(i) Your proposal is for publications or subvention projects; or

(ii) You are an American Indian tribe.

(2) You will find the staff contacts and a list of State historical records coordinators on the Commission's Web site at *http://www.archives.gov/nhprc.*

§ 1206.60 [Amended]

■ 23. Amend § 1206.60 in the first sentence by removing the word "Web" and adding in its place the word "web".

■ 24. Revise § 1206.64(a) to read as follows:

§ 1206.64 What formal notification will I receive, and will it contain other information?

(a) Successful grant applicants will receive a formal grant award document. The document and attachments specify terms of the grant. NHPRC staff notifies project directors informally of awards and any conditions soon after the Archivist approves the grants.

* * * * *

Subpart F—[Amended]

§ 1206.70 [Amended]

■ 25. Amend § 1206.70 by removing the second sentence.

■ 26. Amend § 1206.72 by revising paragraph (a) to read as follows:

§ 1206.72 What are, and where can I find, the regulatory requirements that apply to NHPRC grants?

(a) In addition to this Part 1206, NARA has issued other regulations that apply to NHPRC grants in 36 CFR Parts 1200 to 1212 and 2 CFR Part 2600. NARA also applies the principles and standards in the following regulations and Office of Management and Budget (OMB) Circular for NHPRC grants:

(1) 2 CFR Part 25 Universal Identifier and Central Contractor Registration;

(2) 2 CFR Part 170 Reporting Subaward and Executive Compensation Information;

(3) 2 CFR Part 220 Cost Principles for Educational Institutions (OMB Circular A–21);

(4) 2 CFR Part 225 Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87);

(5) 2 CFR Part 230 Cost Principles for Non-Profit Organizations (OMB Circular A–122); and

(6) OMB Circular A–133, "Audits of States, Local Governments, and Nonprofit Organizations." This circular is available at *http://www.whitehouse.gov/omb/circulars_default.*

* * * * *

§ 1206.74 [Amended]

■ 27. Amend § 1206.74 in the first sentence by removing the word "Commission" and adding "NHPRC" in its place.

■ 28. Revise § 1206.76 to read as follows:

§ 1206.76 May I receive an extension to my grant project?

Yes, requests for extensions of the grant period should be signed by the grantee's authorized representative and submitted not more than two months before the scheduled end of the grant period. The NHPRC will not allow extensions unless a project is up-to-date in its submission of financial and narrative reports.

§ 1206.80 [Amended]

■ 29. Amend § 1206.80(a) in the first sentence by removing the word "status".

■ 30. Revise § 1206.82 to read as follows:

§ 1206.82 What is the format and content of the financial report?

Grant recipients must submit financial reports on Standard Form 425 and have them signed by the grantee's authorized representative or by an appropriate institutional fiscal officer.

■ 31. Amend § 1206.84 by revising the second sentence of paragraph (a) and removing paragraph (c).

The revision reads as follows:

§ 1206.84 What is the format and content of the narrative report?

(a) * * * The report should include a summary of project activities; whether the project proceeded on schedule; any revisions of the work plan, staffing pattern, or budget; any web address created by the project; and any other press releases, articles, or presentations relating to the grant project or its products. * * *

* * * * *

■ 32. Revise § 1206.86 to read as follows:

§ 1206.86 What additional materials must I submit with the final narrative report?

You must submit the materials required in the NHPRC grant announcements and in the grant award document.

§ 1206.88 [Amended]

■ 33. Amend § 1206.88 by removing the phrase "the National Archives and Records Administration (NARA)" and adding "NARA" in its place.

Dated: October 18, 2010.

David S. Ferriero,

Archivist of the United States.

[FR Doc. 2010–27282 Filed 10–27–10; 8:45 am]

BILLING CODE 7515–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 95

RIN 0970–AC33

State Systems Advance Planning Document (APD) Process

AGENCY: Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

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 final rule 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: *Effective Date:* This regulation is effective October 28, 2010.

FOR FURTHER INFORMATION CONTACT: Robin Rushton, OCSE Division of State and Tribal Systems, (202) 690–1244, e-mail: *Robin.Rushton@acf.hhs.gov.* Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Statutory Authority

This final regulation 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). This regulation 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 she is responsible under the Act.

Background

The Department of Health and Human Services (HHS) provides national leadership and direction in planning, managing, and coordinating the nationwide administration and financing of comprehensive State public assistance systems to support programs for children and families. The Advance Planning Document (APD) process governs the procedure by which States obtain approval for Federal Financial Participation (FFP) in the cost of acquiring automated data processing (ADP) equipment and services. The APD process was designed to mitigate financial risks, avoid incompatibilities among systems and ensure that a system supports the program goals and objectives and operates as intended by law and regulation. The APD process also assists in ensuring that the expenditure of Federal funds is made in accordance with Federal regulation.

This rule sets forth technical and conforming revisions, establishes new requirements and modifies existing requirements. The technical revisions delete or update obsolete references to agency names and assistance programs. The conforming revisions to regulations reflect the inclusion of entitlement grants under procurement standards found in 45 CFR Part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments. (Prior to this rule, Part 95 cross-referenced procurement standards in 45 CFR Part 74, titled Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations). These conforming changes are being made in response to comments and reflect Federal regulations that were published on September 8, 2003 [68 FR 52843] to promulgate uniform administrative requirements for certain Federal grants and agreements with State, local and tribal governments. The rule eliminates and reduces the documentation required to be submitted for Federal approval of FFP in the costs of acquiring ADP equipment or services.

Technical revisions were prompted in part by changes made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which eliminated the Job Opportunities and Basic Skills (JOBS) training program and replaced the Aid to Families with Dependent Children (AFDC) program with a Temporary Assistance for Needy Families (TANF) block grant that is not subject to 45 CFR Part 95. Other technical amendments were due to the name change from Health Care Financing Administration to Centers for Medicare & Medicaid Services (CMS).

The conforming revisions were made to reflect the final rule on Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations; and Certain Grants and Agreements with States, Local Governments and Indian Tribal Governments and Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments [68 FR 52843], which brought entitlement grant programs administered by HHS, such as the Child Support Enforcement (CSE) program, under the same regulations that already applied to non-entitlement programs for grants and cooperative agreements to State, local, and tribal governments. This was done by expanding the scope of 45 CFR Part 92 to include entitlement grant programs and removing such programs from the scope of Part 74. According to the rules published in 68 FR 52843, the affected programs under an approved State plan for titles I (Grants to States for Old-Age Assistance for the Aged), IV–A (Block Grants to States for Temporary Assistance for Needy Families), IV–B (Child and Family Services), IV–D (Child Support and Establishment of Paternity), IV–E (Federal Payments for Foster Care and Adoption Assistance), X (Grants to States for Aid to the Blind), XIV (Grants to States for Aid to the Permanently and Totally Disabled), XVI (Grants to States for Aid to the Aged, Blind, and Disabled), XIX (Grants to States for Medical Assistance Programs), and XXI (Children's Health Insurance Program) of the Social Security Act (the Act) and title IV, chapter 2 (Refugee Assistance) of the Immigration and Nationality Act must comply with procurement standards in 45 CFR Part 92. (Please note this final rule on State Systems Advance Planning Documents (APD) narrows the cross-reference to Part 92 by deleting reference to titles I, IV–A, X, XIV, XVI of the Act and title IV, chapter 2 of the Immigration and Nationality Act from § 95.601, titled Scope and Applicability, of this final rule.)

Prior to this rule, regulations at 45 CFR Part 95 (§ 95.605, Definitions, § 95.613, Procurement Standards, § 95.615, Access to Systems and Records, § 95.621, ADP Reviews, § 95.705, Equipment Costs—Federal Financial Participation, § 95.707, Equipment Management and Disposition) contained six references to Part 74; those references were deleted in this final rule and replaced with references to Part 92 where applicable. (Please refer to the Provisions of the Regulation and Changes Made in Response to Comments and the Response to Comments sections of this preamble for additional information.)

The new and modified requirements in this rule were made in response to a variety of studies and recommendations from Federal, State and private organizations over the last decade, including the U.S. Government Accountability Office (GAO), the Technology and Procurement Policy Subcommittee of the House Government Reform Committee, the National Association of State Chief Information Officers (NASCIO), the American Public Human Service Association (APHSA) and the Office of Management and Budget (OMB).

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 the 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.

In 2002, the GAO reviewed the statutory and regulatory requirements for Federal approval and funding of State IT development and acquisition projects. (*See* GAO–02–347T, July 2002). The review examined agencies' processes for reviewing, approving, and funding State IT development acquisition projects and whether these processes hinder or delay States' efforts to obtain approval for projects. The review also examined how the Food and Nutrition Service (FNS) (under the U.S. Department of Agriculture (USDA)), ACF and 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 its analysis of these submissions, GAO determined that 92 to 96 percent of the State requests submitted to Child Support Enforcement (CSE), 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.

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. Although testimony differed on the degree of Federal oversight, witnesses agreed that the regulations and policies should be updated to reflect changes in technology over the last two decades.

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

The Office of Management and Budget (OMB) also has 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 Department's 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. Another three-year extension was approved through February 2, 2011.

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (Affordable Care Act) into law. This law has very significant implications for millions of Americans who will now be eligible for the benefits under Medicaid and the Child Health Insurance Program (CHIP). The Centers for Medicare and Medicaid Services (CMS) anticipates millions of newly eligible individuals applying for, and being determined to be eligible for, these programs. CMS plans to build upon the provisions described herein as it implements the Affordable Care Act and does not expect implementation to conflict with measures in this current rule.

Provisions of the Regulation and Changes Made in Response to Comments

A Notice of Proposed Rule Making (NPRM) was published in the **Federal Register** [73 FR 12341] on March 7, 2008. During the comment period, we received 33 letters generating 153 comments. On the whole, comments were positive and welcomed the increased flexibility in the APD submission requirements for lower-risk projects. Many of the comments suggested we retain the term "Advance Planning Document" (APD) and eliminate use of the proposed term "Information Technology Document" (ITD). Accordingly, we have retained the term "Advance Planning Document" in all of its permutations and deleted "Information Technology Document" throughout this rule. In response to comments, we also revised the regulation to clarify that States are permitted to transmit electronic versions of the APD, acquisition solicitation and contract documents as long as a valid signature accompanies the documentation. We did this by replacing the phrase "in writing" with "in a record" throughout this regulation.

Other commenters asserted that the procurement standards in Part 92 should be cross-referenced in Subpart F (titled Automated Data Processing Equipment and Services—Conditions for Federal Financial Participation) of Part 95, rather than the procurement requirements in Part 74. This comment also affects proposed § 95.613, Procurement Standards, which removed the general cross-reference to Part 74, but added certain key requirements from Part 74 (i.e., recipient's or grantee's responsibilities, codes of conduct, competition, procurement procedures, contract provisions) to the proposed section. We agreed with these comments and have deleted all cross-references to Part 74 and removed the proposed requirements in § 95.613 of the NPRM which were taken from Part 74. Where applicable, we have replaced the previous reference to Part 74 with a cross-reference to Part 92, which permits grantees to follow the same State procurement rules and standards that are used for non-FFP matched projects. Accordingly all HHS grantees are now subject to the procurement standards set forth in 45 CFR Part 92.

Section 95.613 Procurement Standards was revised to provide for a limited exception where the Department retains the authority to provide greater oversight, including requiring a State to comply with the competition provisions of § 92.36(c) if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure.

Changes made in response to comments are discussed in more detail under the Response to Comments section of this preamble. Following is a summary of those changes:

Section 95.601—Scope and Applicability

Section 95.601 prescribes conditions under which the Department of Health and Human Services will approve FFP in the costs of automated data processing services or equipment for social service programs under certain titles of the Act. In the proposed rule we narrowed the scope of this part by deleting reference to titles I, IV–A, X, XIV, XVI and XXI of the Act and title IV, chapter 2 of the Immigration and Nationality Act. In response to comments, we re-inserted the reference to title XXI, titled Children's Health Insurance Program, to clarify that this part applies to the automated data processing equipment and services related to the CHIP program, if a State enhances its existing Medicaid Management Information System (MMIS) to include CHIP functions.

Consistent with the proposed rule, the scope of this final rule does not apply to titles I, X, XIV or XVI of the Act as these titles have been repealed by the Social Security Amendments of 1972 (P.L. 92–603). Similarly, this rule does not apply to title IV–A of the Act since PRWORA eliminated the JOBS program and replaced AFDC with TANF, a block grant. Lastly, this rule does not apply to title IV, chapter 2 of the Immigration and Nationality Act because the State Legalization Impact Assistance Grants program, a time-limited program previously administered by the Office of Refugee Resettlement, has expired. Consequently, the scope of this rule is limited to titles IV–B (Child and Family Services), IV–D (Child Support and Establishment of Paternity), IV–E (Federal Payments for Foster Care and Adoption Assistance), XIX (Grants to States for Medical Assistance Programs) and XXI of the Act (Children's Health Insurance Program).

Section 95.605—Definitions

Section 95.605 sets forth definitions as used in this part. Certain defined terms in the NPRM, such as Alternative approach to the APD requirements, Base Contract, Grantee, Project, Service Agreement paragraphs (d)–(f) and

Service Oriented Architecture are being adopted in the final rule without revision. The intent of this section is to identify and define relevant terms in a centralized location at the beginning of the regulation to facilitate reading of the rule. To that end and in response to comments in the final rule, we used language from § 95.610(a)(1), (b) and (c) and § 95.626(a), to create or revise definitions for the terms Acquisition Checklist, Advance Planning Document (APD), Planning APD, Implementation APD, APD Update, Operational APD and Independent Verification and Validation (IV&V). We also revised the definitions of Commercial-off-the-shelf (COTS) Software, Software Maintenance and Non-Competitive.

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, Initial advance automated data processing planning document 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).

Advanced Planning Document Update (APDU) means 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).

Planning APD means 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 States' systems for transfer, to the maximum extent possible, of an existing system; prepare an Implementation APD; prepare a request for proposal (RFP) and/or develop a General Systems Design (GSD).

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

Operational APD means 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.

Similarly, in response to commenters, we also added a definition for the term Independent Verification and Validation (IV&V) to this section, which "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."

Under § 95.605 we revised the definitions of the terms Commercial-off-the-shelf (COTS) Software and Software Maintenance in response to comments that the proposed definitions were too limiting. With regard to COTS Software, we removed the last sentence of the proposed definition which read: "Examples of COTS include: Standard word processing, database, and statistical packages" and added that language to the preamble discussion of COTS. Likewise, comments indicated that the last sentence in the proposed definition of Software Maintenance inappropriately contains a requirement: "Software maintenance that substantially increases risk or cost or functionality will require an as-needed ITD." We removed that sentence from the definition. For added clarity, an As-Needed APD is required when Software Maintenance results in major changes in the scope of the project, system concept or developmental approach. We revised the definition of acquisition checklist to expand the definition to include contracts and contract amendments as well as RFPs.

Non-competitive 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. The definition of non-competitive was significantly modified from the definition proposed in the NPRM. This revised definition removes specific Federal criteria for sole source justifications from the definition of non-competitive and reflects that each State is permitted under 45 CFR 92.36 to use the same procurement policies and procedures that it uses for procurements from non-Federal funds. Several commenters recommended HHS deference to State procurement policies. One commenter noted, "as always (we) take the position that if a state was in compliance with its procurement rules, that it should be able to self-declare that its IT procurement meets all state standards and this should be sufficient for Federal approval". Another commenter stated "We recommend using the same approach to procurement standards that is used in Part 92 of Title 45 of the Code of Federal Regulations which governs 'Uniform Administrative Requirements for Grants and Cooperative Agreement to State, Local and Tribal Governments'. In Subpart C, Section 92.36 sets forth the requirements related to procurement; 92.36(a) exempts states from complying with the requirements set forth in this section. Instead, States are required to follow the same policies and procedures used for procurements from its non-Federal funds. The procurement standards set forth in Section 95.613 may conflict with or contradict procurement standards set forth in State law even though both are attempting to achieve similar goals."

As noted below, in the discussion of section 95.610(a)(2)(viii)(C), a State that uses a non-competitive solicitation will need to include a justification for this procedure in describing its procurement strategy. That justification should make reference to the procurement policies and procedures used by the State for procurement from non-Federal funds.

Section 95.610—Submission of Advance Planning Documents

We deleted the first sentence of proposed § 95.610(a)(1) from the NPRM and moved that language to the definition of Advance Planning Document in § 95.605. We added the phrase "including the use of shared or purchased services in lieu of State acquired stand-alone resources: To § 95.610 to clarify that it is permissible for States to form consortia to acquire and maintain development, maintenance or other services to address their automation needs. We added § 95.610(a)(2)(viii) to specify the need for an acquisition summary in the Planning APD that will provide for the basis for exempting acquisitions from prior approval.

Section 95.610(c) identifies the criteria for submitting an APD Update (APDU), including an Annual APDU and an As-Needed APDU. In response to comments we revised the timeframe for submitting the Annual APDU from 60 days prior to the anniversary date of the Planning APD to 60 days prior to the expiration of authority for FFP in the costs of acquiring automated data processing equipment and services. By requiring the APDU 60 days before the expiration of authority for FFP granted in the previous APDU, the process decreases the likelihood of a gap in approved FFP in the cost of the State's system.

Section 95.610(c)(1)(viii) of the proposed rule related to requesting an annual cost benefit analysis has been deleted. We received nine comments on this provision. The revisions to the annual cost benefit analysis in the NPRM were supported by all commenters, but they suggested a total elimination of the cost benefit updates. The commenters pointed out that not all projects have tangible, measurable benefits and that CBA updates are unnecessarily burdensome when the values often are stable for large software application developments. We concur that this annual requirement has not provided the type of information useful to determine whether States are pursuing the most cost-effective methods to justify the additional burden it placed on States. We have modified our oversight and monitoring to focus on high risk projects and we believe that the proposed IV&V and disapproval provisions in the final rule are a more targeted means of insuring development of cost effective human service systems.

We modified the requirements of § 95.610(c) related to Annual and As-Needed APDU to require an acquisition summary to describe the information needed on planned acquisitions in order to qualify for an exemption from the prior approval requirements of § 95.611. The information that must be included in the APD in order for the State to qualify for an exemption from prior approval requirements is now listed in § 95.610(c)(1)(viii) as follows:

(a) Type and scope of contract—Examples of type of contract are: Firm fixed price, labor hours, and time and materials. Examples of scope of contract are: Maintenance and operation, COTS software, application software development, service contract, and licenses.

(b) Procurement strategy—Examples of procurement strategy are: Full and open competition, limited competition (*e.g.* master service contract) and sole source procurement. If the procurement is sole source, the State needs to provide a sole source justification, either separately or as part of the APDU. That justification should make reference to the procurement policies and procedures used by the State for procurement from non-Federal funds.

(c) Estimated cost or not to exceed amount—Describes the total cost of the acquisition and annual cost if applicable, or the specified number of labor hours not to be exceeded for all project categories.

(d) Timeframe of contract—Examples of the timeframe of a contract should include the years in the initial contract with the number of options for additional years. This should include the estimated begin and end dates of the contract.

(e) A signed certification from the authorized State official that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617. The Acquisition Checklist issued in OCSE Information Memorandum 05–03 provides a summary of Federal requirements that should be included in the acquisition solicitation documents. A statement in the APD that the acquisitions summarized will comply with all applicable State procurement requirements and the Federal requirement specified in the Acquisition Checklist will be sufficient.

Section 95.611 Prior Approval Conditions

Section 95.611 provides the thresholds for prior approval conditions. This final rule changes the manner in which acquisition exemptions from prior Federal approval are granted. Currently, only the cost of the acquisition triggers prior Federal approval. The intent of these regulatory revisions is to presumptively approve a wider range of acquisitions based on risk rather than simply cost of the acquisition. Sections 95.611(a)(2) and (b) were revised in the final rule to substitute "which is reflected in a record" or "in a record", instead of the current language of "in writing." The revision is in response to comments encouraging a move toward e-government and expediting electronic submissions and approvals. Language within § 95.611(b)(1)(iii) states "unless specifically exempted by the Department," which permits Federal programs to grant exemptions for RFPs, contracts and contract amendments. All Federal programs have granted exemptions, but not routinely, and the burden to request the exemption is on the State. The final rule amends § 95.611(b)(2)(iii) to facilitate the routine granting of these exemptions by including an acquisition summary in the Planning, Annual or As-Needed APDUs. Section 95.611(b)(2)(iii) specifies that for acquisition documents, the exemption request is assumed to be approved concurrent with the approval of the Planning, Annual or As-Needed APDU unless the Federal program office specifically indicates in writing which acquisition(s) should be submitted for prior Federal review and approval. Section 95.611(b)(1)(iii) also specifies the conditions for assumed approval of an exemption. These conditions include: Providing sufficient detail to base an exemption, no deviation from the terms of the exemption, and the acquisition is not the initial acquisition for a high risk activity such as software application development. Examples of failure to meet the first two conditions include, but are not limited to the following:

- The exemption was based on the acquisition summary that indicated the procurement would pursue full and open competition; the eventual acquisition was sole source.
- The summary indicated the acquisition will be a firm fixed price contract; the eventual acquisition was modified to time and materials.
- The acquisition summary indicated that the scope of the contract will be maintenance and operation; the eventual acquisition was expanded to include software development.
- The acquisition summary specified that the acquisition was for a specific functionality, such as document generation; the eventual acquisition was expanded to include other functionality, such as calendaring.

The third condition for assumed approval of an exemption is when "the acquisition is not the initial acquisition for a high risk activity, such as software application development." Examples of situations that may prompt the Department to not grant an exemption request include, but are not limited to the following: The acquisition is for high risk activity such as customized software development; the RFP and contract are related to developing a new or replacement system; the project has past significant cost overruns and/or implementation problems; the State has a past pattern of limiting competition; or the size of the acquisition does not appear to be commensurate with the size of the program or caseload. While the acquisition summary is not required for an Implementation APD, this will not prevent a Federal program office from exercising existing regulatory authority and exempting acquisitions

included in an Implementation APD. For example, the Department may request prior approval of an RFP, but exempt the resulting contract from prior approval if the State keeps the Department informed during the procurement process and submits an information copy of the signed contract. In addition, the Implementation APD may summarize several different types of procurements in the first year such as IV&V, Quality Assurance, or Project Management in addition to the software development acquisition. While the acquisition for software development is high risk and subject to prior approval, at the program office's discretion the other acquisition in an Implementation APD could be exempted, so the State is encouraged to provide an acquisition summary in the Implementation APD as well.

We have retained the submission thresholds for prior approval requirements of § 95.611 for those requestors who opt not to include a description of planned acquisitions in their APDU. The Federal program offices will continue to review and provide comments on any acquisition document submitted by the requesting State, Territory or Tribe as technical assistance. In response to comments, we increased the submission threshold for regular rate software application development from $5 million to $6 million for competitive procurements. In keeping with the comments encouraging an increased submission threshold, we also revised § 95.611(b)(2)(iv) to increase the submission thresholds for enhanced funded projects from $300,000 to $500,000.

Section 95.611(d) was revised to improve the clarity of the provision. We replaced the term "ACF" with "the Department" to clarify that this provision applies to CMS as well as ACF program offices. The term "approving components" was replaced with a new term, "Federal program offices," and clarifies that the Department will send the State an acknowledgment letter once it has received the incoming request from the State and will respond within 60 days. If the State has not received a response from the Federal program office(s) within 60 days of the acknowledgment letter, then the State can assume that it has approval to proceed. The regulation uses the term "provisional approval" to signify that the Federal program office retains the authority to disapprove the Initial APD or IT acquisition, but if the Federal program office has not provided any guidance within those 60 days, then the burden shifts to the Federal program office to justify subsequent requests for more information or disapproval. The phrase "approval, disapproval or request for more information" is retained in the regulation. The term "written approval" was replaced with "which is reflected in a record" to permit electronic transmissions which is intended to improve and expedite communications between the State and Federal offices. However, this revision does not change the requirement that the State's request be sent by an authorized requestor and that the Federal approval, disapproval or request for additional information, while no longer required to be in writing, must still be reflected in a record by the authorized individual in the Federal program office. An oral request or an e-mail for additional information from a Federal program office will not "stop the clock." The State should expect an approval, disapproval or request for additional information from the same Federal official to whom the State's request was sent.

Section 95.611(e) was revised to specify which acquisitions are not subject to prior approval and clarify that the Department retains the authority to request submittal of acquisition documents regardless of threshold.

Section 95.613 Procurement Standards

Section 95.613 provides that the procurement standards for ADP equipment and services are subject to Part 92 instead of Part 74. Since § 92.36 exempts States from the provisions of § 92.36 paragraphs (b) through (i) the State will follow the same procurement policies and procedures that they use for non-Federal matched ADP State projects. The Department retains the authority to provide greater oversight, including requiring a State to comply with the competition provisions in § 92.36(c) if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure. This revision is in response to multiple comments urging the Federal programs to defer to State procurement standards, especially in the area of limitations on competition.

Section 95.617 Software and Ownership Rights

Section 95.617 provides the software and ownership rights that must be contained in the contract for all software or modifications developed or installed with Federal financial participation. In response to comments, we eliminated the examples of software packages in § 95.617(c) that met the exemption from this software ownership provision.

Section 95.621 ADP Reviews

Section 95.921 provides the types of periodic on-site surveys and reviews of State and local agency ADP methods that the Department may conduct. Paragraph (d) related to acquisitions not subject to prior approval was updated to delete the previous reference to Part 74 and substitute Part 92.

Section 95.623 Reconsideration of Denied FFP for Failure To Obtain Prior Approval

Section 95.623 provides a process by which a State may request reconsideration for FFP which was denied due to the State's failure to request Federal prior approval. In response to comments requesting additional specificity, a new paragraph (b) was added that specifies information and documentation that must be submitted with the request for reconsideration. To provide more clarification on the criteria that must be met to qualify for reconsideration, we have revised § 95.623(b) to add the criteria that is currently in OSSP-Action Transmittal 00–01. However, we anticipate that requests for reconsideration will abate given the new authority in § 95.610 to exempt planned acquisitions from prior approval.

Section 95.624 Consideration for FFP in Emergency Situations

Section 95.624 was revised to change the introductory text, paragraph (a) and paragraph (b)(2) to eliminate the reference to written request and substitute "which is reflected in a record" or "reflected in a record." This change was prompted by comments received that encouraged us to move toward e-government and remove any requirement for written submissions and approvals. This change will expedite transmittal of requests from States and Territories in emergency situations.

Section 95.626 Independent Verification and Validation

Proposed § 95.626 is revised to correct the introductory text and references to "Independent Validation and Verification" and replace it with the correct terminology of "Independent Verification and Validation." We also made a technical changes to the first two triggers, i.e., missing regulatory and statutory deadlines and failing to meet a critical milestone, by adding lead-in language to clarify that the assessment is intended to be prospective and not reactive if the agency determines that the State is "at risk" of these problems.

In keeping with our focus on high risk projects, two additional triggers to IV&V

were added to § 95.626. The two triggers are:

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

(8) State's failure to adequately involve the State program office responsible for administering the program in the development and implementation of the project.

We included these additional triggers for IV&V because past experience tells us that the State's failure to seek full and open competition to the maximum extent practicable or to involve State program offices in the planning/development effort are indicators that the project is at risk. Lack of competition in itself is not a trigger for IV&V; rather, the Department will conduct an assessment to determine if the pattern of failing to pursue competition creates risk to the project. This determination may require an IV&V assessment review to evaluate the impact that the lack of competition has had on the project for both increased cost and increased risk for system failure. A decision on whether an IV&V contract is required or the scope of the IV&V services will be deferred until after the IV&V assessment. Lack of involvement of State program offices in the development and implementation of the project is a trigger for IV&V. During the IV&V assessment, the team will consult with all stakeholders, which includes end users, caseworkers and business partners, to assess the user involvement and buy-in regarding system functionality and the ability of the system to support program business needs.

The changes proposed to § 95.631 in the NPRM were related to a change in terminology from Advance Planning Document to Information Technology Document. Since the comments expressed overwhelming opposition to the change, § 95.631 will be unchanged in the final rule.

Several sections in the NPRM are being adopted as proposed. Section 95.612 Disallowance of Federal Financial Participation, § 95.615 Access to systems and records, § 95.627 Waivers, 95.635 Disallowance for automated system that fails to comply with requirements, § 95.705 Equipment costs and § 95.707 Equipment management and disposition are being adopted without revision in the final rule.

Response to Comments

We received 153 comments from 33 State Agencies and other interested parties. Below is a summary of the comments and our response.

General Comments

1. *Comment:* Commenters were overwhelmingly supportive of keeping the terminology of Advance Planning Document (APD) in lieu of the proposed term, Information Technology Documents (ITD). This proposed change generated the most comments, all of which supported retaining the term APD. One commenter suggested several corresponding changes if the terminology was changed from APD to ITD.

Response: We agree and the terminology of Advance Planning Document (APD) is retained in the final regulation.

2. *Comment:* Several commenters urged compatible rules and guidelines across Federal human service agencies to minimize confusion and allow needed automation projects to proceed without unnecessary delay.

Response: We agree and note that the USDA's Food and Nutrition Services, which has jurisdiction over the Supplemental Nutrition Assistance Program (SNAP) systems in commenting on the NPRM, stated: "In the interest of sustaining a consistent federal approval process for State agencies, we intend to minimize differences in the procedures to the extent possible. We intend to propose similar changes in a proposed regulation in the near future."

3. *Comment:* One commenter requested clarification on why Title I, X, XIV, XVI (AABD) and XXI were deleted.

Response: The NPRM proposed deleting reference to title XXI (Children's Health Insurance Program (CHIP)) because, in general, CHIP programs are not subject to Part 95. However, if a State opts to enhance its MMIS to include CHIP functions, then Part 95 would apply to the MMIS in its entirety, including the CHIP portion. Consequently, we have re-inserted reference to title XXI in § 95.601, titled Scope and Applicability, and clarified the circumstances by which the CHIP programs are subject to Part 95 in the preamble.

The other titles of the Act, as identified by the commenter, were deleted from this rule because those titles were repealed by the Social Security Amendments of 1972 (Pub. L. 92–603) and are no longer applicable. (*Please note* that Pub. L. 92–603, § 303, repealed titles I (Grants to States for Old-Age Assistance for the Aged), X (Grants to States for Aid to the Blind), XIV (Grants to States for Aid to the Permanently and Totally Disabled) and XVI (Grants to States for Aid to the Aged, Blind, and Disabled) of the Act, except with respect to Puerto Rico, Guam, and the Virgin Islands. Also, the Commonwealth of the Northern Marianas may elect to initiate social services programs under these titles if it chooses; see Vol. II, Pub. L. 94–241, approved March 24, 1976, 90 Stat. 263, Covenant to Establish Northern Mariana Islands).

4. *Comment:* Several commenters requested training materials and training sessions on the new regulations as quickly as possible after the regulations are finalized. Several commenters specifically requested that the Medicaid manual be updated to reflect final regulations.

Response: All Federal agencies involved have committed to developing training materials and providing training and technical assistance on the new regulations once the regulations are issued in final form. With respect to the State Medicaid manual and other guidance to States, CMS will update these policy guidelines accordingly.

5. *Comment:* One commenter requested that we submit the NPRM for another round of comments. No rationale was provided as to why a second round of comments was needed.

Response: The NPRM was widely disseminated to State agencies and other interested parties with ample opportunity to comment. Furthermore, the comments received were predominately supportive of the proposed changes. Thus, we are not extending the comment period.

6. *Comment:* Several commenters applauded the reduction and elimination of documentation and noted that the ability to submit documents electronically is welcome. One commenter suggested that the term "written" be eliminated or redefined throughout the regulation to permit electronic transmission of the APD and related IT documentation.

Response: We agree and have revised the regulation to clarify that States are permitted to transmit electronic versions of APDs, acquisition solicitations and contract documents as long as a valid form of the authorized requester's signature accompanies the documentation (i.e., signature may be transmitted by fax, scanned PDF electronic document or electronic signature). We note that the elimination of the term "written" does not permit oral approvals or disapprovals by the Federal program offices. The regulation still requires that the approval or disapproval be recorded. We also stress that the State should expect that the electronic approval or disapproval will be made by the same Federal official to

whom the State's request was addressed. An email from a Federal program analyst requesting additional information in order to complete the analysis of the State's request should be considered technical assistance and would not constitute an official request for additional information under § 95.611(d). If no official response is received by the requesting State within 60 days of the acknowledgment letter, the State may assume provisional approval.

Section 95.605—Definitions

1. *Comment:* One commenter requested additional specificity regarding the definition of noncompetitive and asked that the following terms within the definition also be defined: Infeasible; what constitutes a delay; what criteria is used to determine exigency or emergency; and what number of proposals is required to satisfy adequate competition.

Response: We have not added definitions for the terms identified by the commenter because these terms are used in previous Federal standards for sole source justifications under Part 74 which is no longer relevant for State procurements. For the reasons discussed above, definitions of these terms are no longer needed.

2. *Comment:* One commenter suggested a definition of APD and suggested that the substantive requirements for APD should remain in § 95.610, Submission of advance planning documents, but that the initial paragraph of § 95.610 as well as subparagraph (a)(1) and paragraphs (b) and (c) should be moved to § 95.605, Definitions.

Response: We agree with the commenter that § 95.605, Definitions, should include the definitions for the terms Advance Planning Document, (APD), Planning APD, Implementation APD, APD Update and Operational Update. We have taken language from § 95.610(a)(1) and added this language as the definition for APD under § 95.605. We have also retained this language in § 95.610(a)(1) rather than deleting it. We determined that paragraphs (b) and (c) set forth requirements for submitting APDs and are not a part of the definition for APD. These paragraphs are appropriately placed in § 95.610, Submission of advance planning documents, and have not been moved to § 95.605, Definitions.

3. *Comment:* There were several interrelated comments requesting clarification of the definitions of commercial-off-the-shelf (COTS) software, service-oriented architecture (SOA) and a recommendation for a new definition of Enterprise Architecture. Some commenters suggested that the examples cited in the regulation be deleted; other commenters recommended the addition of new examples. Several commenters suggested that the definition of COTS be cross-referenced to § 95.610(b)(3) to clarify that enterprise-level COTS software meets the definition of COTS and requirements for FFP when conducting feasibility studies. One commenter suggested removing the examples in the COTS definition as examples might be limiting and urged clarification that both SOA and enterprise-level COTS software are acceptable for consideration in feasibility studies, analysis of alternatives and overall system approach. One commenter suggested that we remove the specific term "service-oriented architecture" from regulations because terms and meanings change with such frequency and technology advances at such a pace that such specificity will only be current in regulation for a short span of time. Another commenter suggested that the regulation should concentrate on the intent that States can explore other alternative technology solutions beyond system transfers and new custom development. The commenter also noted that based on open standards, a description of the intent would be relevant for a longer period of time. A commenter suggested that a requirement to provide an explanation of why a system transfer is not feasible whenever an alternative technology is identified implies that system transfer is the development approach of choice. Another commenter recommended allowing enterprise framework applications under the examples cited in § 95.617, Software ownership rights, to simplify State procurements. All the comments were related to other alternative technology solutions beyond system transfers and new custom development that can be considered in the Feasibility Study/Analysis of Alternatives. Some commenters requested confirmation that COTS software that is not available to the general public at a list price or needs customization does not meet the definition of COTS under this rule.

Response: We agree that the examples in the COTS definition might be limiting. We have removed them from the regulation and instead reference them in the preamble.

We did not find it necessary to revise § 95.617, Software and ownership rights. Federal program agencies, OCSE and the Administration for Children, Youth and Families, have previously issued guidance explaining that Enterprise level COTS and SOA are acceptable alternatives in a feasibility analysis. OCSE issued an Information Memorandum IM–05–04, which is titled Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems and may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm.* The Children's Bureau has issued guidance under ACYF–IM–07–03, titled Service Oriented Architecture (SOA) and available at *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0703.htm.* These policy issuances sufficiently explain that the business process the Department uses for enterprise-level COTS is the same for any other information technology product.

We note that a definition of the term COTS is needed due to the inclusion of a new submission threshold for hardware and COTS software. However, we believe that commenters may have assumed the definition of COTS was related to § 95.617, titled Software and Ownership rights. Under § 95.617 COTS products that are provided at established catalog or market prices, not developed solely for human service programs and sold or leased to the general public are exempted from the State and Federal government's software ownership provisions. We would like to clarify that a COTS product available at list price and in need of customization (i.e. modifications to meet the State's particular requirements) meets the definition of COTS under this rule. An example is an Excel application that is available at list price but needs customization to meet a human service program need. The Excel application is a COTS product exempt from software and ownership provisions of § 95.617. In this example, the vendor may charge a licensing fee, but any customization to the COTS product that was funded with FFP would be subject to the software and ownership rights in § 95.617 even if the customization was made by the vendor providing the COTS software. We defined the term Service-Oriented Architecture (SOA) because we introduced it in § 95.610(b)(3) in the discussion of criteria for submitting an Implementation APD related to feasibility studies and analysis of alternatives.

4. *Comment:* Several commenters suggested that Enterprise Architecture be defined in § 95.605 as well as defined in Medicaid Information Technology Architecture (MITA).

Response: We have chosen to limit the regulatory definitions to terms that impact the application of the regulatory requirements. As previously mentioned, OCSE and the Children's Bureau have issued guidance on Enterprise Architecture through IM–05–04, which is titled Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems and may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm* and ACYF–IM–07–03, titled Service Oriented Architecture (SOA) and available at *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0703.htm*. These policy issuances clarify that Enterprise Architecture is subject to the same regulatory requirements of Part 95. There is nothing about Enterprise Architecture that impacts the applicability of the regulations. The suggestion that CMS define Enterprise Architecture in their MITA, is outside the scope of this regulation. MITA is not defined in this final rule because it is outside the scope of the NPRM and to introduce it now would not provide interested parties sufficient notice or an opportunity to comment on the definition or applicability of MITA for Enterprise Architecture and cost allocation.

5. *Comment:* One commenter suggested that the definition of Independent Verification and Validation should be moved from § 95.626(a) to the definitions section under § 95.605. They also pointed out that the words verification and validation are sometimes transposed and should be used consistently.

Response: We agree and added the definition of IV&V based on the language from § 95.626(a) to the definitions section under § 95.605. We also agree that the consistent terminology should be Independent Verification and Validation (IV&V) and have revised the regulation accordingly.

6. *Comment:* We received several comments on the new definition of Software Maintenance. Several commenters requested additional specification as to quantity, scope, criteria, risk, increased functionality and level of risk. One commenter asked for clarification whether Software Maintenance and operation phase begins when a project is certified or when the project is implemented.

Response: The Institute of Electrical and Electronics Engineers (IEEE) definition of maintenance was used as the basis for the regulatory definition. While we understand the desire for additional clarity and specificity, we believe that adding specificity in the definition would result in less flexibility and latitude on the part of the Federal and State agencies in meeting their program goals in a cost-effective manner. Neither system certification nor implementation defines when a project's software development and maintenance phase begins. It is the absence of system development that determines whether the State is eligible to submit an Operations and Software Maintenance (O&SM) APD Update under § 95.611(c)(3).

7. *Comment:* Several commenters asked for clarification of funding requirements on a phased implementation basis and the implications, if any, should phased concepts conflict with contract approval.

Response: This is not a new requirement. The APDU references incremental funding authority and project continuation when approval is being granted by phase. The contract may be approved for a longer period of time, but FFP approval is usually limited to the planning, development, testing, implementation, or maintenance phases. The majority of States request FFP on an annual basis because their State matching funds are appropriated on an annual basis. But Federal funding by development phases is still permitted and used by Federal agencies on a case-by-case basis. The APD and procurement approval process has always been a two-step process regardless of whether FFP is being approved on a phased or annual basis. Prior approval is required under the conditions set forth in § 95.611 for the acquisition solicitation and contract documents which may be multi-phase or multi-year. This is consistent with the incremental funding authority under the definition of Advance Planning Document. Whether FFP is approved on a phased or annual basis is in part determined by which time period (phased or annual) is provided in the Annual APD Update.

8. *Comment:* Several commenters understood that there was a substantive requirement embedded in the definition of Software Maintenance in § 95.605, "Software maintenance that substantially increases risk or cost or functionality will require an As-Needed APD." Other commenters requested that the summary section provide clarification on what distinguishes a high-risk from a low-risk project, whether it is related to costs, production timetables or a particular phase of production.

Response: We have removed this sentence from the definition of Software Maintenance and moved it to the preamble with additional clarification of when changes to Software Maintenance would warrant an As-Needed APD.

9. *Comment:* Several commenters requested a definition of the terms Enhanced Match Rate and Regular Match Rate. They requested a clear definition of the match rate associated with those terms. One commenter had a specific question on a Statewide Automated Child Welfare Information System (SACWIS) project whose development was initially funded at the enhanced FFP rate, but is now receiving FFP at the regular match rate for its operational costs. This commenter asked for clarification as to which thresholds and requirements apply.

Response: Enhanced Match Rate is already defined under § 95.605 as "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." We cannot provide the percentages associated with the enhanced and regular rate in regulation, because the percentages are established in legislation and vary with both the program and the period of time. For example, provisions under the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. 99–177) impacted the percentage rates for both Enhanced and Regular Match Rates in the past. Under these regulations, if a project was initially developed with funding at the Enhanced Match Rate but is currently being completed or enhanced with funding at the Regular Match Rate, then the Regular Match Rate submission thresholds apply.

Section 95.610—Submission of Advance Planning Documents

1. *Comment:* Several commenters asked whether ACF would retroactively approve FFP in the costs of tasks associated with the planning phase if a State combines its Planning APD and Implementation APD submissions.

Response: Paragraphs (a) and (b) of § 95.611 require prior approval of a Planning APD and Implementation APD when the State plans to acquire ADP equipment and services that it anticipates will have total acquisition costs of $5,000,000 or more in Federal and State funds. Section 95.605 defines the term Total Acquisition Cost to mean "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."

2. *Comment:* One commenter asked why an As-Needed APDU would be necessary if the State can request additional funding or project extension through an Annual APDU. Another commenter noted that existing rules allow agencies to submit an As-Needed APDU with the Annual APDU and stated that the proposed rule would require a State to submit the As-Needed APDU, no later than 60 days after the occurrence of project changes. The commenter stated that such change would represent an increased burden to States and would be inconsistent with the purpose of the NPRM.

Response: Neither the proposed rule nor this final rule prevents a State from including changes in an Annual APD Update that otherwise would need to be reported in an As-Needed APDU. This is not a new provision and is consistent with requirements in the former § 95.605(b)(ii) as a part of the definition for As-Needed APDU. Additionally, the NPRM and this final rule retained the following language in § 95.610(c)(2): "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."

3. *Comment:* Two commenters requested clarification on when modernization of a legacy system would fall into the Planning APD (PAPD) or Implementation APD (IAPD) process. One commenter asked for clarification on whether a Federal feasibility study must be prepared and approved before Federal funding is provided for modernization tasks that, while significant in scope, do not result in a new system.

Response: If the State has an open APDU, and wishes to enhance its legacy system, an APD Update is the appropriate mechanism to obtain approval for each incremental improvement. If a State is incrementally enhancing its system, it would not be required to submit a PAPD or an IAPD; the State also would not be required to conduct a feasibility study or an analysis of alternatives.

We have learned that several States opt to conduct feasibility studies and include the option of enhancing their legacy system as one of their alternatives in their analysis of alternatives. This practice may be especially advantageous when the benefit of modernization is in question. This point is predicated by the commenter's statement that while incremental modernization is significant in scope, it does not result in a new system. If the incremental enhancement results in a substantial departure from the base system, HHS reserves the right to require additional documentation, including a feasibility study.

4. *Comment:* A majority of commenters welcomed the changes to the Cost Benefit Analysis (CBA) reporting requirements and indicated that the current requirement of annual submission is burdensome. One commenter indicated that this proposal brought the HHS CBA requirements closer to those of the Food and Nutrition Service (FNS) under the Department of Agriculture (USDA). Several commenters, while supporting the additional flexibility, urged additional modifications and flexibility with regard to CBA requirements. Commenters suggested that we consider information technology projects that are not being done to generate savings, but mandated to comply with Federal requirements. The commenters also stated that there are many intangible benefits that are difficult to quantify and recommend permitting a social return on investment approach. Two commenters asked if the revenue stream model and its report were eliminated. One commenter asked for clarification on whether the CBA is a separate report or can be included in the APDU.

Response: Based on the comments, we have removed the requirement for an annual cost benefit analysis from § 95.610(c)(1)(viii) related to required components of the Annual APDU. In response to the numerous comments received, we concur that this annual requirement has not provided the type of information useful to determine whether States are pursuing the most cost-effective methods to justify the additional burden the annual CBA placed on States. We have modified our oversight and monitoring to focus on high risk projects and we believe that the proposed IV&V and disapproval regulatory provisions in the final rule provides more targeted means of insuring development of cost effective human service systems. Please note, the CBA is a required element of the Planning APDU and Implementation APDU as stated in § 95.610(a)(2)(v) and § 95.610(b)(4), respectively. The CBA should not be submitted as a separate report.

HHS has issued several guidance documents to assist State human service agencies to meet this cost benefit analysis requirement. These include: (1) Feasibility, Alternatives and Cost/Benefit Analysis Guide—July 1993; (2) Companion Guide #2—Cost/Benefit Analysis Illustrated—August 1994 (Revised 2004); (3) An Overview of Companion Guide 3—Cost/Benefit Analysis Illustrated for Child Support Enforcement Systems—September 2004; and (4) Companion Guide 3—Cost/Benefit Analysis Illustrated for Child Support Enforcement Services—September 2000 (Revised June 2004). Each of these documents may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/stsys/dsts_plan_cba.html.* The Children's Bureau has developed three additional CBA companion guide chapters specifically to assist Child Welfare-related system projects. They may be accessed at the following link: *http://www.acf.hhs.gov/programs/cb/systems/sacwis/federal.htm*.

We have also provided technical assistance on CBA requirements through revenue stream model spreadsheets, help files and functional model spreadsheets, which are available by request. The revenue stream model is a mechanism used by State Child Support Enforcement (CSE) agencies to meet the annual CBA requirement. The Revenue Stream Model will not be required under this final rule, but will remain available to assist States in tracking the cost benefit of child support automation.

Lastly, we recognize that there may be Congressional or regulatory mandates requiring system enhancements that will not result in monetary benefits that exceed the costs of those system enhancements. We expect States to analyze and consider the most cost effective of the various automation alternatives.

5. *Comment:* Several commenters asked for clarification of situations where a State has closed its APD. Commenters asked whether the final regulation would require them to submit an Operational APDU if the Total Acquisition Cost exceeds $5 million and, if so, whether the Operational APDU would be reviewed under new streamlined approval requirements. One commenter also asked if the final regulations require States to submit an As-Needed APDU based on the new requirements. Another commenter asked if the State is required to submit an APD if it initially submitted an Operation and Software Maintenance (O&SM) APDU and then acquired hardware and application software that do not meet the definition of O&SM but the cost of those items was under the submission thresholds. This commenter also asked if a State is required to submit an APD in the situation described above, how that requirement would impact the State's project.

Response: By definition, an Operational APDU is "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."

Under the final rule States would not be required to reopen an Implementation APD, but would be required to submit an Operational APDU that consists of no more than two pages of information about summary of operational activities, acquisitions and annual budget. If the State is only acquiring maintenance services as defined in the regulation, the State would be exempt from submitting procurement documents related to those operational activities unless requested to do so in writing by the Federal agency. In response to comments, we are also permitting an exemption from the prior approval requirement for acquisition documents for projects still in development mode, if the planned acquisitions are sufficiently described in the Planning, Annual or As-Needed APDU. This regulatory change permits a wider range of acquisitions to be exempted from prior approval regardless of the estimated cost of the acquisition. Instead of basing prior approval solely on cost, the revision to this regulation would place the burden on the Federal approving agency to notify the requesting State if the description was inadequate or if the summary of the planned acquisition raises concern and requires the full acquisition documents to be submitted for prior Federal approval.

If the State is submitting an Operational APD, it will not be required to submit an APD because hardware falls under the definition of operations. If the State anticipates acquiring software development that does not meet the definition of Software maintenance, it should submit either an Annual or As-Needed APDU and summarize the planned acquisition. The Federal program office, in its approval of the APDU, will either exempt the planned acquisition from prior Federal approval or specify which acquisitions it requires to be submitted in full for prior Federal review and approval. If the software development occurs after the submittal and approval of the annual APDU, the State may submit an As-Needed APDU updating the acquisition strategy or submit the acquisition for Federal prior approval.

6. *Comment:* One commenter disagreed with the APD Update due date of 60 days prior to the anniversary date of the APD. The commenter stated that such a due date is inconsistent with Food and Nutrition Service (FNS), which requires that the APDU be submitted after 90 days of the anniversary date so agencies can report actual expenditures and a full year's activities.

Response: We have revised the regulation at § 95.610(c) to clarify that the APD Update is due 60 days prior to the expiration of authorized FFP in the costs of acquiring automated data processing equipment or services. We acknowledge the discrepancy with the FNS regulations, but do not believe that it is in States' interest to further revise the HHS regulation at § 95.610(c). By requiring the APDU 60 days before the expiration of authority for FFP granted in the previous APDU, the HHS process decreases the likelihood of a gap in approved FFP in the cost of the State's system.

7. *Comment:* Several commenters supported the new, shorter APD for State systems that are in operations and maintenance mode. One commenter supported the change, but recommended stipulating the specific information that must be included in the report. If it proves insufficient, more information or a full APDU could be requested by the Federal approving agency.

Response: The comment was focused on the Operational APDU, but the final rule expands the APDU acquisition summary that should be included in a Planning, Annual or As-Needed APDU to qualify for exemption from prior approval. Therefore, § 95.610 has been expanded to specify the type of specific information that must be included in the areas of summary of activities, acquisitions and annual budget.

Section 95.611—Prior Approval Conditions

1. *Comment:* One commenter disagreed with the proposed requirement for States to request approval of O&SM (Operation and Software Maintenance) acquisition documents on an exception basis or if the acquisition is non-competitive. Another commenter requested clarification on the threshold for submitting non-competitive O&SM acquisitions.

Response: As stated in § 95.611(a)(3) of this rule, "A State shall obtain prior approval from the Department, which is reflected in a record, for a sole source/non-competitive acquisition of ADP equipment or services with a total State and Federal acquisition cost of $1,000,000 or more." Therefore the threshold for submitting sole source or noncompetitive operational acquisitions is $1 million or more. Please note, the final rule now revises § 95.613 to reference the procurement standards of § 92.36(a), which indicates that grantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and standards identified in this section. Therefore, grantees must still submit sole source procurements over the $1 million threshold for Federal approval, but the Federal program offices will consider the State procurement laws and policies related to acceptable sole source justifications used in non-FFP-matched State projects.

2. *Comment:* One commenter asked for clarification on what happens to a State's project if a State contracts for custom software that is under the prior approval threshold of $1 million and the Federal approving agency later asks for a full Implementation APD.

Response: The Advance Planning Document is the written plan of action to acquire the proposed ADP services or equipment. The requirement in the current as well as the proposed regulation at § 95.611 is for a State to obtain prior written approval for an Implementation APD when the State plans to acquire ADP equipment or services with FFP that it anticipates will have total acquisition costs of $5 million or more. Total acquisition cost is defined in § 95.605 as "all anticipated expenditures (including State staff costs) for planning and implementation for the project. For purposes of this regulation, total acquisition cost and project costs are synonymous." The fact that an individual contract is under the threshold for submission for prior approval does not affect the threshold for the total or negate the need for the State to submit an APD and provide a detailed description of the activities to be undertaken and the methods to be used to accomplish the project. This would include a report of the tasks/milestones remaining to be completed.

3. *Comment:* One commenter wanted clarification of which threshold applies if the State uses all State staff and does not contract for its system development or maintenance.

Response: Total Acquisition Cost is defined in § 95.605 as "all anticipated expenditures (including State staff costs) for planning and implementation for the project. For purposes of this regulation total acquisition cost and project costs are synonymous." Thus the threshold for submission of an APD is $5 million in anticipated expenditures, whether a State uses its staff or contracts with an outside vendor.

4. *Comment:* We received comments suggesting that we expand the Acquisition Checklist to include acquisitions related to § 95.611(a)(1)(iii) and § 95.611(a)(2)(iii). (Since subparagraphs (a)(1)(iii) and (a)(2)(iii) do not exist in § 95.611, Prior approval conditions, we assume the comments were referring to § 95.611(b)(1)(iii) and § 95.611(b)(2)(iii), which cover specific prior approval requirements for regular and enhanced FFP requests, respectively, for RFP and contracts.) Another commenter requested that the use of the Acquisition Checklist be extended to include the use of master contracts.

Response: We agree. The final rule expands the scope of acquisitions that are not subject to prior Federal approval to contracts, as well as RFPs, non-competitive acquisitions and acquisitions over the previous submission thresholds. The definition of Acquisition Checklist has been revised to reflect that it applies to contracts and contract amendments as well as RFPs and may include sole source as well as competitive procurements. This is consistent with the final rule revising § 95.611 to permit an exemption from prior approval through the Annual or As-Needed APDU process. We are retaining the optional vehicle of an expanded Acquisition Checklist for use by grantees that opt not to include acquisition summary information in their APD or who prefer the Acquisition Checklist approach. Existing policy under IM–05–03 (titled Optional checklist for states and territories use in requesting an exemption of prior approval for Information Technology acquisition documents and available at the following link *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-03.htm*) and ACYF–CB–IM–05–02, (titled Relationship Of Master Contracts For Acquisition Of State Information Technology Products Or Services And Competition and available at the following link *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2005/im0502.htm*), already provides States the option to self-certify that acquisition of automated data processing equipment and/or services complies with all Federal regulations and policies by using the Acquisition Checklist. As stated in IM–05–03 and ACYF–CB–IM–05–02, the Acquisition Checklist currently may be used for Request for Proposals, Requests for Quote, Invitations to Bid, or similar State and local acquisition documents seeking Federal funding for development or maintenance acquisitions at either the regular or enhanced matching rate, including acquisitions under § 95.611(b)(1)(iii) and § 95.611(b)(2)(iii) as noted by the commenter. Guidance related to the Acquisition Checklist will be updated following the issuance of this final rule. The NPRM and this final rule include a definition of Acquisition Checklist in § 95.605 as follows:

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) contract or contract amendment. 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.

Currently, IM–05–03 and ACYF–CB–IM–05–02 limit use of the Acquisition Checklist stating that it is not to be used for contracts (including master contracts as asked by the commenter), Advance Planning Documents or sole source acquisitions (including contract amendments that exceed the regulatory submission threshold of $1 million). States and territories must continue to submit the acquisition document(s) associated with these procurements to the Department(s) for Federal prior approval. However, a State may use the Acquisition Checklist when submitting a task order solicitation in connection with an approved master contract, if the initial master contract has been submitted and approved by a Federal agency, prior to approving the use of solicitations in the State's acquisition checklist. We retained the "unless specifically exempted" language in § 95.611(b)(1)(iii) and (b)(2)(iii) permitting the Federal agencies to exempt in writing contracts and contract amendments from prior approval on a case by case basis. Please note that if the State is soliciting services related to a high risk project, the Federal agency may request the full acquisition document rather than the Acquisition Checklist.

5. *Comment:* One commenter asked if the streamlined approval and thresholds identified in § 95.611(b)(1)(v) apply to States with closed APDs.

Response: Yes, the acquisition submission thresholds of § 95.611(b)(1)(v) apply to States with closed as well as open APDs.

6. *Comment:* One commenter inquired whether States are required to use the term Request for Proposal (RFP) or acquisition solicitation document and if so, asked that we provide examples.

Response: There is no requirement for a State to utilize the terminology of either RFP or acquisition solicitation document. States can continue to use their preferred terminology to refer to RFPs or similar documents. The reason for the term acquisition solicitation document is that States use different terminology such as Invitation for Bid (IFB) without realizing that the provisions of § 95.611 applied to those documents as well.

7. *Comment:* Several commenters stated that although the ability to self-certify through the Acquisition Checklist exists under IM–05–03 and ACYF–CB–IM–05–02, they support including a definition of Acquisition Checklist in this rule. Another commenter (a Federal approving agency) does not support use of the Acquisition Checklist and points out that FNS does not accept the Acquisition Checklist for its SNAP system acquisitions.

Response: Use of the Acquisition Checklist is optional. It is appropriate for States to use the Acquisition Checklist for solicitation documents seeking FFP in the costs of automated data processing equipment or services from HHS agencies. States seeking funding approval from the FNS should comply with the rules of that agency.

8. *Comment:* One commenter expressed concern that HHS agencies could nullify or set aside the self-certification Acquisition Checklist at their discretion.

Response: We would like to reassure the commenter that the Acquisition Checklist is an authorized tool for a State to self-certify that its acquisition of automated data processing equipment and/or services complies with all Federal regulations and policies. As previously stated, we have issued Federal policy in support of the Acquisition Checklist through IM–05–03 (titled Optional checklist for states and territories use in requesting an exemption of prior approval for Information Technology acquisition documents and available at the following link *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-03.htm*) and ACYF–CB–IM–05–02, (titled Relationship Of Master Contracts For Acquisition Of State Information Technology Products Or Services And Competition and available at the following link *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2005/im0502.htm*).

We believe it is important to note, however, that neither the inclusion of a

summary of planned acquisitions in the APD nor the use of the Acquisition Checklist guarantee Federal acceptance. The Department is modifying its approach to review of acquisitions, from a trigger that is based solely on cost of the contract, to an approach that is based on assessed risk to the project. We anticipate that the summary of acquisitions included in the State's Annual APD Update will provide us with sufficient information to exempt the acquisition from prior Federal approval; however, we reserve the authority to request that specified acquisitions be submitted for prior Federal review and approval. One example of acquisitions that will require prior Federal review and approval is the initial acquisition for system development, but it may also include acquisitions for customized software development. The final rule shifts the burden of requesting that the full acquisition documentation be provided for prior Federal approval from the grantee to the Federal program office. As stated in IM–05–03 and ACYF–CB–IM–05–02, the Federal approving authority will provide a record of acceptance or denial of the State's Acquisition Checklist or the APDU within 60 days of submittal.

9. *Comment:* Several commenters urged that the thresholds for large States or large multi-program enterprise initiatives be increased to $15 million for software application development and $60 million for hardware including COTS software. Several commenters suggested utilizing a percentage of total project cost rather than a dollar threshold. One commenter was concerned that the increase in prior approval thresholds for enhanced funding from $100,000 to $300,000 was too low and suggested a percentage factor. Alternatively, commenters recommended increasing the enhanced funding threshold to $500,000, which is consistent with their State's multiple award schedule master services agreement. One commenter asked if the $20 million threshold would apply if a State's enhanced funding has expired and the State is currently seeking funding at the regular match rate for hardware and COTS towards its Statewide Automated Child Welfare Information System (SACWIS).

Response: We agree. We amended the acquisition threshold for regular rate software acquisition development in § 95.611(b)(5)(A) from $5 million to $6 million for competitive RFP and procurements. Section 95.611 has been amended to permit exemptions for acquisitions over the increased thresholds. While sole source procurements over $1 million must include a justification, that justification may be included with the exemption request in the Annual or As-Needed APDU, and the State's procurement policies regarding sole source justifications will be considered in the assessment of risk. Section 95.611(b)(2)(iii) increases the submission threshold for acquisition solicitation documents and contracts at the enhanced match rate from $100,000 in current regulation to $300,000 proposed in the NPRM to $500,000 in the final rule. In eliminating the majority of submission thresholds for projects funded at the regular rate, we shift the burden to the Federal program offices to limit their requests for full acquisition documentation to those procurements that are either insufficiently described in the APD or appear to be at high risk. The final rule acknowledges that the acquisition thresholds for large States or grantees seeking funding for multi-program projects do not in themselves signify that the acquisition is high risk. The Federal program offices will consider multiple risk factors before requesting the full acquisition documentation be submitted for prior Federal approval. We amended § 95.621 to clarify that ADP reviews of acquisitions not subject to prior approval include those acquisitions exempted from prior approval as well as those acquisitions under the submission threshold.

10. *Comment:* One commenter disagreed with the proposal in § 95.611(b)(1)(vi) to eliminate the requirement to submit procurement documents related to competitive Software Maintenance and Operations. They pointed out that this will be inconsistent with FNS, which requires States to submit RFPs and contracts, and considers such acquisition documents critical to assess the scope of work and identify any potential issues with regard to program requirements.

Response: We believe that the Operational APD, as defined in § 95.605, will provide us with sufficient information to highlight potential problems. We also believe that the Federal programs can assess the risk associated with procurements that are summarized in the APD and it is appropriate to limit requests for submitting additional solicitation documents for prior Federal approval to those acquisition documents determined to be at higher risk.

11. *Comment:* One commenter asked for clarification on whether prior approval would be needed if there are several RFPs that compromise the scope of a project. The commenter also asked if a single RFP is defined as the base contract or if the cumulative total of multiple RFPs that have been awarded to accomplish a single agency goal is defined as the base contract and whether each RFP stands on its own and is subject to the 20 percent prior approval threshold. We also received comments asking if States have to submit previous contract amendments when the contract amendments exceed the 20 percent threshold. Another commenter agreed with the proposal as long as a copy of the amendments is sent to the Federal program office.

Response: We have retained the definition of Base Contract for those grantees that opt to not seek an exemption or submit an Acquisition Checklist. Base Contract is defined in § 95.605 to mean "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." The Base Contract refers to the contract, not the RFP, and is related to each individual contract, not multiple contracts associated with a specific project or agency goal.

As stated in § 95.611(b)(1)(vi), prior approval is not required for contract amendments involving contract cost increases with a cumulative total that is below 20 percent of the base contract cost. If the State later learns that the amendments for that contract will exceed the 20 percent threshold, the State should submit all previous contract amendments for information purposes. Provided that those contract amendments comply with the scope of the project, the amendments would not require prior approval. However, we remind States that under § 95.621(d), ADP Reviews, Federal agencies retain the right to review acquisitions not subject to prior approval.

12. *Comment:* One commenter requested clarification of the term "scope" or "change in scope" as it applies to thresholds for procurements. The commenter noted that changes in scope can be minor and involve a limited number of additional hours and resources and have minimal impact on timelines; or changes in scope can require significant resource and a rebase line of the project.

Response: "Changes in the scope of the contract" refers to significant changes such as requesting new functionality not addressed in the original contract or expanding the types of expertise needed for the project. States that consider their scope changes to be minor or have minimal impact may submit such rationale as

justification for seeking a sole source contract amendment, rather than conducting a new procurement of that task.

13. *Comment:* One commenter opposed the requirement that a State submit acquisition documents under the threshold amounts on an exception basis if requested to do so in writing. The commenter stated that such a requirement would create hardship on State staff to recreate documentation that had been exempt from submission.

Response: This is not a new requirement and is consistent with regulations at § 95.621(d) which state that the Department will conduct periodic on-site reviews and surveys of automated data processing equipment and services, including acquisitions not subject to prior approval. Also, this requirement would not require State staff to "recreate" documentation, since all States receiving Federal Financial Participation for a contract are required to retain the contract records and documentation during the contract timeframe and three years after the contract has been terminated as indicated in § 92.42, Retention and access requirements for records.

Section 95.613—Procurement Standards

1. *Comment:* One commenter representing a national organization indicated that revising the procurement standards in § 95.613 to include the procurement language currently in Part 74 makes the proposed rule less cumbersome and is a positive action. However, the same commenter stated "if a state was in compliance with its procurement rules, that it should be able to self-declare that its IT procurement meets all state standards and this should be sufficient for federal approval." Other commenters urged that the procurement standards in Part 92 (titled Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments) be used for Subpart F (titled Automated Data Processing Equipment and Services—Conditions for Federal Financial Participation) of Part 95. The commenter asserts that States should be permitted to follow the same policies and procedures used for procurements that do not receive FFP. One commenter asked why we are reverting to the procurement standards removed in 2003 when HHS grants were transferred from Part 74 (titled Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations and Commercial Organizations) to Part 92. One commenter indicated that State laws may conflict with these Federal procurement standards.

Response: We agree with comments that States should be permitted to follow the same policies and procedures used for procurements that do not receive FFP. We removed all cross-references to Part 74 and deleted the requirements in proposed § 95.613 that require maximum practical full and open competition. We have added a sentence that retains limited authority for the Department to require additional oversight, including compliance with § 92.36(c) for acquisitions if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure. Procurements for Electronic Benefit Transfer (EBT) remain subject to the prior approval requirements and are unlikely to be exempted from prior approval. The final rule also replaces the cross-reference to Part 74 with the cross-reference to Part 92. Section 95.613 as published in this final rule subjects procurement of automated data processing equipment and services to the procurement standards in Part 92 and prior approval requirements in § 95.611 of this final rule.

2. *Comment:* One commenter asked for clarification if the simplified acquisition threshold remains at $100,000.

Response: Regulations at § 95.613(e)(8)(ii) were deleted in the final rule. The threshold amount is referenced in § 92.36(d), Methods of procurement to be followed, and is defined in 41 U.S.C. 403(11), Public Contracts—Office of Federal Procurement Policy, which currently sets the Simplified Acquisition Threshold at $100,000. This final rule does not change the definition of Simplified Acquisition Threshold.

3. *Comment:* Several commenters recommended excluding the language regarding preference for products and services that conserve natural resources and protect the environment and are energy efficient, as this language may be burdensome and unenforceable.

Response: We have deleted the specific language in this rule and replaced it with a general cross-reference to Part 92. Please note that the final rule related to procurement standards references the procurement standards of § 92.36(a) which provides that States are exempt from § 92.36(b) through (i).

4. *Comment:* One commenter was unable to find reference to Subpart Q of Part 74 and asked for clarification on what portion of Part 92 is applicable.

Response: Subpart Q of Part 74 was eliminated in the publication of a final rule on March 22, 1996 [61 FR 11743], which is the reason that this regulation eliminates that and other obsolete regulatory references to Part 74 in Part 95.

5. *Comment:* One commenter disagreed with the requirement that all contracts include language regarding partial breach for termination. The commenter suggested that the clauses be at the State's discretion. They stated that they want the contractor to perform, regardless of forces beyond their control, because the providers are considered critical for business continuity purposes.

Response: We have retained this requirement through the cross-reference to Part 92 (specifically § 92.44, titled Termination for convenience). This is not a new requirement as States have been subject to these requirements for over 15 years.

Section 95.617—Software and Ownership Rights

1. *Comment:* Several commenters urged that this final rule clarify whether enterprise architecture framework software such as Curam, Lagan, Harmony and @dvantage, which can be customized or configured to meet the needs of a vast variety of HHS programs, meets the COTS criteria and is acceptable in place of the traditional custom developed model or transfer model. One commenter suggested replacing the language on proprietary software in § 95.617(c) with a reference to the new definition of acceptable COTS software as the exception to the software ownership provisions. The commenter stated that the belief that custom developed or transfer solutions are fundamentally superior to COTS software is a false premise and one not supported by current market research, experience, or Federal regulation. Another commenter recommended amending the ownership and licensing requirements for proprietary software in § 95.617(c) to provide FFP in the costs of proprietary applications software developed specifically for the public assistance programs covered under this subpart and recommended that FFP should only be considered if the State provides: (1) A business justification for purchase of the software, and (2) a plan detailing how any future transition from a proprietary application to any other type of application will be accomplished. The commenter limited the recommendation to proprietary applications software developed without FFP and noted that the ownership requirements in § 95.617(a)

and the licensing requirements in § 95.617(b) continue to apply to any software designed, developed or installed with FFP.

Response: We did not propose any changes to § 95.617, Software and ownership rights, in the NPRM, other than removal of the example of listed software packages. Although we appreciate the commenters' recommendations, we do not consider it necessary or appropriate to revise § 95.617 at this stage of the regulatory process, since the public would not have an opportunity to comment on what would be a significant change in the regulation. However, related guidance is available through IM–05–04, Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems, which clarifies that enterprise architecture framework software are acceptable alternatives to be considered in a Feasibility Study or Analysis of Alternatives. Please refer to the following link for a more detailed discussion on this topic: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm.*

Section 95.623—Reconsideration of Denied FFP for Failure To Obtain Prior Approval

1. *Comment:* One commenter stated that they appreciate and support the ability of Federal agencies to allow FFP in situations where a State inadvertently neglected to obtain prior approval. One commenter recommended that the timeframe for reconsideration of disallowance be extended from 30 days to 90 days. Another commenter requested clarification as to whether the 30 days was from the date of the letter, 30 calendar days, State/Federal workdays or 30 days from receipt of the letter.

Response: As stated in § 95.623, a "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." The 30 days are calendar days and begin from the receipt date stamped on the letter by the Federal program office.

We disagree with the comment to extend the timeframe for responding to a disallowance from thirty days to ninety days. Thirty days was selected as the appropriate timeframe to request reconsideration to ensure that this rule is consistent with the timeframe established in the rules and regulations that govern the HHS disallowance and reconsideration appeal processes as set forth in 45 CFR Part 16, titled Procedures of the Departmental Grant Appeals Board.

Section 95.626—Independent Verification and Validation

1. *Comment:* Several commenters pointed out an error in transposing validation and verification.

Response: We agree and have corrected the error throughout this rule, including the definition section under § 95.605. The term is properly denoted Independent Verification and Validation (IV&V).

2. *Comment:* Several commenters supported the IV&V for high risk projects only. One commenter was unclear on the criteria used to determine low or high risk projects and suggested that providing consistent guidelines, such as those used in project management methodologies, would improve this process. One commenter asked that we clarify when a project requires IV&V. Commenters recommended that such determination be based on project risk rating with quantifiable ways of measuring risk and deriving the rating. One commenter was concerned that if the State does not plan for IV&V in its budget up front, the project could be delayed. Another commenter requested further clarification of what constitutes significant and critical triggers for IV&V. Another commenter asked for additional clarification on the process used to determine whether an IV&V vendor is required.

Response: The circumstances specified in § 95.626(a) represent high-risk situations wherein IV&V by an entity independent of the State is required as stated in § 95.626(b). We have revised the language in the first two triggers to permit intervention before the project misses a statutory or regulatory deadline or a critical milestone. We also have added two additional triggers that we believe put the project at risk and justify an IV&V assessment review. The first trigger relates to the State's procurement practices and whether the State has a pattern of failing to pursue competition to the maximum extent feasible. Under the final rule, the State will follow the same policies and procedures it uses for procurement from non-Federal funds, which means that in most situations, the Federal program office will accept the States certification that the sole source justification or other competition limiting terms and conditions are consistent with State procurement policy used for procurements from non-Federal funds. The Department continues to encourage all grantees to pursue full and open competition to the maximum extent feasible. If we detect a pattern of sole source contracts or contract amendments or other provisions that limit competition, this will trigger an IV&V assessment review. The IV&V assessment review will determine if the pattern of limiting competition has put the project at higher risk for increased costs or system failure. Only if the IV&V assessment review determines that the lack of competition increases the risk to the system project, will IV&V be required for that project.

The other trigger is related to the States failure to adequately involve the State program offices in the development and implementation of the project. An analysis of past projects indicates that the lack of stakeholder involvement was a major indicator of system failures or putting the project at risk. Again, if a pattern of failure to adequately involve the State program offices is determined, it will trigger an IV&V assessment review.

The State should plan for IV&V in the budget in case any of these events occur.

The CSE program, which has exercised regulatory authority for IV&V since 1999, issued additional guidance on critical milestones, significant delays and cost overruns in OCSE–AT–99–03, titled Distribution of the Addendum to the State Systems APD Guide for Child Support Enforcement Systems and available at the following link: *http://www.acf.hhs.gov/programs/cse/pol/AT/1999/at-9903.htm.* We believe that existing policy provides sufficient guidance in this area and further definition of these terms in regulation would unnecessarily reduce flexibility in determining when IV&V is required.

3. *Comment:* One commenter stated that there is a discrepancy between CSE regulations that require an IV&V and proposed requirements in the NPRM which state that IV&V *may* be required (emphasis added). The commenter questions whether Part 95 language will override CSE language on IV&V.

Response: CSE regulations referred to by the commenter (which can be found in § 307.15(b)(10), Approval of advance planning documents for computerized support enforcement systems) do not contradict Part 95. OCSE routinely conducts an IV&V assessment when one or more of the criteria in § 95.626(a) is triggered. (Note the criteria in § 95.626(a) are incorporated into § 307.15(b)(10)(i). Depending on the results of that assessment, OCSE may or may not determine that IV&V is required.)

4. *Comment:* One commenter recommended that IV&V be funded at 100 percent because it is mandated.

Another commenter requested enhanced funding for IV&V.

Response: Federal funding is available for approved IV&V activities at either the regular or enhanced match rate as defined in § 95.605 of this rule and in accordance with the relevant statutes governing Federal program(s).

Section 95.627—Waivers

1. *Comment:* Several commenters expressed significant concern about the risk associated with submitting an APD based on a waiver for an alternative approach. Some commenters asked if the State would be required to forfeit FFP entirely, if the APD is not approved and there is no appeal. Other commenters asked if the State would be permitted to submit a new APD for the project, if the APD for the alternative approach was disapproved and whether the State would receive funding from the date of original APD submission. Commenters also asked about the HHS timeline to approve or disapprove a waiver.

Response: If the waiver for an alternative approach is not approved, the State does not forfeit FFP entirely; it can submit a new APD. Regardless of whether the APD contains a waiver for an alternative approach or not, FFP is approved from the date of the HHS approval letter, not the date of the State's APD submission, unless the Federal program office agrees, as noted in a recorded approval, to a different approval date. The exception is the provisional approval in § 95.611(d) where the State can assume approval if the Federal program office has not provided approval, disapproval or a request for information within 60 days of the HHS acknowledgment letter.

If a State is contemplating submitting a waiver for an alternative approach, we recommend that the State consult with the appropriate Federal agency prior to submission to expedite the review and approval process.

Section 95.635—Disallowance of Federal Financial Participation (FFP) in the Costs of Automated Systems That Failed To Comply Substantially With Requirements

1. *Comment:* One commenter opposed disallowance of any FFP if the project was in compliance and suggested that any disallowance should be limited to the portion of a contract out of compliance. The commenter asked if there was an appeal process and requested clarification of the phrases "certain ITD projects" and "substantially." One commenter recommended deletion of this provision.

Response: There is no reference to "certain ITD projects" in § 95.635, Disallowance of FFP in the costs of automated systems that failed to comply substantially with requirements. This regulation refers to the disallowance of FFP for the APD project, not disallowance of contract costs which is covered in § 95.612. While substantially is retained in the title, we have modified the language in the final rule by replacing "substantially" with "major failure to comply" in § 95.635(b). This change is consistent with the language in § 95.610(c)(2). An example of an APD that has a major failure to comply with requirements is an APD that meets one of the triggers for an As-Needed APDU such as schedule extension of more than 60 days for major milestones, major changes in the scope of the project, significant changes to its cost distribution methodology or distribution of costs among Federal programs, as defined in § 95.605(b). The authority in § 95.635 permits, but does not require, recoupment of all or part of any costs from system projects that have a major failure to comply with an APD. The Federal program offices will consider a variety of factors in determining whether a project has "failed" and the amount of funding subject to recoupment. The good faith efforts of the grantee and the operational benefits arising from the expenditure will be among the factors that are considered. A funding disallowance is subject to the HHS appeal process as detailed in Part 16, Procedures of the Departmental Grant Appeals Board.

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. The revisions in this final rule to the requirements at 45 CFR Part 95 reduces the documentation required to be submitted by States and territories to the Federal government. The current information collection burden, before this final 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	58	5,336
RFP and Contract	50	.75	1.5	56.35
Emergency Funding Request	27	1	1	27
Service Agreements	14	1	1	14
Biennial Security reports	50	1	1.5	75

This regulation will result in the following reductions:

In Advance Planning Documents—a reduction in the average burden hours for projects that are implemented and in Operational mode. Instead of having to submit a full Annual or As-Needed APDU, 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 Operational APDU 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 Operational APDU submissions. The elimination of the annual cost benefit analysis in the APDU was also factored into the estimated reduction from 60 hours to 58 or 5,336 total burden hours for information technology documents.

In RFP and contracts—a reduction is made in the average burden hours per RFP and acquisition due to the final rule providing several options for the grantee to avoid submitting their full RFP and contracts for prior Federal approval. We anticipate that 90% of the prior approval submissions of RFP and contracts will be eliminated as grantees seek exemptions from prior approval or opt to utilize the Acquisition Checklist. We believe that this will reduce the average number of submissions from 50 to 5 and reduce the total burden hours to 11.5 hours.

The revised annual burden estimates based on this regulation 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	5	.75	1.5	11.5
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 considered 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.

No comments were received specifically on this information collection on the associated burden hours, but numerous commenters urged the elimination of or higher submission thresholds for prior approval of acquisition documents.

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 Regulatory Flexibility Act. The intent of these 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 IT 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 final 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 IT projects and procurement, costs are reduced. Examples of documentation that is no longer required to be submitted for prior approval under this final rule are that most acquisitions will be exempt from prior approval, and instead of having to submit a full Annual or As-Needed APDU, 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. Thus the rule will not increase costs and in fact will result in some cost savings. To estimate the savings we used the same methodology and State and contractor average annual rate as we recommend that States use for their cost 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. The reduction of 243.25 hours for APDs would translate to a cost savings of $24,325 for State staff, or $42,568 if the RFP is prepared by a Quality Assurance contractor. The reduction of 288 hours for submission of RFPs would translate to a cost savings of $28,800 if prepared by State staff and $50,400 if prepared by contractor staff. So the estimate of total cost savings related to the reduction in the information collection budget would be $53,125 to $92,968 a year.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501) 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 adjusted annually for inflation. The current threshold adjusted for inflation using the Gross Domestic Price deflator is $135 million. 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.

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 policy or regulation may affect family well-being. These regulations will not have an impact on family well-being as defined in the legislation.

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.

List of Subjects in 45 CFR Part 95

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

Approved: July 30, 2010.

Kathleen Sebelius,

Secretary of Health and Human Services.

■ For the reasons set forth above, 45 CFR Part 95 is amended 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 the HHS Centers for Medicare & Medicaid Services (CMS), and Administration for Children and Families (ACF), 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 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—[Amended]

■ 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, 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.

■ 7. Amend § 95.605 by:

■ a. Adding the definitions "Acquisition Checklist," "Alternative approach to APD requirements," "Base contract," "Commercial off the shelf software," "Federal program office," "Grantee," "Independent Verification and Validation," "Noncompetitive," "Operational APD," "Service Oriented Architecture" and "Software maintenance."

■ b. Revising the definitions of "Advance Planning Document," "Implementation APD," and "Planning APD," and "Advance Planning Document Update (APDU)."

■ c. Amending the definition of "Acceptance Documents" by removing the phrase "written evidence" and adding in its place "a record".

■ d. Revising the definition heading "Automatic data processing" to read "Automated data processing."

■ e. Revising the definition heading of "Automatic data processing equipment" to read "Automated data processing equipment."

■ f. Removing the definition of "Approving component."

■ g. Revising the definition of "Project."

■ h. Revising 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), 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).

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.

* * * * *

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.

* * * * *

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

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.

* * * * *

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.

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.

* * * * *

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 §§ 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;

* * * * *

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.

* * * * *

■ 8. Add § 95.610 to read as follows:

§ 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;

(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;

(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

(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.

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

§ 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/non-competitive 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) * * *

(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;

(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) * * *

(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.

* * * * *

(c) * * *

(1) * * *

(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.

* * * * *

(2) * * *

(ii) * * *

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

* * * * *

(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.

■ 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 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.

■ 11. In § 95.613, revise paragraph (a) to read as follows:

§ 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.

* * * * *

■ 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 § 95.617 revise paragraph (c) to read as follows:

§ 95.617 Software and ownership rights.

* * * * *

(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.

■ 14. 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 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.

* * * * *

■ 15. In § 95.623, revise the heading, introductory text, and paragraph (b) 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 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:

* * * * *

(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);

■ 16. In § 95.624, revise the introductory text, paragraph (a), introductory text and paragraph (b)(2) to read as follows:

§ 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:

* * * * *

(b) * * *

(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.

* * * * *

■ 17. Add § 95.626 to read as follows:

§ 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.

(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.

■ 18. Add § 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 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, 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 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.

■ 19. Add § 95.635 to read as follows:

§ 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.

Subpart G—Equipment Acquired Under Public Assistance Programs

■ 20. In § 95.705, revise paragraph (a) 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 part 92.

* * * * *

■ 21. In § 95.707, revise paragraphs (a) and (b) introductory text 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 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:

* * * * *

[FR Doc. 2010–26727 Filed 10–27–10; 8:45 am]

BILLING CODE P