was not used in proposed § 433.138(l)(ii). The use of ''or'' in the preamble was inadvertent, and we have deleted the word ''or'' and replaced it with ''and'' in this final rule. The intent of the proposed rule is elucidated in the summary of the preamble of the proposed rule. The summary stated the following: ''We would consider waiving nonstatutorily required procedures relating to identifying possible TPL where the agency finds that following a given required procedure is not cost-effective and is duplicative of another State activity. 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 States.'' (59 FR 4880). We added this waiver consideration because we found through the Federal oversight process that some States have not achieved a satisfactory level of compliance with TPL requirements, and for these States, where processes can be highly manual and labor intensive, an argument can be made that certain TPL requirements are not cost-effective. Nevertheless, the objective of the requirement in question has not been accomplished, and potential TPL resources are lost. Our concern is that these States could theoretically receive waivers and remain in technical compliance, and yet still not accomplish the TPL objective. Therefore, our position is that a State can receive approval of a waiver of a current requirement only if it has an alternate activity that will accomplish the same objective.

In terms of the language that the commenter has requested to be added to the ''examples of documentation'', our reponse is the same as the response to the previous comment requesting flexibility in our interpretation of ''adequate documentation.'' Our examples of documentation are not inclusive, and we will be flexible when considering these waiver requests. We therefore are not adding the requested language to our example in the final rule.

Comment: One commenter requested that States be allowed to request TPL waivers for certain family planning clients.

Response: The commenter appears to be requesting that this rule should provide relief from the general statutory requirement of section 1902(a)(25) of the Act to perform TPL activities for certain family planning clients. This request addresses a broader issue, the State's general responsibility to pursue and determine the existence of third parties, than what is addressed by this rule. There is no statutory authority or regulation that permits HCFA to waive third party identification for a class of claims or recipients. If a State believes that cost avoidance of family planning claims for recipients with TPL is not cost-effective, the regulations at § 433.139(e) provide a recourse for States to follow. If a State identifies TPL but finds that pursuing a recovery is no longer cost-effective, the regulations at § 433.139(f) may provide relief.

In situations where it is determined that the recipient has ''good cause'' for not cooperating in pursuing the third party, the Medicaid agency would not pursue the third party by employing either the cost avoidance or pay and chase method.

IV. Provisions of the Final Regulations

We are adopting the February 2, 1994 proposed rule as final with a modification to the title of § 433.138 ''Determining liability of third parties'' to read ''Identifying liable third parties'' and a conforming change to § 433.137 to reflect this change. While section 1902(a)(25)(A) requires States to take reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the plan, States must first identify third party resources. Section 433.138 explains the requirements for identifying third parties through data exchanges. It does not explain the process of determining liability of third parties. We believe § 433.139 explains that determination of the liability of a third party takes place when the Medicaid agency receives confirmation from the provider or third party resource indicating the extent of TPL. Therefore, we are changing the title of § 433.138 to accurately reflect the section's content.

V. Regulatory Impact Statement

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a final regulation will not have a significant impact on a substantial number of small entities.

Under the RFA, a small entity is a small business, a nonprofit enterprise, or a government jurisdiction (such as a county or township) with a population of less than 50,000. These final regulations will affect only States and individuals, which are not considered small entities.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any final rule that may have a significant impact on the operations of a substantial number of small rural hospitals. Such an analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a Metropolitan Statistical Area and has fewer than 50 beds.

This final rule requires States to submit a formal waiver request to be relieved of compliance with certain TPL requirements that are in our regulations when the cost of implementing the regulation's requirement is not cost-effective. It is extremely difficult to give an exact estimate of the cost savings that would accrue with the implementation of this regulation. This is largely because the cost of any single TPL data match or other procedure, as well as its relative effectiveness, varies from State to State.

In reviewing the need for this waiver, we recognized that some TPL claims reporting and payment regulations are expressly required by statute and that these and additional regulatory requirements are a valuable mechanism by which the Medicaid program has saved and recovered financial resources and that these regulations should be maintained. This waiver gives credence to valid concerns raised by States regarding the cost-effectiveness of certain portions of the TPL regulations in certain instances and allows States greater flexibility in managing their Medicaid programs.

An alternative to these regulatory enhancements would be to force States to comply with all regulations and not allow for any waiver provisions. In this scenario, States would either comply and lose money or discontinue the inefficient practice and risk HCFA sanctions through the system's performance review. Clearly, it was not the intent of the Congress for HCFA to promulgate regulations designed to save the taxpayers money, and then penalize States when the regulations are found by experience not to be cost-effective. This is consistent with our response to comments published in the **Federal Register** dated February 27, 1987 (52 FR 5971) stating that if HCFA received substantial complaints from State Medicaid agencies regarding the cost-effectiveness of State workers' compensation or Motor Vehicle Accident File data matches and diagnosis and trauma code edits, HCFA would reevaluate the data requirement.

We believe that implementation of the waiver procedures will work towards a realistic and cost-effective TPL program.