heading of this order and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 430.20.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Effective date. This regulation shall be effective May 18, 1982.

(Secs. 507, 701 (f) and (g), 52 Stat. 1055–1056 as amended, 59 Stat. 463 as amended (21 U.S.C. 357, 371, (f) and (g)))

Dated: May 7, 1982.

James C. Morrison,

Acting Assistant Director for Regulatory Affairs.

[FR Doc. 82-13301 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Part 510

New Animal Drugs; Change of Sponsor Address

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of several supplemental new animal drug applications (NADA's) filed by Byk-Gulden, Inc., providing for a change of sponsor address.

EFFECTIVE DATE: May 18, 1982.

FOR FURTHER INFORMATION CONTACT: John R. Markus, Bureau of Veterinary Medicine (HFV–104), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4313.

SUPPLEMENTARY INFORMATION: Byk–Gulden, Inc., filed several supplemental NADA's providing for changing its address to 60 Baylis Rd., Melville, NY 11747.

This action concerns a change of sponsor address, and does not involve any changes in manufacturing facilities, equipment, procedures, or production personnel. Under the Bureau of Veterinary Medicine's supplemental approval policy (42 FR 64367; December 23, 1977), this is a Category I change which does not require reevaluation of the safety and effectiveness data in the parent applications. The supplemental NADA's for the change of sponsor address are approved and the regulations are amended to reflect the approvals.

The Bureau of Veterinary Medicine has determined pursuant to 21 CFR 25.24(d)(1)(i) (proposed December 11, 1979; 44 FR 71742) that this action is of a type that does not individually or cumulatively have a significant impact on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This action is governed by the provisions of 5 U.S.C. 556 and 557 and is therefore excluded from Executive Order 12291 by section 1(a)(1) of the Order.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure; Animal drugs; Labeling; Reporting requirements.

PART 510—NEW ANIMAL DRUGS

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10 (formerly 5.1; see 46 FR 26052; May 11, 1981)) and redelegated to the Bureau of Veterinary Medicine (21 CFR 5.83), Part 510 is amended in § 510.600 by revising the entry "Bky-Gulden, Inc." in paragraph (c)(1) and revising the entry "025463" in paragraph (c)(2) to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Byk-Gulden, Inc., 60 Baylis Rd., Melville, NY 11747	025463
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
025463	Byk-Gulden, Inc., 60 Baylis Rd., Melville, NY 11747.
* * * * *	

Effective date. May 18, 1982.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)))

Dated: May 11, 1982.

Robert A. Baldwin,

Associate Director for Scientific Evaluation.

[FR Doc. 82-13302 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF LABOR

Office of Pension and Welfare Benefit Programs

29 CFR Part 2550

Rules and Regulations for Fiduciary Responsibility; Trust Requirement and Definition of Plan Assets—Governmental Mortgage Pools

AGENCY: Pension and Welfare Benefit Programs Office, Labor.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that: (1) Describe the assets that an employee benefit plan is considered to acquire, for purposes of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA), when it invests in certain governmental mortgage pools; and, (2) descibe the way in which the requirement of ERISA that plan assets must be held in trust is satisfied with respect to specified kinds of property. There has been considerable uncertainty regarding what constitutes "plan assets" with respect to a plan's investment in governmental mortgage pools, as well as uncertainty regarding the manner in which the trust requirement of ERISA is satisfied. The regulations will provide guidance to plan fiduciaries, participants and beneficiaries of plans, persons borrowing from plans, certain mortgage pool sponsors and other affected parties.

DATE: The regulation is effective June 17, 1982.

FOR FURTHER INFORMATION CONTACT: William A. Schmidt, Plan Benefits Security Division, Office of the Solicitor, telephone (202) 523–9592, or R. F. Nuissl, Office of Fiduciary Standards, Pension and Welfare Benefit Programs, telephone (202) 523–8369, U.S. Department of Labor, Washington, D.C. 20210.

SUPPLEMENTARY INFORMATION: On August 28, 1979, the Department of Labor (the Department) published a notice in the **Federal Register** (the 1979 proposal) (44 FR 50363) containing proposed regulations that would: (1) Describe property interests that would be regarded as assets of an employee benefit plan under ERISA, and (2) Provide a limited exemption from the

requirement of section 403(a) of ERISA that plan assets be held in trust. The notice gave interested persons an opportunity to comment on the proposal. At the request of certain members of the public, the comment period was extended and, after the expiration of the extended period, subsequently reopened (44 FR 61618, October 26, 1979; 44 FR 74858, December 18, 1979). The comment period was later reopened again in connection with the Department's public hearing on the proposals (45 FR 7521, February 1, 1980).

The public hearing on the proposals was held in Washington, D.C., on February 27 and 28, 1980. At the conclusion of the hearing, the record in the proceeding was held open until March 28, 1980, in order to permit the filing of additional submissions. On June 6, 1980, the Department reproposed paragraph (e) of proposed § 2550.401b–1 (the 1980 proposal) (45 FR 38084) which described the assets that a plan would be considered to own by reason of its acquisition of an equity security, and additional comments were received with respect to the matters covered by the reproposal.

In response to the proposals, the Department received comments from a great number of interested parties who raised questions regarding a variety of different arrangements that might be affected by the proposed regulation defining the term "plan assets." Among the commentators were representatives of certain governmental entities and quasi-governmental entities that sponsor mortgage pools in which a plan may invest. These commentators questioned whether certain provisions of the proposed regulation should apply to a plan's investment in such a pool. Since these comments involve issues that can be addressed separately from other issues that have been raised with respect to the proposed regulation, the Department has decided, in order to eliminate uncertainty, to issue a final regulation at this time which deals with the investments referred to above. This regulation describes the assets that a plan is considered to own, for purposes of the fiduciary responsibility provisions of ERISA [1] when it acquires an interest in a governmental pool.

[1] The regulation applies to Part 4 of Title I of ERISA and to section 4975 of the Internal Revenue Code. Section 102 of Reorganization Plan Number 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), gives the Department authority to issue regulations under most provisions of section 4975 of the Code, including those provisions to which the definition of the term "plan assets" is relevant.

The Department also believes that most of the issues raised in connection with the proposed regulation under section 403(a) of ERISA (relating to the requirement that plan assets be held in trust) may also be resolved at this time. Accordingly, this document also includes a final regulation which describes how the trust requirement of ERISA may be satisfied in specified situations.

The Department intends to address the other issues that have been raised with respect to the proposed plan assets regulation in the near future.

The discussion below summarizes the comments that were received by the Department in connection with those aspects of the proposed regulations that are being dealt with here and describes the provisions of the final regulations.

Plan Assets Regulation—Governmental Mortgage Pools

A. *Description of Governmental Mortgage Pools.* The Department received a number of comments regarding certain investment pools consisting of mortgage notes held for the benefit of investors who acquire certificates which represent a fractional undivided beneficial interest in, or are backed by, the pooled mortgages. Some of these mortgage pools are sponsored by a government agency or a quasi-governmental organization. The commentators were concerned that, under the proposed regulation, the assets of a plan that invests in a mortgage pool might be deemed to include the underlying mortgages of the pool (and the sponsor of such a pool might, therefore, be considered to be a fiduciary with respect to investing plans) under either paragraph (a) or paragraph (e) of the proposal. Paragraph (a) of the proposal provided, as a general rule, that the assets of a plan include any property in which the plan has a "beneficial ownership interest." Paragraph (e) of the proposal provided that the assets of an entity (other than an investment company registered under the Investment Company Act of 1940) in which a plan makes an equity investment will be deemed to include plan assets, unless a specified exception applied.[2] Since ERISA defines the term "fiduciary" to include, among others, persons who exercise authority or control respecting the management or disposition of the assets of a plan,[3] the effect of this provision would be to cause the managers of certain entities in which a plan makes an equity investment to be subject to all of the fiduciary responsibility provisions of ERISA with respect to their dealings with the entity's assets.

[2] The exceptions in the 1979 proposal were for securities issued by companies engaged primarily in the provision, production or sale of a product or service other than the investment of capital (operating companies) and securities that are widely held, freely transferable and registered pursuant to certain requirements of the Federal securities acts. The 1980 proposal also excluded securities issued by companies engaged directly in the management or development of real estate, and securities issued by certain venture capital companies, from the general rule.

Although some of the governmental mortgage pools described by the commentators involve instruments of the kind described in paragraph (b) of the proposed regulation (which stated that when a plan acquires certain interest-bearing securities that are issued by an agency or instrumentality of the United States, its assets would include the securities, but would not include any property underlying the securities), each of these governmental programs has certain different features. These features are described below.

1. *Government National Mortgage Association (GNMA) Mortgage Pools.* GNMA mortgage-backed securities are issued by a private lender, but are backed by pools of mortgages that are insured by the Department of Housing and Urban Development or guaranteed by the Veterans Administration. A holder of such securities acquires the right to receive a proportionate share of the principal and interest attributable to collections on the pooled mortgages, and, when a mortgage is liquidated as a result of prepayment or foreclosure, the security holder becomes entitled to a proportionate share of the unscheduled recovery of principal.

The issuer of GNMA guaranteed securities administers monthly payments to securities holders, and services the pooled mortgages. In addition, an issuer is required to make up from its own funds any shortfalls in scheduled collections as well as certain losses associated with foreclosure. If an issuer of GNMA guaranteed securities is unable to make any required payments as scheduled, GNMA either advances funds to the issuer or pays security holders directly so as to assure timely payment by the fifteenth day of each month. GNMA's guarantee is backed by the full faith and credit of the United States.

Upon the issuance of GNMA guaranteed securities, GNMA becomes the owner of the pooled mortgages, including any past or future collections attributable to the mortgages. Although the issuer, for administrative convenience, remains the mortgagee of

[3] See section 3(21)(A)(i) of ERISA.

record with respect to the pooled mortgages, its interest in such mortgages is, upon the issuance of the securities, reduced to the right to receive a service fee from GNMA (derived from mortgage collections) for so long as it remains an issuer in good standing.

2. *Federal National Mortgage Association (FNMA) Mortgage Pools.* FNMA engages in certain mortgage pool operations pursuant to the Federal National Mortgage Association Charter Act (the Charter Act).[4] The FNMA mortgage pools consist of mortgage loans purchased by FNMA and assembled into separate pools. FNMA holds the mortgages in each pool in trust for the benefit of investors in the pool and issues a "guaranteed mortgage pass-through certificate" to each investor which evidences a pro-rata undivided beneficial interest in the equitable ownership of the mortgage loans comprising each separate identified pool. FNMA is obligated to distribute to certificate holders amounts representing scheduled payments of principal and interest attributable to the underlying mortgages whether or not such amounts are actually received and is also obligated to distribute the full principal amount of any foreclosed or otherwise fully liquidated mortgage loan whether or not such principal amount is actually recovered.

FNMA was originally established in 1938 as a subsidiary of a government corporation. It is now a privately-owned corporation under the Charter Act. However, FNMA is regulated by the U.S. Department of Housing and Urban Development, its securities are provided the same exemption from the registration requirements of the Federal securities laws as that provided for securities issued by the government of the United States, and all offerings of FNMA debt securities and FNMA guaranteed mortgage pass-through certificates must be approved by the Secretary of the Treasury. In addition, one third of the members of the FNMA's board of directors are appointed by the President of the United States.

3. *Federal Home Loan Mortgage Corporation (FHLMC) Mortgage Pools.* FHLMC issues participation certificates and guaranteed mortgage certificates which convey a beneficial ownership interest in certain underlying mortgages. FHLMC guarantees payment of interest on the mortgages underlying guaranteed mortgage certificates or participation certificates to the extent of the certificate rate and also guarantees collection of principal on the mortgages. FHLMC is a corporate instrumentality of the United States created by Congress[5] for the purpose of increasing the availability of mortgage credit for the financing of housing. The Board of Directors of FHLMC is composed of the three members of the Federal Home Loan Bank Board, whose Chairman is the Chairman of the Board of FHLMC. The members of the Federal Home Loan Bank Board are appointed by the President of the United States with the advice and consent of the Senate. The capital stock of FHLMC consists solely of non-voting common stock held by the twelve Federal Home Loan Banks.[6]

B. *Discussion of the Final Regulation Relating to Governmental Mortgage Pools.* When an employee benefit plan invests in a governmental mortgage pool of the kind described above, it acquires a certificate that represents an undivided beneficial interest in, or is specifically backed by, the underlying mortgages of the pool. Thus, under the "beneficial ownership" test in paragraph (a) of the proposed regulation, the underlying mortgages might be considered to be "plan assets" by reason of such an investment. However, the governmental mortgage pool investments described above involve guarantees of the plan's investment by a government agency or government-sponsored corporation. In view of these special characteristics, the Department has concluded that it would be inappropriate to consider such underlying mortgages as plan assets solely because a plan may acquire an interest in the mortgages as an incident of its investment.

Even if the mortgages underlying a governmental mortgage pool are not considered to be plan assets under a "beneficial ownership" rule, the mortgages, might be considered to be plan assets under paragraph (e) of the proposed regulation, relating to equity securities.[7] As discussed in the preambles to both the 1979 proposal and the 1980 proposal, paragraph (e) reflected the Department's concern that, unless the underlying assets of certain entities in which an employee benefit plan invests are characterized as including "plan assets", the purposes of the fiduciary responsibility provisions of ERISA might easily be defeated. However, the special characteristics of governmental mortgage pools described above indicate that a plan's investment in such an entity is not the kind of investment that might be used to avoid fiduciary responsibility.[8] GNMA guaranteed pass-through mortgage certificates are guaranteed by the United States, and where such a guarantee by the United States exists with respect to a plan's investment in a mortgage pool, the Department believes that a plan that invests in the pool will look to the guarantee, rather than to the mortgages underlying the pool, for assurance that amounts due on its investment will be paid. Although FHLMC and FNMA mortgage pool certificates are not guaranteed directly or indirectly by the United States, each corporation guarantees principal and interest on such investments and, accordingly, an investing plan will rely on the creditworthiness of the issuing corporation in making its investment decision. Since there is a significant Federal government involvement in the management of each corporation, and protections similar to those provided to holders of GNMA mortgage pool certificates are afforded to holders of certificates in mortgage pools that are sponsored by FNMA and FHLMC, the Department has concluded that plan investments in these pools should, for purposes of the regulation, be treated in the same way as investments in mortgage pools that have a "full faith and credit" guarantee.

In view of the foregoing, the Department has decided that it is appropriate to treat all governmental mortgage pool investments in the manner contemplated by paragraph (b) of the proposal (relating to obligations of the United States or an agency or instrumentality thereof). Accordingly, the final regulation provides that when a plan invests in a governmental mortgage pool, its assets include its investment,

[4] 12 U.S.C. 1716–1723h.

[5] Title III of the Emergency Home Finance Act of 1970, as amended, 12 U.S.C. 1451–1459.

[6] Legislation has recently been introduced that would, among other things, result in the conversion of the non-voting capital stock of FHLMC to voting common stock and would provide authority for distribution of voting stock to the shareholders of the various Federal Home Loan Banks. FHLMC also would have authority to sell common and preferred stock to the public, and, after a transitional period, six of the nine directors of FHLMC would be elected by the common stockholders.

[7] The exception in paragraph (e), as proposed, for securities that are widely held, freely transferable and registered under certain provisions of the Federal securities acts would not be available for interests in governmental mortgage pools because such interests are issued pursuant to an exemption from the registration requirements of the Securities Act of 1933. *See* 15 U.S.C. 77c(a)(2) (relating to securities guaranteed by the United States or an instrumentality thereof) and 12 U.S.C. 1719(b) (relating to interests in FNMA pools).

[8] Although the distinction between investments in governmental mortgage pools and those equity investments that would be subject to the general "look through" rule of paragraph (e) of the proposal is significant to the Department's decision to adopt a special rule for governmental mortgage pools, the discussion in this notice should not be read to imply that paragraph (e) will ultimately be adopted substantially as it was proposed.

but do not, solely by reason of such investment, include any of the underlying mortgages. Thus, the sponsor or manager of a governmental mortgage pool would not be a fiduciary of a plan merely by reason of the plan's investment in the pool. The regulation specifically states that interests in FHLMC, GNMA and FNMA mortgage pools are among the investments to which the regulation's general rule applies.[9]

C. *Other Issues Under the Proposed Plan Assets Regulation.* As noted above, the Department has decided to issue a final regulation relating to governmental mortgage pools at this time in view of the widespread concern regarding the potential effect of the proposed regulation, if adopted, on employee benefit plan investments in such pools and the consequent need for guidance in this area. However, the Department is not prepared at this time to issue a final regulation which deals comprehensively with the definition of "plan assets" as it relates to the fiduciary responsibility provisions of ERISA. Nonetheless, the Department contemplates that the regulation being adopted here will be redesignated and incorporated in the forthcoming plan assets regulation.

Regulation Relating to the Trust Requirement

A. *General Considerations.* The comments received by the Department in connection with the proposed regulation under section 403(a) of ERISA indicated that there is uncertainty regarding the manner in which the requirement of that section that plan assets be "held in trust" may be satisfied with respect to various kinds of property. The final regulations under section 403(a) contain specific rules for those arrangements that were of most concern to the commentators. These specific rules are discussed below.

The rules in the final regulation are intended to permit trustees to hold plan assets in conventional ways, but are also intended to be consistent with the purposes underlying the trust requirement of section 403(a) of ERISA. In this respect, the Department noted in the preamble to its original proposed regulation under section 403(a) that an underlying rationale of the trust requirement is to prevent commingling of plan assets.[10] In addition, the Department believes that the trust requirement also should be interpreted in the context of the further requirement of section 403(a) that the plan's trustee [11] must have exclusive authority and discretion to manage and control the assets of the plan (except as otherwise specifically provided). In the Department's view, the purposes underlying the trust requirement suggest that the two primary considerations in determining whether a particular arrangement satisfies the trust requirement are: (1) The segregation of the property so as to prevent commingling of the property held in trust with property held for his own account by the person managing the property; and, (2) The trustee's retention of the exclusive authority and discretion to manage and control all of the plan's rights with respect to the property.

When the primary considerations identified above are taken into account, it is apparent that plan trustees should have considerable flexibility under the trust requirement to determine the manner in which an asset of the plan will be held. Nonetheless, plan assets must, in any event, be held in a manner that is consistent with the general fiduciary provisions of ERISA, including the "prudence" rule of section 404(a)(1)(B).[12] In addition, a person holding property on behalf of the plan's trustee may be acting as agent for the trustee. The Department is not addressing here the question of the extent to which a plan trustee is responsible as principal for the acts of such a person.

B. *Street Name and Nominee Registration.* In footnote 14 to the preamble of the 1979 proposal, the Department suggested that, generally, the practice of registering securities in which a plan has invested in the name of a broker-dealer or its nominee (sometimes referred to as "street name" registration) [13] would violate the requirement of section 403(a) of ERISA that plan assets be held in trust, unless the broker-dealer held the securities as trustee for the plan pursuant to an executed trust agreement. Several commentators stated that it is customary for the securities of employee benefit plans to be held in street name and urged that the Department reconsider whether it is permissible to hold securities in this manner under section 403(a).

According to the commentators, where securities are owned by an employee benefit plan, but registered in street name, the interests of the plan are adequately protected, and a plan trustee's control over such assets is assured, even though the securities are not actually registered in the name of the trust under which the plan is maintained. In this regard, the commentators pointed out that the Securities and Exchange Commission has promulgated rules that specifically regulate the conduct of a broker-dealer with respect to its holdings of customer securities.[14]

Moreover, the commentors noted, insurance is provided (under the Securities Investor Protection Act of 1970) [15] against losses resulting from the insolvency of a broker-dealer in whose name, or in the name of whose nominee, securities of a plan are held. In addition, the commentators noted that most major broker-dealers also carry additional insurance against losses which exceed the amount covered by the Securities Investor Protection Act. The commentators also pointed out that the Federal Bankruptcy Code establishes certain preferences in bankruptcy with respect to claims against a broker-dealer in whose name securities are held on behalf of a customer,[16] and those

[9] Of course, the plan's interest in a governmental mortgage pool would itself be an asset of the plan, and would include all of the rights of a holder of such an interest under applicable law.

[10] 39 FR 44456, December 24, 1974.

[11] The discussion in this notice refers to a single plan "trustee" for purposes of convenience. However, section 403(a) expressly contemplates that a plan may have more than one trustee, and, where a plan does have more than one trustee, such trustees are generally obligated, under section 405(b)(1)(B) of ERISA, to jointly manage and control the assets of the plan. The discussion of the trust requirement in this document also applies to a plan with two or more trustees.

[12] Whether a person holding property on behalf of a plan is a fiduciary with respect to such property would be determined under the definition of that term in section 3(21) of ERISA.

[13] Securities also are frequently held in the name of a nominee of an institutional investor (such as a bank or insurance company) and such arrangements are referred to as "nominee" name registration. *See* Final Report of the Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities 1 (1976).

[14] The commentators specifically referred to Rules 8c–1, 15c–1 and 15c3–3 under the Securities Exchange Act of 1934 (17 CFR 240.8c–1, 240.15c2–1 and 240.15c3–3). Rules 8c–1 and 15c2–1 restrict the hypothecation of customers' securities by a broker-dealer; rule 15c3–3 establishes rules relating to a broker-dealer's control over securities held on behalf of a customer and also requires a broker-dealer to establish a special reserve account with a bank for the exclusive benefit of customers.

[15] 15 U.S.C. 78aaa–78*lll*. The Securities Investor Protection Act of 1970 established the Securities Investor Protection Corporation, which has authority to bring actions in order to assure the protection of customers of a broker-dealer and also administers a fund from which advances may be made, subject to certain limitations, in order to satisfy a broker-dealer's obligation to its customers.

[16] 11 U.S.C. 752. Section 752 provides for the priority distribution of customer property to a broker-dealer's customers to the extent of their "allowed net equity claims." In general, the customer's "net equity claim" is equal to the amount

Continued

provisions provide additional protection against loss.

The commentators also pointed out that the plan trustee does not relinquish control over securities of an employee benefit plan merely because they are registered in street name. For example, the owner of stock registered in street name must be given proxy solicitations and has the right to vote the stock, and, in addition, is entitled to bring stockholder derivative actions.

The commentators also stated that street name registration may, in some respects, be advantageous to employee benefit plans. Several commentators pointed out that a plan's actual registration of securities increases the costs associated with holding and transfer of the securities. In addition, some commentators asserted that street name registration is particularly important for plans that allow a participant to direct the investment of his individual account [17] because such transactions are normally relatively small and their timing is not under the control of the plan's trustee.

According to the commentators, the use of street name registration is an important factor in the promotion of a Congressional policy favoring the establishment of a national clearance and settlement system because the ability to deposit and maintain customers' securities in a securities depository (thereby eliminating the necessity for the physical movement and delivery of stock certificates and making possible book entry transfers) is an essential component of such a national clearance and settlement system.[18] In this respect, some commentators called particular attention to certain central securities depositories which routinely hold securities in the name of a nominee.

The Department has reconsidered its position with respect to the application of the trust requirement to securities that are owned by an employee benefit plan, but are registered in street name. On the basis of the comments received, it appears that where securities owned by a plan are held in the name of a nominee or in street name, the trustee of the plan ordinarily retains exclusive control over all of the rights of ownership of such securities. For example, notwithstanding that securities are held in street name, the trustee may freely sell the securities, or pledge them, and, in the case of stock, may vote the shares. In addition, the comments received indicate that other statutes and regulations relating to such arrangements provide certain meaningful protections to the owners of securities (including plans) against the risks arising from the registration of the securities in the name of an entity other than their beneficial owner. Therefore, the Department has determined that the holding of securities of an employee benefit plan in nominee or street name will not, in itself, be a violation of the trust requirement of section 403(a). A new paragraph has accordingly been added to the final regulation to make it clear that the trust requirement of section 403(a) does not prohibit the holding of securities in street name or in the name of a nominee, provided such securities are held on the plan's behalf by a bank or its nominee, a broker-dealer or its nominee, or a "clearing agency" (as defined in the Securities Exchange Act of 1934) or its nominee.[19]

Notwithstanding the inclusion of a specific provision relating to street name registration in the final regulation, the Department notes that plan trustees and other plan fiduciaries should take steps to assure that any such arrangement in fact provides the trustee or trustees of the plan with authority and control over the securities. In addition, plan trustees and other fiduciaries have an obligation to evaluate the safeguards against loss that exist with respect to an arrangement under which securities owned by a plan are held in street name.[20] Such an evaluation is a particularly important part of a fiduciary's obligations in this context because the plan might be unable to dispose of securities held in street name on its behalf if the holder of such securities becomes bankrupt.

C. *Corporations Described in Section 501(c)(2) of the Internal Revenue Code.* Some commentators expressed concern that the regulation relating to the trust requirement as proposed by the Department would prevent a trustee of a plan from holding real property in a corporation described in section 501(c)(2) of the Internal Revenue Code.[21] According to these commentators, certain trustees have traditionally established such corporations in order to hold title to real property in states in which they do not do business because many states prohibit corporations other than those domiciled or doing business in the state from owning real property that is located within the state.

In the case of a corporation described in section 501(c)(2) of the Code that is organized for purposes of holding real property on behalf of a plan, the plan's rights to the assets of such corporation—*i.e.* the real property held by the corporation—are evidenced by shares of stock. Therefore, it appears that, under such an arrangement, a plan trustee would control all of the plan's rights with respect to such property if he holds all of the stock in trust.[22] Accordingly, the final regulation has been revised to make it clear that the trust requirement of section 403(a) would be satisfied with respect to real property held in a 501(c)(2) corporation on behalf of the plan if the stock of the corporation is held in trust.

D. *Certain Plan Investments.* Under the Department's proposed regulation dealing with the definition of plan assets, the assets of an entity in which a plan makes an equity investment under certain circumstances would include "plan assets".[23] Several commentators

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that would have been realized at the time of filing of the bankruptcy petition, upon liquidation of the customer's security position, less the amount of any claims of the broker-dealer against the customer. *See* 11 U.S.C. 741(a)(5).

[17] Section 404(c) of ERISA specifically contemplates participant directed individual account plans.

[18] The commentators referred specifically to Pub. L. No. 94–21 (May 9, 1975) which amended certain provisions of the Federal securities acts. Section 2 of that statute states that one of Congress' purposes in enacting the amendments was to "remove impediments to and perfect mechanisms of * * * a national system for clearance and settlement of securities transactions and the safeguarding of securities and fails related thereto."

[19] The specific provision relating to securities held in street name or by a nominee deals with those arrangements which were brought to the attention of the Department in the public comments. The regulation does not specifically address how the trust requirement would be satisfied with respect to other arrangements under which securities might be held on behalf of a plan.

[20] See the general discussion above regarding the application of the trust requirement. Among the factors that would be relevant to such an evaluation in cases where securities are held in the name of a broker-dealer or its nominee would be the financial stability of the broker-dealer, the safeguards established for the holding of securities, the extent to which adequate insurance is provided against loss (relative to the value of the securities held on behalf of the plan), and the feasibility of alternative methods of holding the securities.

[21] Section 501(c)(2) of the Code exempts from taxation a "(c)orporation organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the entire amount thereof, less expenses, to an organization which is itself exempt under this section." (Section 501(a) of the Code exempts from taxation trusts that form part of an employee pension plan that meets the requirements of section 401(a) of the Code).

[22] The Department will separately address the issue of when the assets of a plan will be considered to include the underlying assets of a corporation which is wholly owned by the plan in its final regulation dealing with the definition of "plan assets." The Department also notes that Interpretive Bulletin 75–2, 29 CFR 2509.75–2 describes the application of certain of the fiduciary responsibility provisions of ERISA in cases where a corporation is controlled by a plan.

[23] See paragraph (e) of the proposed plan assets regulation, discussed above.

noted that the proposed regulation relating to the trust requirement did not state how the requirement that plan assets be held in trust is satisfied in such cases.

The Department is not at this time addressing all of the issues that have been raised in connection with the proposed regulations relating to plan investments in entities such as corporations and partnerships. Nonetheless, the Department believes that is both feasible and appropriate to describe, in the regulation being issued here, how the trust requirement of ERISA is satisfied where the assets of an entity include plan assets by reason of a plan's investment in the entity.

In the Department's view, the fact that the assets of an entity in which a plan invests may, for purposes of the fiduciary responsibility provisions ERISA, be considered to include plan assets does not, in itself, have the effect of requiring that the assets of the entity be held in trust. In such circumstances, the plan's rights in the entity, and the terms and conditions to which its interest in the entity is subject, are usually governed by a contract, certificate, or other instrument. Where control over such an instrument is sufficient to provide the plan's trustee with exclusive authority to exercise all to the plan's rights with respect to the assets of the entity (other than those rights which arise from the fiduciary obligations of either the management of the entity or other persons who are fiduciaries with respect to such assets) the trustee's control of such instrument is sufficient to satisfy the trust requirements of section 403(a). For example, if the assets of a limited partnership are considered (for purposes of ERISA) to include plan assets by reason of a plan's acquisition of an interest in the partnership, persons with discretionary authority or control with respect to the assets of the partnership would be fiduciaries (because they are exercising discretion over plan assets). However, under the final trust regulation, it is the evidence of the plan's interest in the partnership, rather than some other evidence of ownership of an interest in each of the partnership's assets, that must be held in trust.

In view of the foregoing, the final regulation relating to the trust requirement includes a new paragraph which indicates that when the assets of an entity are considered to include plan assets by reason of a plan's investment in the entity, the trust requirement is satisfied if the certificate, contract or other instrument evidencing the plan's investment is held in trust.

E. *Administrative Exemptions From the Trust Requirement.* Several commentators discussed various issues concerning the provision of the proposed regulations that would have provided a limited exemption from the trust requirement of section 403(a) for certain employee contributions under welfare plans. This provision has been reserved in the final regulation. Many of these commentators also raised issues relating to when employee contributions become "plan assets," and the Department intends to deal with all of the comments relating to employee contributions in its regulation relating to the definition of that term.

Another commentator requested that the Department provide an exemption from the trust requirement for certain organizations described in section 501(c)(9) of the Internal Revenue Code. The Department will also deal separately with that issue.

F. *Conforming Change.* Section 403b–1(b) of the final regulation has been modified to include an additional exemption from the trust requirement of ERISA that was enacted as part of the Multiemployer Pension Plan Amendments Act of 1980. This exemption concerns certain unfunded plans of companies owned by employees and former employees.[24]

G. *Organization of the Final Regulation Relating to the Trust Requirement.* In view of the revisions that have been made to the final regulation, the Department has decided to reorganize the regulation for the purpose of clarity. Paragraph (a) of the regulation under section 403(a) sets forth the general rule that plan assets must be held in trust; paragraph (b) of the regulation describes the manner in which the trust requirement is satisfied in certain specific situations; paragraph (c) sets forth specific obligations of trustees and is derived from paragraph (a) of the proposed regulation.

The final regulation under section 403(b) sets forth the exemptions from the trust requirement specifically established by statute.

In addtion, a minor revision has been made to paragraph (a)(3) of the regulation under section 403(b) to make it clear that the language limiting the availability of the statutory exemption in section 403(b)(3) of ERISA to assets held under certain custodial accounts applies to plans covering employees described in section 401(c)(1) of the Internal Revenue Code as well as to individual retirement accounts.

[24] See section 411(c), Pub. L. 96–364, September 25, 1980.

Regulatory Flexibility Act

The requirements of 5 U.S.C. 603–604 are not applicable to regulations with respect to which a notice of proposed rulemaking was published before January 1, 1981. *See* section 4 of the Regulatory Flexibility Act, Pub. L. 96–354, 94 Stat. 1165 (1980).

Executive Order 12291

The Department has determined that the regulations being issued here are not "major" rules as defined in section 1(b) of Executive Order 12291, because they are not likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Estimates recently compiled by the Department of Housing and Urban Development indicate that approximately 7.3% of current (1981) private non-insured plan assets are in housing related entities, or approximately $20 billion. To the extent pension fund fiduciaries have avoided investing pension fund assets in governmental mortgage pools because of concern or uncertainty as to the extent of their fiduciary liabilities or fear of engaging in prohibited transactions, this regulation could increase investments by pension funds in governmental mortgage pools. This possible transfer of funds from other investments to governmental mortgage pools, will, of course, result in no net increase in pension fund investments in the economy.

While no additional pension investments will result from the regulation relating to governmental mortgage pools, the allocation of plan assets among competing investments would be expected to be more efficient to the extent there have been impediments imposed on investment managers. In addition, the regulation would not result in a reduction in protection offered plan participants and beneficiaries. Therefore, the regulation should not have any adverse, and could have a positive, effect on competition for funds and the functioning of the market.

Similarly, the clarification of the trust requirement will allow normal business practices to continue while still protecting the interests of participants and beneficiaries.

Paperwork Reduction Act

The regulations being issued here are not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) because they do not contain an "information collection request" as defined in 44 U.S.C. 3502(11).

Statutory Authority

The regulations below are adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and under section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR, 1978 Comp., .332.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Employee Retirement Income Security Act, Employee Stock Ownership Plans, Exemptions, Fiduciaries, Investments, Investments, foreign, Party in interest, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and trustees.

Regulation

For the reasons stated above, Subchapter F, Chapter XXV, Subtitle B, of Title 29, Code of Federal Regulations, is amended as set forth below.

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for Part 2550 is revised to read as follows:

Authority: Sec. 505, Employee Retirement Income Security Act of 1974. Pub. L. 93–406, 88 Stat. 894 (29 U.S.C. 1135) unless otherwise noted. Sec. 401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR, 1978 Comp. .332.

2. In Part 2550, a new § 2550.401b–1 is added, in the appropriate place, to read as follows:

§ 2550.401b–1 Definition of "Plan Assets"—Governmental Mortgage Pools.

(a) *In General.* (1) Where an employee benefit plan acquires a guaranteed governmental mortgage pool certificate, as defined in paragraph (b), then, for purposes of part 4 of Title I of the Act and section 4975 of the Internal Revenue Code, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate.

(b) A "guaranteed governmental mortgage pool certificate" is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. The term "guaranteed governmental mortgage pool certificate" includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:

(1) The Government National Mortgage Association;

(2) The Federal Home Loan Mortgage Corporation; or

(3) The Federal National Mortgage Association.

3. In Part 2550, § 2550.403a–1 and § 2550.403b–1 are added in the appropriate place to read as follows:

§ 2550.403a–1 Establishment of trust.

(a) *In General.* Except as otherwise provided in § 403b–1, all assets of an employee benefit plan shall be held in trust by one or more trustees pursuant to a written trust instrument.

(b) *Specific applications.* (1) The requirements of paragraph (a) of this section will not fail to be satisfied merely because securities of a plan are held in the name of a nominee or in street name, provided such securities are held on behalf of the plan by:

(i) A bank or trust company that is subject to supervision by the United States or a State, or a nominee of such bank or trust company;

(ii) A broker or dealer registered under the Securities Exchange Act of 1934, or a nominee of such broker or dealer; or

(iii) A "clearing agency," as defined in section 3(a)(23) of the Securities Exchange Act of 1934, or its nominee.

(2) Where a corporation described in section 501(c)(2) of the Internal Revenue Code holds property on behalf of a plan, the requirements of paragraph (a) of this section are satisfied with respect to such property if all the stock of such corporation is held in trust on behalf of the plan by one or more trustees.

(3) If the assets of an entity in which a plan invests include plan assets by reason of the plan's investment in the entity, the requirements of paragraph (a) of this section are satisfied with respect to such investment if the indicia of ownership of the plan's interest in the entity are held in trust on behalf of the plan by one or more trustees.

(c) *Requirements concerning trustees.* The trustee or trustees referred to in paragraphs (a) and (b) shall be either named in the trust instrument or in the plan instrument described in section 402(a) of the Act, or appointed by a person who is a named fiduciary (within the meaning of section 402(a)(2) of the Act). Upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that:

(1) The plan instrument or the trust instrument expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the provisions of Title I of the Act of Chapter XXV of this Title, or

(2) Authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers (within the meaning of section 3(38) of the Act) pursuant to section 402(c)(3) of the Act.

§ 2550.403b–1 Exemptions from Trust Requirement.

(a) *Statutory exemptions.* The requirements of section 403(a) of the Act and section 403a–1 shall not apply—

(1) To any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) To any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) To a plan—

(i) Some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1954; or

(ii) Which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954 to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code, whichever is applicable;

(4) To a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code.

(5) To any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their

beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to the Act.

(b) [Reserved]

Signed at Washington, D.C. this 13th day of May, 1982.

Jeffrey N. Clayton,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

[FR Doc. 82-13400 Filed 5-13-82; 3:17 pm]

BILLING CODE 4510-29-M

POSTAL SERVICE

39 CFR Part 265

Release of Information; Disclosure of Listings of Employees at Postal Facilities

Correction

In FR Doc. 82-13047, appearing at page 20303, in the issue of Wednesday, May 12, 1982, make the following correction:

On page 20304, in § 265.6(e) the 8th line should read "names or addresses (past or present) of".

BILLING CODE 1505-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 228

Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: Section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, directs the Secretary to allow, upon request, the taking of small numbers of marine mammals incidental to specified activities if the Secretary makes certain findings and prescribes regulations. These regulations establish a mechanism for the submission and evaluation of requests and establish requirements for specific regulations and Letters of Authorization to conduct allowed activities. In addition, pursuant to a request and available information, specific regulations allowing the taking of ringed seals incidental to on-ice seismic exploratory activities in the Beaufort Sea for the period 1982 to 1986, which set forth permissible methods of taking and requirements for monitoring and reporting, are established.

EFFECTIVE DATE: These regulations become effective on May 18, 1982.

FOR FURTHER INFORMATION CONTACT: Mr. R. B. Brumsted, Acting Deputy Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, U.S. Department of Commerce, Washington, D.C. 20235, Telephone (202) 634-7529.

SUPPLEMENTARY INFORMATION:

Background

Pub. L. 97-58 amended the Marine Mammal Protection Act of 1972 (MMPA), by adding, among other things, a new Section 101(a)(5) (16 U.S.C. 1371(a)(5)) which directs the Secretary to allow, upon request by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, the incidental, but not intentional, taking of small numbers of marine mammals. This permission may be granted for periods of five years or less. Such taking may be allowed only if the species involved is not depleted and if the Secretary, after notice and opportunity for public comment, (a) finds that the total taking will have a negligible impact on the species, its habitat, and the availability of the species for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking.

On November 20, 1981 (46 FR 57098), the National Marine Fisheries Service (NMFS) published a Request for Information and Advanced Notice of Proposed Rulemaking in the **Federal Register**, which solicited information and suggestions from interested persons on (a) the types of activities that may be authorized under Section 101(a)(5); (b) the structure and content of regulations relating to permissible methods of taking, monitoring and reporting; and (c) a processing system for individual requests for such permission to take. In particular, NMFS specifically invited relevant information concerning seismic activities which might affect marine mammals so that appropriate implementing regulations could be considered.

The NMFS published proposed regulations in the **Federal Register** on March 3, 1982 (47 FR 9027), to implement Section 101(a)(5) of the MMPA by establishing a mechanism for the submission and evaluation of requests and establishing requirements for specific regulations and Letters of Authorization to conduct allowed activities (50 CFR Part 228, Subpart A). In addition, pursuant to a request from the International Association of Geophysical Contractors and available information, specific regulations to allow the taking of ringed seals (*Phoca hispida*) incidental to on-ice seismic exploratory and associated activities in the Beaufort Sea for the period 1982 to 1986 were proposed which set forth permissible methods of taking and requirements for monitoring and reporting (50 CFR Part 228, Subpart B). These regulations were based on a proposed finding that on-ice seismic exploratory activities in the Beaufort Sea of Alaska over the next five years may involve the taking of small numbers of non-depleted marine mammals, specifically ringed seals, and that the total of such taking will have a negligible impact on the species, on its habitat, and on the availability of such species for subsistence uses. The **Federal Register** notice also invited requests and outlined the information required for Letters of Authorization to conduct activities pursuant to final regulations, if established, for on-ice seismic activities.

Comments and Discussion

Ten comments were received from the public on the proposed regulations: The Whale Center felt the general regulations were appropriate, but expressed concern over the specific regulations governing the taking of ringed seals incidental to on-ice seismic activities.

The Environmental Defense Fund submitted comments on the general and specific regulations to ensure that the regulations provide for a system of accountability designed to evaluate the effects of each activity, and that the allowed activity be reevaluated annually.

The Animal Protection Institute of America expressed concern that the regulations regarding the incidental taking of ringed seals by seismic activities did not seem to address the effects of such taking on the health and stability of the ecosystem, and that the harassment and displacement of nursing females, which they feel will result in pup mortality, appear to violate at least the spirit of the MMPA which was intended to offer special protection to infant and nursing marine mammals.

The Alaska Department of Fish and Game expressed a general concern about the annual differences in the

geographical extent and intensity of seismic exploration since the impact is directly proportional to these factors. The ADF&G felt that all seismic lines actually shot should be plotted to monitor the intensity and assess the probable impacts. Further, the ADF&G felt that in the vicinity of Point Barrow, on-ice seismic activity conducted after mid-April may be in close proximity to the migratory corridors of the bowhead and beluga whales, and that this should be considered.

The Mayor, North Slope Borough, felt that the effects on the Beaufort Sea population of ringed seals would be more than negligible and that no taking should be allowed until the study by the Alaska Department of Fish and Game assessing the degree of disturbance of ringed seals has been completed. The Mayor also expressed concern that the seismic work might impact bowhead and beluga whales. The law firm of Terris and Sunderland, which submitted additional comments on behalf of the North Slope Borough, felt that the definition of "small numbers" should be changed, and that the specific regulations governing seismic activities would allow the taking of large numbers of ringed seals, would involve significant adverse impacts on the population, would impose inadequate monitoring and research obligations, and would be inconsistent with NMFS' April 1, 1982, biological opinion on Outer Continental Shelf activities in the Arctic Region.

Defenders of Wildlife, while not opposed to the regulations, did express reservations about the new amendment which sanctions human activities which have some degree of adverse impact on marine mammals. Defenders felt that NMFS must ensure that progress is made towards eliminating adverse effects on all marine mammals and that research be conducted to address the effects of seismic activities on other species including beluga whales, bearded and spotted seals, and endangered whales.

The taking of a depleted species cannot be allowed under Section 101(a)(5) of the MMPA. The bowhead whale is listed as depleted under the MMPA and is listed as endangered under the Endangered Species Act of 1973. Under Section 7 of the Endangered Species Act, the Bureau of Land Management and the Minerals Management Service, Department of the Interior, are required to consult with NMFS to ensure that activities associated with the Outer Continental Shelf oil and gas program are not likely to jeopardize the continued existence of endangered species or result in the destruction or adverse modification of critical habitat. In biological opinions issued pursuant to Section 7(b) of the Endangered Species Act, NMFS has included reasonable and prudent alternatives and recommendations to assist the Department of the Interior in planning OCS acitivities in the Arctic Region and fulfilling its obligations under Section 7 of the Endangered Species Act.

The NMFS does not have information which indicates that on-ice seismic activities will result in the taking of beluga whales, bearded or spotted seals, or other species of marine mammals. Further, these regulatons would not allow the taking of species of marine mammals other than ringed seals.

The International Association of Geophysical Contractors and the National Ocean Industries Association submitted joint comments in support of the regulations and findings, as proposed. The IAGC and NOIA offered to cooperate in a training program to assure that the observations and reports are made on a sound basis, and have been advised by the Alaska Department of Fish and Game that they would be willing to cooperate in such a venture. Further, IAGC and NOIA stated that geophysical operators have met with members of the Alaska Department of Fish and Game to assist in the design of the scientific studies. Exxon suggested certain changes to the wording of the regulations.

Chevron U.S.A. Inc. felt that the regulations proposed are not necessary and should not be adopted because: there can be no justification for a regulation on an activity that admittedly will have a negligible impact on the species; contrary to a statement in the discussion, the proposed regulations would regulate or restrict seismic activities because of the burden and the bureaucracy required to implement the regulations; the contention that the requirements of the Paperwork Reduction Act are inapplicable was erroneous; and the propriety, if not the authority, to change the definition of "taking" to accommodate the proposed regulations was questioned.

In regard to Chevron's comments, the MMPA requires the establishment of regulations to allow the taking of small numbers of marine mammals where the taking will have a negligible impact. The definition of "taking" has not been changed; however, "incidental, but not intentional, taking" has been defined since only this type of taking is allowed under Section 101(a)(5) of the MMPA. The NMFS does not believe that the requirements of the regulations place an undue burden or restrict seismic activities. Nor does NMFS have any indication that more than nine contractors will be requesting Letters of Authorization, and therefore has determined that the requirements of the Paperwork Reduction Act are not applicable.

In addition, comments were received from NMFS Regional Offices, the Marine Mammal Commission, and the Minerals Management Service and the Office of OCS Program Coordination, U.S. Department of the Interior. All comments are available for review in the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, 3300 Whitehaven Street, N.W., Washington, D.C.

Specific substantive comments on Subpart A and Subpart B of the regulations and the proposed findings under MMPA will be discussed separately.

Subpart A—General

Section 228.1 Purpose. It was suggested that the purpose statement be clarified to state that the permission to take can be allowed only "for a specified period of time not to exceed five consecutive years." The House Report on the Amendment (No. 97–228) states that the permission to take can be granted for periods of five years or less, but does not imply that taking cannot be allowed after the five-year (or less) period originally authorized for a specified activity is reached. After the initial period authorized, the permission to take could be allowed again for the same activity only after additional opportunity for public comment and after the necessary findings were made. Therefore, the purpose statement has been modified to state that the taking can be allowed during periods of not more than five consecutive years each.

Section 228.2 Scope. The required finding of negligible impact has been modified to read "* * * finds that the total taking during the specified time period will have a negligible impact * * *," as suggested by one reviewer. Further, it was suggested that the total taking must be considered with other factors which impact the population, such as predation and taking for subsistence use, in a determination of negligible impact. The NMFS agrees and feels that the present wording takes this into account.

Section 228.2 states that the taking can be allowed only after NMFS "prescribes regulations setting forth permissible methods of taking and other

means of effecting the least practicable adverse impact on the species and their habitat * * *." It was suggested that the phrase "means of effecting the least practicable adverse impact" be replaced by language indicating that activities should be conducted so as to minimize adverse effects. The NMFS has used the specific language contained in Section 101(a)(5) of the MMPA, which NMFS believes includes specifying methods of conducting an activity. Therefore, the suggested change has not been made.

Section 228.3 Definitions. It was suggested that the definition of incidental taking include activities such as directed harassment to accommodate situations where directed harassment could prevent accidental mortality, such as blasting for harbor construction. The House Report notes that the phrase "incidental, but not intentional" is intended to mean accidental taking; however, the MMPA also requires the Secretary to prescribe regulations setting forth permissible methods of taking and means of effecting the least practicable adverse impact on the species and its habitat. It is conceivable that a specified activity could involve the accidental taking of small numbers of marine mammals which would have a negligible impact on the species and its habitat, but that the impact, although negligible, could be reduced by requiring certain measures such as directed harassment to prevent mortality. However, it is not clear whether such activities could be allowed under Section 101(a)(5) of the MMPA since other exceptions to the MMPA which allow directed taking are more explicit. Therefore, the definition of "incidental, but not intentional, taking" has not been changed; however, NMFS may consider a change in the future with additional opportunity for public comment.

One reviewer argued that the definition of "small numbers" equates it with "negligible impact" and is, therefore, inconsistent with the intent of Congress as cited in the House Report to make the small number requirement separate from, and in addition to, the negligible impact requirement. The reviewer suggested that the definition of "small numbers" be changed to refer to takings which are "infrequent, unavoidable, or accidental," and should contain a standard separate from the one for "negligible impact," such as a specified percentage of the relevant population (e.g. 1 percent). In discussing the term "small numbers," the House Report recognizes "the imprecision of the term * * *, but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits. The Committee intends that these provisions be available for persons whose taking of marine mammals is infrequent, unavoidable, or accidental." The NMFS does not believe that the term can be expressed as an absolute number or percentage or be defined in any absolute terms. However, NMFS feels that by defining "small numbers" to mean a portion of a marine mammal species or stock whose taking would have a negligible impact, an upper limit is placed on the term, and the phrase more effectively implements the Congressional intent underlining the new Section 101(a)(5) of the MMPA.

It was suggested that a definition for "total taking" be added to make clear that total taking refers to the taking that results from the combination of all applicants' activities. Since a finding of negligible impact is made for the specified activity, it cannot be made unless the total taking by all persons conducting the specified activity is found to be negligible. The NMFS feels that a separate definition would not add to the clarity of the regulations; therefore, a separate definition has not been added.

In general, commenters were concerned that NMFS define the terms of new Section 101(a)(5) in a fashion consistent with Congressional intent. A potential problem area is that the new Section speaks in terms of "citizens of the United States" requesting authority to take small numbers of marine mammals in carefully proscribed circumstances. The NMFS believes that a definition of "citizens of the United States" is necessary with respect to corporations, partnerships, associations, or governmental entities that may request Section 101(a)(5) authorization. Thus, a definition has been added to the effect that any of these entities will be deemed citizens of the United States for purposes of this Part.

The NMFS, for good cause, finds that a comment period regarding this particular definition is impractical and contrary to the public interest under 5 U.S.C. 553(b)(B) because it would impede the Agency's timely and orderly implementation of new Section 101(a)(5) and otherwise would prevent the Agency from properly administering and enforcing these new rules.

Section 228.4 Submission of Requests. One reviewer questioned the appropriateness of requiring that requests include the biological information in § 228.4(a) (3) and (4) since comprehensive knowledge of these biological parameters is the responsibility of NMFS. Another reviewer questioned whether requestors would be able to specify the numbers of animals, much less their probable age, sex, and reproductive condition. The NMFS recognizes that for certain activities it may not be possible to supply specific and detailed information. Furthermore, NMFS feels that it is the responsibility of the person seeking authorization to demonstrate that the taking would be consistent with the purposes of the MMPA. Inherent in this demonstration is a description of the potential taking and potential impacts resulting from the activities. However, NMFS will use all available information, in addition to any information provided, in its determinations of negligible impact.

Section 228.4(a)(5) has been separated into two statements, as suggested, and the subsequent sections renumbered accordingly. It was recommended that § 228.4(a)(7), which requests information on the likelihood of restoration of the habitat, specify that only restoration by natural causes is relevant; however, NMFS feels that information concerning restoration of the habitat by both natural and man-made causes is appropriate to consider and is encompassed by the proposed wording. Therefore, no change has been made. Section 228.4(a)(10), which concerns means of accomplishing the necessary monitoring and reporting, has been changed to specify monitoring and reporting "which will result in increased knowledge of the species, level of taking or impacts," as suggested. It was recommended that § 228.4(a)(11), which asks for suggested means of encouraging and coordinating research, be supported by a specific commitment of the applicant's resources. The NMFS feels that the commitment, if appropriate to a specific activity, should be requested from the individuals requesting Letters of Authorization under established regulations, rather than from the person making the general request for NMFS to consider regulations. In addition, minor changes in wording suggested by reviewers have been made to § 228.4(a) for clarification.

One reviewer objected to § 228.4(b), which states that the Assistant Administrator shall determine the adequacy of a request prior to review by the public, and felt that public comments should be solicited before the agency determines its adequacy. If a request is received which contains insufficient information for evaluating impacts, NMFS sees no reason to expend the time and money of publishing a notice in the **Federal Register**, newspapers of general circulation and appropriate

electronic media. Therefore, the regulations have not been changed. However, this initial determination of adequacy does not preclude NMFS, based on comments and suggestions, from requiring further information at any time concerning the request.

Section 228.6 Letters of Authorization. Under § 228.6, the Assistant Administrator will make available the information to be included in requests for Letters of Authorization. It was suggested that the information required in requests for Letters of Authorization be specifically noted in § 228.6(a) or in each subpart addressing a specified activity. The information required for a Letter of Authorization will be specific for each specified activity and, therefore, would be inappropriate to address in the general regulations. Further, based on experience, the information required may be altered or additional information may be required. In order to avoid the necessity of modifying regulations in the future, NMFS feels it more appropriate to have the Assistant Administrator specifically inform requestors about the informational requirements, all of which will be noted in the **Federal Register.** For Letters of Authorization requested this year for on-ice seismic activities, the information required was outlined in the proposed rulemaking and is again outlined in this rulemaking.

Further, certain reviewers felt it was redundant and inappropriate to request the same type of information already provided in the general request under § 228.4. One reviewer felt that in light of the information already provided, the only useful information for determining whether effects of a specific operation would exceed those estimated by NMFS would be information on the area to be disturbed by a specific operation and that requiring estimates of the age, sex, etc., of seals estimated to be taken would result only in speculation. However, in order to be assured that the specific request is covered by the general request and findings, NMFS feels that the information requested is necessary. For this reason, it is important for potential users of the regulations to submit comments on proposed rules to ensure that final regulations will cover the activities which they seek to conduct.

One reviewer suggested that the time frame within which NMFS will act on a request for a Letter of Authorization should be specified, and recommended that it be no greater than 30 days. The NMFS will act as expeditiously as possible on all requests; however, depending on the nature and completeness of a request, the time frame may vary. Although not possible this year, NMFS suggests that requests be made at least 60 days prior to the desired effective date to allow sufficient time for processing.

One reviewer expressly supported the required annual renewal of Letters of Authorization, while another felt that it was an unnecessary administrative burden to make a general one-year restriction on Letters of Authorization and that it would be more appropriate to determine the period of validity on a case-by-case basis depending on the specific activity. The NMFS agrees that the term of Letters of Authorization should be based on the specified activity and has modified § 228.6(d) to reflect this. However, for the Letters of Authorization issued under the specific regulations under Subpart B—Taking of Ringed Seals Incidental to on-Ice Seismic Activities, NMFS has determined that a one-year Letter of Authorization is appropriate. The purpose of this requirement for new Letters of Authorization each year is to ensure that the authorized taking will be consistent with the original findings. This assessment will be based on the required reports, ongoing research, and information contained in the requests for Letters of Authorization.

As was suggested, § 228.6(e) has been clarified to read that Letters of Authorization "shall" (as opposed to "may") be withdrawn or suspended "either on an individual or class basis, as appropriate."

A new § 228.6(g) has been added to state that a violation of the terms and conditions of a Letter of Authorization or the specific regulations will subject the Holder to the penalties provided in the MMPA.

Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities

As suggested, the title of Subpart B has been renamed "Taking of Ringed Seals Incidental to on-Ice Seismic Activities," to emphasize that these regulations do not allow the taking of any other species of marine mammals which occurs as a result of the seismic activities.

Two comments addressed the general scheme of Letters of Authorization under these specific regulations. One reviewer felt that an annual limit should be established on the number of seals which can be taken, and that when the quota is reached, no new authorizations should be issued and existing ones should be suspended. The other reviewer questioned whether operators would be allotted or assigned authorizations on a first come, first served basis, or whether new operators could request that the total allowable take be reallocated. As each request for a Letter of Authorization is received, it will be reviewed and evaluated to determine whether it is consistent with the specific regulations and findings, and, if so, a Letter of Authorization with appropriate conditions would be issued. If the request is for activities not covered by the regulations, no authorization would be granted. A general request would be needed, and the procedures, findings, and opportunity for public comment as outlined in Subpart A would be required to either develop new regulations or modify existing regulations. If it is determined that the level of taking for the specified activity would exceed that upon which the findings were made, then all existing Letters of Authorizations along with the one proposed to be issued would have to be amended with restrictions to ensure that the total taking by all Holders of Letters of Authorization would be negligible and involve only small numbers. Therefore, NMFS does not believe it necessary to establish specific numerical quotas.

Section 228.11 Specified Activity and Specified Geographical Region. It was suggested that seismic work be allowed only in areas where the ADF&G is conducting research. The NMFS feels that it is not appropriate to restrict the areas of operation solely on the basis of where research is being conducted since the intent of the regulations is to insure that the taking is negligible. However, if the total requested taking was determined to have more than a negligible impact, restriction could be imposed to insure that the allowed taking would be negligible.

Section 228.12 Effective Dates. Two reviewers objected strongly to the proposed five-year term of the regulations because of the uncertainties concerning the level of taking, adverse effects and impacts, and the successfulness of the program under the new amendment. Based on information and research collected during the suggested one-year term, NMFS could then consider a longer period of effectiveness for these, or modified regulations. The NMFS agrees in part that the activities, along with new information which becomes available, should be re-evaluated after each year to determine if the level of taking is consistent with the findings, and has, therefore, determined to make the required Letters of Authorization valid for only one year. Further, additional

requirements could be developed and incorporated sooner under the existing scheme of annual Letters of Authorization than by new regulations. One reviewer suggested that the five-year effective date period be changed to 1983–1987 since these regulations will be promulgated too late to be effectively applied to the 1982 seismic season. While we recognize that the information to be gained from this year's activities will be limited, NMFS feels it desirable to require the monitoring and reporting for any period remaining this year in order to have better information for evaluating subsequent requests for Letters of Authorization.

Another reviewer noted that while Section 101(a)(5) allows authorization of incidental taking for up to a five-year period, the scheme accomplishes the authorization through the Letter of Authorization, not through the regulations themselves, and therefore suggested that this section on effective dates be deleted to avoid the need to repromulgate regulations. The NMFS feels that the intent of the new amendment, which requires notice and affords the opportunity for public comment, can best be served through the notice and comment rulemaking process.

The effective date statement has been modified to clarify that the regulations are effective for the entire 1982 through 1986 period, rather than from January to May each year. Although the taking is allowed only from January to May, other aspects of the regulations, such as reporting requirements, are valid throughout the year.

Section 223.13 Permissible Methods. It was recommended that seismic testing not be allowed during the pupping and weaning season (March through May). Unless the activities were found to have more than a negligible impact during the pupping season, NMFS does not feel such a drastic restriction is appropriate.

It was suggested that § 228.13(a)(1) include vibrator-type, airgun, "or similar energy source equipment," to allow and encourage the development and use of improved equipment. It was also suggested that the permitted activities include the "Poulter technique" which is now being tested and which has logistical and technical advantages with comparatively lesser impact on the environment. The wording has been changed to potentially allow in the future the use of other energy source equipment. Energy sources, other than the vibrator-type or airgun, would be allowed only if they were shown to have similar or lesser effects.

As was suggested, § 228.13(b) has been modified to state that activities be conducted in a manner which minimizes adverse effects "to the greatest extent practicable."

One reviewer felt that the phrase "as far as practicable" in § 228.13(c) required clarification by definition so that seals are not unnecessarily harassed. The NMFS does not feel that at this time a more precise restriction is appropriate; although, based on new information and required reports, further refinements of restrictions may be developed and required in the future. It was pointed out that the requirement in § 228.13(c), which states that no energy source be placed over a ringed seal lair, may impose an unrealistic requirement. Therefore, the wording has been changed to "observed" ringed seal lair to be consistent with the first sentence of § 228.13(c), as proposed.

Section 228.14 Requirements for Monitoring and Reporting. It was recommended that in § 228.14(a), the words "as necessary" be inserted after the word monitor which would allow the suspension of the five-year monitoring requirement if further research proves monitoring to be unnecessary. The requirement that Holders of Letters of Authorization cooperate with NMFS and designated agencies will not change, although the scope of monitoring may change. Therefore, the suggested change has not been made.

Certain reviewers felt that the requirements for monitoring should be strengthened. One reviewer suggested that a preliminary survey of seal distribution be required prior to any seismic testing so that test sites could be selected from the lowest seal distributions. Another reviewer suggested that since seismic testing is usually concentrated at a few locations, at a minimum, the regulations should require monitoring before and after testing to evaluate the effects on seals in those locations. One reviewer felt that in order for the monitoring program to be effective, it would be necessary to determine the locations of all lairs using trained dogs, mark all lairs for future identification, and recheck lairs following surveys to determine if they have been abandoned and determine the fate of the pup. Another reviewer questioned the effectiveness of any monitoring program in view of the difficulty of finding any lairs by simple visual inspection by untrained people. Alternatively, another reviewer felt that while it would be reasonable to require operators to make visual observations and maintain reports, it would not be reasonable to require an elaborate and costly research program, employing specialists and equipment that may be limited or not available, in order to detect and monitor the locations of lairs and seals along all shot lines and camps before, during, and after activities are conducted. The reviewer was also concerned that such unrealistic requirements may be imposed in the future as NMFS interprets and refines its perceived needs, and requested that NMFS clarify this section to indicate that operators will be responsible only for visual observations. At this time, NMFS feels that the regulations concerning monitoring which require observations and reports as proposed are sufficient. The industry has been in contact with the Alaska Department of Fish and Game, which has offered its assistance concerning a training program to teach designated individuals how best to make observations. Further, the ADF&G is conducting research designed to study the effects of the seismic operations on ringed seals. However, since additional monitoring requirements may be needed in the future, NMFS reserves the option to do so.

One reviewer, who felt that the reporting requirements were inadequate, recommended that the information required in annual reports parallel the requirements of the initial request, including information on the number of ringed seals taken by age, sex, reproductive condition, type of taking, and description of the seismic activity, and information pertaining to means of minimizing impacts on the marine mammals. Another reviewer suggested that information on all recovered carcasses and the number of expected mortalities should be included in required reports to help assess the rate of natural and man-related mortality. Also, to adequately assess impacts, one reviewer suggested that data on seismic operations should include total number, frequency, decibel level, timing, site-specific distribution, and duration of tests conducted and observations on direct seal reactions to seismic activities. Further, it was suggested that these and other data should be identified and then collected as part of a well-designed and coordinated research/monitoring program through NMFS Alaska Regional Office, but that in the absence of such an articulated program at this time, it may be desirable to add an item calling for submission of such other information as may be requested in the Letter of Authorization. As a result of these comments, the information required in annual reports has been expanded along with the option of requiring additional information, if appropriate, in the future.

It was also recommended that an incident report be required to ensure adequate reporting of any incident of non-negligible taking of marine mammals. Due to the extremely small numbers of expected actual, observable takings, NMFS feels that an annual report is sufficient.

There was also concern expressed as to how the information from the required reports is to be used in view of the extremely low probability of direct observations. The NMFS concurs with the views expressed that the information provided by operators be considered as very conservative data and not be used as an indication of seal distribution or as proof that only the observed seals are affected by activities.

The due date for the required annual report has been clarified, as suggested, to be within 90 days of completion of the year's activities. Since activities are allowed only through May 31, this report is due not later than August 31.

Certain reviewers referenced the House Report which states that "the Committee expects that persons operating under the authority of Section 101(a)(5) shall engage in appropriate research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned," and felt that the regulations should require the industry to initiate and conduct research designed to reduce the effects of seismic activities on ringed seals. The industry has met with the Alaska Department of Fish and Game to assist in the design of studies during the present operating season that will help to assure that the effects of seismic activity on ringed seals will be addressed more directly, is coordinating their operations with the ADF&G, and is providing information and logistical support. Further, industry is now testing the "Poulter technique" as an alternative method which may have lesser environmental impacts. In view of the ongoing efforts and research, NMFS does not feel any regulatory requirement is necessary, but encourages industry to continue and expand efforts to assist, coordinate, and conduct appropriate research.

Proposed Findings Under the MMPA

Two reviewers felt that in determining the impact of the taking, an overly broad geographic region, that being the Bering, Chukchi, and Beaufort Seas, was identified in defining the relevant population of ringed seals. One of the reviewers referenced the House Report which states that the specified geographical region "should not be larger than is necessary to accomplish the specified activity," and interpreted this to mean that only those animals in the specified geographical region could be considered the relevant population in determining effects. The NMFS feels it is more appropriate to evaluate the effects on the population of animals, rather than on just those animals which coincide with the specified activity, in its determination of negligible impacts. These reviewers felt that the appropriate population to consider was the winter residents of the Beaufort Sea, estimated at 40,000 animals. Further, they felt that the taking would involve more than small numbers compared to the population size and would have more than a negligible impact. There is no evidence that the Beaufort Sea population is discrete. There is a seasonal migration of seals which winter in the Bering Sea northward to the edge of the permanent ice pack and near shore ice remnants. There is also evidence of year to year changes in abundance within the same area. Lower ringed seal densities in the Beaufort Sea and northern Chukchi Sea, apparently due to heavy ice in 1975 and 1976, were noted concurrently with increased densities in the Bering and southern Chukchi Seas. Based on available information, NMFS feels that the Bering, Chukchi, and Beaufort population of ringed seals is the relevant "stock" to consider in its findings.

Certain reviewers questioned the statement in the request for IAGC that the preferred habitat of ringed seals is ice which is two feet or less thick, and, therefore, was less likely to coincide with seismic activities. Because of the lack of evidence supporting this assumption, this rationale was not used as a basis for NMFS' proposed finding of negligible impact.

One reviewer questioned the use of the word "may" in the proposed finding that seismic activities may result in the taking or ringed seals. However, since there is no definitive evidence that any specific seismic activity has or will result in actual takings of ringed seals, NMFS feels that the wording is appropriate.

One reviewer felt that since the taking is largely by displacement, the potential impact on opportunity for subsistence hunters is minimal. Another reviewer felt that it was premature to state that seismic activities will have negligible impact on subsistence use until proper studies have been conducted. The NMFS has no basis to support a finding that the potential taking, which would be mainly by displacement of animals, would have more than a negligible impact on the availability of ringed seals for subsistence uses.

Statement of Findings

Based on a review of the available data and comments received, NMFS has found that on-ice seismic activities may result in the taking of small numbers of ringed seals and that the total taking during the period 1982 through 1986 will have a negligible impact on the Bering, Chukchi, and Beaufort Seas stock, its habitat, and on the availability of such stock for subsistence uses.

Letters of Authorization

A Letter of Authorization is required to conduct activities pursuant to the specific regulations governing the taking of ringed seals incidental to on-ice seismic activities. United States citizens who engage in on-ice seismic exploratory activities which may result in the incidental take of ringed seals in the Beaufort Sea may submit a request for a Letter of Authorization. Requests should include the following information:

(1) Name, address, and telephone number of requestor;

(2) A description of the activities, including methods, dates and duration, and general locations of activities, including estimated area to be surveyed;

(3) Anticipated numbers of ringed seals which may be taken by age, sex, and reproductive condition, and the type of taking (e.g., disturbance or harassment, displacement, or abandonment of pups);

(4) Anticipated impact of the activity upon the habitat and the likelihood of restoration;

(5) Actions which will be taken to minimize potential adverse impacts on the ringed seals, their habitat, and on their availability for subsistence uses; and

(6) Actions which will be taken to assist in, cooperate with, or conduct research related to reducing the incidental taking or evaluating its effects.

Letters of Authorization issued under 50 CFR Part 228, Subpart B—Taking of Ringed Seals Incidental to on-Ice Seismic Activities will be valid for one year only. Each year, a written request containing the information outlined above will be required, and a new Letter of Authorization issued. If further or different information is required in subsequent years, Holders of Letters of Authorization will be so notified. As stated in § 228.6(d), Letters of Authorization may contain additional terms and conditions appropriate for the specific request.

Applicability to Other Laws and Requirements

The general regulations in Subpart A implement section 101(a)(5) of the MMPA by providing a mechanism for authorizing the incidental, but not intentional, taking of small numbers of non-depleted marine mammals by U.S. citizens engaged in a specified activity in a specified geographical region, for up to five years. Also included are specific regulations in Subpart B allowing the taking of small numbers of ringed seals incidental to on-ice seismic operations in the Beaufort Sea for the period 1982 to 1986.

The NMFS has determined that the general regulations will have no impact on the human environment. The NMFS has prepared an Environmental Assessment reflecting the determination that the specific regulations allowing the taking of ringed seals will have an insignificant impact on the human environment and, therefore, do not constitute a major action under the National Environmental Policy Act. The Environmental Assessment is available on request from the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235.

These regulations are not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or government agencies; or (3) significant adverse effect on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. The NMFS has determined, therefore, that these regulations do not constitute a major rule and require no regulatory impact analysis under Executive Order 12291.

The General Counsel of the Department of Commerce has certified that the general regulations will not have a significant economic impact on a substantial number of small entities, and that the specific regulations allowing the taking of ringed seals will not have a major significant impact on a substantial number of small entities since the oil companies and their contractors identified as possible applicants under the specific regulations cannot be identified as small businesses under the Small Business Act. Therefore, a regulatory flexibility analysis is not required.

Since the number of requests expected under the general regulations is expected to be less than ten, and the number of applicants under the specific regulations allowing the taking of ringed seals is expected to be less than ten, the requirements of the Paperwork Reduction Act are inapplicable.

These regulations contemplate exemptions to the moratorium on the taking of marine mammals imposed by the Marine Mammal Protection Act and potentially relieve a restriction by authorizing the taking of marine mammals subject to certain conditions. For these reasons, the requirements of Section 553(d) of the Administrative Procedure Act, that the publication of a substantive rule be made not less than 30 days before its effective date is waived. These regulations shall become effective May 18, 1982.

To ensure consistency, 50 CFR 216.11 is also revised to indicate that takings allowed under the new Part 228 of 50 CFR are not prohibited. Because of the non-substantive nature of this revision to 50 CFR 216.11 and in view of the public's participation in commenting on the substantive aspects of the new Part 228 to 50 CFR, NMFS for good cause finds that a further comment period is impractical, unnecessary, and contrary to the public interest. Further, because the revision refers to exemptions that may be granted under the new 50 CFR Part 228, NMFS finds good cause for making this revision effective immediately upon the date of publication under 5 U.S.C. 553(d).

List of Subjects in 50 CFR Part 228

Marine mammals, Administrative practice and procedure, Outer Continental Shelf, Oil and gas exploration.

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Accordingly, 50 CFR Chapter II, Subchapter C—Marine Mammals, is amended as set forth below.

1. The authority citation for Part 216 is revised to read as follows:

Authority: 16 U.S.C. 1361 et seq., unless otherwise noted.

2. The introductory text of § 216.11 is revised to read as follows:

§ 216.11 Prohibited taking.

Except as otherwise provided in Subparts C, D, and I of this Part 216 or in Part 228, it is unlawful for:

* * * * *

3. A new Part 228 is added as follows:

PART 228—Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities

Subpart A—General

Sec.

Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities

Authority: 16 U.S.C. 1371(a)(5), unless otherwise noted.

Subpart A—General

§ 228.1 Purpose.

The regulations in this part implement Section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1371(a)(5), Pub. L. 97–58, which provides a mechanism for allowing, upon request, during periods of not more than five consecutive years each, the incidental, but not intentional, taking of small numbers of non-depleted marine mammals by U.S citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region.

§ 228.2 Scope.

The taking of small numbers of marine mammals under Section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the species involved are not depleted and if the National Marine Fisheries Service (a) finds that the total taking during the specified time period will have a negligible impact on the species and their habitat, and on the availability of the species for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking. The specific regulations governing specified activities are contained in subsequent subparts to this Part 228.

§ 228.3 Definitions.

In addition to definitions contained in the Act and in 50 CFR 216.3 and unless

the context otherwise requires, in this Part 228:

"Citizens of the United States" and "U.S. citizens" mean individual U.S. citizens or any partnership, corporation, association, or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) and controlled by individuals who are U.S. citizens. U.S. Federal, state and local government agencies shall also constitute citizens of the United States for purposes of this Part.

"Incidental, but not intentional, taking" means accidental taking. It does not mean that the taking is unexpected, but rather it includes those takings which are infrequent, unavoidable or accidental. (Complete definition of take is contained in 50 CFR 216.3).

"Negligible impact" means an impact which can be disregarded or which is so small, unimportant, or of so little consequence as to warrant little or no attention. A finding of negligible impact cannot be made if a species or stock is depleted under 16 U.S.C. 1362(1).

"Small numbers" means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

"Specified activity" means any activity, other than commercial fishing, which takes place in a specified geographical region and potentially involves the taking of small numbers of non-depleted marine mammals. The specified activity and specified geographical region should be identified so that the anticipated effects on non-depleted marine mammals will be substantially similar.

"Specified geographical region" means an area within which a specified activity is conducted and which has certain biogeographic characteristics.

§ 228.4 Submission of requests.

(a) In order for the National Marine Fisheries Service to consider allowing the taking by U.S. citizens of small numbers of non-depleted marine mammals incidental to a specified activity, a written request must be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235. Requests shall include the following information on the activity in general and cumulative impacts of the total potential taking (by all persons conducting the activity):

(1) A description of the specific activity or class of activities that can be expected to result in incidental taking of non-depleted marine mammals;

(2) The dates and duration of such activity and the specific geographical region where it will occur;

(3) The species and numbers of marine mammals likely to be taken by age, sex and reproductive condition, and the type of taking (e.g., disturbance by sound, injury or death resulting from collision, etc.) and the number of times such taking is likely to occur;

(4) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks likely to be affected by such activities;

(5) The anticipated impact of the activity upon the species or stocks;

(6) The anticipated impact of the activity on the availability of the species or stocks for subsistence uses;

(7) The anticipated impact of the activity upon the habitat of the marine mannal populations, and the likelihood of restoration of the affected habitat;

(8) The anticipated impact of the loss or modification of the habitat on the marine mammal populations involved;

(9) The availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance;

(10) Suggested means of accomplishing the necessary monitoring and reporting which will result in increased knowledge of the species, level of taking or impacts and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity; and

(11) Suggested means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects.

(b) The Assistant Administrator shall determine the adequacy and completeness of a request, and if found to be adequate, will invite information, suggestions, and comments through notice in the **Federal Register**, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity. All information and suggestions will be considered by the National Marine Fisheries Service in developing, if appropriate, the most effective regulations.

(c) The Assistant Administrator shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking constitutes a negligible impact on the species or stocks of marine mammals, their habitat, and on the availability of the species for subsistence uses. Any preliminary finding of negligible impact shall be proposed for public comment before specific regulations are promulgated.

§ 228.5 Specific regulations.

(a) Specific regulations will be established for each allowed activity which set forth permissible methods of taking and requirements for monitoring and reporting.

(b) Regulations will be established based on the best available information. As new information is developed, through monitoring, reporting or research, the regulations may be modified, in whole or part, after notice and opportunity for public review.

§ 228.6 Letters of authorization.

(a) A Letter of Authorization, which may be issued only to U.S. citizens, is required to conduct activities pursuant to any regulations established. Requests for Letters of Authorization shall be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235. The information to be submitted in a request may be obtained by writing the Assistant Administrator.

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the finding that the total of such taking will have a negligible impact on the marine mammal species or stocks and their habitat, and on the availability of the species for subsistence uses.

(c) Notice of issuance of all Letters of Authorization will be published in the **Federal Register** within 30 days of issuance.

(d) Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request.

(e) Letters of Authorization shall be withdrawn or suspended, either on an individual or class basis, as appropriate, if, after notice and opportunity for public comment, the National Marine Fisheries Service determines that (1) the regulations prescribed are not being substantially complied with, or (2) the taking allowed is having, or may have, more than a negligible impact on the species or stocks concerned, their habitat, or on their availability for subsistence uses.

(f) The requirement for notice and opportunity for public review in § 228.6(e) shall not apply if the National Marine Fisheries Service determines that an emergency exists which poses a significant risk to the well-being of the species or stocks of marine mammals concerned.

(g) A violation of any of the terms and conditions of a Letter of Authorization or of the specific regulations shall subject the Holder and/or any individual who is operating under the authority of the Holder's Letter of Authorization to penalties provided in the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407).

Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities

§ 228.11 Specified activity and specified geographical region.

Regulations in this subpart apply only to the incidental taking of ringed seals (*Phoca hispida*) by U.S. citizens engaged in on-ice seismic exploratory and associated activities over the Outer Continental Shelf of the Beaufort Sea of Alaska, from the shore outward to 45 miles and from Point Barrow east to Demarcation Point, from January 1 through May 31 of any calendar year.

§ 228.12 Effective dates.

Regulations in this subpart are effective for the period 1982 through 1986.

§ 228.13 Permissible methods

(a) The incidental, but not intentional, taking of ringed seals from January 1 through May 31 by U.S. citizens holding a Letter of Authorization is permitted during the course of the following activities:

(1) On-ice geophysical seismic activities involving vibrator-type, airgun, or other energy source equipment shown to have similar or lesser effects; and

(2) Operation of transportation and camp facilities associated with seismic activities.

(b) All activities identified in § 228.13(a) shall be conducted in a manner which minimizes to the greatest extent practicable adverse effects on ringed seals and their habitat.

(c) All activities identified in § 228.13(a) shall be conducted as far as practicable from any observed ringed seal or ringed seal lair. No energy source shall be placed over an observed ringed seal lair, whether or not any seal is present.

§228.14 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization are required to cooperate with the National Marine Fisheries Service and any other Federal, State, or local agency monitoring the impacts on ringed seals.

(b) Holders of Letters of Authorization shall designate an individual or individuals to make observations and record the presence of ringed seals and ringed seal lairs along shot lines and around camps, and the information required in §228.14(c).

(c) An annual report shall be submitted to the Assistant Administrator for Fisheries within 90 days of completion of the year's activities which shall include the following information:

(1) Location(s) of survey activities;

(2) Level of effort (e.g., duration, area surveyed, number of surveys), methods used, and a description of habitat (e.g., ice thickness, surface topography) for each location;

(3) Numbers of ringed seals observed, proximity to seismic or associated activities, and any seal reactions observed for each location;

(4) Numbers of ringed seal lairs observed and proximity to seismic or associated activities for each location; and

(5) Other information as required in a Letter of Authorization.

Dated: May 12, 1982.

William H. Stevenson,

Deputy Assistant Administrator for Fisheries National Marine Fisheries Service.

[FR Doc. 82-13360 Filed 5-17-82; 8:45 am]

BILLING CODE 3510-22-M

National Oceanic and Atomospheric Administration

50 CFR Part 640

Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Extension of emergency interim rule.

SUMMARY: An interim rule in effect through May 15, 1982, implements certain provisions of the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic. NOAA extends this emergency interim rule from May 16, 1982, through June 29, 1982. The extension will continue the protection of the spawning stock in the fishery conservation zone (FCZ) until the final regulations become effective.

DATES: Emergency rule effective from May 16, 1982 through June 29, 1982.

FOR FURTHER INFORMATION CONTACT: Jack T. Brawner, Acting Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702; telephone 813–893–3141.

SUPPLEMENTARY INFORMATION: Under Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act, emergency interim regulations implementing certain provisions of the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic were published on March 30, 1982 (47 FR 13353). The rulemaking stated that the regulations would be effective for 45 days and that they could be repromulgated for an additional 45-day period, if necessary. The emergency interim rule (1) establishes a closed season in the fishery conservation zone (FCZ) during the peak spawning period; and (2) provides the authority for any Authorized Officer to dispose of lobster traps that are in the management area during the period April 6–July 20. The intended effect of this interim rule is to provide protection for the spawning stock in the FCZ during the major spiny lobster reproductive period. The Assistant Administrator for Fisheries, NOAA, acting on behalf of the Secretary of Commerce, has determined that the emergency situation described in the initial emergency rule continues to exist, and therefore extends the emergency regulations through June 29, 1982.

The NOAA Administrator has determined that these regulations are non-major under Executive Order 12291, and that the emergency provisions in section 8 of the Order apply to this action.

(16 U.S.C. 1801 *et seq.*)

List of Subjects in 50 CFR Part 640

Fish; Fisheries.

Dated: May 13, 1982.

William H. Stevenson,

Deputy Assistant Administrator, National Marine Fisheries Service.

[FR Doc. 82-13447 Filed 5-17-82; 8:45 am]

BILLING CODE 3510-22-M

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50 CFR Part 661

Ocean Salmon Fisheries Off the Coasts of California, Oregon, and Washington

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.