mission's Secretary shall prepare a complete transcript or electronic recording adequate to record fully the proceedings of each closed meeting, or closed portion of a meeting.

(b) *Minutes of closed meetings.* In the case of a meeting, or portion of a meeting, closed to the public pursuant to § 200.402(a) (8), (9)(i), or (10), the Secretary may, in his or her discretion or at the direction of the Commission, prepare either the transcript or recording described in § 200.407(a), or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each participating Commission member on the question). All documents specifically considered by the Commission in connection with any action shall be identified if such minutes are maintained.

(c) *Retention of certificate and statement.* The Secretary shall retain a copy of every certification executed by the General Counsel pursuant to § 200.406, together with a statement from the presiding officer of the meeting, or portion of a meeting to which the certification applies, setting forth the time and place of the meeting, and the persons present.

(d) *Minute Record.* Nothing herein shall affect the provisions of §§ 200.13a and 200.40 requiring the Secretary to prepare and maintain a Minute Record reflecting the official actions of the Commission.

§ 200.408 Public access to transcripts and minutes of closed Commission meetings; record retention.

(a) *Public access to record.* Within twenty days (excluding Saturdays, Sundays, and legal holidays) of the receipt by the Commission's Freedom of Information Act Officer of a written request, or within such extended period as may be agreeable to the person making the request, the Secretary shall make available for inspection by any person in the Commission's Public Reference Room, the transcript, electronic recording, or minutes (as required by § 200.407 (a) or (b)) of the discussion of any item on the agenda, except for such item or items as the Freedom of Information Act Officer determines to involve matters which may be withheld under § 200.402 or otherwise. Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication, as set forth in § 200.80e, and, if a transcript is prepared, the actual cost of such transcription.

(b) *Review of deletion from record.* Any person who has been notified that the Freedom of Information Act Officer has determined to withhold any transcript, recording, or minute, or portion thereof, which was the subject of a request for access pursuant to § 200.402 (a), or any person who has not received a response to his or her own request within the 20 days specified in § 200.408 (a), may appeal the adverse determination or failure to respond by applying for an order of the Commission determining and directing that the transcript, recording or minute, or deleted portion thereof, be made available. Such application shall be in writing and should be directed to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549. The applicant shall state such facts and cite such legal or other authorities as the applicant may consider appropriate. The Commission shall make a determination with respect to any appeal pursuant to this subsection within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such appeal, or within such extended period as may be agreeable to the person making the request. The Commission may determine to withhold any record that is exempt from disclosure pursuant to § 200.402(a), although it may disclose a record, even if exempt, if, in its discretion, it determines it to be appropriate to do so.

(c) *Retention of record.* The Commission, by its Secretary, shall retain a complete verbatim copy of the transcript, or a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever occurs later.

§ 200.409 Administrative appeals.

(a) *Review of determination to open meeting.* Following any announcement stating that the Commission intends to open a meeting or a portion thereof, any person whose interests may be directly and substantially affected by the disposition of the matter to be discussed at such meeting may make a request, directed to the Commission's Secretary, that the meeting, or relevant portion thereof, be closed pursuant to § 200.402(a) (5), (6), or (7). The Secretary shall circulate such a request to the members of the Commission, along with a supporting statement provided by the requestor setting forth the requestor's interest in the matter and the reasons why the requestor believes that the meeting (or portion thereof) should be closed, and the Commission, upon the request of any one of its members, shall vote by recorded vote on whether to close such meeting or portion.

(b) *Review of determination to close meeting.* Following any announcement that the Commission intends to close a meeting or a portion thereof, any person may make written or telegraphic request, directed to the Commission's Secretary, that the meeting or a portion thereof be open. Such a request shall set forth the requestor's interest in the matter and the reasons why the requestor believes that the meeting (or a portion thereof) should be open to the public. The Secretary shall circulate such a request and supporting statement to the members of the Commission, and the Commission, upon the request of any one of its members, shall vote whether to open such a meeting or a portion thereof.

§ 200.410 Miscellaneous.

(a) *Unauthorized recordings; maintenance of decorum.* Nothing in this subpart shall authorize any member of the public to be heard at, or otherwise participate in, any Commission meeting, or to record any Commission meeting or portion thereof by electronic or photographic devices. The Commission may exclude any person from attendance at any meeting whenever necessary to preserve decorum, or where appropriate or necessary for health or safety reasons, or where necessary to terminate behavior unauthorized by this subsection. Any person desiring to record or photograph an open Commission meeting may apply to the Commission's Secretary for permission to do so, setting forth the requestor's interest in the matter and the reasons why the requestor desires to record or photograph the Commission's proceedings. The Commission's determination whether or not to permit such conduct shall be confided to its exclusive discretion; *Provided, however,* That nothing herein shall preclude any person from taking notes at, or publicly or privately reporting on, the Commission's open meetings.

(b) *Suspension of open meeting.* Subject to the satisfaction of any procedural requirements which may be required by this subpart, nothing in this subpart shall preclude the Commission from directing that the room be cleared of spectators, temporarily or permanently, whenever it appears that the discussion during an open Commission meeting is likely to involve any matter described in § 200.402(a) (respecting closed meetings).

(c) *Access to Commission documents.* Except as expressly provided, nothing in this subpart shall authorize any person to obtain access to any document not otherwise available to the public or not required to be disclosed pursuant to Subpart D. Access to documents considered or mentioned at Commission meetings may only be obtained subject to the procedures set forth in, and the provisions of, Subpart D.

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Title 18—Conservation of Power and Water Resources

CHAPTER I—FEDERAL POWER COMMISSION

SUBCHAPTER A—GENERAL RULES

[Docket No. RM77-4; Order No. 562]

PART 1—RULES OF PRACTICE AND PROCEDURE

PART 3—ORGANIZATION; OPERATION; INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS

Order Adopting Rules Governing Observation of Commission Meetings and Ex Parte Communications

On November 15, 1976, the Commission issued a notice in this proceeding, 41 FR 52303 (1976), wherein we proposed to

amend portions of Parts 1 and 3 of the Commission's rules and to adopt a new Section 1.3a, Chapter I, Title 18, CFR, to be entitled "Notice and procedures for Commission meetings." The purposes of the proposed changes are to conform the Commission's current open meeting procedures to the requirements of section 3 of the Government in the Sunshine Act (Act), Pub. L. No. 94-409, and to revise and clarify its current ex parte rule in light of section 4 of the Act.

The Commission had previously issued a notice in Docket No. RM76-24, stating that it had been petitioned by certain utilities and others to amend its ex parte rule, 18 CFR § 1.4(d) (1976). The petition proposed the amendment for the stated purpose of facilitating the disposition of matters before the Commission by allowing informal discussions between Commission staff counsel, or certain other Commission employees, and counsel for parties to proceedings before the Commission concerning proposed settlements or proposed agreements for disposition of particular issues. To the extent that the comments filed in Docket No. RM76-24 have been incorporated by reference by respondents herein, they have been considered in revising the proposed ex parte rule.

The notices provided for a period of comment and comments were received from 24 parties in Docket No. RM76-24 [1] and 11 parties in Docket No. RM77-4. [2] The concerns of the commenting parties are discussed hereafter according to subject matter. In addition to the opportunity for written submittals, an on-the-record public conference was held on February 24, 1977 in response to a request for further consideration of the proposed ex parte rule amendments. A number of participants from within and without the Commission attended. [3]

Open Meeting Provisions

The meetings of the Commission, i.e., the deliberations of the Commissioners, have been opened to public observation since April 21, 1976 pursuant to Administrative Order No. 160, issued April 1, 1976. The respondents indicated no objection to the proposed procedures in light of the Act. Some suggestions for technical revisions to the proposed rules are adopted and are not specifically discussed herein.

The Southern California Edison Company (Edison) requested that the Commission allow public observers at open meetings to record such meetings by electronic equipment or cameras in order to benefit those interested persons who are unable to attend due to distance from Washington, D.C. In view of the fact that official minutes of such meetings will be made, which will be available to members of the general public, and that ample provision is made for members of the press desiring to report on the Commission's public deliberations, we decline to accede to Edison's request. The logistical difficulties coupled with the potential for interruption do no warrant allowing the requested procedures in view of alternatives available to those unable to attend the Commission's open meetings.

The Director of the U.S. Department of Health, Education, and Welfare's Consumer Affairs Office commented that the agenda for an open meeting should be publicized as early as possible and at least one month in advance, whenever possible. We will, of course, give notice of such meetings as early as possible, although we recognize that it will likely be infeasible to announce the agenda for a particular meeting more than one week in advance in most situations. The Director also urged that we use the Commission's 24-hour telephone "Hotline" for announcing upcoming meetings. Technical limitations prevent us from extending total taped message time to include meeting announcements at the present; however, we believe the suggestion is a good one and we intend to pursue its implementation whenever it appears technically feasible to do so.

Columbia Gas Transmission Corporation, et al. requested that the Commission expand the current format of its published agenda in order to describe each action being considered by the Commissioners. The Commission's current procedure is to announce its agenda by designating each agenda item by complete docket number without further elaboration. We believe that this procedure is sufficient to alert interested members of the public of the general matters to be considered, particularly in the context of current filings that are available for public inspection. We therefore decline to adopt the suggestion due to the fact that the purpose of the Act is to open the deliberations of the Commissioners to the public rather than to expand the public's rights to secure information which would otherwise be exempt from public disclosure under the Freedom of Information Act. 5 U.S.C. 552(b)(k), 90 Stat. 1241, 1246.

Congresswoman Bella Abzug, Chairwoman of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations made several suggestions for clarifying amendments which are adopted herein without further elaboration. Congresswoman Abzug incorrectly asserted, however that the Commission cannot avail itself of exemption 9A of the Act "since (the Commission) is not 'an agency which regulates currencies, securities, commodities, or financial institutions.'" In light of our responsibilities under various statutes respecting certain corporate transactions of regulated utilities, we do not choose to delete exemption 9A from the Commission's regulations under the Act. See, e.g., 16 U.S.C. 824b, 824c, 825d and 825q; 15 U.S.C. 717k.

Congresswoman Abzug, without citing any authority for the proposition, suggested that the Commission had no discretion to delete individual items on an agenda without notice. The Commission's proposed procedure would result in the announcement of items for Commission consideration, even though the staff work might not have been completed at the time of the announcement. To eliminate flexibility with respect to deletions of agenda items would serve no useful purpose, while creating additional administrative burdens. The proposed procedure gives adequate notice to the public that a particular matter may be considered at a meeting. The agenda is subject to further check with the agency contact person designated in the notice. We therefore believe that retaining the proposed procedure best serves the needs of the public.

We recognize that a majority of the Commission's meetings may properly be closed to the public pursuant to exemptions 4, 8, 9A or 10 of the Act or any combination thereof. In such a situation, the agency is authorized to provide by special regulation for the closing of meetings under 5 U.S.C. 552b(d)(4), 90 Stat. 1241, 1243. Certain procedural and informational requirements of the Act do not apply to any portion of a meeting closed under such special regulations. This Commission has been in the vanguard in its commitment to a policy of open meetings since the adoption of Administrative Order No. 160. While we do not preclude the possibility that at some future time due to changing conditions the Commission may find it appropriate to provide a more streamlined mechanism for closing meetings, we decline to do so at the present time.

Ex Parte Communications

The Commission's proposal to modify its rule regarding ex parte communications in light of the Act and the legislative history thereof was the focus of considerable comment. Most comments were critical of the Commission's current rule and the proposed rule, arguing that both were unduly restrictive and should be revised to track the language of Section 4 of the Act, Substantive comments are responded to hereafter.

Several respondents commented that the proposed rule was in conflict with the Act because the proposed rule, though less restrictive than the current rule, was more restrictive than and, it was argued, in conflict with the Act. We recognized, and so announced, in our notice of rulemaking that the present rule served to impede unnecessarily the conduct of Commission business by prohibiting generally all contacts between Commission employees and any interested person in any contested on-the-record proceeding. At the same time, we recognized that Section 4 of the Act established a floor, not a ceiling, for prohibited ex parte communications. Thus, the Act would supplement more stringent restrictions against ex parte contacts which an agency may have issued prior to the Act. H.R. Rep. No. 94-880, Part I, 94th Cong., 2d Sess. 19 (1976).

To the extent that our proposed ex parte rule continues to be more restrictive than the minimum required by the Act, we believe that it serves a valid pur-

[1] See Attachment A.
[2] See Attachment B.
[3] See Attachment C.

pose in preventing even the appearance of improper contacts between those within[4] and without the agency. To the extent that the proposed rule would allow limited, informal discussions between staff counsel or certain Commission employees and counsel for parties to proceedings before the Commission, we believe that the relaxation of our present rule in this regard would have the salutory effect of expediting the disposition of Commission business without diminishing the integrity of the decisional process. In any event, non-unanimous settlement proposals would be required to be served upon all parties to a proceeding for such action as they may consider appropriate prior to any formal submission to the Commission.[5] Even after the filing of proposed settlement agreements with the Commission, our practice is to allow submission of comments on the proposal before any action is taken by us. Given the existence of these safeguards against the unfair treatment of any party to a proceeding before this Commission, we cannot believe that such a practice can be reasonably considered to erode public confidence in the administrative process.

Several respondents suggested that the proposed definition of ex parte contacts should be revised to exclude requests for status reports. We encourage such requests to be made to the Secretary.[6] In light of the Act, which expressly excludes requests for status reports on any matter or proceeding covered by the Act as being an ex parte contact, we will not include such requests within our definition of ex parte contacts. S. Rep. No. 94–1178, 94th Cong., 2d Sess. 29 (1976); H.R. Rep. No. 94–1441, 94th Cong., 2d Sess. 29 (1976). At the same time, we wish to make it clear that we will not allow such a request to be used as an indirect or subtle effort to influence the substantive outcome of a covered proceeding. In doubtful cases, Commissioners and staff shall treat the communication as ex parte so as to protect the integrity of the decisionmaking process. H.R. Rep. No. 94–880, Part I, 94th Cong., 2d Sess. 20–21 (1976).

It was also suggested by several respondents that the proposed exemption (vi) to the ex parte rule should eliminate the prohibition against contacts with decisional employees made after reasonable prior notice to and consent of all parties. In order that we not preclude legitimate contacts between the Commission and its staff and outside interested persons, we herein eliminate the limitation. We do so since it is our belief that the decisionmaking process is protected in instances where all parties have been given reasonable prior notice and have unanimously consented to certain communications.

Alabama Power Company et al. suggested that the definition of an ex parte communication be modified to clarify that such a communication is prohibited only when it is relative to the merits of an on-the-record proceeding pending before the Commission. We agree that such is the purpose of Section 4 of the Act, H.R. Rep. No. 94–880, Part I, 94th Cong., 2d Sess. 19–20 (1976), and our proposed rule. Accordingly, our rule will be clarified as suggested.

The Executive Committee of the Federal Power Bar Association (Association) and several participants at the public conference suggested that we define who is a decisional employee with greater precision. We consider this to be an appropriate request and will direct the Commission's Secretary to prepare and issue a list of decisional employees who are to be protected from non-consensual ex parte contacts. Such a list cannot, however, be considered as eliminating the burden upon outside persons to inquire of staff members whether they are decisional employees in a particular proceeding. Similarly, a member of the staff not listed as a decisional employee who acts in that capacity with respect to a particular proceeding should so inform any interested outside person attempting to make an ex parte contact.

This responsibility of the decisional staff is the analogue of the responsibility of the trial staff to make an appearance in a particular proceeding in order to inform the public and the decisional staff that they will not thereafter be involved in the decisional process. See, e.g., Tr. 5. Having voluntarily made or entertained prohibited ex parte communications, an employee will be prohibited from future participation in the decisional process of the relevant pending on-the-record proceeding. See, e.g., Tr. 50–51.

The Association also suggested that the Commission clarify those proceedings covered by the ex parte prohibition. We believe that the proposed rule sufficiently defines the scope of the prohibition to cover any proceeding "required by statute, constitution, published Commission rule or regulation or order in a particular case, to be decided on the basis of the record of a Commission hearing. * * *"

Edison urged that we modify the proposed rule to eliminate the provision for triggering the prohibition by the filing of protests and notices to intervene in a particular proceeding. We do not believe that this provision creates any additional difficulties for the public since it parallels the definition of "contested on-the-record proceeding" in the current rule. More importantly, however, there are sometimes unavoidable, but lengthy intervals between the filing of protests or petitions to intervene and any notice for hearing which may be issued in a particular proceeding. In such instances, we do not believe that such delays, unavoidable though they may be, should serve to erode public confidence in the decisional process by effectively preventing protestants and intervenors from being informed about and participating at all stages of a pending proceeding.

The Commission finds: (1) The notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, and presentation at a public, on-the-record conference held on February 24, 1977 of data, views, comments, and suggestions in the manner described above, are consistent and in accordance with the procedural requirements prescribed by 5 U.S.C. 553.

(2) Good cause exists for making the amendments herein adopted effective immediately upon issuance.

(3) It is necessary and appropriate for the administration of the Government in the Sunshine Act, the Federal Power Act and the Natural Gas Act, that the Commission's General Rules be amended as herein provided.

The Commission, acting pursuant to the authority granted the Federal Power Commission by the Federal Power Act, as amended, particularly Sections 308 and 309 (49 Stat. 858, 859; 16 U.S.C. 825g, 825h), by the Natural Gas Act, as amended, particularly Sections 15 and 16 (52 Stat. 829, 830; 15 U.S.C. 717n, 717o), and by Pub. L. No. 94–409 (90 Stat. 1241) orders:

(A) Part I—Rules of Practice and Procedure—Chapter I, Title 18 of the Code of Federal Regulations, is amended as follows:

1. Section 1.1(c)(1) is revised to read as follows:

§ 1.1 The Commission.

* * * * *

(c) Sessions. * * * (1) *Public.* Public sessions of the Commission will be held after due notice as ordered by the Commission. (See §§ 1.3 and 1.3a).

* * * * *

2. Section 1.2(a)(1) is revised to read as follows:

§ 1.2 The Secretary.

(a) *Official records.* (1) The Secretary shall have custody of the Commission's seal, the minutes of all action taken by the Commission, the transcripts, electronic recordings or minutes of meetings closed to public observation, its rules and regulations and its administrative orders.

* * * * *

3. Immediately following § 1.3, a new § 1.3a, Notice and procedures for Commission meetings, is added. Section 1.3a reads as follows:

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[4] Several respondents expressed concern that improper contacts may occur between trial staff and advisory staff in the absence of an express prohibition and of separation of function within the staff. We do not believe that further actions are necessary in this regard since we construe 18 CFR § 1.30 (f) as prohibiting improper contacts between different staff elements. Thus, any Commission employee who participates in a substantial manner in a contested on-the-record proceeding should enter a formal appearance in that proceeding, whether or not appearing as a witness or as staff counsel, and should thereafter refrain from improper contacts with the advisory, i.e., decisional, staff.

[5] Unaccepted proposals of settlement may continue to be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege pursuant to 18 CFR § 1.18(e) (1976).

[6] See, e.g., 18 CFR § 3.100(b) (1976).

§ 1.3a Notice and procedures for Commission meetings.

(a) *Definitions.* In this section:

(1) "Agency", as defined in 5 U.S.C. 551(1) as "* * * each authority of the Government of the United States, whether or not it is within or subject to review by another agency, * * *" includes "* * * any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency * * *" (5 U.S.C. 552(e)) which is headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) "Meeting" means the deliberations of at least the number of individual members of the Federal Power Commission required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by paragraphs (d)(3) and (f) of this section;

(3) "Member" means an individual who belongs to the collegial body heading the Federal Power Commission; and

(4) "Staff" includes the employees of the Federal Power Commission other than the five Commissioners.

(b) *Open meetings.* (1) Every portion of every meeting of the Federal Power Commission will be open to public observation subject to the exemptions provided in paragraph (d)(1) of this section. Open meetings will be attended by the Commissioners, certain Commission staff, and any other individual or group desiring to observe the meeting. The public will be invited to observe and listen to the meeting but not to participate nor to record any any of the discussions by means of electronic or other devices or cameras. Documents being considered at Commission meetings may be obtained subject to the procedures and exemptions set forth in § 1.36 of this Part.

(2) Commission members shall not jointly conduct or dispose of agency business other than in accordance with this section.

(c) *Physical arrangements.* The Secretary shall be responsible for seeing that ample space, sufficient visibility, and adequate acoustics are provided for public observation of the Commission meetings.

(d) *Closed meetings.* (1) Meetings will be closed to public observation where the Commission properly determines, according to the procedures set forth in paragraph (d)(3) of this subsection, that such portion or portions of the meeting or disclosure of such information is likely to:

(i) Disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and are (B) in fact properly classified pursuant to such Executive order;

(ii) Relate solely to the internal personnel rules and practices of an agency;

(iii) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(iv) Disclose the trade secrets and commercial or financial information obtained from a person and privileged or confidential, which may include geological or geophysical information and data, including maps, concerning wells;

(v) Involve accusing any person of a crime, or formally censuring any person;

(vi) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, including personnel and medical files and similar files;

(vii) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or, (F) endanger the life or physical safety of law enforcement personnel;

(viii) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(ix) Disclose information the premature disclosure of which would:

(A) In the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) In the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that paragraph (d)(1)(ix)(B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(x) Specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Commission of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

(2) Commission meetings shall not be closed pursuant to paragraph (d)(1) of this section when the Commission finds that the public interest requires that they be open.

(3) (i) Action to close a meeting, or portion thereof, pursuant to the exemptions defined in paragraph (d)(1) of this section shall be taken only when a majority of the entire membership of the Commission votes to take such action. A separate vote of the Commission members shall be taken with respect to each Commission meeting a portion or portions of which are proposed to be closed to the public or with respect to any information which is proposed to be withheld. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each Commission member participating in such vote shall be recorded and no proxies shall be allowed.

(ii) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the Commission close such portion to the public for any of the reasons referred to in paragraph (d)(1)(v), (d)(1)(vi), (d)(1)(vii) of this section, the Commission, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(iii) Within one day of any vote taken pursuant to paragraph (d)(3)(i) or (d)(3)(ii) of this section, the Secretary of the Commission shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the Secretary shall, within one day of the vote taken pursuant to paragraph (d)(3)(i) or (d)(3)(ii) of this section, make publicly available a full written explanation of the Commission's action closing the portion together with a list of all persons expected to attend the meeting and their affiliation. The information required by this paragraph shall be disclosed except to the extent that it is exempt from disclosure under the provisions of paragraph (d)(1) of this section.

(e) *Transcripts.* (1) Prior to a determination that a meeting should be closed pursuant to paragraph (d) of this section, the General Counsel of the Commission shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the

meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the Secretary of the Commission as part of the transcript, recording, or minutes required by paragraph (e)(2) of this section.

(2) The Secretary shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraphs (d)(1)(viii), (d)(1)(ix)(A), or (d)(1)(x) of this section, the Secretary shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll-call vote (reflecting the vote of each member on the question). All agenda documents considered in connection with any Commission action shall be identified in such minutes.

(3) The Secretary shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever occurs later.

(4) Within a reasonable time after the adjournment of a meeting closed to the public, the Commission shall make available to the public, in the Office of Public Information of the Commission, Washington, D.C., the transcript, electronic recording, of minutes (as required by paragraph (e)(2) of this section) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the Director of Public Information determines to contain information which may be withheld under paragraph (d) of this section. Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription (see § 3.102).

(5) The determination of the Director of Public Information to withhold information pursuant to paragraph (e)(4) of this section may be appealed to the Chairman of the Commission, in his capacity as administrative head of the Commission pursuant to Section 1 of Reorganization Plan No. 9 of 1950. The Chairman, or officer designated pursuant to § 3b.224(f) of this subchapter, will make a determination to withhold or release the requested information within twenty days from the date of receipt of the request for review (excluding Saturdays, Sundays, and legal public holidays).

(6) For an extension of the time limit prescribed by paragraph (e)(5) of this section, the provisions of § 1.36(f)(3) of this part shall apply.

(f) *Public announcement.* (1) Except to the extent that such information is exempt from disclosure under the provisions of paragraph (d) of this section, in the case of each meeting, the Secretary of the Commission shall make public announcement at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated by the Commission to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the Commission determines by a recorded vote that Commission business requires that such meeting be called at an earlier date, in which case the Secretary shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (f)(1) of this section only if the Secretary publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the Commission to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (i) a majority of the entire membership of the Commission determines by a recorded vote that Commission business so requires (as for example, pursuant to paragraph (d)(3)(ii) of this section) and that no earlier announcement of the change was possible, and (ii) the Secretary publicly announces such change and the vote of each member upon such change at the earliest practicable time: *Provided,* That individual items which have been announced for Commission consideration may be deleted without notice.

(3) The "earliest practicable time", as used in this subsection, means as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.

(4) The Secretary of the Commission shall use reasonable means to assure that the public is fully informed of the public announcements required by this subsection. For example, such announcements may be posted on the Commission's public notice boards, published in official FPC publications, or sent to the persons on a mailing list maintained for those who want to receive such material.

(5) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in a preceding announcement, and the name and telephone number of the official designated by the Commission to respond to requests for information about the meeting shall also be submitted by the Secretary of the Commission for publication in the FEDERAL REGISTER.

(6) Following each Commission meeting, the Secretary shall issue a list of Commission actions taken which shall become effective as of the date of issuance of the related order or other document, which the Secretary shall issue in due course, all in the manner prescribed by the Commission under the Natural Gas Act, Federal Power Act, or other legal authority.

* * * * *

4. Section 1.4(d) is amended as follows:

(a) Paragraph (1) is amended by adding two new definitions to the second sentence.

(b) Five new subparagraphs (v), (vi), (vii), (viii), and (ix) are added to paragraph (2).

(c) Paragraph (3) is amended by the addition of a phrase to the first sentence and by the addition of two additional sentences.

(d) Paragraph (4) is amended by deleting the fourth sentence.

(e) Paragraph (6) is redesignated as paragraph (7) and a new paragraph (6) is added.

(f) Newly designated paragraph (7) is completely revised.

Section 1.4(d), as amended, reads as follows:

§ 1.4 Appearances and practice before the Commission.

* * * * *

(d) *Ex parte communications.* * * *

(1) * * *

For the purposes of this paragraph, the term "ex parte communication" means an oral or written communication relative to the merits of an on-the-record proceeding pending before the Commission which is not on the public record and with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this section; the term "decisional employee" means a Commissioner or member of his personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of the proceeding; the term "contested on-the-record proceedings" means * * *

(2) The prohibitions contained in paragraph (d)(1) of this section do not apply to a communication:

* * * * *

(v) When the communication is between the staff counsel assigned to the proceeding or, in the presence of or after coordination with such staff counsel, any other employee of the Commission (except a decisional employee) and any party or counsel to any party or parties to the proceeding or, in the presence of or after coordination with such counsel or party, and agent of any such party: *Provided,* That any employee of the Commission who may reasonably be expected to participate in the decisional

process may waive such participation by entering a staff appearance in the proceeding: *Provided further*, That nonunanimous settlement offers shall thereafter be served on all participants in the proceeding prior to the submission of such offers to the Commission;

(vi) Which all the participants agree may be made on an ex parte basis;

(vii) Related to routine safety, construction, and operational inspections of project works by the Commission staff not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(viii) Related to routine field audits of the accounts or any books or records of a company subject to the Commission's accounting requirements not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(ix) Which relates solely to a request for supplemental information or data necessary for an understanding of factual materials contained in documents filed with the Commission in a proceeding covered by this subsection and which is made in the presence of or after coordinationer with counsel, except a communication with a decisional employee, in the absence of waiver of participation.

(3) All written communications prohibited by paragraph (d)(1) of this section, all sworn statements reciting the substance of all such oral communications, and all written responses and sworn statements reciting the substance of all oral responses to such prohibited communications shall be delivered to the Secretary of the Commission who shall place the communication in public files associated with the case, but separate from the record material upon which the Commission can rely in reaching its decision. The Secretary shall serve such communications upon all parties to the proceeding. The Secretary shall also serve a copy of the sworn statement to the communicator and allow him a reasonable opportunity to file a response.

(4) A Commissioner, member of his immediate staff, Administrative Law Judge, or any other employee of the Federal Power Commission who receives an oral offer of any communication prohibited by paragraph (d)(1) of this section shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he will not consider the communication. The recipient shall prepare a sworn statement setting forth the substance of the communication and the circumstances thereof within 48 hours and deliver the statement to the Secretary of the Commission for compliance with the procedures established in paragraph (d)(3) of this section.

* * * * *

(6) Upon receipt of a communication knowingly made in violation of paragraph (d)(1) of this section, the Commission, Administrative Law Judge, or other employee presiding at the hearing may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(7) The prohibitions contained in paragraph (b)(1) of this section shall apply from the time at which a proceeding is noticed for hearing or the person responsible for such communication has knowledge that it will be noticed for hearing or at the time at which a protest or a petition or notice to intervene in opposition to requested Commission action has been filed, whichever occurs first.

* * * * *

5. Section 1.36 is amended as follows:

a. Subsection (a) is amended by adding a new sentence immediately following the second sentence.

b. Paragraph (14) of subsection (c) is redesignated as paragraph (15) and a new paragraph (14) would be added.

c. Subparagraph (iii) of the newly designated paragraph (15), in susection (c), is revised.

Section 1.36, as amended, reads as follows:

§ 1.36 Public information and requests.

* * * * *

(a) *Notice of proceedings.* * * * Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is provided for by § 157.9 of this chapter. Notice of public sessions and proceedings and of meetings of the Commission is provided by §§ 1.3 and 1.3a of this chapter.

* * *

* * * * *

(c) *Public records.*

* * * * *

(14) Transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material nonexempt pursuant to § 1.3a of this Part.

(15) All other records of the Commission except for those that are:

* * * * *

(iii) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * * * *

(B) Section 3.102(b), Part 3—Organization; Operation; Information and Requests; Miscellaneous Charges; Ethical Standards, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new sentence immediately following the third sentence. As amended, § 3.102(b) reads as follows:

§ 3.102 Public information requests, and assistance; miscellaneous charges.

* * * * *

(b) * * * Any person may obtain a copy of the schedule of fees by requesting such schedule from the Office of Public Information in person, by telephone, or by mail. Copies of transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material non-exempt pursuant to § 1.3a of this Part are available to the public at the actual cost of duplication or transcription.

* * * * *

(C) The Secretary shall issue a list of employees usually participating in the decisionmaking process, which is to be updated periodically.

(D) The Secretary shall cause prompt publication of this order to be made in the FEDERAL REGISTER.

By the Commission.

KENNETH F. PLUMB,
Secretary.

ATTACHMENT A—RESPONDENTS IN DOCKET NO. RM76-24

American Bar Association
Cities of Adrian, Minnesota, et al.
Columbia Gas of Kentucky, Inc., et al.
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power and Light Company
Executive Committee of The Federal Power Bar Association
FPC—Bureau of Natural Gas
FPC—Office of Administrative Law Judges
FPC—Office of Economics, Bureau of Power, Office of the General Counsel, and Office of Special Assistants
Georgia Power Company
Gulf Power Company
Interstate Natural Gas Association of America
The Montana Power Company
Northern Natural Gas Company
Pacific Power and Light Company
Phillips Petroleum Company
Power Authority of the State of New York
Public Service Commission of the State of New York
Public Service Company of New Mexico
Public Service Electric and Gas Company
Southern California Edison Company
Tucson Gas and Electric Company
Wisconsin Municipal Electric Utilities

ATTACHMENT B—RESPONDENTS IN DOCKET NO. RM77-4

Cong. Bella Abzug
Alabama Power Company, et al.
Columbia Gas Transmission Corporation, et al.
Consumers Power Company
Executive Committee of the Federal Power Bar Association
FPC, Bureau of Natural Gas
HEW, Virginia H. Knauer, Director, Office of Consumer Affairs
Interstate Natural Gas Association of America
Northern Natural Gas Company
Southern California Edison Company
Tenneco Oil Company

ATTACHMENT C—PARTICIPANTS IN PUBLIC CONFERENCE IN DOCKET NO. RM77-4 HELD FEBRUARY 24, 1977

PRESENT

Romulo L. Diaz, Jr., of the Commission, presiding.
William I. Harkaway, 1750 Pennsylvania Avenue, N.W., Washington, D.C. 20006, on behalf of the Federal Power Bar Association.
Jerome J. McGrath, John H. Cheatham, III, of the Interstate Natural Gas Association, on behalf of the Interstate Natural Gas Association.
William G. Porter, Jr., of Porter, Stanly, Platt & Arthur, 37 W. Broad Street, Columbus, Ohio, on behalf of Alabama Power Co., et al.
Richard M. Merriman, of Reid & Priest, 1701 K Street, Northwest, Washington, D.C. 20006, on behalf of the Federal Power Bar Association.
Francis J. Walsh, 1101 17th Street, Northwest, Washington, D.C., on behalf of Union Texas.
C. R. Tilley, of Columbia Gas System Service Corporation, 1625 I Street, N.W., Washington, D.C. 20006, on behalf of Columbia Gas System Service Corporation and Columbia Gas Transmission Corporation.
Frederick T. Searls, of Debevoise and Liberman, 806 15th Street, Northwest, Washington, D.C. 20005, on behalf of Alabama Power Company, et al.
Thomas F. Ryan, Jr., 821 15th Street, Northwest, Washington, D.C. 20005, on behalf of himself.
Kenneth Richardson, Joseph J. Solters, William Bagliebter, Robert Scarbrough, Lilo Schifter, H. H. Hammond, William W. Lindsay, of the Federal Power Commission, on behalf of the Federal Power Commission.
Mary Jane Klipple, Room 500, 1101 17th Street, N.W., Washington, D.C. 20036, on behalf of Foster Associates.
Carl W. Ulrich, of Chapman, Gadsby, Hannah and Duff, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, on behalf of Colorado Interstate Gas Company.
George L. Weber, of Consolidated Natural Gas Service Co., Inc., 1101 16th Street, N.W., Washington, D.C., on behalf of Consolidated Natural Gas Co.
William Warfield Ross, 1320 19th Street, N.W., Washington, D.C. 20036, on behalf of the Administrative Law Section, American Bar Association.
Harry L. Albrecht, 1120 Connecticut Avenue, N.W., Washington, D.C. 20037, on behalf of Natural Gas Pipeline Co.
Anthony D. Pryor, P.O. Box 2511, Houston, Texas 77001, on behalf of Tennessee Gas Pipeline Co.
Morton L. Simons, of Simons & Simons, 1629 K Street, N.W., Washington, D.C. 20006.

[FR Doc.77-7795 Filed 3-11-77;5:01 pm]

Title 20—Employees' Benefits

CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 401—DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

PART 422—ORGANIZATION AND PROCEDURES

Freedom of Information

In order to conform current regulations to the requirements of the Freedom of Information Act as amended by the Government in the Sunshine Act, Pub. L. 94-409, secion 5(b) effective March 12, 1977, the Secretary of Health, Education, and Welfare is issuing the interim amendment to 20 CFR Part 401 set out below. The rules for disclosure of social security records contained in 20 CFR Part 401, the Social Security Administration's Regulation No. 1, were the subject of a Notice of Intent and Hearings published by the Commissioner of Social Security on November 22, 1976 (41 FR 51425). The notice solicited public comments and testimony on the Social Security Administration's disclosure policy in anticipation of a proposal to amend Regulation No. 1. The Department is currently studying the testimony received at public hearings and the written comments as part of an indepth evaluation of existing policy and preparation of a notice of proposed rulemaking. The Secretary has determined that an interim Regulation No. 1 is needed immediately so that the disclosure rules for social security information will be consistent with the requirements of the amended Freedom of Information Act. For that reason the Secretary finds that prior notice and public comment on the interim regulation, as well as a delayed effective date, are impracticable and contrary to the public interest. Although the interim regulation contains the general disclosure policy for social security information, a final set of rules (which will be established as soon as practicable after notice of proposed rulemaking and further opportunity for public comment) will explain the application of the disclosure policy in a much more specific manner.

Social security information, as referred to herein, includes information obtained by the Department in administering titles II, XVI, and XVIII of the Social Security Act, irrespective of the organizational component within the Department responsible for the administration of the programs authorized by those titles.

Prior to the Government in the Sunshine Act, any social security information protected by Regulation No. 1 pursuant to section 1106(a) of the Social Security Act was also immune from disclosure under the Freedom of Information Act. Such information constituted matter "specifically exempted from disclosure by statute" within the meaning of exemption (3) of the Freedom of Information Act, 5 U.S.C. 552(b)(3). The Government in the Sunshine Act amended exemption (3) with the result that the Department can no longer cite section 1106(a) as authority for denying a Freedom of Information Act request. The Congressional Conference Committee specifically noted section 1106(a) as an example of a statute whose terms would not bring it within the amended exemption (3). See House of Representative Report No. 94-1441, 94th Cong., 2d Sess. (August 26, 1976) p. 25. Accordingly any social security information previously withheld on this basis must be made available unless another Freedom of Information Act exemption applies or another statute, which qualifies under amended exemption (3), prohibits disclosure. The Social Security Administration has applied the Freedom of Information Act rules to nonpersonal information since the July 1975 amendment to Regulation No. 1, 40 FR 27649, and the Department will now apply these rules to personal information as well.

While the Freedom of Information Act does not apply to disclosure to Federal agencies, Federal and State courts, or to instances where no specific request is made, the Department considers that a single consistent set of interim rules best promotes the public interest. Therefore, the interim regulation incorporates the principles of the Freedom of Information Act as the general rules for determining whether social security information may be disclosed, whether or not the Freedom of Information Act specifically applies. If, considering the circumstances of the disclosure, the information would not be exempt under 5 U.S.C. 552(b), the information may be disclosed (unless, of course, disclosure would be prohibited by another statute such as the Privacy Act or the Internal Revenue Code as amended by the Tax Reform Act of 1976). If the information would be exempt under the Freedom of Information Act, then the information will generally not be disclosed. The rules provide that information arguably exempt—for example, internal memoranda under 5 U.S.C. 552(b)(5) or investigatory records under 5 U.S.C. 552(b)(7)—may nevertheless be released under criteria for "waiving" an exemption. The interim regulation also expressly incorporates the access requirements of the Privacy Act and the mandatory disclosure provisions of the Freedom of Information Act, as well as the disclosure restrictions of other applicable laws.

In applying the interim rules to social security information, in all likelihood the most pertinent Freedom of Information Act exemption will be exemption (6), 5 U.S.C. 552(b)(6). Exemption (6) protects

personnnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This exemption requires the Department to weigh the individual's interest in privacy against the public interest served by disclosure. The Department anticipates that application of this balancing test to the records of workers and beneficiaries will produce results similar to the existing rules in Regulation No. 1. Therefore, a significant change in the availability of beneficiary or worker information is not intended or anticipated. Nevertheless unforeseen differences could occur in some cases, since the outcome of the balancing test depends on the precise facts of the case to which it is applied.

The balancing test may have a different impact on some other information currently protected by Regulation No. 1, for example, payments to individual physicians under the Medicare program. Although this information reflects at least to some degree the physician's income, a matter in which he has a privacy interest, disclosure would serve the strong public interest in the accountability of government programs, revealing how public funds are spent and the extent to which the funds are paid to individuals when acting in a business or professional capacity. The Department's past disclo-

sure of the amounts paid to physicians under the Medicaid program would be consistent with a determination that releasing the same information regarding Medicare payments does not involve a "clearly unwarranted" invasion of privacy.

Furthermore, exemption (4), while it may affect the new rules for disclosure of some social security data, would not appear to preclude disclosure of Medicare payments. Exemption (4), 5 U.S.C. 552 (b)(4), applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Since Medicare payment information is generated by the Department and its carriers, the data are not "obtained from" a source outside the Executive Branch as required by current case law on exemption (4).

In addition to exemptions (4) and (6), the new disclosure rules will also require the Department in some instances to apply exemption (3), the "statutory" exemption in 5 U.S.C. 552(b)(3). Although section 1106(a) no longer qualifies, there are other statutes affecting social security information which appear to meet the exemption (3) criteria as amended by the Sunshine Act. For example, the Tax Reform Act of 1976 will still govern the redisclosure of tax "returns" and "return information" in the possession of the Department. Section 1865(a)(2) of the Social Security Act, which protects the confidentiality of accreditation survey reports submitted by the Joint Commission on Accreditation of Hospitals, will continue to do so under the new disclosure rules. Sections 1106 (d) and (e) of the Social Security Act, which protect certain official reports dealing with the operation of the health programs established by title XVIII of the Act, qualify under exemption (3) and will remain binding. The rules of these and other qualifying statutes are incorporated in the new Regulation No. 1 simply by reference to the "Freedom of Information Act rules," which include, by definition, exemption (3).

The regulation also provides that the procedural rules in 20 CFR Part 422, Subpart E, will apply to requests for disclosure governed by the substantive rules in Part 401. Under this provision, the fee schedules in 20 CFR Part 422 and the Department public information regulation, 45 CFR Part 5, will be applied to requests pursuant to the Freedom of Information Act. The fees for access by individuals to information about them in program record systems under the Privacy Act are limited, of course, by the Privacy Act, 5 U.S.C. 552a(f)(5), as implemented by the Department Privacy Act regulation, 45 CFR 5b.13. Fees for all other disclosures will be determined in accordance with section 1106(b) of the Social Security Act. It is anticipated that determinations thereunder will follow the prior rules established in 20 CFR 401.6 before amendment.

Accordingly, the principles of the Freedom of Information Act are adopted as interim rules for disclosure in the amendments to 20 CFR Part 401 set forth below. The Secretary finds that new statutory requirements resulting from the Government in the Sunshine Act establish good cause for dispensing with prior notice and a delayed effective date. Therefore, as authorized by the Administrative Procedure Act, 5 U.S.C. 553 (b) and (c), the amendments are adopted effective immediately.

If you have questions, please contact Mr. Kenneth Dyer, Acting Legal Assistant, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (301) 594–7454.

(Secs. 205, 1102, and 1106 of the Social Security Act; 49 Stat. 624, as amended, 647, as amended, 53 Stat. 1398, as amended; sec. 290, 66 Stat. 234; (42 U.S.C. 405, 1302, 1306; 8 U.S.C. 1360; 5 U.S.C. 552a) (Privacy Act of 1974); (5 U.S.C. 552) (Freedom of Information Act), as amended by Pub. L. 94–409, 90 Stat. 1241; 26 U.S.C. 6103, as amended by Pub. L. 94–455, 90 Stat. 1667 (Tax Reform Act of 1976))

(Catalog of Federal Domestic Assistance Programs No. 13.800–13.807, Social Security Programs.)

NOTE: The Department has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821 amended by Executive Order 11949 and OMB Circular A–107.

Dated: March 11, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education, and Welfare.

Parts 401 and 422 of Chapter III of Title 20 of the Code of Federal Regulations are amended as follows:

1. Part 401 is amended by deleting §§ 401.4 through 401.6 and amending §§ 401.1 through 401.3 as follows:

§ 401.1 Purpose and scope.

(a) The regulations in this part implement section 1106(a) of the Social Security Act. As authorized by section 1106 (a), these regulations prescribe rules for the disclosure of information protected by section 1106(a). The rules apply to information obtained by officers or employees of the Department in the course of administering titles II, XVI, and XVIII of the Social Security Act, information obtained by Medicare intermediaries or carriers in the course of carrying out agreements under sections 1816 and 1842 of the Social Security Act, information obtained by State agencies in the course of carrying out agreements for making disability or blindness determinations under sections 221 and 1633 of the Social Security Act, information obtained during the course of a consultative examination under Part 404, § 404.1527 or Part 416, § 416.927 of this chapter, and any other information subject to section 1106(a) of the Social Security Act. The rules do not govern disclosure of information which is not subject to the prohibitions of section 1106(a), such as employee personnel records or other information maintained solely for purposes of personnel management.

(b) Except as authorized by the rules in this part, no information described in paragraph (a) of this section shall be disclosed. The procedural rules in Part 422, Subpart E, of this chapter shall be applied to requests for information which is subject to the rules for disclosure in this part.

(c) Requests for information which may not be disclosed according to the provisions of this part shall be denied under authority of section 1106(a) of the Social Security Act and this part, and furthermore, such requests which have been made pursuant to the Freedom of Information Act shall be denied under authority of an appropriate Freedom of Information Act exemption, 5 U.S.C. 552 (b).

§ 401.2 Definitions.

For purposes of this part: (a) The term "Freedom of Information Act rules" means the substantive mandatory disclosure provisions of the Freedom of Information Act, 5 U.S.C. 552 (including the exemptions from mandatory disclosure, 5 U.S.C. 552(b), as implemented by the Department's public information regulation, 45 CFR Part 5, Subpart F and by Part 422, Subpart E of this chapter);

(b) The term "subject individual" means an individual whose record is maintained by the Department in a system of records, as the terms "individual," "record," and "system of records" are defined in the Privacy Act of 1974, 5 U.S.C. 552a(a);

(c) The term "person" means a person as defined in the Administrative Procedure Act, 5 U.S.C. 551(2). This includes State or local agencies, but does not include Federal agencies or State or Federal courts.

§ 401.3 Rules for disclosure.

(a) *General rule.* The Freedom of Information Act rules shall be applied to every proposed disclosure of information. If, considering the circumstances of the disclosure, the information would be made available in accordance with the Freedom of Information Act rules, then the information may be disclosed regardless of whether the requester or recipient of the information has a statutory right to request the information under the Freedom of Information Act, 5 U.S.C. 552, or whether a request has been made.

(b) *Application of the general rule.* Pursuant to the general rule in paragraph (a) of this section,

(1) Information shall be disclosed—

(i) To a subject individual when required by the access provision of the Privacy Act, 5 U.S.C. 552a(d), as implemented by the Department Privacy Act regulation, 45 CFR Part 5b; and

(ii) To a person upon request when required by the Freedom of Information Act, 5 U.S.C. 552;

(2) Unless prohibited by any other statute (e.g., the Privacy Act of 1974, 5 U.S.C. 552a(b), the Tax Reform Act of 1976, 26 U.S.C. 6103, or section 1106 (d) and (e) of the Social Security Act), information may be disclosed to any requester or recipient of the information, including another Federal agency or a State or Federal court, when the information would not be exempt from man-

datory disclosure under Freedom of Information Act rules or when the information nevertheless would be made available under the Department's public information regulation's criteria for disclosures which are in the public interest and consistent with obligations of confidentiality and administrative necessity, 45 CFR Part 5, Subpart F, as supplemented by Part 422, Subpart E of this chapter.

§§ 401.4–401.6 [Deleted]

§ 422.426 [Amended]

2. Section 422.426 of Subpart E of Part 422 is amended by deleting paragraph (b) and redesignating paragraph (c) as paragraph (b).

[FR Doc.77-7754 Filed 3-11-77;4:14 pm]

[Regs. No. 4, 16]

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Rights and Benefits Based on Disability; Determination of Disability or Blindness; Additional Medical Criteria for Determinations of Disability for Children Under Age 18

On December 3, 1976, there was published in the FEDERAL REGISTER (41 FR 53042) a notice of proposed rule making with proposed amendments to Subpart P, Regulations No. 4 and Subpart I, Regulations No. 16. The proposed amendments provided: (1) Additional medical criteria for the determination of disability of children under age 18 under title XVI of the Social Security Act; and (2) For the use of these criteria when evaluating disability under title II of a wage earner under age 18. Section 501(b) of Pub. L. 94–566, enacted October 20, 1976, requires that we publish these criteria within 120 days of enactment. Interested parties were given 45 days from the date of publication of that notice within which to submit any data, views, or arguments to the Social Security Administration, Department of Health, Education, and Welfare.

These criteria were developed in consultation with the Social Security Administration's Medical Consultant Staff, augmented by physicians with expertise in specific subspecialties of pediatrics. Several groups in the medical community were requested to comment on these medical criteria as they were being formulated.

The definition of disability in title XVI closely parallels that in title II, with the exception that title XVI provides specifically for eligibility for children under age 18 on the basis of disability. Within the basic definition of disability (i.e., an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months), title XVI provides for a finding of disability in the case of a child under the age of 18 if the child suffers from any medically determinable physical or mental impairment of comparable severity.

In determining "comparable severity," it is necessary to recognize that the manifestations of certain disease processes in children may be different than in adults, even where the diagnosed disease is the same.

The basic requirements for the determination of disability for children under age 18 are found in Regulations No. 16, Subpart I, § 416.904. Section 416.904 provides, in part, that disability will be deemed to exist for a child under age 18 if the child is not engaging in substantial gainful activity and his impairment(s) meets the requisite durational requirement and is either listed in the published appendix to Subpart I or, with appropriate consideration of the particular effect of disease processes in children, is medically the equivalent of a listed impairment. Thus, determinations of disability of children have been made and will continue to be made under the authority provided in § 416.904 and in consideration of the basic requirements stated therein.

The Listing of Impairments in the published appendix to Subpart I is identical to that in the appendix to Subpart P of Regulations No. 4. These criteria had originally been developed for the purpose of determining disability with respect to the essentially adult claimant population of the title II disability insurance program. When these criteria were adopted for the title XVI program, it was recognized that for a number of impairments, the medical criteria published in the appendix were directly applicable for determining disability of children, as well as of adults, and that these criteria could readily be used in children's claims.

Conversely, it was also recognized from the outset that some of the published criteria would not be directly applicable for determining disability of children because those criteria are based primarily on experience with impairments in adults. Additionally, it was recognized that some diseases and impairments generally seen only in young children were not addressed in the published appendix. Experience gained in evaluating impairments of children since January 1974 indicates the advisability of providing additional medical criteria at this time.

These proposed additional criteria do not alter the basic requirements for determining disability for children under § 416.904. They will, however, facilitate the decision making process because the criteria are directly applicable for determining disability for children. Because these proposed additional medical criteria are based on the concept of "comparable severity" to the Listing of Impairments published in the appendix to Subpart I, there should not be any transitional problems upon a child's attainment of age 18. Absent medical improvement, an impairment or a combination of impairments which meets or equals the proposed additional medical criteria for children until the attainment of age 18 would be expected to meet or equal the comparable existing medical criteria after the attainment of age 18.

The proposed amendments also contain technical revisions; specifically, the appendix has been redesignated "Appendix 1" and subdivided into Parts A and B. Part A contains the Listing of Impairments in the published appendix and is applicable to all individuals age 18 and over and to children under age 18 where it is clear, based upon the medical facts of the case, that the criteria are appropriate. Part B, which is herewith published as a Final Regulation, is applicable only to the evaluation of children's impairments where the criteria in Part A do not give appropriate consideration to the particular effect of disease processes in childhood. Thus, where additional criteria are included in Part B, the impairment categories are, to the extent feasible, numbered in such a way as to maintain a relationship with their counterparts in Part A.

We are also amending Regulations No. 4, Subpart P, § 404.1506 to refer to Part B when evaluating disability under title II of a wage earner under age 18 where the adult criteria are not applicable. Though not conclusive of the issue of disability in title II claims, use of the criteria in Part B will facilitate the title II decision making process in those cases where an applicant under age 18 applies for disability benefits on the basis of his own earnings.

In response to the Notice of Proposed Rule Making various interested parties submitted comments which were considered in preparing these final regulations. There follows a discussion of the comments received from 30 sources.

1. One writer stated that the proposed amendments to the regulations do not show how the Department arrived at the proposed medical criteria nor how the impairments are disabling; and another inquired about the extent of input from practicing physicians. The medical criteria were developed and formulated over a 2-year period by the Social Security Administration Medical Consultant Staff together with practicing physicians, and other professionals, such as psychologists, who are experts in various specialties, primarily pediatrics. In identifying these impairments and the level of severity which would establish disability, these professionals placed primary emphasis on the effects of physical and mental impairments in children, the impact of the impairment on the child's activities, and the restrictions on growth, learning, and development imposed on the child by the impairments. Those impairments which were determined to impact on the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of "comparable severity" to the adult listing. All the listed impairments have a severe impact on the child's development in one form or another—

physical, mental, emotional, or social. Thus, within this context, we believe that we have complied with Congressional intent and the law.

2. Another commentator stated that the Social Security Administration interprets severity in medical rather than functional terms. Such an interpretation is necessary because the proposed amendments to the regulations are derived from section 1614(a)(3)(C) of the Social Security Act, which specifies that a physical or mental impairment is one which is "demonstrable by medically acceptable clinical and laboratory diagnostic techniques." The medical criteria proposed, however, do result in functional limitations or restrictions, depending on the nature of the impairments, and these have been considered.

3. One writer questioned the use of the term "medically determinable" in § 416.904, pointing out that the exact cause of mental deficiency is not known in many cases. The term "medically determinable" is not meant to imply that the specific etiology of a disabling condition must be determined, but that its effect and limitations are discernible by the use of techniques commonly employed and accepted by medical professionals. In the case of mental deficiency, this can include detailed accounts of the child's daily activities, based on the observations of professional persons, as explained in section 112.00 of the Appendix.

4. Several writers commented that the proposed amendments to the regulations provide for a finding of childhood disability only when the particular child's impairment fits within one of the impairments enumerated in the regulations and that they do not make provision for a situation where a child has several impairments which involve more than one body system. The impairments listed in Appendix 1 provide a means to efficiently and equitably evaluate the more common impairments. The enumeration of these impairments does not preclude a finding of disability for children who have an impairment that is not included in the Appendix, nor does it preclude a favorable decision in cases where the child has a combination of impairments—where the individual impairments are less severe than a listed impairment. Decisions in such cases are made within the framework of § 416.904(b), which provides for evaluating unlisted impairments or a combination of multiple impairments. These decisions are made on the basis of whether the unlisted impairment, or the totality of impairments, are of a severity equivalent to a listed impairment.

5. One writer stated that the Listing is simply a modification of that used for adults. We agree that for those impairments common to both adults and children the proposed Listing corresponds to the adult Listing, with modifications of the adult criteria, where necessary, to take into account the different impact on children. In addition, the Listing contains impairments that are generally seen only in children.

6. Some writers indicated that the regulations should be broadened to include developmental needs. The medical criteria in Appendix 1 do consider developmental levels. Many of the criteria were established by considering disability in terms of departures from developmental norms at various levels. Developmental needs, however, such as counseling, special education, training, rehabilitation, guidance, etc., are not considered because they are not within the scope of the law.

7. Other writers suggested that the regulations should be based on a definition of disability which responds specifically to the physical, mental, and emotional development of the child; and several commentators believed that children must be evaluated according to developmental milestones. In applying the law, we considered those medical factors which relate to physical, mental, and emotional development. We also considered developmental milestones and, where they apply, these criteria were incorporated into the Listing so that the regulations do describe childhood impairments that interfere with the child's development.

8. A number of writers suggested that title XVI should include additional provisions for the general welfare and health needs of disabled children. Several writers suggested that the proposed regulations be broadened to help all children in need of medical care. Another writer recommended that responsibility for the care of children found disabled under the regulations be linked with a State program for crippled children. Another writer was concerned about the absence of a provision for dental care. Finally, one writer observed that the regulations should weigh the effect of the child's familial and educational development. While we concur that disabled children require many services, the intent of Congress is to provide benefits for children who meet the definition of disability. Because none of the above concerns relate to "disability," no changes are being made. To the writer who suggested a link with a State program for crippled children, however, Public Law 94-566, enacted on October 20, 1976, amends section 1615 of title XVI and provides for the referral of those children found blind or disabled under the title XVI criteria to a State agency, such as one providing crippled children's services, for appropriate counseling, medical, educational, developmental, rehabilitative, and social services.

9. One writer noted that § 416.902 gives consideration to education and indicated that consideration of education in an infant or child is inappropriate. We agree that consideration of education is inappropriate in determining disability in children under age 18. Section 416.902 does not apply to children under age 18; it refers to individuals age 18 and over.

10. Section 416.904 states that a child under age 18 will be found to be disabled as defined in § 416.901(b)(1) if he has a medically determinable physical or mental impairment of comparable severity to that which qualifies an individual age 18 or over. Several writers expressed concern about the phrase "if the child is not engaging in substantial gainful activity" as contained in § 416.904. A recommended substitution for "substantial gainful activity" was "age-appropriate major daily activities." This portion of § 416.904 is derived from section 1614(a)(3) and does not enter into the medical evaluation process. It covers the unusual situation where a child is actually working and deriving substantial earnings therefrom despite the presence of a severe impairment. As required by section 1614(a)(3)(D) of the Social Security Act, such a situation would preclude a finding of disability. Further, we believe that to set a standard based on "age-appropriate major daily activities" for all impairments is unduly restrictive and not within the intent of the law.

11. Other writers stated that it seems inappropriate to use a work-related definition for children. Recognizing that children are not expected to engage in work activity, disability in children has been defined in terms of a child's activity, growth, and development. Thus, the child's theoretical capacity to engage in work activity is not considered in determining disability under the listing in Appendix A.

12. Another writer states that a child's performance of substantial gainful work should not be a conclusive factor in denying supplemental security income benefits. This writer points out that some disabled children may be in situations where they are found to engage in employment. Not all employment situations constitute substantial gainful activity as defined elsewhere in the regulations (§§ 416.932, 416.933, and 416.934). Most persons who are denied under this provision (which applies to adults as well as children) are those who have developed special skills that permit them to perform substantial work despite a severe impairment. It would be unusual for a child who has a severe impairment to find and successfully perform substantial gainful activity. In that event, however, section 1614(a)(3)(D) of the Social Security Act requires a denial of the disability claim.

13. One writer was concerned that "substantial gainful activity" could be interpreted to mean attendance in a school classroom. The term substantial gainful activity as defined in §§ 416.932–416.934 of the regulations refers only to that activity within a work situation which is usually performed for remuneration, pay, or profit. Thus, school attendance cannot be construed as substantial gainful activity.

14. Appendix 1, Part B, section 112.00B states that developmental milestone criteria may be the sole basis for adjudication only in cases where the child's young age or condition preclude formal standardized testing by a psychologist or psychiatrist experienced in testing children. One writer commented that the

proposed amendments to the regulations limit the identification of mental disorders to physicians; additionally, he suggested that psychologists are limited to a testing role. Under the title XVI statutory provisions, evidence from a medical source is necessary to establish the existence, severity, and duration of an impairment. Psychologists are recognized as a source of medical evidence as pointed out in Appendix I, Part A, section 12.00D, which indicates that "the severity of a mental disorder should be evaluated on the basis of psychiatrists' reports, hospital reports, psychologists' reports and description of daily activities." Consequently, psychologists' reports represent primary sources of medical evidence and are included in determining whether disability exists. Additionally, section 112.00B of the proposed amendments to the regulations indicates that standardized intelligence test results are essential to the adjudication of all cases of mental retardation that are not clearly covered under the provisions of section 112.05A. Thus, many cases may include psychologists' reports containing a composite of information pertaining to the claimant's daily activities and current behavior, as well as laboratory findings including the results of standardized psychological tests. Because the validity of these test results are important in the documentation and evaluation of mental deficiency, the regulations simply emphasize that they should be administered by qualified and experienced psychologists or psychiatrists. Reference to psychologists in this capacity is not intended to imply that their role is limited to this function. Because all symptoms, signs, and laboratory findings by psychologists are considered medical evidence and because their role is not limited to that of testing, no change in the proposed regulatory language is required.

15. One writer commented that the medical criteria of the regulations should be reviewed in light of the medical advances. Consistent with traditional policies of the Social Security Administration, the need for ongoing review of the regulations in light of progress in medicine is fully appreciated and undertaken periodically. Future revisions will be made based on these medical advances and operating experience.

16. One commenter was concerned that investigations of continuing medical severity, after entitlement, will infringe upon privacy. Periodic redeterminations of disability do not constitute an invasion of the individual's privacy if he wishes benefits. In scheduling future reexaminations to determine whether medical recovery has occurred, emphasis is placed on those who have impairments which have a definite potential for improvement.

17. Another writer objected to the use of the pronouns "her," "his," and "him." This accords with §416.120(c)(11) of the regulations which states that the masculine gender includes the feminine, unless otherwise indicated.

18. One writer raised a question as to the clarity of the criteria for growth impairment and pointed out that the requirement of one standard deviation of bone age delay would include too many normal children. Appropriate changes have been made to section 100.00 Growth Impairment in response to this comment.

19. Three writers advised using additional higher frequency tone levels in evaluating hearing impairments, and one writer advised other clarifying language for evaluating hearing impairments. These changes have been incorporated in sections 102.00, and 102.08.

20. Two writers recommended clarifying language for section 104.00 Cardiovascular Impairments. A number of these have been adopted. The others are under study.

21. Two writers questioned the specific identification of Down's syndrome under section 112.00. Because there is an adequate basis for adjudication of impairments associated with this diagnosis elsewhere in the Regulations, the reference to Down's syndrome in sections 112.00 and 112.05 have been removed.

Section 102.02 has been revised to clarify that the standard for evaluating impairment of central visual acuity in adults also applies to children under age 18. Minor editorial changes have also been made. According, these amendments to the regulations are adopted as set forth below.

(Secs. 223, 1102, 1614, 1631, of the Social Security Act, as amended; 70 Stat. 815, 49 Stat. 647, as amended, 86 Stat. 1471, 86 Stat. 1475; 42 U.S.C. 423, 1302, 1382c, 1383.)

Effective date: The amendments shall be effective March 16, 1977.

(Catalog of Federal Domestic Assistance Programs No. 13.802, Social Security-Disability Insurance, No. 13.807, Supplemental Security Income Program.

NOTE: The Social Security Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order No. 11821 and OMB Circular A-107.

Dated: February 16, 1977.

J. B. CARDWELL,
Commissioner of Social Security.

Approved: March 9, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health, Education, and Welfare.

Parts 404 and 416 of Chapter III of Title 20 of the Code of Federal Regulations are amended as follows:

1. Section 404.1506 is amended by inserting a new paragraph (e) to read as follows:

§ 404.1506 Listing of impairments in appendix.

* * * * *

(e) In determining whether a wage earner under age 18 has an impairment which is disabling on medical considerations alone (see § 404.1502(a)), reference shall also be made to Part 416, Subpart I, Appendix 1, Part B.

2. The entries for section 416.906, and Appendix in the Table of Contents for Part 416, Subpart I are revised as follows:

Subpart I—Determination of Disability or Blindness

* * * * *

416.906 Listing of impairments in Appendix 1.

* * * * *

APPENDIX 1—LISTING OF IMPAIRMENTS

Part A.—Criteria Applicable to Individuals Age 18 and Over and to Children Under Age 18 Where Criteria are Appropriate.

Part B.—Additional Medical Criteria for the Evaluation of Impairments of Children.

3. Paragraph (a) of § 416.902 is revised to read as follows:

§ 416.902 Evaluation of disability for individuals age 18 or over.

(a) Whether or not an impairment in a particular case constitutes a disability, as defined in § 416.901(b)(1), is determined from all the facts of that case. Primary consideration is given to the severity of the individual's impairment. Consideration is also given to such other factors as the individual's age, education and work experience. Medical considerations alone can justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalites. On the other hand, medical considerations alone (including physiological and psychological manifestations of aging) can, except where other evidence rebuts a finding of "disability," e.g., the individual is actually engaging in substantial gainful activity, justify a finding that the individual is under a disability where his impairment is one that meets the duration requirement in § 416.901(b)(1), and is listed in Part A of Appendix 1 to this Subpart I, or the Social Security Administration determines his impairment (or combined impairments) to be medically the equivalent of a listed impairment (see § 416.905).

* * * * *

4. Section 416.904 is revised to read as follows:

§ 416.904 Evaluation of disability of a child under age 18.

A child under age 18 will be found to be disabled as defined in § 416.901(b)(1) if he has a medically determinable physical or mental impairment of comparable severity to that which qualifies an individual age 18 or over. Disability shall be deemed to be of comparable severity and to exist under § 416.901(b)(1) if the child is not engaging in substantial gainful activity, and if:

(a) His impairment or impairments meet the durational requirements in § 416.901(b)(1), and are listed in Appendix 1 to this Subpart I; or

(b) His impairment or impairments are not listed in Appendix 1 to this Subpart I but singly or in combination meet the durational requirement in § 416.901(b)(1) and are determined by the Social

Security Administration, with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment (see § 416.905).

5. Section 416.905 is revised to read as follows:

§ 416.905 Determining medical equivalence.

(a) An individual's impairment or impairments shall be determined to be medically the equivalent of an impairment listed in Appendix 1 to this Subpart I, only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment.

(b) Any decision with respect to disability made under the criteria in § 416.901(b) as to whether an individual's impairment or impairments are medically the equivalent of an impairment listed in Appendix 1 to this Subpart I, shall be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Social Security Administration, relative to the question of medical equivalence. A "physician designated by the Social Security Administration" shall include a physician in the employ of or engaged for this purpose by the Social Security Administration or State agency authorized to make determinations of disability.

6. Section 416.906 is amended by revising the title, redesignating the existing paragraphs (b), (c), and (d) as (c), (d), and (e) respectively, incorporating technical revisions in the existing paragraphs (a) and (c), and inserting a new paragraph (b) to read as follows:

§ 416.906 Listing of impairments in appendix 1.

(a) With respect to § 416.901(b)(1), the Listing of Impairments in Appendix 1 to this Subpart I describes, for each of the major body systems, impairments which:

(1) Are of a level of severity which can justify a finding that the individual is disabled, except where other evidence rebuts such a finding; and

(2) Are expected to result in death or to last for a continuous period of not less than 12 months.

(b) The Listing of Impairments consists of two parts—A and B. Part A contains medical criteria that are applicable to all individuals age 18 and over. The medical criteria in Part A may also be applied in the evaluation of impairments in children under age 18 where the disease processes have similar impairment impact on children and adults. Part B contains additional medical criteria applicable only to the evaluation of impairments of children under age 18. Part B is used where the criteria in Part A do not give appropriate consideration to the particular effects of the disease processes in childhood; i.e., when the disease process is generally found only in children or when the disease process differs in its effect on children than on adults. Where additional criteria are included in Part B, the impairment categories are, to the extent feasible, numbered to maintain a relationship with their counterparts in Part A. The method for adjudicating claims for children under age 18 is to look first to Part B. Where the medical criteria in Part B are not applicable, the medical criteria in Part A should be used.

* * * * *

(d) An impairment shall not be considered to be one listed in Appendix 1 to this Subpart I solely because it has the name of a listed impairment. To be considered a listed impairment, it must also have such attendant findings as are recited in the Listing for the impairment.

* * * * *

7. Subpart I of Part 416 is amended by designating the existing Listing of Impairments as Part A entitled as follows:

APPENDIX 1

LISTING OF IMPAIRMENTS

Part A

Criteria applicable to individuals age 18 and over and to children under age 18 where criteria are appropriate.

Sec.

* * * * *

8. Subpart I of Part 416 is further amended by adding to Appendix 1 a new Part B, which read as follows:

Part B

Additional medical criteria for the evaluation of impairments of children under age 18 (where criteria in Part A do not give appropriate consideration to the particular disease process in childhood).

Sec.

100.00 GROWTH IMPAIRMENT

A. *Impairment of growth* may be disabling in itself or it may be an indicator of the severity of the impairment due to a specific disease process.

Determinations of growth impairment should be based upon the comparison of current height with at least three previous determinations, including length at birth, if available. Heights (or lengths) should be plotted on a standard growth chart, such as derived from the National Center for Health Statistics: NCHS Growth Charts. Height should be measured without shoes. Body weight corresponding to the ages represented by the heights should be furnished. The adult heights of the child's natural parents and the heights and ages of siblings should also be furnished. This will provide a basis upon which to identify those children whose short stature represents a familial characteristic rather than a result of disease. This is particularly true for adjudication under § 100.02B.

B. *Bone age determinations* should include a full descriptive report of roentgenograms specifically obtained to determine bone age and must cite the standardization method used. Where roentgenograms must be obtained currently as a basis for adjudication under § 100.03, views of the left hand and wrist should be ordered. In addition, roentgenograms of the knee and ankle should be obtained when cessation of growth is being evaluated in an older child at, or past, puberty.

C. The criteria in this section are applicable until closure of the major epiphyses. The cessation of significant increase in height at that point would prevent the application of these criteria.

100.01 CATEGORY OF IMPAIRMENTS, GROWTH

100.02 *Growth Impairment*, considered to be related to an additional specific medically determinable impairment, and one of the following:

A. Fall of greater than 15 percentiles in height which is sustained; or

B. Fall to, or persistence of, height below the third percentile.

100.03 *Growth impairment*, not identified as being related to an additional, specific medically determinable impairment. With:

A. Fall of greater than 25 percentiles in height which is sustained; and

B. Bone age greater than two standard deviations (2 SD) below the mean for chronological age (see § 100.00B).

101.00 MUSCULOSKELETAL SYSTEM

A. *Rheumatoid arthritis.* Documentation of the diagnosis of juvenile rhematoid arthritis shoud be made according to an established protocol, such as that published by the Arthritis Foundation, *Bulletin on the Rheumatic Diseases*, Vol. 23, 1972–1973 Series, p. 712. Inflammatory signs include persistent pain, tenderness, erythema, swelling, and increased local temperature of a joint.

B. *The measurements of joint motion* are based on the technique for measurements described in the "Method of Measuring and Recording," published by the American Academy of Orthopedic Surgeons in 1965, or "The Extremities and Back" in *Guides to the Evaluation of Permanent Impairment*, Chicago, American Medical Association, 1971 Chapter 1, pp. 1–48.

C. *Degenerative arthritis* may be the end stage of many skeletal diseases and conditions, such as traumatic arthritis, collagen disorders, septic arthritis, congenital dislocation of the hip, aseptic necrosis of the hip, slipped capital femoral epiphyses, skeletal dysplasias, etc.

101.01 CATEGORY OF IMPAIRMENTS, MUSCULOSKELETAL

101.02 *Juvenile rheumatoid arthritis.* With:

A. Persistence or recurrence of joint inflammation despite six months of medical treatment and one of the following:

1. Limitation of motion of two major joints of 50 percent or greater; or

2. Fixed deformity of two major weight-bearing joints of 30 degrees or more; or

3. Radiographic changes of joint narrowing, erosion, or subluxation; or

4. Persistent or recurrent systemic involvement such as iridocyclitis or pericarditis; or

B. Steroid dependence.

101.03 *Deficit of musculoskeletal function* due to deformity or musculoskeletal disease and one of the following:

A. Walking is markedly reduced in speed or distance despite orthotic or prosthetic devices; or

B. Ambulation is possible only with obligatory bilateral upper limb assistance (e.g. with walker, crutches); or

C. Inability to perform age-related personal self-care activities involving feeding dressing and personal hygiene.

101.05 *Disorders of the spine.*

A. *Fracture of vertebra with cord involvement (substantiated by appropriate sensory and motor loss).*

B. *Scoliosis (congenital idiopathic or neuromyopathic).* With:

1. Major spinal curve measuring 60 degrees or greater; or

2. Spinal fusion of six or more levels. Consider under a disability for one year from the time of surgery; thereafter evaluate the residual impairment; or

3. FEV (vital capacity) of 50 percent or less of predicted normal values for the individual's measured (actual) height.

C. *Kyphosis or lordosis measuring 90 degrees or greater.*

101.08 *Chronic osteomyelitis* with persistence or recurrence of inflammatory signs or drainage for at least 6 months despite prescribed therapy and consistent radiographic findings.

102.00 Special Sense Organs

A. *Visual impairments in children.* Impairment of central visual acuity should be determined with use of the standard Spellen test chart. Where this cannot be used, as in very young children, a complete description should be provided of the findings using other appropriate methods of examination, including a description of the techniques used for determining the central visual acuity for distance.

The accommodative reflex is generally not present in children under 6 months of age. In premature infants, it may not be present until 6 months plus the number of months the child is premature. Therefore absence of accommodative reflex will be considered as indicating a visual impairment only in children above this age (6 months).

Documentation of an ophthalmologic disorder must include description of the ocular pathology.

B. *Hearing impairments in children.* The criteria for hearing impairments in children take into account that a lesser impairment in hearing which occurs at an early age may result in a severe speech and language disorder.

Improvement by a hearing aid, as predicted by the testing procedure, must be demonstrated to be feasible in that child, since younger children may be unable to use a hearing aid effectively.

The type of audiometric testing performed must be described and a copy of the results must be included. The pure tone air conduction in § 102.08 are based on American National Standard Institute Specifications for Audiometers, S 3.6—1969 (ANSI-1969). The report should indicate the specifications used to calibrate the audiometer

The finding of a severe impairment will be based on the average hearing levels of the four frequencies, 500, 1000, 2000, and 3000 Hertz (Hz) in the better ear, and on speech discrimination, as specified in § 102.08.

102.01 Category of Impairments, Special Sense Organs

102.02 *Impairment of central visual acuity.*

A. Remaining vision in the better eye after best correction is 20/200 or less.

B. For children below 3 years of age at at time of adjudication:

1. Absence of accommodative reflex (see § 102.00A for exclusion of children under 6 months of age); or

2. Retrolental fibroplasia with macular scarring or neovascularization; or

3. Bilateral congenital cataracts with visualization of retinal red reflex only or when associated with other ocular pathology.

102.08 *Hearing impairments.*

A. For children below 5 years of age at time of adjudication, inability to hear air conduction thresholds at an average of 40 decibels (db) hearing level or greater in the better ear.

B. For children 5 years of age and above at time of adjudication:

1. Inability to hear air conduction thresholds at an average of 70 decibels (db) or greater in the better ear or

2. Speech discrimination scores at 40 percent or less; or

3. Inability to hear air conduction thresholds at an average of 40 decibels (db) or greater in the better ear, and a speech and language disorder which significantly affects the clarity and content of the speech and is attributable to the hearing impairment.

103.00 Respiratory System

A. *Documentation of pulmonary insufficiency.* The reports of spirometric studies for evaluation under Table I must be expressed in liters. The reported FEV_1 should represent the largest of at least three satisfactory attempts, and should be within 10 percent of another FEV_1. The appropriately labeled spirometric tracing of three FEV maneuvers must be submitted with the report, showing distance per second on the abscissa and distance per liter on the ordinate. The unit distance for volume on the tracing should be at least 15 mm. per liter and the paper speed at least 20 mm. per second. The height of the individual without shoes must be recorded.

The ventilatory function studies should not be performed during or soon after an acute episode or exacerbation of a respiratory illness. In the presence of acute bronchospasm, or where the FEV_1 is less than that stated in Table I, the studies should be repeated after the administration of a nebulized bronchodilator. If a bronchodilator was not used in such instances, the reason should be stated in the report.

A statement should be made as to the child's ability to understand directions and to cooperate in performance of the test, and should include an evaluation of the child's effort. Where tests cannot be performed or completed, the reason (such as a child's young age) should be stated in the report.

B. *Cystic fibrosis.* This section discusses only the pulmonary manifestations of cystic fibrosis. Other manifestations, complications, or associated disease must be evaluated under the appropriate section.

The diagnosis of cystic fibrosis will be based upon appropriate history, physical examination, and pertinent laboratory findings. Confirmation based upon elevated concentration of sodium or chloride in the sweat should be included, with indication of the technique used for collection and analysis.

103.01 Category of Impairments, Respiratory

103.03 *Bronchial asthma.* With evidence of progression of the disease despite therapy and documented by one of the following:

A. Recent, recurrent intense asthmatic attacks requiring parenteral medication; or

B. Persistent prolonged expiration with wheezing between acute attacks and radiographic findings of peribronchial disease.

103.13 *Pulmonary manifestations of cystic fibrosis.* With:

A. FEV_1 equal to or less than the values specified in Table I (see § 103.00A for requirements of ventilatory function testing); or

B. For children where ventilatory function testing cannot be performed:

1. History of dyspnea on mild exertion or chronic frequent productive cough; and

2. Persistent or recurrent abnormal breath sounds, bilateral rales or rhonchi; and

3. Radiographic findings of extensive disease with hyperaeration and bilateral peribronchial infiltration.

Table I

Height (in centimeters):	FEV_1 *equal to or less than (liters)*
110 or less	0.6
120	.7
130	.9
140	1.1
150	1.3
160	1.5
170 or more	1.6

104.00 Cardiovascular System

A. *General.* Evaluation should be based upon history, physical findings, and appropriate laboratory data. Reported abnormalities should be consistent with the pathologic diagnosis. The actual electrocardiographic tracing, or an adequate marked photocopy, must be included. Reports of other pertinent studies necessary to substantiate the diagnosis or describe the severity of the impairment must also be included.

B. *Evaluation of cardiovascular impairments in children* requires two steps:

1. The delineation of a specific cardiovascular disturbance, either congenital or acquired. This may include arterial or venous disease, rhythm disturbance, or disease involving the valves, septa, myocardium or pericardium; and

2. Documentation of the severity of the impairment, with medically determinable and consistent cardiovascular signs, symptoms, and laboratory data. In cases where impairment characteristics are questionably secondary to the cardiovascular disturbance, additional documentation of the severity of the impairment (e.g., catherization data, if performed) will be necessary.

C. *Chest roentgenogram* (6 ft. PA film) will be considered indicative of cardiomegaly if:

1. The cardiothoracic ratio is over 60 percent at age one year or less, or 55 percent at more than one year of age; or

2. The cardiac size is increased over 15 percent from any prior chest roentgenograms; or

3. Specific chamber or vessel enlargement is documented in accordance with established criteria.

D. *Tables* I, II, *and* III below are designed for case adjudication and not for diagnostic purposes. The adult criteria may be useful for older children and should be used when applicable.

E. *Rheumatic fever,* as used in this section assumes diagnoses made according to the revised Jones Criteria.

104.01 Category of Impairments, Cardiovascular

104.02 *Chronic congestive failure.* With two or more of the following signs:

A. Tachycardia (see Table I).

B. Tachypnea (see Table II).

C. Cardiomegaly on chest roentgenogram (see § 104.00C).

D. Hepatomegaly (more than 2 cm. below the right costal margin in the right midclavicular line).

E. Evidence of pulmonary edema, such as rales or orthopnea.

F. Dependent edema.

G. Exercise intolerance manifested as labored respiration on mild exertion (e.g., in an infant, feeding).

TABLE I—TACHYCARDIA AT REST

Age	Apical Heart (beats per minute)
Under 1 yr	150
1 through 3 yr	130
4 through 9 yr	120
10 through 15 yr	110
Over 15 yr	100

TABLE II—TACHYPNEA AT REST

Age	Respiratory rate over (per minute)
Under 1 yr	40
1 through 5 yr	35
6 through 9 yr	30
Over 9 yr	25

104.03 *Hypertensive cardiovascular disease.* With persistently elevated blood pressure for age (see Table III) and one of the following:

A. Impaired renal function as described under the criteria in § 106.02; or

B. Cerebrovascular damage as described under the criteria in § 111.06; or

C. Congestive heart failure as described under the criteria in § 104.02.

TABLE III—ELEVATED BLOOD PRESSURE

Age	Systolic (over) In mm. Hg	Diastolic (over) In mm. Hg
Under 6 mo	95	60
6 mo. to 1 yr	110	70
1 through 8 yrs	115	80
9 through 11 yrs	120	80
12 through 15 yrs	130	80
Over 15 yrs	140	80

104.04 *Cyanotic congenital heart disease.* With one of the following:

A. Surgery is limited to palliative measures; or

B. Characteristic squatting, hemoptysis, syncope, or hypercyanotic spells; or

C. Chronic hematocrit of 55 percent or greater or arterial O_2 saturation of less than 90 percent at rest, or arterial oxygen tension of less than 60 Torr at rest.

104.05 *Cardiac arrhythmia, such as persistent or recurrent heart block or A-V dissociation (with or without therapy).* And one of the following:

A. Cardiac syncope; or

B. Congestive heart failure as described under the criteria in § 104.02; or

C. Exercise intolerance with labored respirations on mild exertion (e.g., in infants, feeding).

104.07 *Cardiac syncope.* With at least one documented syncopal episode characteristic of specific cardiac disease (e.g., aortic stenosis).

104.08 *Recurrent hemoptysis.* Associated with either pulmonary hypertension or extensive bronchial collaterals due to documented chronic cardiovascular disease.

104.09 *Chronic rheumatic fever or rheumatic heart disease.* With:

A. Persistence of rheumatic fever activity for 6 months or more, with significant murmur(s), cardiomegaly (see § 104.00C), and other abnormal laboratory findings (such as elevated sedimentation rate or electrocardiographic findings); or

B. Congestive heart failure as described under the criteria in § 104.02.

105.00 DIGESTIVE SYSTEM

A. *Disorders of the digestive system* which result in disability usually do so because of interference with nutrition and growth, multiple recurrent inflammatory lesions, or other complications of the disease. Such lesions or complications usually respond to treatment. To constitute a listed impairment, these must be shown to have persisted or be expected to persist despite prescribed therapy for a continuous period of at least 12 months.

B. *Documentation of gastrointestinal impairments* should include pertinent operative findings, radiographic studies, endoscopy, and biopsy reports. Where a liver biopsy has been performed in chronic liver disease, documentation should include the report of the biopsy.

C. *Growth retardation and malnutrition.* When the primary disorder of the digestive tract has been documented, evaluate resultant malnutrition under the criteria described in § 105.08. Evaluate resultant growth impairment under the criteria described in § 100.03. Intestinal disorders, including surgical diversions and potentially correctable congenital lesions, do not represent a severe impairment if the individual is able to maintain adequate nutrition, growth, and development.

D. *Multiple congenital anomalies.* See related criteria, and consider as a combination of impairments.

105.01 CATEGORY OF IMPAIRMENTS, DIGESTIVE

105.03 *Esophageal obstruction, caused by atresia, stricture, or stenosis.* With malnutrition as described under the criteria in § 105.08.

105.05 *Chronic liver disease.* With one of the following:

A. Inoperable biliary atresia demonstrated by X-ray or surgery; or

B. Intractable ascites not attributable to other causes, with serum albumin of 3.0 gm./100 ml. or less; or

C. Esophageal varices (demonstrated by angiography, barium swallow, or endoscopy or by prior performance of a specific shunt or plication procedure); or

D. Hepatic coma, documented by findings from hospital records; or

E. Hepatic encephalopathy. Evaluate under the criteria in § 112.02; or

F. Chronic active inflammation or necrosis documented by SGOT persistently more than 100 units or serum bilirubin of 2.5 mg. percent or greater.

105.07 *Chronic inflammatory bowel disease (such as ulcerative colitis, regional enteritis), as documented in § 105.00.* With one of the following:

A. Intestinal manifestations or complications, such as obstruction, abscess, or fistula formation which has lasted or is expected to last 12 months; or

B. Malnutrition as described under the criteria in § 105.08; or

C. Growth impairment as described under the criteria in § 100.03.

105.08 *Malnutrition, due to demonstrable gastrointestinal disease causing either a fall of 15 percentiles of weight which persists or the persistence of weight which is less than the third percentile (on standard growth charts).* And one of the following:

A. Stool fat excretion per 24 hours:

1. More than 15 percent in infants less than 6 months.

2. More than 10 percent in infants 6-18 months.

3. More than 6 percent in children more than 18 months; or

B. Persistent hematocrit of 30 percent or less despite prescribed therapy; or

C. Serum carotene of 40 mcg./100 ml. or less; or

D. Serum albumin of 3.0 gm./100 ml. or less.

106.00 GENITO-URINARY SYSTEM

A. *Determination of the presence of chronic renal disease* will be based upon the following factors:

1. History, physical examination, and laboratory evidence of renal disease.

2. Indications of its progressive nature or laboratory evidence of deterioration of renal function.

B. *Renal transplant.* The amount of function restored and the time required to effect improvement depend upon various factors including adequacy of post-transplant renal function, incidence of renal infection, occurrence of rejection crisis, presence of systemic complications (anemia, neuropathy, etc.) and side effects of corticosteriod or immunosuppressive agents. A period of at least 12 months is required for the individual to reach a point of stable medical improvement.

C. Evaluate associated disorders and complications according to the appropriate body system listing.

106.01 CATEGORY OF IMPAIRMENTS, GENITO-URINARY

106.02 *Chronic renal disease.* With:

A. BUN of 30 mg./100 ml. or greater; or

B. Serum creatinine of 3.0 mg./100 ml. or greater; or

C. Creatinine clearance equal to or less than 42 ml./min./1.73 m^2; or

D. Chronic renal dialysis program for irreversible renal failure; or

E. Renal transplant. Consider under a disability for 12 months following surgery; thereafter, evaluate the residual impairment (see § 106.00B).

106.06 *Nephrotic syndrome, with edema not controlled by prescribed therapy.* And:

A. Serum albumin less than 2 gm./100 ml.; or

B. Proteinuria more than 2.5 gm./1.73 m^2/day.

107.00 HEMIC AND LYMPHATIC SYSTEM

A. *Sickle cell disease* refers to a chonric hemolytic anemia associated with sickle cell hemoglobin, either homozygous or in combination with thalassemia or with another abnormal hemoglobin (such as C or F).

Appropriate hematologic evidence for sickle cell disease, such as hemoglobin electrophoresis must be included. Vaso-occlusive, hemolytic, or aplastic episodes should be documented by description of severity, frequency, and duration.

Disability due to sickle cell disease may be solely the result of a severe, persistent anemia or may be due to the combination of chronic progressive or episodic manifestations in the presence of a less severe anemia.

Major visceral episodes causing disability include meningitis, osteomyelitis, pulmonary infections or infarctions, cerebrovascular accidents, congestive heart failure, genitourinary involvement, etc.

B. *Coagulation defects.* Chronic inherited coagulation disorders must be documented by appropriate laboratory evidence such as abnormal thromboplastin generation, coagulation time, or factor assay.

C. *Acute leukemia.* Initial diagnosis of acute leukemia must be based upon definitive bone marrow pathologic evidence. Recurrent disease may be documented by peripheral blood, bone marrow, or cerebrospinal fluid examination. The pathology report must be included.

Section 107.11 contains the designated duration of disability implicit in the finding

of a listed impairment. Following the designated time period, a documented diagnosis itself is no longer sufficient to establish a severe impairment. The severity of any remaining impairment must be evaluated on the basis of the medical evidence.

107.01 CATEGORY OF IMPAIRMENTS, HEMIC AND LYMPHATIC

107.03 *Hemolytic anemia (due to any cause).* Manifested by persistence of hematocrit of 26 percent or less despite prescribed therapy, and reticulocyte count of 4 percent or greater.

107.05 *Sickle cell disease.* With:

A. Recent, recurrent, severe vaso-occlusive crises (musculoskeletal, vertebral, abdominal); or

B. A major visceral complication in the 12 months prior to application; or

C. A hyperhemolytic or aplastic crisis within 12 months prior to application; or

D. Chronic, severe anemia with persistence of hematocrit of 26 percent or less; or

E. Congestive heart failure, cerebrovascular damage, or emotional disorder as described under the criteria in § 104.02, § 111.00ff, or § 112.00ff.

107.06 *Chronic idiopathic thrombocytopenic purpura of childhood.* With purpura and thrombocytopenia of 40,000 platelets/cu. mm. or less despite prescribed therapy or recurrent upon withdrawal of treatment.

107.08 *Inherited coagulation disorder.* With:

A. Repeated spontaneous or inappropriate bleeding; or

B. Hemarthrosis with joint deformity.

107.11 *Acute leukemia.* Consider under a disability:

A. For 2½ years from the time of initial diagnosis; or

B. For 2½ years from the time of recurrence of active disease.

109.00 ENDOCRINE SYSTEM

A. *Cause of disability.* Disability is caused by a disturbance in the regulation of the secretion or metabolism of one or more hormones which are not adequately controlled by therapy. Such disturbances or abnormalities usually respond to treatment. To constitute a listed impairment these must be shown to have persisted or be expected to persist despite prescribed therapy for a continuous period of at least 12 months.

B. *Growth.* Normal growth is usually a sensitive indicator of health as well as of adequate therapy in children. Impairment of growth may be disabling in itself or may be an indicator of a severe disorder involving the endocrine system or other body systems. Where involvement of other organ systems has occurred as a result of a primary endocrine disorder, these impairments should be evaluated according to the criteria under the appropriate sections.

C. *Documentation.* Description of characteristic history, physical findings, and diagnostic laboratory data must be included. Results of laboratory tests will be considered abnormal if outside the normal range or greater than two standard deviations from the mean of the testing laboratory. Reports in the file should contain the information provided by the testing laboratory as to their normal values for that test.

D. *Hyperfunction of the adrenal cortex.* Evidence of growth retardation must be documented as described in § 100.00. Elevated blood or urinary free cortisol levels are not acceptable in lieu of urinary 17-hydroxycorticosteroid excretion for the diagnosis of adrenal cortical hyperfunction.

E. *Adrenal cortical insufficiency.* Documentation must include persistent low plasma cortisol or low urinary 17-hydroxycorticosteroids or 17-ketogenic steroids and evidence of unresponsiveness to ACTH stimulation.

109.01 CATEGORY OF IMPAIRMENTS, ENDROCRINE

109.02 *Thyroid Disorders.*

A. *Hyperthyroidism (as documented in § 109.00C).* With clinical manifestations despite prescribed therapy, and one of the following:

1. Elevated serum thyroxine (T_4) and either elevated free T_4 or resin T_3 uptake; or

2. Elevated thyroid uptake of radioiodine; or

3. Elevated serum triiodothyronine (T_3).

B. *Hypothyrodism.* With one of the following, despite prescribed therapy:

1. IQ of 69 or less; or

2. Growth impairment as described under the criteria in § 100.02B and C; or

3. Precocious puberty.

109.03 *Hyperparathyroidism (as documented in § 109.00C).* With:

A. Repeated elevated total or ionized serum calcium; or

B. Elevated serum parathyroid hormone.

109.04 *Hypoparathyroidism or Pseudohypoparathyroidism.* With:

A. Severe recurrent tetany or convulsions which are unresponsive to prescribed therapy; or

B. Growth retardation as described under the criteria in § 100.02B and C.

109.05 *Diabetes insipidus, documented by pathologic hypertonic saline or water depriation test.* And one of the following:

A. Intracranial space-occupying lesion, before or after surgery; or

B. Unresponsiveness to Pitressin; or

C. Growth retardation as described under the criteria in § 100.02B and C; or

D. Unresponsive hypothalmic thirst center, with chronic or recurrent hypernatremia; or

E. Decreased visual fields attributable to a pituitary lesion.

109.06 *Hyperfunction of the adrenal cortex (Primary or seconday).* With:

A. Elevated urinary 17-hydroxycorticosteroids (or 17-ketogenic steroids) as documented in § 109.00C and D; and

B. Unresponsiveness to low-dose dexamethasone suppression.

109.07 *Adrenal cortical insufficiency (as documented in § 109.00C and E).* With recent, recurrent episodes of circulatory collapse.

109.08 *Juvenile diabetes mellitus (as documented in § 109.00C) requiring parenteral insulin.* And one of the following, despite prescribed therapy:

A. Recent, recurrent hospitalizations with acidosis; or

B. Recent, recurrent episodes of hypoglycemia; or

C. Growth retardation as described under the criteria in § 100.02B or C; or

D. Impaired renal function as described under the criteria in § 106.00ff.

109.09 *Iatrogenic hypercorticoid state.* With chronic glucocorticoid therapy resulting in one of the following:

A. Osteoporosis; or

B. Growth retardation as described under the criteria in § 100.02B or C; or

C. Diabetes mellitus as described under the criteria in § 109.08; or

D. Myopathy as described under the criteria in § 111.06; or

E. Emotional disorder as described under the criteria in § 112.00ff.

109.10 *Pituitary dwarfism (with documented growth hormone deficiency).* And growth impairment as described under the criteria in § 100.02C.

109.11 *Adrenogenital syndrome.* With:

A. Recent, recurrent salt-losing episodes despite prescribed therapy; or

B. Inadequate replacement therapy manifested by accelerated bone age and virilization; or

C. Growth impairment as described under the criteria in § 100.02B or C.

109.12 *Hypoglycemia (as documented in § 109.00C).* With recent, recurrent hypoglycemic episodes producing convulsion or coma.

109.13 *Gonadal Dysgenesis (Turner's Syndrome), chromosomally proven.* Evaluate the resulting impairment under the criteria for the appropriate body system.

110.00 MULTIPLE BODY SYSTEMS

A. *Catastrophic congenital abnormalities or disease.* This section refers only to very serious congenital disorders, diagnosed in the newborn or infant child.

B. *Immune deficiency diseases.* Documentation of immune deficiency disease must be submitted, and may include quantitative immunoglobulins, skin tests for delayed hypersensitivity, lymphocyte stimulative tests, and measurements of cellular immunity mediators.

110.01 CATEGORY OF IMPAIRMENTS, MULTIPLE BODY SYSTEMS

110.08 *Catastrophic congenital abnormalities or disease.* With:

A. A positive diagnosis (such as anencephaly, trisomy D or E, cyclopia, etc.), generally regarded as being incompatible with extrauterine life; or

B. A positive diagnosis (such as cri du chat, Tay-Sachs Disease) wherein attainment of the growth and development level of 2 years is not expected to occur.

110.09 *Immune deficiency disease.*

A. *Hypogammaglobulinemia or dysgammaglobulinemia.* With:

1. Recent, recurent severe infections; or

2. A complication such as growth retardation, chronic lung disease, collagen disorder, or tumors.

B. *Thymic dysplastic syndromes* (such as Swiss, diGeorge).

111.00 NEUROLOGICAL

A. *Seizure disorder* must be substantiated by at least one detailed description of a typical seizure. Report of recent documentation should include an electroencephalogram and neurological examination. Sleep EEG is preferable, especially with temporal lobe seizures. Frequency of attacks and any associated phenomena should also be substantiated.

Young children may have convulsions in association with febrile illnesses. Proper use of § 111.02 and § 111.03 requires that a seizure disorder be established. Although this does not exclude consideration of seizures occurring during febrile illnesses, it does require documentation of seizures during nonfebrile periods.

There is an expected delay in control of seizures when treatment is started, particularly when changes in the treatment regimen are necessary. Therefore, a seizure disorder should not be considered to meet the requirements of § 111.02 or § 111.03 unless it is shown that seizures have persisted more than three months after prescribed therapy began.

B. *Minor motor seizures.* Classical petit mal seizures must be documented by characteristic EEG pattern, plus information as to age at onset and frequency of clinical seizures. Myoclonic seizures, whether of the typical infantile or Lennox-Gastaut variety after infancy, must also be documented by the characteristic EEG pattern plus information as to age at onset and frequence of seizures.

C. *Motor dysfunction.* As described in § 111.06, motor dysfunction may be due to any neurological disorder. It may be due to static or progressive conditions involving any area of the nervous system and producing any type of neurological impairment. This

may include weakness, spasticity lack of coordination, ataxia, tremor, athetosis, or sensory loss. Documentation of motor dysfunction must include neurologic findings and description of type of neurologic abnormality (e.g., spasticity, weakness), as well as a description of the child's functional impairment (i.e., what the child is unable to do because of the abnormality). Where a diagnosis has been made, evidence should be included for substantiation of the diagnosis (e.g., blood chemistries and muscle biopsy reports), wherever applicable.

D. *Impairment of communication.* The documentation should include a description of a recent comprehensive evaluation, including all areas of affective and effective communication, performed by a qualified professional.

111.01 CATEGORY OF IMPAIRMENT, NEUROLOGICAL

111.02 *Major motor seizure disorder.*

A. *Major motor seizures.* In a child with an established seizure disorder, the occurrence of more than one major motor seizure per month despite at least three months of prescribed treatment. With:

1. Diurnal episodes (loss of consciousness and convulsive seizures); or

2. Nocturnal episodes manifesting residuals which interfere with activity during the day.

B. *Major motor seizures.* In a child with an established seizure disorder, the occurrence of at least one major motor seizure in the year prior to application despite at least three months of prescribed treatment. And one of the following:

1. IQ of 69 or less; or

2. Significant interference with communication due to speech, hearing, or visual defect; or

3. Significant emotional disorder; or

4. Where significant adverse effects of medication interfere with major daily activities.

111.03 *Minor motor seizure disorder.* In a child with an established seizure disorder, the occurrence of more than one minor motor seizure per week, with alteration of awareness or loss of consciousness, despite at least three months of prescribed treatment.

111.05 *Brain tumors.* A. Malignant gliomas (astrocytoma—Grades III and IV, glioblastoma multiforme), medulloblastoma, ependymoblastoma, primary sarcoma, or brain stem gliomas; or

B. Evaluate other brain tumors under the criteria for the resulting neurological impairment.

111.06 *Motor dysfunction (due to any neurological disorder).* Persistent disorganization or deficit of motor function for age involving two extremities, which (despite prescribed therapy) interferes with age-appropriate major daily activities and results in disruption of:

A. Fine and gross movements; or

B. Gait and station.

111.07 *Cerebral palsy.* With: A. Motor dysfunction meeting the requirements of § 111.06 or § 101.03; or

B. Less severe motor dysfunction (but more than slight) and one of the following:

1. IQ of 69 or less; or

2. Seizure disorder, with at least one major motor seizure in the year prior to application; or

3. Significant interference with communication due to speech, hearing, or visual defect; or

4. Significant emotional disorder.

111.08 *Meningomyelocele (and related disorders).* With one of the following despite prescribed treatment:

A. Motor dysfunction meeting the requirements of § 111.06 or § 111.03; or

B. Less severe motor dysfunction (but more than slight), and:

1. Urinary or fecal incontinence when inappropriate for age; or

2. IQ of 69 or less; or

C. Four extremity involvement; or

D. Noncompensated hydrocephalus producing interference with mental or motor developmental progression.

111.09 *Communication impairment, associated with documented neurological disorder.* And one of the following:

A. Documented speech deficit which significantly affects the clarity and content of the speech; or

B. Documented comprehension deficit resulting in ineffective verbal communication for age; or

C. Impairment of hearing as described under the criteria in § 102.08.

112.00 MENTAL AND EMOTIONAL DISORDERS

A. *Introduction.* This section is intended primarily to describe mental and emotional disorders of young children. The criteria describing medically determinable impairments in adults should be used where they clearly appear to be more appropriate.

B. *Mental retardation. General.* As with any other impairment, the necessary evidence consists of symptoms, signs, and laboratory findings which provide medically demonstrable evidence of impairment severity. Standardized intelligence test results are essential to the adjudication of all cases of mental retardation that are not clearly covered under the provisions of § 112.05A. Developmental milestone criteria may be the sole basis for adjudication only in cases where the child's young age and/or condition preclude formal standardized testing by a psychologist or psychiatrist experienced in testing children.

Measures of intellectual functioning. Standardized intelligence tests, such as the Wechsler Preschool and Primary Scale of Intelligence (WPPSI), the Wechsler Intelligence Scale for Children (WISC), the Revised Stanford-Binet Scale, and the McCarthey Scales of Children's Abilities, should be used wherever possible. Key data such as subtest scores should also be included in the report. Tests should be administered by a qualified and experienced psychologist or psychiatrist, and any discrepancies between formal test results and the child's customary behavior and daily activities should be duly noted and resolved.

Developmetal milestone criteria. In the event that a child's young age and/or condition preclude formal testing by a psychologist or psychiatrist experienced in testing children, a comprehensive evaluation covering the full range of developmental activities should be performed. This should consist of a detailed account of the child's daily activities together with direct observations by a professional person; the latter should include indices or manifestations of social, intellectual, adaptive, verbal, motor (posture, locomotion, manipulation), language, emotional, and self-care development for age. The above should then be related by the evaluating or treating physician to established developmental norms of the kind found in any widely used standard pediatrics text.

C. Profound combined mental-neurological-musculoskeletal impairments. There are children with profound and irreversible brain damage resulting in total incapacitation. Such children may meet criteria in either neurological, musculoskeletal, and/or mental sections; they should be adjudicated under the criteria most completely substantiated by the medical evidence submitted. Frequently, the most appropriate criteria will be found under the mental impairment section.

112.01 CATEGORY OF IMPAIRMENTS, MENTAL AND EMOTIONAL

112.02 *Chronic brain syndrome.* With arrest of developmental progression for at least six months or loss of previously acquired abilities.

112.03 *Psychosis of infancy and childhood.* Documented by psychiatric evaluation and supported, if necessary, by the results of appropriate standardized psychological tests and manifested by marked restriction in the performance of daily age-appropriate activities; constriction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others; together with persistence of one (or more) of the following:

A. Significant withdrawal or detachment; or

B. Impaired sense of reality; or

C. Bizarre behavior patterns; or

D. Strong need for maintenance of sameness, with intense anxiety, fear, or anger when change is introduced; or

E. Panic at threat of separation from parent.

112.04 *Functional nonpsychotic disorders.* Documented by psychiatric evaluation and supported, if necessary, by the results of appropriate standardized psychological tests and manifested by marked restriction in the performance of daily age-appropriate activities; construction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others; together with persistence of one (or more) of the following:

A. Psychophysiological disorder (e.g., diarrhea, asthma); or

B. Anxiety; or

C. Depression; or

D. Phobic, obsessive, or compulsive behavior; or

E. Hypochondriasis; or

F. Hysteria; or

G. Asocial or antisocial behavior.

112.05 *Mental retardation.*—A. Achievement of only those developmental milestones generally acquired by children no more than one-half the child's chronological age; or

B. IQ of 59 or less; or

C. IQ of 60–69, inclusive, and a physical or other mental impairment imposing additional and significant restriction of function or developmental progression.

13.00 NEOPLASTIC DISEASES, MALIGNANT.—A. *Introduction.* Determination of disability in the growing and developing child with a malignant neoplastic disease is based upon the combined effects of:

1. The pathophysiology, histology, and natural history of the tumor; and

2. The effects of the currently employed aggressive multimodal therapeutic regimens.

Combinations of surgery, radiation, and chemotherapy or prolonged therapeutic schedules impart significant additional morbidity to the child during the period of greatest risk from the tumor itself. This period of highest risk and greatest therapeutically-induced morbidity defines the limits of disability for most of childhood neoplastic disease.

B. *Documentation.* The diagnosis of neoplasm should be established on the basis of symptoms, signs, and laboratory findings. The site of the primary, recurrent, and metastatic lesion must be specified in all cases of malignant neoplastic diseases. If an operative procedure has been performed, the evidence should include a copy of the operative note and the report of the gross and microscopic examination of the surgical specimen, along with all pertinent laboratory and X-ray reports. The evidence should also include a recent report directed especially at describing whether there is evidence of local or regional recurrence, soft

part or skeletal metastasis, and significant post-therapeutic residuals.

C. *Malignant solid tumors*, as listed under § 113.03, include the histiocytosis syndromes except for solitary eosinophilic granuloma. Thus, § 113.03 should not be used for evaluating brain tumors (see § 111.05) or thyroid tumors, which must be evaluated on the basis of whether they are controlled by prescribed therapy.

D. *Duration of disability* from malignant neoplastic tumors is included in § 113.02 and § 113.03. Following the time periods designated in these sections, a documented diagnosis itself is no longer sufficient to establish a severe impairment. The severity of a remaining impairment must be evaluated on the basis of the medical evidence.

113.01 Category of impairments, neoplastic diseases—malignant.

113.02 *Lymphoreticular malignant neoplasms.* Consider under a disability:

A. For 2½ years from the time of initial diagnosis, or

B. For 2½ years from the time of recurrence of active disease.

113.03 *Malignant solid tumors.* Consider under a disability:

A. For 2 years from the time of initial diagnosis; or

B. For 2 years from the time of recurrence of active disease.

113.04 *Neuroblastoma.* With one of the following:

A. Extension across the midline; or

B. Distant metastasis; or

C. Recurrence; or

D. Onset at age 1 year or older.

113.05 *Retinoblastoma.* With one of the following:

A. Bilateral involvement; or

B. Metastases; or

C. Extension beyond the orbit; or

D. Recurrence.

[FR Doc.77-7605 Filed 3-15-77;8:45 am]

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

Public Observation of Parole Commission Meetings

On February 3, 1977 42 FR 6610, the United States Parole Commission published a notice of proposed rules implementing the requirements of 5 U.S.C. 552b, subsections (b) through (f), ("The Government in the Sunshine Act"). Following the period announced for the submission of public comment, the Commission voted to adopt its rules with the single change that § 16.200(e)(5) was expanded to clarify the functions of the study committees referred to in that section.

The only comment received was from Rep. Richardson Preyer, Chairman of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations. This letter raised several points of criticism, specifically discussed below.

1. Section 16.202(b) was criticized for prohibiting the use of "any mechanical or electronic device" to record an open meeting. The comment suggested consideration be given to permitting recording methods whose operation would not disturb the proceedings. The Commission reserves in its rule the right to grant prior permission for the use of such methods in appropriate circumstances. The Commission believes that as a general policy, a limitation to observation and note-taking prevents the possibility of disruption while providing members of the public with the opportunity to keep memoranda of points of interest to them.

2. Section 16.203(a)(4) was criticized for varying from the language of exemption 4 of the Act. However, the Commission believes that one proper function of agency rules is to apply a general law such as the Sunshine Act to the specific context within which the agency operates, and to explain its practical significance to day to day agency operations. No criticism was made that the type of financial information involved in applications for exemptions under 29 U.S.C. 504 and 1111, would not fall within the exemption for "financial information" set forth at section (c)(4), whenever obtained upon a promise of confidentiality.

3. Section 16.203(b) was criticized for not setting up a formal, two-step procedure by which the Commission would apparently first vote whether a meeting could be closed, and second, whether the meeting should be opened in the public interest, notwithstanding an available exemption under the law. However, such a procedural formality is not, in the Commission's view, required by the law. The Commission believes that it is implicit in its regulation, and it is the Commission's intent, that it will in all cases consider the public interest, and that it will open its meetings whenever feasible notwithstanding the available exemptions.

4. Section 16.203(d)(4) was criticized for failing to require certification by the General Counsel before a meeting may be closed. The Commission agrees that the better practice, as suggested in H. Rep. 94–1441, p. 19, is to obtain certification prior to the holding of a closed meeting, and will endeavor to make it its practice to do so. Moreover, the relative infrequency of Commission business and policy meetings (as compared with other agencies), makes the possibility of late certification generally unlikely. Only in the case of meetings to decide individual parole cases would the rare emergency be likely to arise (under statutory deadlines for decision-making) necessitating late certification.

5. Finally, § 16.204(c)(2) was criticized because it would permit deletion of items without notice; however, this deletion provision applies only to closed meetings. Thus, no member of the public planning to attend a meeting would be inconvenienced by such a deletion.

Accordingly, pursuant to the authority of 18 U.S.C. 4203(a)(1) and 5 U.S.C. 552b(g), a new Subpart F is added to 28 CFR, Chapter I, Part 16 as follows, effective March 12, 1977.

Dated: March 10, 1977.

GEORGE J. REED,
Acting Vice Chairman,
United States Parole Commission.

Subpart F—Public Observation of Parole Commission Meetings

AUTHORITY: 18 U.S.C. 4203(a)(1), 5 U.S.C. 552b(g).

Subpart F—Public Observation of Parole Commission Meetings

§ 16.200 Definitions.

As used in this part: (a) The term Commission means the United States Parole Commission and any subdivision thereof authorized to act on its behalf.

(b) The term meeting refers to the deliberations of at least the number of Commissioners required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business.

(c) Specifically included in the term meeting are:

(1) Meetings of the Commission required to be held by 18 U.S.C. 4203(a);

(2) Special meetings of the Commission called pursuant to 18 U.S.C. 4204(a)(1);

(3) Meetings of the National Commissioners in original jurisdiction cases pursuant to 28 CFR 2.17(a);

(4) Meetings of the entire Commission to determine original jurisdiction appeal cases pursuant to 28 CFR 2.27; and

(5) Meetings of the National Appeals Board pursuant to 28 CFR 2.26.

(6) Meetings of the Commission to conduct a hearing on the record in conjunction with applications for certificates of exemption under section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959, and section 411 of the Employee Retirement Income Security Act of 1974 (28 CFR 4.1–17 and 28 CFR 4a.1–17).

(d) Specifically excluded from the term meeting are:

(1) Determination made through independent voting of the Commissioners without the joint deliberation of the number of Commissioners required to take such action, pursuant to § 16.201;

(2) Original jurisdiction cases determined by sequential vote pursuant to 28 CFR 2.17;

(3) Cases determined by sequential vote pursuant to 28 CFR 2.24 and 2.25;

(4) National Appeals Board cases determined by sequential vote pursuant to 28 CFR 2.26;

(5) Meetings of committees of Commissioners, not constituting a quorum of the Commission, which shall be established by the Chairman to report and make recommendations to the Commis-