Agency (SWICA) data match, safeguard recipient information, obtain recipient assignment of rights, and submit a TPL action plan for HCFA approval. These statutory requirements are not affected by the provisions of this final rule.

Nonstatutory requirements, specified in the Medicaid regulations at § 433.138 (and subject to proposed waiver), include obtaining information (via data matching) with the State Workers' Compensation or Industrial Accident Commission files and State Motor Vehicle Accident report files. Another nonstatutory requirement is the requirement for agencies to identify all paid claims with trauma/diagnosis codes found in the International Classification of Disease, 9th Revision, Clinical Modification, Volume 1 (ICD–9–CM) 800 through 999, except 994.6. In § 433.139 (and subject to proposed waiver), State agencies are required to bill the third party resource within 60 days after the last day of the month the State learns of the available resource.

Under our regulations at § 433.138, pertinent health insurance information must be obtained (1) from Medicaid applicants or recipients during the determination and redetermination process; (2) by securing data match agreements with specific Federal and State agencies; (3) by conducting diagnosis and trauma code edits; and (4) by following specified procedures regarding the frequency of these activities.

Regulations at § 433.139 govern State payment of claims where TPL is involved. There are two methods of paying claims for recipients with known TPL: the cost-avoidance method and the pay-and-chase method. Under the cost-avoidance method, the Medicaid agency does not initially pay the claim, but returns the claim to the provider with information necessary for the provider to bill the third party. Under the pay-and-chase method, an agency may pay the total amount allowed under its payment schedule and then seek recovery from the liable third parties. The agency must initiate recovery within 60 days after the end of the month in which payment is made or the Agency learns of the existence of the third party resource.

Most States that implement the requirements in our regulations at § 433.138 achieve significant Medicaid savings. Whenever third party resources can be utilized instead of Medicaid, both Federal and State taxpayers save money. In some instances, however, TPL requirements are not cost-effective.

Some States have reported very poor results in terms of identifying new TPL leads through trauma and diagnosis code edits. There are reports that some codes never yield TPL. Currently, States may obtain a partial waiver from HCFA of the requirement in § 433.138(e) to take action to identify those paid claims for Medicaid recipients that contain diagnosis codes 800 through 999 (except that no State has to pursue information concerning code 994.6, motion sickness). Under § 433.138(e), the State may obtain a waiver from complying with the requirements for specific codes.

In § 433.139(e), we also permit a State to request a waiver from HCFA of the cost-avoidance method of paying if the State could document that the pay-and-chase method is at least as cost-effective as the cost-avoidance method. The State is required to revalidate its cost-avoidance waiver request every 3 years and notify HCFA of any event that may change the cost-effectiveness of the waiver.

When these requirements were established by HCFA, the Medicaid TPL program was in its infancy. Many States were not pursuing TPL or only recovering TPL passively; that is, making recoveries when contacted by a provider or attorney who was making a third party settlement. We believed there were tremendous untapped TPL resources that were not identified by States. Therefore, the initial regulations were broad and did not allow States discretion to decide whether or not to perform required TPL activities based upon their cost-effectiveness. For this reason, we issued TPL regulations which we have determined are now too prescriptive and, at times, duplicative. On February 27, 1987, we published in the **Federal Register** (52 FR 5971) a response to State comments regarding cost-effectiveness of our discretionary regulations at §§ 433.138 and 433.139. We stated that we would reevaluate these requirements if we received substantial complaints. This rule is consistent with that statement.

Currently, the majority of the States have aggressive and comprehensive TPL programs and have reported substantial savings from TPL activities. However, program experience has identified situations where some activities required by our regulations duplicate some State agency requirements in identifying new TPL leads. Also, situations have been identified where some of our requirements in regulations are not cost-effective; that is, States can reasonably expect to spend more to perform a TPL activity than will be realized in savings. It is for these reasons that we are now offering States the opportunity to request waivers from the unproductive activities that are not mandated by statute, and for which States have superior methods for accomplishing the same objectives as our regulations.

II. Issuance of Proposed Rule

On February 2, 1994, we published in the **Federal Register** (59 FR 4880) a proposed rule that would allow States to request a waiver from requirements in § 433.138(c), (d)(4), (d)(5), (e), (f), (g)(1), (g)(2), (g)(3), and (g)(4) or § 433.139(b), (d)(1), and (d)(2) that are not explicitly mandated by statute when it is found that performing the requirement is not cost-effective. We indicated that we would revise our rules to allow a State to request a waiver from the nonstatutorily required activities that concern specific types of third party information, exchange of data, diagnosis and trauma code edits, and follow-up activities for certain exchanges. A nonstatutorily required activity would be eligible for a waiver if the cost of the required activity exceeds the TPL recoupment and the required activity accomplishes, at the same or at a higher cost, the same objective as another activity that is being performed by the State.

We made this proposal to allow States to perform TPL operations more efficiently and at a greater savings to the Federal Government. We believed that duplicative efforts (and higher costs) would be eliminated when States have already identified third party resources through another more cost-effective means. We note that HCFA's financial participation in State Medicaid Management Information Systems costs, including costs related to data matches we require States to perform, may be as much as 90 percent. Therefore, it is not in the interest of the Federal Government to have States perform activities which are either duplicative or nonproductive.

We proposed relief from regulatory requirements in the form of a waiver. The State would submit a formal request to the HCFA regional office (RO). The State would be required to provide documentation that demonstrates that the cost of the required activity exceeds the TPL recoupment and the required activity accomplishes, at the same or at a higher cost, the same objective as another activity which is being performed by the State.

Documentation to support the waiver request could include past claims recovery data that demonstrate the administrative expenses involved in meeting that particular requirement, and a State analysis that documents a cost-effective alternative that accomplishes the same task. HCFA's ROs would