(1)(viii) or (c)(2)(vi) or submit an Acquisition Checklist.

(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. The sole source justification can be provided as part of the Planning, Annual or As-Needed APDU.

(v) If the State does not opt for an exemption or submittal of an Acquisition Checklist for the contract, prior to the execution, the State 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—\$6,000,000 or more (competitive) and \$1,000,000 or more (noncompetitive);

(B) Hardware and 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) 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.

(2) For enhanced FFP requests.

(i) For the Planning APD.

(ii) For the Implementation APD.

(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 \$500,000.

(iv) For contract amendments, unless specifically exempted by the Department, prior to execution of the contract amendment, involving contract cost increases exceeding \$500,000 or contract time extensions of more than 60 days.

(3) Failure to submit any of the above to the satisfaction of the Department may result in disapproval or suspension of project funding.

(c) Specific approval requirements. The State agency shall obtain written approval from the Department:

(1) For regular FFP requests.

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(i) For an annual APDU for projects with a total cost of more than \$5,000,000, and projects with a total estimated cost of less than \$5,000,000 only if requested by the Department.

(ii) For an “As Needed APDU” when changes cause any of the following:

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

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

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

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

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

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

(2) For enhanced FFP requests.

(i) For an Annual APDU.

(ii) For an “As needed” APDU 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. For Aid to Families with Dependent Children (AFDC) Family Assistance Management Information System (FAMIS)-type projects, in accordance with section 402(e)(2)(C) of the Social Security Act, any schedule change which affects the State's implementation date as specified in the approved APD requires that the Department recover 40 percent of the amount expended. The Secretary may extend the implementation date, if the implementation date is not met because of circumstances beyond the State's control. Examples of circumstances beyond the State's control are:

(1) Equipment failure due to physical damage or destruction; or,

(2) Change imposed by Federal judicial decisions, or by Federal legislation or regulations;

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

(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% of estimated cost benefits.

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

(3) Failure to submit any of the above to the satisfaction of the Department may result in disapproval or suspension of project funding.

(d) Prompt action on requests for prior approval. The Department will promptly send to the approving Federal program offices the items specified in paragraph (b) of this section. If the Department has not provided approval, disapproval, or a request for information which is reflected in a record, within 60 days of the date of the Departmental letter acknowledging receipt of a State’s request, the Department will consider the request to have provisionally met the prior approval conditions of paragraph (b) of this section.

(e) Acquisitions not subject to prior approval. If the Department has not specifically requested in a record, the submittal of additional acquisition documentation for those acquisitions summarized in the APD, the approval of the Planning, Annual or As-Needed APDU will constitute an exemption of the acquisition documents from prior Federal 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 a record by the Department.

[51 FR 45326, Dec. 18, 1986, as amended at 55 FR 4377, Feb. 7, 1990; 56 FR 12356, Mar. 25, 1991; 59 FR 30708, June 15, 1994; 61 FR 39897, July 31, 1996; and 75 FR 66319, October 28, 2010]

§ Sec. 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 APD 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 APD for enhanced funding, see § 307.40(a). In the case of a suspension of the approval of an APD for a State Automated Child Welfare Information System (SACWIS) project, see § 1355.56.

[55 FR 4378, Feb. 7, 1990 as amended at 75 FR 66319, October 28, 2010]

§ Sec. 95.613 Procurement standards.

(a) General. Procurements of ADP equipment and services are subject to the procurement standards prescribed by Part 92 regardless of any conditions for prior approval. The Department retains the authority to provide greater oversight including requiring a State to comply with § 92.36(c) if the Department determines that the State procurement process is an impediment to competition that could substantially impact project cost or risk of failure.

(b) Those standards, as well as the requirement for prior approval, apply to ADP services and equipment acquired by a State or local agency, and the ADP services and equipment acquired by a State

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or local Central Data Processing facility primarily to support the Social Security Act programs covered by this subpart. Service agreements are exempt from these procurement standards.

§ Sec. 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.

[43 FR 44853, Sept. 29, 1978, as amended at 45 FR 10794, Feb. 19, 1980 and 75 FR 66319, October 28, 2010]

§ Sec. 95.617 Software and ownership rights.

(a) *General.* The State or local government must include a clause in all procurement instruments that provides that the State or local government will have all ownership rights in software or modifications thereof and associated documentation designed, developed or installed with Federal financial participation under this subpart.

(b) *Federal license.* The Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes, such software, modifications, and documentation.

(c) *Proprietary software.* Proprietary operating/vendor software packages which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions in paragraphs (a) and (b) of this section. FFP is not available for proprietary applications software developed specifically for the public assistance programs covered under this subpart.

§ Sec. 95.619 Use of ADP systems.

ADP systems designed, developed, or installed with FFP shall be used for a period of time specified in the advance planning document, unless the Department determines that a shorter period is justified.

§ Sec. 95.621 ADP reviews.

The Department will conduct periodic onsite surveys and reviews of State and local agency ADP methods and practices to determine the adequacy of such methods and practices and to assure that ADP equipment and services are utilized for the purposes consistent with proper and efficient administration under the Act. Where practical, the Department will develop a mutually acceptable schedule between the

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Department and State or local agencies prior to conducting such surveys or reviews, which may include but are not limited to:

(a) *Pre-installation readiness.* A pre-installation survey including an onsite evaluation of the physical site and the agency's readiness to productively use the proposed ADP services, equipment or system when installed and operational.

(b) *Post-installation.* A review conducted after installation of ADP equipment or systems to assure that the objectives for which FFP was approved are being accomplished.

(c) *Utilization.* A continuing review of ADP facilities to determine whether or not the ADP equipment or services are being efficiently utilized in support of approved programs or projects.

(d) *Acquisitions not subject to prior approval.* Reviews will be conducted on an audit basis to assure that system and equipment acquisitions costing less than \$200,000 or acquisitions exempted from prior approval were made in accordance with Part 92 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.

(2) A State agency that did not obtain prior approval of a service agreement, as required by Sec. 95.611(b)(2) as it was in effect from December 28, 1978 (unless a State chose to exercise the option to make it effective as early as September 29, 1978) through January 19, 1987, is eligible for FFP claimed for services furnished by other State or local agencies under that agreement if:

(i) The State agency has a copy of it in its files for Federal review;

(ii) It meets the definition of a service agreement as it was defined in section 95.605 from December 28, 1978 through January 19, 1987;

(iii) The claim conforms to the timely claim provisions of 45 CFR part 95, subpart A; and

(iv) The service agreement was not previously disapproved by HHS.

(f) **ADP System Security Requirements and Review Process--(1) ADP System Security Requirement.** State agencies are responsible for the security of all ADP projects under development, and operational systems involved in the administration of HHS programs. State agencies shall determine the appropriate ADP security requirements based on recognized industry standards or standards governing security of Federal ADP systems and information processing.

(2) **ADP Security Program.** State ADP Security requirements shall include the following components:

(i) Determination and implementation of appropriate security requirements as specified in paragraph (f)(1) of this section.

(ii) Establishment of a security plan and, as appropriate, policies and procedures to address the following area of ADP security:

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- (A) Physical security of ADP resources;
- (B) Equipment security to protect equipment from theft and unauthorized use;
- (C) Software and data security;
- (D) Telecommunications security;
- (E) Personnel security;
- (F) Contingency plans to meet critical processing needs in the event of short or long-term interruption of service;
- (G) Emergency preparedness; and,
- (H) Designation of an Agency ADP Security Manager.

(iii) Periodic risk analyses. State agencies must establish and maintain a program for conducting periodic risk analyses to ensure that appropriate, cost effective safeguards are incorporated into new and existing systems. State agencies must perform risk analyses whenever significant system changes occur.

(3) ADP System Security Reviews. State agencies shall review the ADP system security of installations involved in the administration of HHS programs on a biennial basis. At a minimum, the reviews shall include an evaluation of physical and data security operating procedures, and personnel practices.

(4) Costs incurred in complying with provisions of paragraphs (f)(1)-(3) of this section are considered regular administrative costs which are funded at the regular match rate.

(5) The security requirements of this section apply to all ADP systems used by State and local governments to administer programs covered under 45 CFR part 95, subpart F.

(6) The State agency shall maintain reports of their biennial ADP system security reviews, together with pertinent supporting documentation, for HHS on-site review.

[43 FR 44853, Sept. 29, 1978, as amended at 51 FR 45329, Dec. 18, 1986; 53 FR 27, Jan. 4, 1988; 55 FR 4378, Feb. 7, 1990; 61 FR 39898, July 31, 1996; and 75 FR 66319, October 28, 2010]

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

For ADP equipment and services acquired by a State without prior approval, which is reflected in a record, the State may request reconsideration of the disallowance of FFP by written request to the head of the Federal program office within 30 days of the initial written disallowance determination. In such a reconsideration, the agency may take into account overall federal interests. The Department may grant a request for reconsideration if:

- (a) The State submitted to the Department all information required under Sec. 95.611, satisfactorily responded to all concerns raised by the Department and received a final letter of approval from the

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Department; or,

(b) The State requests reconsideration of a denial by submitting in a record information that addresses the following requirements:

- (1) The acquisition must be reasonable, useful and necessary;
- (2) The State's failure to obtain prior approval, which is reflected in a record, must have been inadvertent (i.e., the State did not knowingly avoid the prior approval requirements);
- (3) The request was not previously denied by HHS;
- (4) The acquisition must otherwise meet all other applicable Federal and State requirements, and would have been approved under Part 95, Subpart F had the State requested in a record, prior approval;
- (5) The State must not have a record of recurrent failures, under any of the programs covered by the prior approval regulations, to comply with the requirement to obtain prior approval in a record, of its automatic data processing acquisitions (i.e., submissions under these procedures, from States that have failed in the past to acquire prior approval which is reflected in a record, in accordance with Part 95, Subpart F, may be denied).

[51 FR 3339, Jan. 27, 1986, as amended at 55 FR 4378, Feb. 7, 1990; and 75 FR 66319, October 28, 2010]

§ Sec. 95.624 Consideration for FFP in emergency situations.

For ADP equipment and services acquired by a State after December 1, 1985 to meet emergency situations, which preclude the State from following the requirements of § 95.611, the Department will consider providing FFP upon receipt of a request from the State which is reflected in a record. In order for the Department to consider providing FFP in emergency situations, the following conditions must be met:

(a) The State must submit a request to the Department, prior to the acquisition of any ADP equipment or services. The request must be reflected in a record, and include:

- (1) A brief description of the ADP equipment and/or services to be acquired and an estimate of their costs;
- (2) A brief description of the circumstances which result in the State's need to proceed prior to obtaining approval from the Department; and
- (3) A description of the harm which will be caused if the State does not acquire immediately the ADP equipment and services.

(b) Upon receipt of the information, the Department will within 14 days take one of the following actions:

- (1) Inform the State in writing that the request has been disapproved and the reason for disapproval; or

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(2) Inform the State in a communication reflected in a record, that the Department recognizes that an emergency exists and that within 90 days from the date of the State’s initial request, the State must submit a formal request for approval which includes the information specified at § 95.611 in order for the ADP equipment or services acquisition to be considered for the Department’s approval.

(c) If the Department approves the request submitted under paragraph (b) of this section, FFP will be available from the date the State acquires the ADP equipment and services.

[51 FR 3339, Jan. 27, 1986, as amended at 55 FR 4378, Feb. 7, 1990 and 75 FR 66319, October 28, 2010]

§ Sec. 95.625 Increased FFP for certain ADP systems.

(a) *General.* FFP is available at enhanced matching rates for the development of individual or integrated systems and the associated computer equipment that support the administration of State plans for Titles IV-D, IV-E, and/or XIX provided the systems meet the specifically applicable provisions referenced in paragraph (b) of the section.

(b) *Specific reference to other regulations.* The applicable regulations for the Title IV-D program are contained in 45 CFR Part 307. The applicable regulations for the Title IV-E program are contained in 45 CFR 1355.55. The applicable regulations for the Title XIX program are contained in 42 CFR Part 433, Subpart C.

[59 FR 30708, June 15, 1994]

§ 95.626 Independent Verification and Validation.

(a) An assessment for independent verification and validation (IV&V) analysis of a State’s system development effort may be required in the case of APD projects that meet any of the following criteria:

(1) Are at risk of missing statutory or regulatory deadlines for automation that is intended to meet program requirements;

(2) Are at risk of failing 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, major delay, or cost overrun in their systems development efforts;

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

(7) State’s procurement policies put the project at risk, including a pattern of failing to pursue competition to the maximum extent feasible.

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(8) State’s failure to adequately involve the State program offices in the development and implementation of the project.

(b) Independent Verification and Validation 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.

(c) The acquisition document 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 acquisition documents and contract for required IV&V services must be submitted to the Department for prior written approval.

[75 FR 66319, October 28, 2010]

§ 95.627 Waivers.

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

(b) *Waiver approvals.* The Secretary, or his or her designee, 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,

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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 efficient, 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 APD and is applicable to the approving agency. A waiver is subject to the APD suspension provisions in § 95.611(c)(3). When a waiver is disapproved, the entire APD will be disapproved. The APD disapproval is a final administrative decision and is not subject to administrative appeal.

[75 FR 66319, October 28, 2010]

Federal Financial Participation in Costs of ADP Acquisitions

§ Sec. 95.631 Cost identification for purpose of FFP claims.

The conditions of this subpart apply notwithstanding the existence of an approved cost allocation plan. State agencies shall assign and claim the costs incurred under an approved APD in accordance with the following criteria:

(a) *Development costs.* (1) Using its normal departmental accounting system, 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 APD; (2) the methods for distributing costs set forth in the APD 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 APD methodology for the identification, assignment and distribution of the development costs.

(b) *Operational costs.* Costs incurred for the operation of an ADP system shall be identified and assigned by the State agency to funding sources in accordance with the approved cost allocation plan required by Subpart E of this part.

(c) *Service agreement costs.* States that operate a central data processing facility shall use their approved central service cost allocation plan required by OMB Circular A-87 to identify and assign costs incurred under service agreements with the State agency. The State agency will then distribute these costs to funding sources in accordance with paragraphs (a) and (b) of this section.

§ Sec. 95.633 Nondiscrimination requirements.

State agencies that acquire ADP equipment and services are subject to the nondiscrimination requirements in Parts 80, 84, and 90.

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[45 FR 10794, Feb. 19, 1980]

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

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

(b) All or part of any costs for system projects that have a major failure to comply with an APD approved under applicable regulation at § 95.611, or for the Title IV–D program contained in Part 307, the applicable regulations for the Title IV–E and Title IV–B programs contained in Chapter 13, subchapter G, § 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.

[75 FR 66319, October 28, 2010]

Exemptions

§ Sec. 95.641 Applicability of rules for charging equipment in Subpart G of this part.

ADP equipment, as well as other equipment acquired under public assistance programs, is subject to Subpart G of this part. Among other things, Subpart G provides that a State may charge only depreciation or use allowances for equipment with unit acquisition cost of over \$25,000. However, for ADP equipment HHS will consider requests for waivers of that restriction. If the acquisition of the equipment is part of an APD that is subject to the prior approval requirements of Subpart F, the State may submit the request for a waiver as part of the APD.

Subpart G—Equipment Acquired Under Public Assistance Programs

§ Sec. 95.701 Purpose and scope of subpart.

Source: 47 FR 41576, Sept. 21, 1982, unless otherwise noted.

(a) This subpart prescribes requirements concerning the computation of claims for Federal financial participation in the cost of equipment under public assistance programs. This subpart also prescribes requirements for the management and disposition of equipment whose costs are claimed for Federal financial participation under these programs.

(b) This subpart applies to equipment purchased by State agencies (as defined in Sec. 95.703) and to equipment purchased under service agreements with other State agencies and under cost-type contracts.

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§ Sec. 95.703 Definitions.

As used in this subpart:

Acquisition cost of an item of purchased equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the equipment usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective intransit insurance shall be included in or excluded from the unit acquisition cost in accordance with the regular accounting practices of the organization purchasing the equipment. If the item is acquired by trading in another item and paying an additional amount, acquisition cost means the amount received for trade-in plus the additional outlay.

Equipment means an article of tangible personal property that has a useful life of more than two years and an acquisition cost of \$500 or more. Any recipient may use its own definition of equipment, if its definition would at least include all items of equipment as defined here.

Public Assistance Programs means programs authorized by titles I, IV-A, IV-B, IV-C, IV-D, IV-E, X, XIV, XVI (AABD), XIX and XXI of the Social Security Act, and programs authorized by the Immigration and Nationality Act as amended by the Refugee Act of 1980 (Pub. L. 96-212).

State means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Northern Mariana Islands and Guam.

State Agency means the State agency administering a public assistance program(s). This term includes local government public assistance agencies which administer public assistance programs under a

State supervised system and the State agencies which supervise the local agencies.

[47 FR 41576, Sept. 21, 1982, as amended at 65 FR 33633, May 24, 2000]

§ Sec. 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 part 92.

(b) *Exceptions.* (1) Equipment purchased under service agreements with other State agencies and under cost-type contracts shall be depreciated. However, equipment having a unit acquisition cost of

\$25,000 or less may be claimed in the period acquired if (a) the State agency approved the specific purchase and the claiming of the cost of the item, and (b) the contract or service agreement requires that the equipment or its residual value be transferred to the State agency when the equipment is no longer needed to carry out the work under the contract or service agreement.

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(2) Reimbursement for ADP equipment having an acquisition cost in excess of \$25,000 and subject to subpart F of this part must be depreciated over its useful life unless otherwise specifically provided for by the Department. ADP equipment not subject to subpart F is subject to the requirements of this subpart.

[47 FR 41576, Sept. 21, 1982, as amended at 75 FR 66319, October 28, 2010]

§ Sec. 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 APD), the equipment shall be subject to the property disposal rules in § 92.32, Equipment.

(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. The following requirements apply to the disposition of this equipment:

(1) If the cost of the equipment was claimed in the period acquired and the equipment is later sold, the proceeds of the sale shall be credited to current expenditures in approximate proportion to the distribution of the equipment's cost.

(2) If the cost of the equipment was claimed in the period acquired and the equipment is later transferred to an activity which is not involved in the performance of programs currently or previously funded by the Federal Government, an amount equal to the fair market value of the equipment on the date of the transfer shall be credited to current expenditures in approximate proportion to the distribution of the equipment's costs.

(3) If the cost of the equipment was claimed in the period acquired and the equipment is later traded in on other equipment claims for Federal financial participation in the costs of replacement equipment shall be limited to the additional outlay.

(4) If the equipment was depreciated, any gain or loss on the disposition of the equipment shall be treated as a decrease or an increase to the depreciation expense of the period in which the disposition takes place. This provision does not apply to equipment whose costs were claimed for Federal financial participation through use allowances.

[47 FR 41576, Sept. 21, 1982, as amended at 75 FR 66319, October 28, 2010]