consider the individual merits of each waiver request and would grant or deny the waiver request based on cost-effectiveness and State alternatives presented.

We indicated that we would issue separate guidelines for developing and evaluating waiver requests for the new waivers. We currently have cost-effectiveness guidelines in place to govern our existing cost-avoidance waiver process. These guidelines were developed by a national work group comprised of HCFA Central Office (CO) and RO staff, whose purpose was to make the guidelines comprehensive and to ensure consistent application throughout the country. They are found in section 3904.2 of the State Medicaid Manual. We indicated that we would issue similar guidelines to review the new waivers. Sources of data would most likely include claims processing tabulations, State expenditure reports, and savings data from the TPL recovery units and the HCFA Form 64.9a report.

CO staff also would provide clarification to RO staff as needed through our regular teleconferences. Consultation on specific waiver requests would be provided routinely, as is currently done in the State plan amendment process, cost-avoidance waivers, trauma code edit waivers, and State TPL action plan submissions. As with our current waiver provisions, ROs would be required to report approvals and disapprovals to CO on an ongoing basis. When changes in waiver status occur, CO also would be notified.

III. Summary of Public Comments and Responses

We received four letters of comment on the February 1994 proposed rule. These comments and our responses are discussed below:

Comment: Several commenters expressed concern that the proposed rule did not go far enough to allow States the flexibility needed to achieve additional savings from TPL. One commenter cited section 1902(a)(25) of the Act which requires States to take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services available under the plan. The commenter provided two examples of unique and innovative practices that enhance the State's TPL operations and should be permissible under Federal regulations. In the first example, the recipient receives a portion of the proceeds of settlements from tort actions taken against third parties. In the second example, the State has developed a program which pays county welfare departments incentive payments (''bounties'') of $50 for each new case certified for eligibility where other health insurance is identified.

Response: We agree that States should be allowed to implement unique and innovative practices that are reasonable measures and not prohibited by Federal statute. Medicaid services are provided using Federal matching funds. In the first example, the State has provided Medicaid services for recipients that were injured by liable third parties, and these recipients have subsequently taken legal action to receive compensation through the courts for their injuries. Section 1912(b) of the Act requires that when a State makes a recovery, the State reimburse itself (and the Federal government) before any remaining funds are given to the recipient. If the State is reimbursing the recipient from the amounts collected before fully refunding the Federal government its share, such practice violates section 1912(b) of the Act. The State is, however, free to pay State monies to the recipient as an incentive, without violating section 1912 of the Act.

In the second example, we take issue with the ''county bounty'' program where Federal matching funds were requested and denied for the bounty payments, because these expenditures are not authorized for Federal matching funds under title XIX of the Act. We agree, that in both examples, these practices could increase TPL identification and savings, and States may find it worthwhile to continue these programs with State-only funds. This rule will provide States with additional flexibility in their TPL programs within the confines of Federal law.

Comment: One commenter requested that we revise the regulations to define, interpret, and explain more positively the meaning of the statutory phrase ''all reasonable measures.''

Response: We have interpreted the language in section 1902(a)(25) of the Act that refers to ''all reasonable measures'' by specifying the requirements for TPL in regulations at §§ 433.138 and 433.139. These regulations include TPL activities specified by the statute, and other discretionary activities that we have deemed to be logical actions to take to identify and pursue TPL. We originally decided to offer TPL waivers of these regulatory requirements because several States expressed concern that our discretionary regulatory activities were not cost effective, and that other State activities were accomplishing the same objective. We believe waivers of discretionary TPL requirements can provide States with some flexibility in managing their TPL programs without compromising the integrity of the TPL program. We have always supported States' innovative and unique measures to achieve TPL savings that are not prohibited by Federal statute. These innovative and unique measures have been issued several times by us in a compilation entitled, *''Third Party Liability in the Medicaid Program . . . A Guide to Successful State Agency Practices.''* We are continuously supportive of approaches that do not violate the statute, and these regulations do not preclude States from developing such operations.

Comment: Two commenters suggested that in § 433.138(l) we provide considerable flexibility in our interpretation of ''adequate documentation'' for waiver consideration.

Response: We wish to stress that our ''examples of documentation'' in the proposed rule are strictly examples and not an inclusive list. It is our intention to employ flexibility when considering these waiver requests. While we will provide guidance to States for submissions of waiver requests through the State Medicaid Manual, we understand that the unique characteristics of each State Medicaid program will govern States' abilities to produce cost-effectiveness data.

Comment: One commenter questioned our intent regarding the requirements for ''adequate documentation'', as specified in proposed § 433.138(l)(ii), which states that ''Examples of documentation are claims recovery data and a State analysis documenting a cost-effective alternative that accomplished the same task.'' The commenter noted that this language means that even if a State TPL practice is not cost-effective, the State must also demonstrate that it performs an alternative practice. The commenter also points out that in section II of the preamble of the proposed rule, an example of ''adequate documentation'' was given as ''. . . claims recovery data *or* State analysis . . .'' (emphasis added), and asserts that HCFA intended that States either document that a practice is not cost-effective *or* that another alternative practice is performed, but that the intent is that States do not have to provide both. In addition, the commenter requested that we add after the words ''. . . claims recovery data . . .'' the language ''costs for the process(es) for which a waiver is being requested.''

Response: The commenter was correct in pointing out the inconsistency in the use of the word ''or'' in section II of the preamble of the proposed rule which