



FEMA

W-04040

July 30, 2004

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and
NFIP Servicing Agent

FROM: WYO Clearinghouse

SUBJECT: Interim Final Rule—Financial Assistance/Subsidy Arrangement

Attached is an interim final rule published in today's Federal Register that amends the Federal Insurance Administration Financial Assistance/Subsidy Arrangement and related regulations. It also amends procedures for companies seeking to become, and ceasing to be, WYO Companies.

This interim final rule becomes effective October 1, 2004. FEMA invites comments, which should be received on or before September 28, 2004, as directed in the attachment.

If you have any questions, please contact your Program Coordinator.

Attachment

cc: Vendors, IBHS, FIPNC, WYO Standards Committee, Government Technical Representative

Suggested Routing: Accounting, Claims, Legal, Marketing, Underwriting

us and underpayments owed by us to providers, suppliers, and other entities.

B. Effects on the Medicare and Medicaid Programs

This final rule reduces the amount of interest assessed on Medicare overpayments and underpayments and MSP debts. During FY 2001, we recovered \$167 million in interest on delinquent overpayments and MSP debts. Had this final rule been in effect, interest recoveries would have been \$153 million, a difference of \$14 million. During FY 2001, we paid \$2.6 million in interest on underpayments. Had this final rule been in effect, we would have paid \$2.4 million, a difference of \$0.2 million. During FY 2002, we recovered \$115.7 million in interest on delinquent overpayments and MSP debts. Had this final rule been in effect, interest recoveries would have been \$106.1 million, a difference of \$9.6 million. During FY 2002, we paid \$5.2 million in interest on underpayments. Had this final rule been in effect, we would have paid \$4.8 million, a difference of \$0.4 million. In FY 2003, interest recoveries were \$93.4 million and would have been \$85.6 million, or \$7.8 million less, had this rule been in effect. In FY 2003, interest we paid was \$4.1 million and would have been \$3.8 million, or \$0.3 million less, had this rule been in effect. There is no effect on the Medicaid program.

C. Alternatives Considered

We considered a number of other methods to use in calculating the amount of interest owed. We assessed the relative merits of alternative calculation methods based on two primary criteria: comparability to a commercial business model and secondly, relative ease and cost of administration. Applying the first criterion precludes continuing our current calculation method. Under this final rule, we are able to use commercially obtained off-the-shelf software to calculate interest. As in the private sector, the debtor will still have a set payment period to pay the amount owed without additional interest being assessed during the payment period. We considered calculating and assessing interest on a daily basis but determined this would be prohibitively expensive and administratively burdensome for Medicare contractors, providers, beneficiaries, and other entities.

D. Conclusion

This final rule is not a major rule. It does not change the way overpayments or underpayments are determined, nor how MSP debts are established. It does

not have a significant impact on a substantial number of rural hospitals. Since a partial period is no longer considered a full 30-day period, interest assessed on amounts owed to us will be reduced. Therefore, this final rule reduces State, local, and tribal government expenditures. The final rule does not impose any direct requirement costs on State and local governments and does not preempt State law or have any Federalism implications.

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined that this rule does not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 411

Kidney diseases, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

Subpart C—Suspension of Payment, Recovery of Overpayments, and Repayment of Scholarships and Loans

■ 1. The authority citation for part 405, subpart C, continues to read as follows:

Authority: Secs. 1102, 1815, 1833, 1842, 1866, 1870, 1871, 1879, and 1892 of the Social Security Act (42 U.S.C. 1302, 1395g, 1351, 1395u, 1395cc, 1395gg, 1395hh, 1395pp, and 1395ccc) and 31 U.S.C. 3711.

■ 2. In § 405.378, paragraph (b)(2) is revised to read as follows:

§ 405.378 Interest charges on overpayments and underpayments to providers, suppliers, and other entities.

(b) * * *

* * *

(2) Interest accrues from the date of the final determination as defined in

paragraph (c) of this section, and either is charged on the overpayment balance or paid on the underpayment balance for each full 30-day period that payment is delayed.

* * * * *

PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

■ 3. The authority citation for part 411 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Insurance Coverage That Limits Medicare Payment; General Provisions

■ 4. In § 411.24, paragraphs (m)(2)(ii) and (iii) are revised to read as follows:

§ 411.24 Recovery of conditional payments.

(m) * * *
(2) * * *

(ii) Interest may accrue from the date when that notice or other information is received by CMS, is charged until reimbursement is made, and is applied for full 30-day periods; and

(iii) The rate of interest is that provided at § 405.378(d) of this chapter.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: February 26, 2004.

Dennis G. Smith,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 15, 2004.

Tommy G. Thompson,

Secretary.

[FR Doc. 04-17316 Filed 7-29-04; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 62

RIN 1660-AA28

National Flood Insurance Program (NFIP); Assistance to Private Sector Property Insurers

AGENCY: Federal Emergency Management Agency (FEMA),

Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Interim final rule.

SUMMARY: FEMA is amending the Federal Insurance Administration, Financial Assistance/Subsidy Arrangement ("Arrangement") and related regulations regarding issues of Federal jurisdiction and applicability of Federal law for lawsuits involving Write-Your-Own (WYO) Companies and of reimbursement to WYO Companies for the cost of litigation. Additionally, FEMA is amending procedures for companies seeking to become, and ceasing to be, WYO Companies.

DATES: This interim final rule takes effect on October 1, 2004. FEMA invites comments on this interim final rule, which should be received on or before September 28, 2004.

ADDRESSES: Please send your comments to the Rules Docket Clerk, Office of the General Counsel, FEMA, 500 C Street, SW., Room 840, Washington, DC 20472, (facsimile) 202-646-4536, or (e-mail) FEMA-RULES@dhs.gov.

FOR FURTHER INFORMATION CONTACT: Charles Plaxico, FEMA, 500 C Street, SW., Washington, DC 20472, (phone) 202-646-3422, (facsimile) 202-646-4327, or (email) Charles.Plaxico@dhs.gov.

SUPPLEMENTARY INFORMATION:

Approximately 100 private sector property insurers issue flood insurance policies and adjust flood insurance claims under their own names, based on the Arrangement with the Federal Insurance Administration (FIA) (44 CFR Part 62, Appendix A). The WYO insurers receive an expense allowance and remit the remaining premium to the Federal Government. The Federal Government pays for flood losses incurred through WYO insurers and pays loss adjustment expenses based on a fee schedule. Litigation costs, including court costs, attorney fees, judgments, and settlements, are paid by FIA based on submitted documentation. The Arrangement provides that under certain circumstances reimbursement for litigation costs will not be made. On October 14, 2003, FEMA published a proposed rule (68 FR 59146) that would make several changes to the Arrangement and related regulations.

During the comment period, FEMA received comments from two insurance agent trade associations, one insurance company trade association, two WYO Companies, and a committee of WYO Company representatives with whom FEMA regularly consults on WYO matters. The two insurance agent trade

associations requested an opportunity to present oral comments during the comment period, and pursuant to 44 CFR 1.6, FEMA arranged for such a session, which was held on November 6, 2003. Also in attendance with an opportunity to comment were WYO Company representatives, an attorney representing the committee of WYO representatives, and representatives from an insurance company trade association.

The two insurance agent associations in their oral and written comments opposed FEMA's proposal to clarify 44 CFR 61.5 by creating a new Subsection f from the current text of Subsection e to provide that agents selling Standard Flood Insurance Policies issued by a WYO Company, like agents selling the policies issued directly by FEMA, act for the insured and are not agents of the WYO Company. The committee of WYO representatives supported the change in its oral and written comments and urged that the proposed changes in their entirety be made final. One WYO Company also urged that the proposed changes in their entirety be made final. Because of the issues raised, FEMA believes this proposed change warrants further comment and review. Therefore, FEMA is publishing this interim final rule without the change to 44 CFR 61.5. Comments on whether changes to 44 CFR 61.5 should be added to the regulations are invited in response to this interim final rule. FEMA will consider making changes to 61.5 in the final rule after reviewing any further comments. FEMA is also specifically seeking comments on whether this provision has a significant economic impact on a substantial number of small entities. FEMA hopes to publish the final rule in 2004.

One of the insurance trade associations, in opposing the change to 44 CFR 61.5, also opposed the change to 44 CFR 62.22 without explanation. That change codifies the understanding of FEMA and numerous court rulings and specifically provides that Federal jurisdiction under 42 U.S.C. 4072 encompasses lawsuits against WYO Companies. The association said it supports jurisdiction in Federal Courts, but opposes Federal preemption of State law as it applies to lawsuits between WYO Companies and independent agents and agencies. It did not identify which portions of the proposed rule are related to this concern. We have looked at the concerns raised but do not understand how section 62.22 applies nor do we understand the concern about preemption. Therefore we did not make any changes to this interim final rule based on these comments. Rather we

invite further comments, which we will consider prior to publishing a final rule.

The remaining amendments in the proposed rule related to Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement.

The insurance company trade association opposed only allowing, at the discretion of the Administrator, an appeal to the WYO Standards Committee of a decision by the Administrator not to reimburse for litigation. It also suggested that the Administrator be required to act within 30 days, with a 30-day extension at the Administrator's discretion. (See Article III.D.3.d.) The committee of WYO Company representatives also expressed concern about this change, but said it accepted it as part of the complete set of changes in the proposed rule. FEMA believes the Administrator should have the discretion to refer appeals to the WYO Standards Committee, so the interim final rule does not change this provision. The 30-day deadline for the Administrator to act has not been added. FEMA believes that a reasonable time to act is implied, so a deadline is not necessary. However, we have clarified that the Administrator must act within a reasonable time.

Also, the committee of WYO Company representatives expressed concern about the "pattern of errors" basis for not reimbursing for litigation, but said it accepted it as part of the complete set of changes in the proposed rule. One of the WYO Companies opposed the "pattern of errors" (Article III.D.3.b) provision as lacking "definition and statutory authority." It also contended that "at a bare minimum to pass constitutional muster, the federal government, not the auditor, must provide advance written notice and an opportunity to challenge the alleged "pattern of errors"." While FEMA does not agree with the comment and continues to believe that it has broad statutory authority to set the rules for the administration of the NFIP, and further believes that the right to appeal any denial of reimbursement for litigation in the Arrangement is sufficient safeguard for the WYO Companies, FEMA is withdrawing the "pattern of errors" portion of the proposed rule. Rather FEMA will continue to rely on the "significantly outside the scope of the Arrangement" standard for reimbursement decisions including those decisions related to a pattern of errors.

One of the WYO Companies suggested clarifying a provision in Article I that the WYO Companies and the Federal

Government are the sole parties under the Arrangement. FEMA agrees and has made that change in the interim final rule.

This WYO Company suggested several other changes. One was to clarify that, under the proposed revision to the procedures for a WYO Company that is ceasing participation (Article V.C and V.E), transferring the flood insurance book of business to another WYO Company is an option for the company and will not be required by FIA. This was FEMA's intent. FEMA believes that the revision to Article V.C is clear that this is an option for the company but that it will not be required by FIA. In light of the WYO Company's comment, FEMA has changed Article V.E to clarify any ambiguity. Article V.D has a provision similar to the one in V.E and has been likewise clarified.

Another suggested change was to make the 2004 Arrangement run concurrently with Congressional reauthorization. In the past, the reauthorization dates have been October 1 and January 1. The NFIP was recently reauthorized by Congress through September 30, 2008 (Public Law 108–264). In light of this reauthorization, the concern that prompted this comment appears to have been addressed for a number of years.

Finally, the proposed rule did not contain any change in the reimbursement for unallocated loss adjustment expense (ULAE), which is in Article III.C.1. However, a WYO Company proposed to increase the reimbursement for ULAE from 3.3% to 6.0%. FEMA had been reviewing this issue prior to the proposed rule and had requested that the WYO Companies furnish data. However, the data received was not sufficient to make a decision, so the proposed rule did not contain any change regarding reimbursement for ULAE. Now, FEMA plans to make a detailed data call to the WYO Companies, and after reviewing the responses, will make a decision as to whether and to what extent it believes a change is justified. Any change will require another rulemaking action. FEMA does not believe that it will be practical to make any change effective for the Arrangement year beginning October 1, 2004, so any change would likely be effective October 1, 2005.

In addition to the changes discussed above, FEMA has made a few editorial changes.

During July 2004, FEMA will send a copy of the offer for the 2004–2005 Arrangement year, together with related materials and submission instructions, to all private insurance companies participating under the current 2002–

2004 Arrangement. Any private insurance company not currently participating in the WYO Program but wishing to consider FEMA's offer for 2004–2005 may request a copy by writing: Federal Emergency Management Agency, Mitigation Division, Attn: WYO Program, Washington, DC 20472, (facsimile) 202–646–3445, or (e-mail) Edward.Connor@dhs.gov.

Executive Order 12866, Regulatory Planning and Review

We have prepared and reviewed this interim final rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, 58 FR 51735, Oct. 4, 1993, a significant regulatory action is subject to review by the Office of Management and Budget (“OMB”) and the requirements of the Executive Order. The Executive Order defines

“significant regulatory action” as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

In determining whether we should move forward with this rule, we considered three alternatives. The First Alternative was to take no action and to allow the WYO Arrangement to expire as a result. 44 CFR 62.23 would become inoperative, the appendixes to Part 62 would expire, and effective October 1, 2004 the companies no longer would have a relationship with FEMA except for the runoff of existing policies and the sale and administration of the Standard Flood Insurance Policies by the participating private WYO Companies would cease. This alternative would have the following adverse impact on the number of NFIP policies-in-force, future Disaster Assistance, and on those individuals who as a result are not insured at the time of their next flood loss.

The number of policies-in-force can be expected to drop following the expiration of the WYO Arrangement

because insurance agents would lose their vehicle for renewing the existing policies. These agents would be required to establish a relationship with our Direct-side contractor and then renew their existing policyholders through that contractor. Many agents would not make this transition. Even for those who would make this transition, there would be a delay in completing this change of relationship, which would result in a delayed renewal for many policies. Any losses suffered by those policyholders in the interim would be uninsured, causing significant economic loss to them.

The net effect once all agents who intend to continue writing flood insurance have established the proper Direct-side relationship will be a greatly reduced NFIP policyholder base. Any quantification of that drop is speculative at this point, but FEMA's informed judgment is up to a 5 percent decrease in the number of policyholders (which is about 250,000 policies). Such a decline in flood insurance policies would create more uninsured flood victims with (1) a corresponding increase in Disaster Assistance, (2) more individuals facing large monthly payments as they repay their Disaster Loans, and (3) victims without available Federal Assistance when no Presidential Disaster Declaration is declared. Since average annual NFIP losses currently exceed \$800 million, this would mean an expected reduction of NFIP losses of between \$10 million to \$40 million—an amount that would be either directly borne by the property owner, or partially shouldered by the taxpayers through Disaster Assistance or loans.

If the Arrangement were to be implemented again in the future, it would be unrealistic to expect that the drop in NFIP policies-in-force would be restored quickly, and there likely would be an overall long-term negative influence on policies in force. There also would be a moderate to serious long-term impact on the favorable working relationship FEMA has developed with the WYO Companies.

A Second Alternative would be to extend the current WYO Arrangement and to delay further or eliminate the changes to the WYO Arrangement included in this rule. Although the consequences would not be as significant as the First Alternative, delaying the rule leaves the Program subject to the following possible adverse developments:

The rule will clarify our current understanding and would ensure that future NFIP litigation will be properly brought in Federal courts. If the rule is delayed, the Program and insureds will

incur increased costs related to cases improperly brought in State courts, and there is a risk of inconsistent application of laws and inappropriate application of State law to this Federal Program.

Certain provisions of the proposed rule are intended to reduce the litigation exposure throughout the Program. For example, the limitation on situations where premium refunds are allowed should restrict the number of future lawsuits on this issue. Therefore, a delay in this rule could result in unexpected litigation costs to the WYO Companies and FEMA.

The Third Alternative is to amend the Arrangement as outlined in this interim final rule. We believe that doing so would prevent the cost shifting to the Federal taxpayers outlined in the first two alternatives. In addition, by clarifying the rule to comport with our understanding of jurisdiction, we will ensure that cases are brought in the appropriate Federal courts, and the provision limiting litigation exposure to the Program and its participants would minimize unnecessary proceedings (including those in State courts), protect the Federal Treasury, and further the purposes of the Program. We further believe that the clarity that this interim final rule brings to the NFIP would make it easier for companies and agents to sell NFIP policies thereby further transferring the costs of floods from the taxpayers to this premium funded Program.

OMB has reviewed this rule under the principles of Executive Order 12866. This rule is a significant rule as defined under Executive Order 12866.

National Environmental Policy Act

This interim final rule falls within the exclusion category of 44 CFR Part 10.8(d)(2)(ii), which addresses the preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents related to actions that qualify for categorical exclusions. Because no other extraordinary circumstances have been identified, this interim final rule will not require the preparation of either an environmental assessment or an environmental impact statement as defined by the National Environmental Policy Act.

Paperwork Reduction Act

This interim final rule does not contain a collection of information and is therefore not subject to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations and local governments). When 5 U.S.C. 553 requires an agency to publish a notice of proposed rulemaking, the Act requires a regulatory flexibility analysis for both the proposed rule and the final rule if the rulemaking could “have a significant economic impact on a substantial number of small entities.” The Act also provides that if a regulatory flexibility analysis is not required, the agency must certify in the rulemaking document that the rulemaking will not “have a significant economic impact on a substantial number of small entities.”

We believe that this rule does not have a significant economic impact on a substantial number of small entities, and as a result at the time of the proposed rule we issued a certification that the rule did not.

We received a comment that indicated that the proposed change to 44 CFR 61.5 would have a significant impact on a substantial number of small entities. In light of that comment, we have decided not to include that provision in this interim final rule. Rather, we are requesting additional comments on the proposed change to 44 CFR 61.5, as outlined in the proposed rule, and in particular on whether it would have a significant impact on a substantial number of small entities. We request that comments on this issue be as specific as possible when commenting on the type and scope of the impact and to provide as much quantitative information as possible to assist us in understanding the issue. If, after our own further evaluation and review of any additional comments that we receive, we believe the change to 44 CFR 61.5 is still warranted and think that it may have an impact, we will prepare an Initial Regulatory Flexibility Analysis (IFRA). If we prepare an IFRA we will publish it and seek public comment prior to publication of a final rule on 44 CFR 61.5.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, dated August 4, 1999, sets forth principles and criteria to which agencies must adhere in formulating and implementing policies that have federalism implications; that is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies

must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and must consult with State and local officials before implementing any such action to the extent practicable.

FEMA has reviewed this interim final rule under Executive Order 13132 and concludes that the interim final rule has no federalism implications as defined by the Executive Order. FEMA has determined that the rule does not significantly affect the rights, roles, and responsibilities of States, involves no additional preemption of State law, and does not limit State policymaking discretion.

List of Subjects in 44 CFR Part 62

Flood insurance.

■ Accordingly, we amend 44 CFR Part 62 as follows:

PART 62—SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS

■ 1. The authority citation for Part 62 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E. O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

■ 2. Amend § 62.22 by revising paragraph (a) to read as follows:

§ 62.22 Judicial review.

(a) Upon the disallowance by the Federal Insurance Administration, a participating Write-Your-Own Company, or the servicing agent of any claim on grounds other than failure to file a proof of loss, or upon the refusal of the claimant to accept the amount allowed upon any claim after appraisal pursuant to policy provisions, the claimant within one year after the date of mailing by the Federal Insurance Administration, the participating Write-Your-Own Company, or the servicing agent of the notice of disallowance or partial disallowance of the claim may, pursuant to 42 U.S.C. 4072, institute an action on such claim against the insurer only in the U.S. District Court for the district in which the insured property or the major portion thereof shall have been situated, without regard to the amount in controversy.

* * * * *

■ 3. Amend § 62.23 by revising paragraph (g) to read as follows:

§ 62.23 WYO Companies authorized.

* * * * *

(g) A WYO Company shall act as a fiscal agent of the Federal Government, but not as its general agent. WYO

Companies are solely responsible for their obligations to their insured under any flood insurance policies issued under agreements entered into with the Administrator, such that the Federal Government is not a proper party defendant in any lawsuit arising out of such policies.

* * * * *

■ 4. In Appendix A to part 62, revise the *Effective Date* to read as follows:

Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/ Subsidy Arrangement

* * * * *

Effective Date: October 1, 2004.

* * * * *

■ 5. In Appendix A to part 62, revise Article I to read as follows:

Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/ Subsidy Arrangement

* * * * *

Article I—Findings, Purpose, and Authority

Whereas, the Congress in its “Finding and Declaration of Purpose” in the National Flood Insurance Act of 1968, as amended, (“the Act” or “Act”) recognized the benefit of having the National Flood Insurance Program (the “Program” or “NFIP”) “carried out to the maximum extent practicable by the private insurance industry”; and

Whereas the Federal Insurance Administration (FIA) within the Mitigation Division recognizes this Arrangement as coming under the provisions of Section 1345 of the Act (42 U.S.C. 4081); and

Whereas, the goal of the FIA is to develop a program with the insurance industry where, over time, some risk bearing role for the industry will evolve as intended by the Congress (Section 1304 of the Act (42 U.S.C. 4011)); and

Whereas, the insurer (hereinafter the “Company”) under this Arrangement shall charge rates established by the FIA; and

Whereas, FIA has promulgated regulations and guidance implementing the Act and the Write-Your-Own Program whereby participating private insurance companies act in a fiduciary capacity utilizing Federal funds to sell and administer the Standard Flood Insurance Policies, and has extensively regulated the participating companies’ activities when selling or administering the Standard Flood Insurance Policies; and

Whereas, any litigation resulting from, related to, or arising from the Company’s compliance with the written standards, procedures, and guidance issued by FEMA or FIA arises under the Act, regulations, or FIA guidance, and legal issues thereunder raise a federal question; and

Whereas, through this Arrangement, the Federal Treasury will back all flood policy claim payments by the Company; and

Whereas, this Arrangement has been developed to enable any interested qualified insurer to write flood insurance under its own name; and

Whereas, one of the primary objectives of the Program is to provide coverage to the maximum number of structures at risk and because the insurance industry has marketing access through its existing facilities not directly available to the FIA, it has been concluded that coverage will be extended to those who would not otherwise be insured under the Program; and

Whereas, flood insurance policies issued subject to this Arrangement shall be only that insurance written by the Company in its own name under prescribed policy conditions and pursuant to this Arrangement and the Act; and

Whereas, over time, the Program is designed to increase industry participation, and accordingly, reduce or eliminate Government as the principal vehicle for delivering flood insurance to the public; and

Whereas, the sole parties under this Arrangement are the WYO Companies and the Federal Government.

Now, therefore, the parties hereto mutually undertake the following:

■ 6. In Appendix A to Part 62, revise Article II, Section G to read as follows:

Article II—Undertaking of the Company

* * * * *

G. Compliance with Agency Standard and Guidelines.

1. The Company shall comply with written standards, procedures, and guidance issued by FEMA or FIA relating to the NFIP and applicable to the Company.

2. The Company shall market flood insurance policies in a manner consistent with marketing guidelines established by FIA.

■ 7. In Appendix A to Part 62 amend Article III to revise the second paragraph of Section B; revise Section D; and add a sentence to the end of Section E to read as follows:

Article III—Loss Costs, Expenses, Expense Reimbursement, and Premium Refunds

* * * * *

B. * * *

* * * * *

The Company may retain fifteen percent (15%) of the Company’s written premium on the policies covered by this Arrangement as the commission allowance to meet commissions or salaries of insurance agents, brokers, or other entities producing qualified flood insurance applications and other related expenses.

* * * * *

D. Loss Payments.

1. Loss payments under policies of flood insurance shall be made by the Company from Federal funds retained in the bank account(s) established under Article II, Section E and, if such funds are depleted, from Federal funds derived by drawing against the Letter of Credit established pursuant to Article IV.

2. Loss payments include payments as a result of litigation that arises under the scope of this Arrangement, and the Authorities set forth herein. All such loss payments and related expenses must meet the documentation requirements of the Financial

Control Plan and of this Arrangement, and the Company must comply with the litigation documentation and notification requirements established by FEMA. Failure to meet these requirements may result in the Administrator’s decision not to provide reimbursement.

3. Limitation on Litigation Costs.

a. Following receipt of notice of such litigation, the FEMA Office of the General Counsel (“OGC”) shall review the information submitted. If the FEMA OGC finds that the litigation is grounded in actions by the Company that are significantly outside the scope of this Arrangement, and/or involves issues of agent negligence, then the FEMA OGC shall make a recommendation to the Administrator regarding whether all or part of the litigation is significantly outside the scope of the Arrangement.

b. In the event the Administrator agrees with the determination of the FEMA OGC under Article III, Section D.3.a then the Company will be notified in writing within thirty (30) days of the Administrator’s decision that any award or judgment for damages and any costs to defend such litigation will not be recognized under Article III as a reimbursable loss cost, expense or expense reimbursement.

c. In the event a question arises whether only part of a litigation is reimbursable, the FEMA OGC shall make a recommendation to the Administrator about the appropriate division of responsibility, if possible.

d. In the event that the Company wishes to petition for reconsideration of the determination that it will not be reimbursed for any part of the award or judgment or any part of the costs expended to defend such litigation made under Article III, Section D.3.a–c, it may do so by mailing, within thirty (30) days of the notice that reimbursement will not be made, a written petition to the Administrator, who may request advice on other than legal matters of the WYO Standards Committee established under the WYO Financial Control Plan. The WYO Standards Committee will consider the request at its next regularly scheduled meeting or at a special meeting called for that purpose by the Chairman and issue a written recommendation to the Administrator. The Administrator’s final determination will be made in writing within a reasonable time to the Company.

E. * * * As fiscal agent, the Company shall not refund any premium to applicants or policyholders in any manner other than as specified in the NFIP’s “Flood Insurance Manual” since flood insurance premiums are funds of the Federal Government.

8. In Appendix A to Part 62, revise Article V to read as follows:

Article V—Commencement and Termination

A. The initial period of this Arrangement is from October 1, 2004 through September 30, 2005. Thereafter the Arrangement will be effective on an annual basis for the period October 1 through September 30. The FIA shall provide financial assistance only for policy applications and endorsements accepted by the Company during this period

pursuant to the Program's effective date, underwriting and eligibility rules.

B. Each year, the FIA shall publish in the **Federal Register** and make available to the Company the terms for subscription or re-subscription to this Financial Assistance/ Subsidy Arrangement. The Company shall notify the FIA of its intent to re-subscribe or not re-subscribe within thirty days of publication.

C. In order to assure uninterrupted service to policyholders, the Company shall promptly notify the FIA in the event the Company elects not to participate in the Program during the Arrangement year. If so notified, or if the FIA chooses not to renew the Company's participation, the FIA, at its option, may require the continued performance of all or selected elements of this Arrangement for the period required for orderly transfer or cessation of business and settlement of accounts, not to exceed 18 months, and may either require Article V.C.1 or allow Article V.C.2:

1. The delivery to the FIA of:

a. A plan for the orderly transfer to the FIA of any continuing responsibilities in administering the policies issued by the Company under the Program including provisions for coordination assistance; and

b. All data received, produced, and maintained through the life of the Company's participation in the Program, including certain data, as determined by FIA, in a standard format and medium; and

c. All claims and policy files, including those pertaining to receipts and disbursements that have occurred during the life of each policy. In the event of a transfer of the services provided, the Company shall provide the FIA with a report showing, on a policy basis, any amounts due from or payable to insureds, agents, brokers, and others as of the transition date; and

d. All funds in its possession with respect to any policies transferred to FIA for administration and the unearned expenses retained by the Company.

2. Submission of plans for the renewal of the business by another WYO Company or Companies or the submission of detailed plans for another WYO Company to assume responsibility for the Company's NFIP policies. Such plans shall assure uninterrupted service to policyholders and shall be accompanied by a formal request for FIA approval of such transfers.

D. Financial assistance under this Arrangement may be canceled by the FIA in its entirety upon thirty (30) days written notice to the Company by certified mail stating one of the following reasons for such cancellation: (i) Fraud or misrepresentation by the Company subsequent to the inception of the Arrangement; or (ii) Nonpayment to the FIA of any amount due the FIA; or (iii) Material failure to comply with the requirements of this Arrangement or with the written standards, procedures, or guidance issued by FEMA or FIA relating to the NFIP and applicable to the Company. Under these specific conditions, the FIA may require the transfer of administrative responsibilities and the transfer of data and records as provided in Article V, Section C.1.a through d. If transfer is required, the unearned expenses

retained by the Company shall be remitted to the FIA. In such event, the Government will assume all obligations and liabilities owed to policyholders under such policies, arising before and after the date of transfer. As an alternative to transfer of the policies to the Government, the FIA will consider a proposal, if it is made by the Company, for the assumption of responsibilities by another WYO Company as provided in Article V, Section C.2.

E. In the event that the Company is unable or otherwise fails to carry out its obligations under this Arrangement by reason of any order or directive duly issued by the Department of Insurance of any jurisdiction to which the Company is subject, the Company agrees to transfer, and the Government will accept, any and all WYO policies issued by the Company and in force as of the date of such inability or failure to perform. In such event the Government will assume all obligations and liabilities within the scope of the Arrangement owed to policyholders arising before and after the date of transfer, and the Company will immediately transfer to the Government all needed records and data and all funds in its possession with respect to all such policies transferred and the unearned expenses retained by the Company. As an alternative to transfer of the policies to the Government, the FIA will consider a proposal, if it is made by the Company, for the assumption of responsibilities by another WYO Company as provided by Article V, Section C.2.

F. In the event the Act is amended, or repealed, or expires, or if the FIA is otherwise without authority to continue the Program, financial assistance under this Arrangement may be canceled for any new or renewal business, but the Arrangement shall continue for policies in force that shall be allowed to run their term under the Arrangement.

■ 9. In Appendix A, Part 62, revise Article VII Section C. to read as follows:

Article VII—Cash Management and Accounting

* * * * *

C. In the event the Company elects not to participate in the Program in this or any subsequent fiscal year, or is otherwise unable or not permitted to participate, the Company and FIA shall make a provisional settlement of all amounts due or owing within three months of the expiration or termination of this Arrangement. This settlement shall include net premiums collected, funds drawn on the Letter of Credit, and reserves for outstanding claims. The Company and FIA agree to make a final settlement, subject to audit, of accounts for all obligations arising from this Arrangement within 18 months of its expiration or termination, except for contingent liabilities that shall be listed by the Company. At the time of final settlement, the balance, if any, due the FIA or the Company shall be remitted by the other immediately and the operating year under this Arrangement shall be closed.

■ 10. In Appendix A to Part 62, revise the first paragraph of Article IX to read as follows:

Article IX—Errors and Omissions

In the event of negligence by the Company that has not resulted in litigation but has resulted in a claim against the Company, FEMA will not consider reimbursement of the Company for costs incurred due to that negligence unless the Company takes all reasonable actions to rectify the negligence and to mitigate any such costs as soon as possible after discovery of the negligence. Further, (i) if the claim against the Company is grounded in actions significantly outside the scope of this Arrangement or (ii) if there is negligence by the agent, FEMA will not reimburse any costs incurred due to that negligence. The Company will be notified in writing within thirty (30) days of a decision not to reimburse. In the event the Company wishes to petition for reconsideration of the decision not to reimburse, the procedure in Article III, Section D.3.d shall apply.

* * * * *

■ 11. In Appendix A to Part 62, revise Article XVI to read as follows:

Article XVI—Relationship Between the Parties (Federal Government and Company) and the Insured

Inasmuch as the Federal Government is a guarantor hereunder, the primary relationship between the Company and the Federal Government is one of a fiduciary nature, *i.e.*, to assure that any taxpayer funds are accounted for and appropriately expended. The Company is a fiscal agent of the Federal Government, but is not a general agent of the Federal Government. The Company is solely responsible for its obligations to its insured under any policy issued pursuant hereto, such that the Federal Government is not a proper party to any lawsuit arising out of such policies.

Dated: July 27, 2004.

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 04-17358 Filed 7-29-04; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04-2132; MB Docket No. 04-24; RM-10846]

Radio Broadcasting Services; Lincoln and Yuba City, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a *Notice of Proposed Rule Making*, 69 FR 8355 (February 24, 2004), this *Report and Order* downgrades Channel 280B1, Station KXCL(FM), Yuba City California, to Channel 280A; reallots Channel 280A to Lincoln, California;