§ 1125.86 Deduction for marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler, in making payments to producers (other than with respect to milk of such handler's own production) pursuant to § 1125.73(a)(2), shall make a deduction of 5 cents per hundredweight of milk or such amount not exceeding 5 cents per hundredweight as the Secretary may prescribe, with respect to the following:

(1) All milk received form producers at a plant not operated by a cooperative association.

(2) [Reserved].

(3) All milk received at a plant operated by a cooperative association from producers for whom the marketing services set forth below in this subparagraph are not being performed by the cooperative association as determined by the market administrator. Such deduction shall be paid by the handler to the market administrator on or before the 16th day after the end of the month. Such moneys shall be expended by the market administrator for the verification of weights, sampling and testing of milk received from producers, and in providing for market information to producers; such services to be performed in whole or in part by the market administrator or by an agent engaged by and responsible to him.

(b) In the case of each producer;

(1) Who is a member of, who has given written authorization for the rendering of marketing service and the taking of deduction therefore to a cooperative association;

(2) Whose milk is received at a plant not operated by such association; and

(3) For whom the market administrator determines that such association is performing the services described in paragraph (a) of this section, each handler shall deduct, in lieu of the deduction specified under paragraph (a) of this section, from the payments made pursuant to § 1125.73(a)(2) the amount per hundredweight on milk authorized by such producer and shall pay, on or before the 18th day after the end of the month, such deduction to the association entitled to receive it under this paragraph.

Effective date: January 1, 1984.

Signed at Washington, D.C. on: November 17, 1983.

C. W. McMillan,

Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 83-31454 Filed 11-22-83; 8:45 am]

BILLING CODE 3410-02-M

Animal and Plant Health Inspection Service

9 CFR Part 81

[Docket No. 83-123]

Highly Pathogenic Avian Influenza; Expansion of Quarantined Area in Pennsylvania

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

SUMMARY: This document amends the "Highly Pathogenic Avian Influenza and Similar Poultry Diseases" interim rule by expanding the quarantined area in Pennsylvania to include additional portions of York and Chester Counties. This action is necessary to help prevent the interstate spread of highly pathogenic avian influenza, a highly contagious and pathogenic viral disease of poultry.

DATES: Effective date is November 21, 1983. Written comments must be received on or before January 23, 1984.

ADDRESS: Written comments should be submitted to Thomas O. Gessel, Director, Regulatory Coordination Staff, APHIS, USDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Written comments received may be inspected at Room 728 of the Federal Building, 8 a.m. to 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. William W. Buisch, Chief, National Emergency Field Operations Staff, VS, APHIS, USDA, Room 747, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8073.

SUPPLEMENTARY INFORMATION:

Emergency Action

Dr. John K. Atwell, Deputy Administrator of the Animal and Plant Health Inspection Service for Veterinary Services, has determined that an emergency situation exists which warrants publication of this interim rule without prior opportunity for public comment. In order to help prevent the spread of highly pathogenic avian influenza, immediate action is necessary to regulate the interstate movement of certain poultry and other items from the areas added to the quarantined area and to provide for the cleaning and disinfection of certain accessories and means of conveyance.

Further, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest; and good cause is found for making this interim rule effective upon signature. Comments are solicited for 60 days after publication of this document. A final document discussing comments received and any amendments required will be published in the **Federal Register**.

Background

Because of the finding of highly pathogenic avian influenza in poultry on premises in Pennsylvania, an interim rule establishing a quarantine and regulations was made effective on November 4, 1983 (48 FR 51422-51423). The interim rule was amended on November 7, 1983, November 10, 1983, and November 16, 1983, as explained in a document published in the **Federal Register** on November 17, 1983 (48 FR 52420-52427).

Highly pathogenic avian influenza is a highly contagious and pathogenic viral disease of poultry. It is defined as a disease of poultry caused by any influenza virus Type A that results in not less than 75 percent mortality within 8 days in at least eight healthy susceptible chickens, 4 to 8 weeks old, inoculated by the intramuscular, intravenous, or caudal airsac route with bacteria-free infectious allantoic or cell culture fluids and using standard laboratory operating procedures to assure specificity. Clinical evidence of the disease includes decreased feed and water consumption, depression, unusual movements or positions, increased mortality, hemorrhage beneath the skin on the lower legs and feet, severe decrease in egg production, post mortem lesions and history of the disease occurrence in the flock.

Prior to the effective date of this document, the quarantined area in Pennsylvania included all of Lancaster County and portions of Berks, Chester, Cumberland, Dauphin, Lebanon, and York Counties.

It had been determined that a quarantined area should have easily understood boundary lines, include the premises where highly pathogenic avian influenza is found, and include at least a five mile buffer zone in every direction from premises where the disease is found. The previous quarantined area was established in accordance with this criteria.

It has now further been determined that if the boundary line under the above criteria would be contiguous to an area containing a high concentration of poultry, the quarantined area should be expanded to include the area containing the high concentration of poultry. Action

is being taken to depopulate poultry and to conduct cleaning and disinfecting operations on premises determined to be infected by highly pathogenic avian influenza. Also, State regulatory measures are in effect to regulate the movement of means of conveyance and other items from quarantined areas to nonquarantined areas within Pennsylvania. However, it is not feasible to regulate all commerce (such as social visits, delivery of services) that could possibly be a means of spreading the disease from premises in quarantined areas to nearby premises in nonquarantined areas. Therefore, as a precautionary measure, it is necessary to include in the quarantined area such contiguous areas where high populations of poultry exist, and thereby require that poultry and other items from the premises in such contiguous areas be subject to the safeguards contained in the interim rule concerning interstate movement.

Based on the finding of clinical evidence of highly pathogenic avian influenza, it has been determined that the disease has spread within Pennsylvania to an area in York County outside of the previously quarantined area. Further, there are high concentrations of poultry being raised in areas contiguous to the previously established quarantine boundary line in the southwestern portion of Chester County.

In accordance with the specified criteria, the regulated area is expanded by adding additional portions of York and Chester Counties and is redescribed as follows:

The following area in Berks, Chester, Cumberland, Dauphin, Lancaster, Lebanon, and York Counties in Pennsylvania beginning at the eastern bank of the Susquehanna River at Interstate Highway 81; then northeasterly along Interstate Highway 81 to its intersection with Interstate Highway 78; then northeasterly along Interstate Highway 78 to its intersection with PA Highway 61; then southerly along PA Highway 61 to its intersection with U.S. Highway 422; then southeasterly along U.S. Highway 422 to its intersection with Interstate Highway 176; then southerly along Interstate Highway 176 to its intersection with Interstate Highway 76; then easterly along Interstate Highway 76 to its intersection with PA Highway 82; then southerly along PA Highway 82 to its intersection with U.S. Highway 1; then southwesterly along U.S. Highway 1 to its intersection with PA Highway 841; then southerly along PA Highway 841 to its intersection with the Pennsylvania/Maryland State Line; then westerly along the Pennsylvania/Maryland State Line to its intersection with PA Highway 516; then northerly along PA Highway 516 to its intersection with PA Highway 116; then northeasterly along PA Highway 116 to its intersection with U.S. Highway 30; then easterly along U.S. Highway 30 to its intersection with Interstate Highway 83; then northerly along Interstate Highway 83 to the eastern bank of the Susquehanna River; then northerly along the eastern bank of the Susquehanna River to Interstate Highway 81.

With certain exceptions, the interim rule provides that the following articles designated as prohibited article are prohibited from being moved interstate from a quarantined area:

(1) Live poultry infected with or exposed to highly pathogenic avian influenza,

(2) Manure from poultry, and

(3) Litter that has been used by poultry.

The interim rule also provides that the following articles designated as restricted articles are allowed to be moved interstate from a quarantined area only in accordance with certain conditions:

(1) Live poultry not infected with or exposed to highly pathogenic avian influenza,

(2) Poultry carcasses or parts thereof,

(3) Eggs from poultry, and

(4) Used coops, containers, troughs or other accessories for use in the handling of poultry or poultry eggs.

The interim rule also contains provisions concerning the cleaning and disinfection of coops, containers, troughs, other accessories, and means of conveyance used in the interstate movement of poultry from quarantined areas.

Executive Order and Regulatory Flexibility Act

The emergency nature of this action makes it impracticable for the Agency to follow the procedures of Executive Order 12291 and Secretary's Memorandum 1512–1 with respect to this interim rule. In order to help prevent the spread of highly pathogenic avian influenza, immediate action is necessary to regulate the interstate movement of certain poultry and other items from the areas added to the quarantined area and to provide for the cleaning and disinfection of certain accessories and means of conveyance.

This emergency situation also makes compliance with section 603 and timely compliance with section 604 of the Regulatory Flexibility act impracticable. Since this action may have a significant economic impact on a substantial number of small entities, the Final Regulatory Impact Analysis, if required, will address the issues required in section 604 of the Regulatory Flexibility Act.

List of Subjects in 9 CFR Part 81

Animal diseases, Poultry and poultry products, Transportation.

PART 81—HIGHLY PATHOGENIC AVIAN INFLUENZA AND SIMILAR POULTRY DISEASES

Under the circumstances referred to above, § 81.4 of 9 CFR Part 81 is revised to read as follows:

§ 81.4 Quarantined areas.

The following area in Berks, Chester, Cumberland, Dauphin, Lancaster, Lebanon, and York Counties in Pennsylvania is designated as a quarantined area: That portion of Pennsylvania beginning at the eastern bank of the Susquehanna River at Interstate Highway 81; then northeasterly along Interstate Highway 81 to its intersection with Interstate Highway 78; then northeasterly along Interstate Highway 78 to its intersection with PA Highway 61; then southerly along PA Highway 61 to its intersection with U.S. Highway 422; then southeasterly along U.S. Highway 422 to its intersection with Interstate Highway 176; then southerly along Interstate Highway 176 to its intersection with Interstate Highway 76; then easterly along Interstate Highway 76 to its intersection with PA Highway 82; then southerly along PA Highway 82 to its intersection with U.S. Highway 1; then southwesterly along U.S. Highway 1 to its intersection with PA Highway 841; then southerly along PA Highway 841 to its intersection with the Pennsylvania/Maryland State Line; then westerly along the Pennsylvania/Maryland State Line to its intersection with PA Highway 516; then northerly along PA Highway 516 to its intersection with PA Highway 116; then northeasterly along PA Highway 116 to its intersection with U.S. Highway 30; then easterly along U.S. Highway 30 to its intersection with Interstate Highway 83; then northerly along Interstate Highway 83 to the eastern bank of the Susquehanna River; then northerly along the eastern bank of the Susquehanna River to Interstate Highway 81.

(Sec. 2, 23 Stat. 31, as amended; secs. 4–8, 23 Stat. 31–33, as amended; secs. 1–3, 32 Stat. 791, 792, as amended; secs. 1–4, 33 Stat. 1264, 1265; 41 Stat. 699; sec. 2, 65 Stat. 693; secs. 3 and 11, 76 Stat. 129, 130 and 132; 76 Stat. 663, 7 U.S.C. 450, 21 U.S.C. 111–113, 114a–1, 115–117, 119–126, 130, 134a, 134b, 134d, 134f; 7 CFR 2.17, 2.51, and 371.2(d))

Done at Washington, D.C. this 21st day of November, 1983.

J. K. Atwell,

Deputy Administrator, Veterinary Services.

[FR Doc. 83-31840 Filed 11-21-83; 3:58 pm]

BILLING CODE 3410-34-M

CIVIL AERONAUTICS BOARD

14 CFR Part 316

[Procedural Reg. Issuance of Part 316 Docket 41660; PR-262]

Collection of Claims Owed the United States

AGENCY: Civil Aeronautics Board.

ACTION: Final rule.

SUMMARY: The CAB is issuing rules to implement the Federal Claims Collection Act and the Debt Collection Act. These rules state the procedures to be used by the CAB to collect debts owed the United States, and how interest will be charged on unpaid claims. The rules further state when interest and penalty changes may be waived and what actions a person must take to respond to a notice of claim. These rules are intended to ensure a fair and expeditious collection of these claims.

DATES: Effective: December 23, 1983.

Adopted: November 1, 1983.

FOR FURTHER INFORMATION CONTACT: Joseph L. Kull, Comptroller, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428; 202-673-5476.

SUPPLEMENTARY INFORMATION: By notice of proposed rulemaking (PDR-84, 48 FR 39081, August 29, 1983), the Board proposed rules to implement two laws for the collection of debts owed the United States. Those statutes were the Federal Claims Collection Act (Pub. L. 89-508) and the Debt Collection Act, as amended (Pub. L. 97-365). Those laws set the guidelines and general procedures for agencies to pursue claims for the United States. Two comments were received in response to PDR-84: Frontier Airlines and the Regional Airline Association (on behalf of Britt Airways, Chaparral Airlines, Comair, Empire Airlines, PBA Airlines, Pennsylvania Airlines, Precision Airways, Prinair, Rocky Mountain Airways, Scheduled Skyways, and Tennessee Airways). Both comments suggested clarifications or changes in the proposed rules. The Board has decided to adopt the rule with some of those changes.

The rules set simple procedures to implement the laws under the guidelines in rules published jointly by the General Accounting Office and the Department of Justice. Once the amount of a debt is set, the Board will send the debtor a notice of claim. The Regional Airline Association (RAA) commented that it was unclear about what constitutes the notice of claim and whether it would be sent before or after a final Board order or another final disposition setting an overpayment amount. The answer is that a notice of claim is a separate document that would be sent after a final order or other final disposition is adopted. The debt is not owed to the United States until a final order is adopted, so a notice of claim could not be sent until that time. The Board does not believe, therefore, that any change in the rule is needed on this point.

Payment is then due 30 days from the date the notice of claim is sent. The debtor must send the full payment within that period or explain its failure to do so. The Board will make a technical change in the rule suggested by RAA to clarify that the debtor need only respond if full payment is not made within the required 30 days.

Both Frontier and RAA commented on that part of the proposed rule stating how and when interest and penalty charges will be imposed on the debtor. The RAA commented that where the Board is reimbursing a carrier for losses, neither the carrier nor the Board would know that there is an overpayment resulting in a debt until after the fact. RAA argued that a small carrier could be faced with a large debt required to be paid within 30 days that could not have been reasonably anticipated. In such a case, RAA contended, the Board should consider a liberal policy of waiving interest on the debt.

The Board agrees with RAA that proposed § 316.4(c)(3) is broad enough to include such a waiver if found in the best interests of the United States. The Board does not believe any change should be made in the rule to mention specifically that circumstance. The Board and its staff handling these matters are aware of the stain that could be placed on small carriers by a large unanticipated debt, and are prepared to grant waivers where they are found in the public interest.

The Board further believes that Frontier's concern should be handled in the same manner. Frontier stated that waivers of interest and penalties should also be made when claims are challenged by the debtor in the courts. Frontier contended that to threaten a debtor with interest and penalties while a claim is being litigated would be unfair, and would place a roadblock in the way of those debtors exercising their right to judicial review.

The Board does not agree that imposition of interest or penalty charges is unfair in this situation. Any person is free to litigate any claim in our courts, regardless of the merit of the arguments raised. While the litigation is being pursued, the debtor has the use of the money in question. The interest is a measure of the value of that use. The modest (6 percent per year) penalty charge is an additional incentive not to unduly delay payment. If a debtor's claim is sustained, no interest will be owed. If the United States prevails, it should be entitled to interest or other charges, just as are contractors who challenge and win an appeal of a contract claim against the U.S. under the Contract Disputes Act (Pub. L. 96-563). On those occasions where the best interests of the United States would be so served, the Board will waive interest and penalty charges.

Under the rule and applicable statutes, the Board may proceed to collect unpaid claims by offset against payments owed by the United States. RAA contended that under the Debt Collection Act, the Board cannot use offset procedures until "after trying to collect the claim elsewise." The proposed rule states that the Board will collect claims by offset "whenever feasible." RAA implied that this contradicts the statute. We disagree. The statute requires that an agency proceed to collect the claim before using offset measures. An agency is not required to exhaust all other methods. If a debtor does not pay the claim within 30 days or such other period as may be prescribed or arrange for alternative payments, the Board may then proceed with offset. The Board will do so whenever it is practical. The Board recognizes, as RAA pointed out, that offset must be used under the statutory guidelines and those issued by the General Accounting Office and the Department of Justice. The Board will closely follow those guidelines.

No comments were received on the rest of the rule, which establishes procedures for the settlement of claims for less than the principal of the debt and sets forth additional actions the Board may take to collect unpaid claims, such as referral for litigation and notification of credit bureaus.

By a separate rule, the Board is designating its Comptroller as the Claims Agent. That rule gives the Comptroller delegated authority, in accordance with Board policy and precedent, to take action under Part 316.

Final Regulatory Flexibility Analysis

The discussion above is the Board's final regulatory flexibility analysis of the rule under the Regulatory Flexibility Act (5 U.S.C. 604). Copies of this document can be obtained from the Distribution Section, Civil Aeronautics Board, Washington, D.C. 20428, 202-673-5432, by referring to the "PR" number at the top of the document.

Paperwork Reduction Act

The collection-of-information requirements in this proposal are subject to the Paperwork Reduction Act, Pub. L. 96-511, 44 U.S.C. Chapter 35. Those requirements have been submitted to the Office of Management and Budget (OMB) for review and comment. These have been approved by OMB under number 3024-0070.

List of Subjects in 14 CFR Part 316

Administrative practice and procedure, Claims, and Penalties.

Accordingly, the Civil Aeronautics Board amends 14 CFR Chapter II to add a new Part 316, *Collection of Claims Owed the United States*, as follows:

PART 316—COLLECTION OF CLAIMS OWED THE UNITED STATES

Sec.

Authority: Secs. 204, 401, 402, 407, 416, Pub. L. 85-726, as amended, 72 Stat. 740, 754, 757, 758, 771; 49 U.S.C. 1324, 1371, 1372, 1377, 1386. Secs. 3 and 5, Pub. L. 89-308, as amended, 89 Stat. 308, 96 Stat. 1754-1758, 31 U.S.C. 3701-3719.

Note.—The information collection requirements contained in this part have been approved by the Office of Management and Budget under number 3024-0070.

§ 316.1 Purpose.

This part implements the Federal Claims Collection Act, as amended by the Debt Collection Act and interpreted by the General Accounting Office and Department of Justice. It provides procedures under which the Board will collect claims owed to the United States arising from activities under the Board's jurisdiction. The part further sets forth the procedures for the Board to determine and collect interest and other charges on those claims under the Debt Collection Act and for referral of unpaid claims for litigation.

§ 316.2 Applicability.

The part applies to all claims due the United States under the Federal Claims Collection Act as amended by the Debt Collection Act, arising from activities under the jurisdiction of the Board, including amounts due the United States from fees, overpayments, fines, civil penalties, damages, interest, and other sources.

§ 316.3 Notice of claim.

(a) The Board will send a written notice to any person who owes payment to the United States under this part, stating the basis for the claim, the possible interest and penalty charges under this part for non-payment, additional consequences of non-payment, and the date full payment is due. That payment will normally be due 30 days from the date notice under this part is mailed. The notice of claim will be sent return receipt requested.

(b) If the claim is disputed, the debtor shall respond to the notice in writing and state whether and when full payment is to be made, and the reasons for non-payment. If full payment is not made by the date asked in the notice, the debtor shall also state the reasons for the inability to make full payment and how and when payments are to be made.

(c) If no response to the notice is received by the date asked in the notice, the Board may take further action under this part or under 4 CFR Parts 101-105, and the Federal Claims Collection Act, as amended. These actions may include reports to credit bureaus, contracts with collection agencies, revocation of licensing or offset of Federal salary or other administrative offset, as authorized in 31 U.S.C. 3701-3719.

§ 316.4 Interest, penalty fees, and collection charges.

(a) The Board will assess interest on unpaid claims. The interest rate used by the Board is set by the Secretary of the Treasury. The Board will further charge penalty fees of not more than 6 percent per year of the unpaid claim for failure to pay a part of a debt more than 90 days past due. The Board will also impose collection charges to cover the costs of processing and handling overdue claims, based on the costs incurred.

(b) Interest on debts will be charged and will run from the date the notice of claim is mailed if the amount of the debt is not paid within 30 days from that date. The Board may extend the 30-day period when in the public interest. Interest will be calculated only on the principal of the debt. The rate of interest charged is the rate in effect on the date from which interest begins to run. The rate will remain fixed for the duration of the indebtedness.

(c) The Board may waive interest, collection charges or penalty fees if it finds that:

(1) The debtor is unable to pay any significant sum within a reasonable period of time;

(2) Collection of interest or charges jeopardizes collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including, under such circumstances, where an offset or installment payment agreement is in effect.

§ 316.5 Collection by offset.

(a) Whenever feasible, the Board will collect claims under this part by means of administrative offset against obligations of the United States to the debtor. Collection by Federal salary will be under the procedures in 4 CFR Part 102.

(b) The Board will notify the debtor in writing of its intent to use offset procedures to collect the debt unless the debtor agrees to repayment. The Board will ask other Federal agencies to help in the offset whenever possible. The notice to the debtor shall also include the type and amount of the claim and an explanation of the debtor's rights for records and review under 31 U.S.C. 3716(a).

§ 316.6 Settlement of claims.

(a) The Board may not waive the principal of any debt owed the United States.

(b) The Board may settle claims not exceeding $20,000 by compromise at less than the principal of the claim if—

(1) The debtor shows an inability to pay the full amount within a reasonable time;

(2) The Government would be unable to enforce collection in full through litigation or administrative means within a reasonable time;

(3) The cost of collecting the full amount is not justified by the amount of the claim; or

(4) With respect to enforcement debts, the Board's enforcement policy would be served by settlement of the claim for less than the full amount.

§ 316.7 Referral for litigation.

Claims that cannot be settled under § 316.6 or for which collection action cannot be ended or suspended under 4 CFR Parts 103 and 104 will be referred to

the General Accounting Office for litigation.

§ 316.8 Disclosure to consumer reporting agency.

The Board may disclose delinquent debts to consumer reporting agencies under the Federal Claims Collection Act, as amended. If, after a report has been made under this section, the status or amount of the claim substantially changes, the Board will notify the reporting agency in writing within 15 days of the change. Any request for verification information will be given to the reporting agency by the Board within 30 days of receipt of the request. Before disclosure to a reporting agency, the Board will obtain in writing a statement by the agency that it will comply with the Fair Credit Reporting Act and other applicable Federal statutes.

§ 316.9 Board claims agent.

(a) The Board's Comptroller is the Claims Collection Agent for all claims under this part. The Comptroller will take action as delegated under Part 385 of this chapter to carry out this part and the requirements of 4 CFR Parts 101–105.

(b) All action for the collection of claims under this part will be the responsibility of the Comptroller. All Board bureaus and offices shall send documents supporting claims under this part to the Comptroller for action. Delegated waivers or compromise under this part shall be with the concurrence of the General Counsel. Any action taken by the Comptroller under this Part involving air carriers receiving subsidy will be in consultation with the appropriate Bureau or Office director(s).

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 83-31520 Filed 11-22-83; 8:45 am]

BILLING CODE 6320-01-M

14 CFR Part 385

[Organization Reg. Amdt. No. 134 to Part 385, Docket 41660, OR-212]

Delegations and Review of Action Under Delegation; Nonhearing Matters

AGENCY: Civil Aeronautics Board.

ACTION: Final rule.

SUMMARY: The CAB is delegating authority to its Comptroller to act as its Claims Agent. The Comptroller will take action to collect debts owed the United States, in accordance with Board policy and precedent.

This will ensure an expeditious collection of these claims.

DATES:

Effective: December 23, 1983.

Adopted: November 1, 1983.

FOR FURTHER INFORMATION CONTACT: Joseph L. Kull, Comptroller, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428, 202–673–5225.

SUPPLEMENTARY INFORMATION: For the reasons stated in PR–262, issued contemporaneously, the Board is amending its delegations of authority.

List of Subjects in 14 CFR Part 385

Administrative practice and procedure, Authority delegations (Government Agencies).

PART 385—[AMENDED]

Accordingly, the Civil Aeronautics Board amends 14 CFR Part 385, Delegations and Review of Action Under Delegation: Nonhearing Matters, as follows:

1. The authority for Part 385 is:

Authority: Secs. 102, 104, 401, 402, 403, 407, 416, Pub. L. 85–726, as amended; 72 Stat. 740, 743, 754, 757, 758, 766, 771; 49 U.S.C. 1302, 1324, 1371, 1372, 1373, 1377, 1386. Reorganization Plan No. 3 of 1961, 26 FR 5989.

2. A new paragraph (h) is added to § 385.27 to read:

§ 385.27 Delegation to the Comptroller.

* * * * *

(h) Send notices of claim and other communications to a debtor under Part 316, and to impose and to waive interest and other charges and to settle claims by compromise with the concurrence of those Board officials specified in § 316.9(b) of the chapter, in accordance with Board policy and precedent.

By the Civil Aeronautics Board.

Phyllis T. Kaylor,

Secretary.

[FR Doc. 83-31519 Filed 11-22-83; 8:45 am]

BILLING CODE 6320-01-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1406

Provision of Performance and Technical Data for Coal and Wood Burning Appliances; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule; correction.

SUMMARY: This document corrects a citation contained in final regulations requiring that sales catalogs and other point of sale literature for certain wood and coal burning appliances shall contain information as to minimum safe distances that should be maintained between the appliance and combustibles, which were published May 16, 1983 (48 FR 21893).

FOR FURTHER INFORMATION CONTACT: Wade Anderson, Directorate for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, D.C. 20207, phone (301) 492–6400.

Accordingly, the Consumer Product Safety Commission is correcting 16 CFR 1406.1(c)(2) to read as follows:

§ 1406.1 Scope, purpose, and effective date.

* * * * *

(c) *Effective date.* * * *

(2) The requirements of § 1406.4(c) apply to sales catalogs and point of sale literature provided by manufacturers after May 16, 1984.

Dated: November 18, 1983.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 83-31470 Filed 11-22-83; 8:45 am]

BILLING CODE 6355-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release Nos. 33-6499; 34-20384; 35-23122; File No. S7-979]

Shelf Registration

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission today announced the adoption of a revised shelf registration rule. Rule 415 (17 CFR 230.415) relates to the registration of securities to be offered or sold on a delayed or continuous basis in the future. As revised, the Rule is available for offerings qualified to use short form registration statements and for traditional shelf offerings. These modifications reflect experience with the Rule and the views that have been expressed, particularly those relating to disclosure and due diligence.

EFFECTIVE DATE: December 31, 1983.

FOR FURTHER INFORMATION CONTACT: Prior to the effective date, contact Steven L. Molinari (202) 272–2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. After the effective date, contact David B. H.

Martin (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

In the eighteen months since its adoption on a temporary basis, Rule 415 [1] has operated efficiently and has provided registrants with important benefits in their financings, most notably cost savings. The cost savings are attributable to a number of factors, including flexibility to respond to rapidly changing markets, reduced legal, accounting, printing and other expenses and increased competition among underwriters. At the same time, however, concerns have been raised, including institutionalization of the securities markets, impact on retail distribution, increased concentration in the securities industry, effects on the secondary markets, adequacy of disclosure and due diligence.

The Commission has considered the concerns that have been expressed about Rule 415. Some relate to economic factors, such as volatile interest rates and other market forces, which exist apart from Rule 415 and thus are not appropriate bases on which to take action on the Rule. The Commission believes that the concerns about disclosure and due diligence, however, should be addressed because they may be affected by the manner in which offerings under the Rule may proceed. Accordingly, the Commission has determined to modify the Rule to limit its availability to those offerings where the benefits of shelf registration are most significant and where the disclosure and due diligence concerns are mitigated by other factors. The Commission believes that limiting the Rule to primary offerings of securities qualified to be registered on Form S-3 or F-3 [2] and to traditional shelf offerings strikes the appropriate balance.

The integrated disclosure system [3] recognizes that, for companies in the top tier, there is a steady stream of high quality corporate information continually furnished to the market and broadly digested, synthesized and disseminated. In addition, procedures for conducting due diligence investigations of such registrants, including continuous due diligence by means such as designated underwriters' counsel, are being adapted to the intergrated disclosure system and shelf registration. The Commission believes that the widspread market following of such companies and the due diligence procedures being developed serve to address the concerns about the adequacy of disclosure and due diligence and, thus, ensure the protection of investors.

With respect to traditional shelf offerings, the Commission believes that continued use of Rule 415 also is appropriate. First, concerns have not been expressed about these offerings. Second, these offerings may not be feasible on other than a delayed or continuous offering basis.

As to other offerings by non-S-3 or F-3 registrants, however disclosure and due diligence concerns need to be addressed. Accordingly, the Commission has determined not to allow the Rule to be used for such offerings.

As revised, Rule 415 enumerates the securities which are allowed to be offered on a continuous or delayed basis. Unless the securities fall within one of the provisions spelling out the various traditional shelf offerings, they must qualify for registration on Form S-3 or F-3. If they do not, they may not be registered for delayed or continuous offerings.

II. Background

Securities have been registered for continuous and delayed offerings for many years. Some of the instances in which shelf registration was allowed were set forth in Guide 4, which was promulgated in 1968.[4] These included securities to be issued in continuing acquisition programs or those underlying exercisable options, warrants or rights. Administrative practice, however, accommodated traditional shelf offerings beyond those specified in the Guide. Shelf registration was permitted for such diverse offerings as limited partnership tax shelters, employee benefit plans, pools of mortgage backed pass through certificates offered from time to time, and customer purchase plans.

Rule 415 arose in connection with the development of the integrated disclosure system. As part of that effort, the Commission comprehensively reviewed all of the Guides for the Preparation and Filing of Registration Statements and Reports and reorganized them to separate the substantive disclosure and procedural provisions. The shelf rule was the procedural rule which resulted from the reevaluation of Guide 4 and reflected current administrative practice as well as the provisions of the Guide.

The Rule was published for comment twice,[5] before being adopted on a temporary basis in March 1982.[6] Following public hearings and further public comment,[7] the Commission, in September 1982, extended the effective date of the Rule until December 31, 1983.[8] In June 1983, the Commission published the shelf registration rule for comment again in order to provide all interested parties another opportunity to submit their views and experience under the Rule before the Commission made its final determination.[9] Throughout the course of this rulemaking proceeding, the Commission has received almost 400 written and oral submissions from commentators expressing their views on shelf registration.[10]

Two dominant themes emerged from these comments on Rule 415. The majority of commentators, mostly registrants, have been pleased with the Rule and favor its adoption on a permanent basis. Members of the securities industry, on the other hand, have expressed a wide spectrum of views and have reiterated several concerns. In the most recent comment solicitation, they emphasize concerns over the adequacy of disclosure and due diligence. While these commentators voice concerns, only a few of them believe that there should be no shelf registration rule at all. Others with concerns about the Rule recommend that it be retained, either in its present form or in modified form.

The suggested modifications of Rule 415 include: (1) Restricting eligibility for use of the Rule to (a) investment grade debt securities, (b) a combination of investment grade debt securities and

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[1] 17 CFR 230.415 under the Securities Act of 1933 ("Securities Act") [15 U.S.C. 77a et seq.].

[2] Forms S-3 [17 CFR 239.13] and F-3 [17 CFR 239.33] provide short form registration for a variety of transactions, including primary offerings of investment grade debt and non-convertible preferred securities and primary offerings where the registrant meets certain float requirements designed to ensure widespread market following.

[3] The Commission has adopted an integrated disclosure system for domestic registrants and for foreign private issuers. *See* Release Nos. 33-6383 (March 3, 1982) [47 FR 11380] and 33-6437 (November 19, 1982) [47 FR 54764].

[4] Release No. 33-4936 (December 9, 1968) [33 FR 18617].

[5] *See* Release Nos. 33-6276 (December 23, 1980) [46 FR 78] and 33-6334 (August 6, 1981) [46 FR 42001].

[6] Release No. 33-6383 (March 3, 1982).

[7] The public hearings were announced in Release No. 33-6391 (March 12, 1982) [47 FR 11701].

[8] Release No. 33-6423 (September 2, 1982) [47 FR 39799].

[9] Release No. 33-6470 (June 9, 1983) [48 FR 27768].

[10] The written submissions, transcripts and highlights prepared by the staff are available for public inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549 *see* File Nos. S7-869, 896, 925 and 979).

limited types of equity securitites or (c) registrants that are widely followed in the marketplace; (2) requiring advance notice to the marketplace of forthcoming offerings; and (3) imposing some form of "cooling off period" between the announcement and sale of securities. Some commentators also suggest providing underwriters relief from liability under the Securities Act.

III. Experience

The Commission, registrants, the securities industry, and others have had over eighteen months of experience with the shelf registration rule. During this time, the Commission has monitored the operation and impact of the Rule, has been provided information concerning actual experience with the Rule and has considered empirical data and studies related to the Rule.[11]

From March 1982 through September 1983, almost 4,600 shelf registration statements relating to $181 billion were filed.[12] These shelf filings represent 52% of the over 8,800 registration statements and 52% of $345 billion of securities registered during this period.

Over 85% of the shelf registrations have been traditional shelf filings.[13] Filings for employee benefit plans and dividend or interest reinvestment plans alone account for 55% of the shelf filings and represent 26% of the $181 billion in shelf registered securities.

Most of the balance have been filings for investment grade debt securities offered and sold from time to time on a delayed basis. These 369 debt filings (registering almost $70 billion) represent 53% of the $133 billion of total debt issues filed from March 1982 through September 1983. Approximately 94% of the 369 delayed debt filings were on Form S-3. Over 35% of the filings were made by companies in the financial industry and over 20% were made by utilities.

The remaining shelf filings related to 195 delayed equity filings (registering $12.5 billion). These filings amounted to about 3% of the over 7,700 equity registration statements and 6% of the $212 billion in equity securities registered. Over half were fixed price syndicated offerings which were filed under Rule 415 largely for the procedural convenience afforded by the Rule.[14] Of the remaining delayed equity filings, 90% were on Form S-3. Aproximately 70% were for common stock and 30% were for preferred stock. Fifteen percent listed an "at the market" distribution as one of the potential distribution methods described. Eleven of these filings were for so-called "dribble-outs" by utility companies, in which common stock is offered through an underwriter into an existing trading market on a regular basis.

IV. Discussion

A. Benefits of Shelf Registration

Virtually all commentators state that shelf registration provides substantial benefits for corporate financings. The principal benefit cited by commentators is that of cost savings. Empirical studies on shelf registration also suggest that securities sold under Rule 415 have lower issuance costs than securities not sold under the Rule.[15]

Cost savings and other benefits are attributed to a number of factors. Flexibility is the Rule's most frequently cited benefit, because it is the source of the greatest cost savings and provides other advantages as well. Commentators stress that flexibility is important in today's volatile markets; that the procedural flexibility afforded by the Rule enables a registrant to time its offering to avail itself of the most advantageous market conditions; that by being able to meet "market windows," registrants are able to obtain lower interest rates on debt and lower dividend rates on preferred stock, thereby benefiting their existing shareholders. The flexibility provided by the Rule also permits variation in the structure and terms of securities on short notice, enabling registrants to match securities with the current demands of the marketplace. Some commentators attributed the success of their offerings to the flexibility provided by the Rule. Empirical studies also support the importance of enhanced financing flexibility in new issue design, market timing and choice of distribution technique.[16] While most discussion of flexibility is in the context of debt offerings, some commentators also assert that flexibility is necessary in the equity markets.

Simplification of the securities registration process also is cited as reducing costs. Legal, accounting, printing and other costs are stated to have been reduced, because only a single registration statement need be filed for a series of offerings, rather than a separate registration statement each time an offering is made. Some commentators also state that simplification of the registration process has given them more flexibility in planning their financing schedules.

Finally, some commentators stress that increased competition among underwriters has resulted in lower underwriting spreads and offering yields, which produce cost savings for registrants and their shareholders. Empirical studies of debt and equity offerings under Rule 415 found lower issuance costs and attributed this primarily to increased competition among investment bankers.[17] Some commentators note that increased competition has spurred the innovation of new financing products.

On the basis of the benefits cited, many commentators, especially registrants, support permanent adoption of Rule 415 as proposed.

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[11] In particular, in response to the June 1983 comment solicitation, registrants and investment bankers provided data on their actual experience under the Rule. This and other experience with the Rule, including empirical data and studies (*see* note 15 *infra*), are included in the most recent public file of this proceeding and are available for inspection and copying at the Commission's Public Reference Room (*see* File No. S7-979).

[12] These do not include 45 shelf registration statements (registering almost $19 billion of debt securities) filed by 27 foreign government and political subdivisions thereof from September 1980 through October 1983. While Rule 415, by its terms, is not available to foreign government issuers (*see* 17 CFR 230.415(b)), such issuers have been permitted to use a shelf registration procedure since September 1980 (*see* discussion in Part VIII *infra*).

[13] Traditional shelf offerings include those offerings enumerated in former paragraphs (a)(1)(ii) through (a)(1)(vii) of the Rule. These include: (1) Secondary offerings; (2) securities offered pursuant to employee plans and dividend reinvestment plans; (3) securities which are to be issued upon the exercise of outstanding options, warrants or rights; (4) securities which are to be issued upon conversion of other outstanding securities; (5) securities which are to be pledged as collateral; and (6) securities which are registered on Form F-6 [17 CFR 239.36]. Traditional shelf offerings also include some offerings falling within former paragraph (a)(1)(i) of the Rule: commodity fund offerings, mortgage related securities, limited partnership interests, securities registered in connection with a planned series of acquisitions and offerings made on a best efforts basis. As discussed in greater detail in Part VI *infra*, the Commission, in modifying the Rule, has enumerated the permissible traditional shelf offerings.

[14] *See* discussion in Part VI.B *infra*.

[15] *See* Kidwell, Marr, and Thompson, "SEC Rule 415—the Ultimate Competitive Bid," *University of Tennessee and Virginia Polytechnic Institute and State University Working Paper*, 1983 (indicating that debt issues sold under Rule 415 sell between 30 and 40 basis points less than comparable negotiated issues); Rogowski and Sorensen, "Shelf Registration and the Cost of Capital: A Test of Market Efficiency," *Washington State University and University of Arizona Working Paper*, 1983 (evidence of improved efficiency in the securities markets resulting from the flexibility associated with Rule 415); and Bhagat, Marr, and Thompson, "The Rule 415 Experiment: Equity Markets," *University of Utah and Virginia Polytechnic Institute and State University Working Paper*, 1983 (indicating that the issuing cost of equity securities sold under Rule 415 is about 29 percent less than that of comparable equity securities not sold under Rule 415).

[16] *Id.*

[17] *Id.*

B. Concerns

1. *Adequacy of Disclosure.* A number of commentators, especially those from the securities industry, express concerns relating to the adequacy of disclosure. While Rule 415 has been the focal point of these concerns, these commentators question aspects of the Commission's integrated disclosure system, such as short form registration and incorporation by reference. They question the amount and quality of information available, as well as whether investors receive it in time to make investment decisions. These commentators express concern that the Rule contributes to deficiencies in the disclosure provided to investors caused, in great part, by short form registration statements.

The Commission believes that the integrated disclosure system has enhanced the level of disclosure to investors. The basis for the system was the upgrading of the continuous reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act").[18] This upgrading was designed to ensure that complete and current information is available to all investors on a continuous basis, not only when a registrant makes a public offering of its securities, but for the trading markets as well.[19] This focus recognized that the secondary trading market volume dwarfs the volume of Securities Act offerings.

For Securities Act registration, the integrated disclosure system builds upon the existence of timely and accurate corporate reporting. Thus, registrants that are widely followed in the marketplace may use Forms S–3 and F–3, which allow maximum use of incorporation by reference of Exchange Act reports and generally do not require information contained in those reports to be reiterated in the prospectus and delivered to investors. Forms S–3 and F–3 recognize the applicability of the efficient market theory to those companies which provide a steady stream of high quality corporate information to the marketplace and whose corporate information is broadly disseminated. Information about these companies is constantly digested and synthesized by financial analysts, who act as essential conduits in the continuous flow of information to investors, and is broadly disseminated on a timely basis by the financial press and other participants in the marketplace.[20] Accordingly, at the time S–3/F–3 registrants determine to make an offering of securities, a large amount of information already has been disseminated to and digested by the marketplace.

2. *Due Diligence.* Concerns expressed about the quality of disclosure also relate to underwriters' ability to conduct due diligence investigations.[21] Commentators attribute concerns about due diligence largely to fast time schedules. Under the Rule, any underwriter may be selected to handle a particular offering. Some commentators suggest that no underwriter can afford to devote the time and expense necessary to conduct a due diligence review before knowing whether it will handle an offering and that there may not be sufficient time to do so once it is selected. These commentators also indicate that they may not have the opportunity to apply their independent scrutiny and judgment to documents prepared by registrants many months before an offering

On the other hand, registrants using the Rule indicate that procedures for conducting due diligence investigations have developed and are developing to enable underwriters to adapt to the integrated disclosure system and the shelf registration environment. They note the use of continuous due diligence programs, which employ a number of procedures, including designated underwriters' counsel. These registrants believe that underwriters' ability to conduct adequate due diligence investigations in this environment has not been impaired and, in some cases, has been enhanced.

The Commission recognizes that procedures for conducting due diligence investigations of large, widely followed registrants have changed and are continuing to change. Registrants and the other parties involved in their public offerings—attorneys, accountants, and underwriters—are developing procedures which allow due diligence obligations under Section 11(b) to be met in the most effective and efficient manner possible.[22] The anticipatory and continuous due diligence programs being implemented combine a number of procedures designed both to protect investors by assuring timely and accurate disclosure of corporate information and to recognize the separate legal status of underwriters by providing them the opportunity to perform due diligence.

The trend toward appointment of a single law firm to act as underwriters' counsel is a particularly significant development.[23] Of course, this procedure is not new. Appointing a single law firm to act as underwriters' counsel has been done traditionally by public utility holding companies and their subsidiaries subject to the competitive bid underwriting requirements of Rule 50 (17 CFR 250.50) under the Public Utility Holding Company Act of 1935.[24] This technique is now being followed more broadly in the shelf registration environment and represents what the Commission believes to be a sound practice because it provides for due diligence investigations to be performed continually throughout the effectiveness of the shelf registration statement. Designation of underwriters' counsel facilitates continuous due diligence by ensuring on-going access to the registrant on the underwriters' behalf. Recognizing the independent statutory basis on which underwriters perform

[18] 15 U.S.C. 78a et seq.

[19] *See* Release No. 33–6231 (September 2, 1980) [45 FR 63630], amending Form 10–K [17 CFR 249.310] and Rule 14a–3 [17 CFR 240.14a–3]; Release No. 33–6233 (September 2, 1980) [45 FR 63660], amending Articles 3, 5, and 12 of Regulation S–X [17 CFR Part 210]; Release No. 33–6234 (September 2, 1980) [45 FR 63682], adopting uniform financial statement requirements; and Release No. 33–6288 (February 9, 1981) [46 FR 12480], amending Form 10–Q [17 CFR 249.308a].

[20] In recognition of the important role of research reports in the integrated disclosure system, the Commission recently proposed revisions to Rule 139 [17 CFR 230.139], which provides guidance as to the publication of broker-dealer research reports relating to companies in registration. Release No. 33–6492 (October 5, 1983) [48 FR 46801]. The proposals would increase the research reports that may be issued by reducing substantially the restrictions on research reports concerning registrants eligible to use Form S–3 or F–3.

[21] Section 11 of the Securities Act imposes liability for material misstatements or omissions contained in a registration statement when it goes effective. Section 11(b) provides that each person, other than the issuer, will not be held liable if he can sustain the burden of proof that his conduct, under the circumstances, was reasonable. Specifically, Section 11(b)(3) permits the defendant to prove that he made a reasonable investigation of and had reasonable grounds to believe in the accuracy of the non-expertised portions of the registration statement or, with respect to any part presented upon the authority of an expert other than the defendant, that he had no reasonable ground to believe and did not believe there was a material omission or misstatement. 15 U.S.C. 77k(b)(3). This investigation is known as "due diligence."

[22] *See* Olson, "Spotlight Shines Anew on Statutory Diligence Tasks," *Legal Times* (April 4, 1983), p.14; Hovdesven and Wolfram, "Underwriter Liability in the Integrated Disclosure System," *The National Law Journal* (July 5, 1982), p.13; Landau, "Some Aspects of the Implementation of Shelf Registration Procedures," in *The New Exemptions from SEC Registration*, Law & Business, Inc./Harcourt Brace Jovanovich, p.321; AICPA Exposure Draft, "Amendments to SAS No. 38: Letters for Underwriters" (November 4, 1983), which reflects the accounting profession's adaptation to evolving procedures, including the use of designated underwriters' counsel; and comment letters in File No. S7–879 in response to June 1983 comment solicitation.

[23] Registrants appoint the law firm to act as underwriters' counsel, either with or without consulting with the prospective participating underwriters.

[24] 15 U.S.C. 79–79z–6.

due diligence, registrants cooperate with underwriters and designated counsel in making accommodations necessary for them to perform their due diligence investigation.

Other procedures registrants have developed complement the use of underwriters' counsel by presenting various opportunities for continuous due diligence throughout the shelf process. A number of registrants indicate that they hold Exchange Act report "drafting sessions." This affords prospective underwriters and their counsel an opportunity to participate in the drafting and review of periodic disclosure documents before they are filed.

Another practice is to hold so-called periodic due diligence sessions. Some registrants hold sessions shortly after the release of quarterly earnings to provide prospective underwriters and their counsel an opportunity to discuss with management the most recent financial results and other events of that quarter. Periodic due diligence sessions also include annual meetings with management to review financial trends and business developments. In addition, some registrants indicate that prospective underwriters and underwriters' counsel are able to schedule individual meetings with management at any time.

The Commission believes that the development of anticipatory and continuous due diligence techniques is consistent with the integrated disclosure system and will permit underwriters to perform due diligence in an orderly, efficient manner. Indeed, in adopting Rule 176 as part of that system, [T125] the Commission recognized that, just as different registration forms are appropriate for different companies, the method of due diligence investigation may not be the same for all registrants. Rule 176 sets forth a non-exclusive list of circumstances which the Commission believes bear upon the reasonableness of the investigation and the determination of what constitutes reasonable grounds for belief under Section 11(b) of the Securities Act.[26]

Circumstances which may be particularly relevant to an underwriter's due diligence investigation of registrants qualified to use short form registration include the type of registrant, reasonable reliance on management, the type of underwriting arrangement and the underwriter's role, and whether the underwriter participated in the preparation or review of documents incorporated by reference into the registration statement. The Commission expects that the techniques of conducting due diligence investigations of registrants qualified to use short form registration, where documents are incorporated by reference, would differ from due diligence investigations under other circumstances.

3. *Other Concerns.* Securities industry commentators also raise concerns relating to institutionalization of the securities markets, the impact on retail distribution, increased concentration in the securities industry and effects on the secondary markets. Specifically, these commentators believe that Rule 415 is accelerating the trends toward institutionalization of the securities markets and concentration in the securities industry. In their view, the Rule is decreasing the number of syndicated offerings in which regional securities firms participate and excluding individual investors from the new issues market.

While the Commission recognizes the existence of these trends, it believes that they reflect econmic and other factors apart from shelf registration. These factors include volatile interest rates and markets, the growth of mutual and pension funds which act as intermediaries for individual investors, and the homogenization of the financial services industry. These factors are not necessarily affected by Rule 415. Rule 415 is a procedural rule which presents an optional filing technique. It does not mandate any particular method of distribution. Indeed, many offerings of debt and equity securities registered under the Rule have been sold in traditional syndicated offerings. The Commission therefore believes that these concerns transcend Rule 415.

V. Commission Action

The Commission has considered all views and suggestions with respect to Rule 415. There are several reasons why it may be appropriate to adopt the shelf registration rule in substantially its present form. During the eighteen months the Rule has been in effect, it has worked well and has provided registrants with substantial benefits in their financings. Also, most of the concerns raised transcend shelf registration. On the other hand, the Commission believes that concerns raised about the quality and timing of disclosure and due diligence are important to address because they relate to the adequacy of disclosure investors receive in connection with public offerings. Having weighed all considerations, the Commission is modifying Rule 415 to strike an appropriate balance by making it available for offerings eligible to be registered on Form S–3 or F–3 and for traditional shelf offerings.

The Commission believes that shelf registration should continue to be available for registrants eligible to use short form registration. The integrated disclosure system addresses concerns about the quality and timeliness of disclosure by ensuring that the marketplace is provided with a continuous stream of high quality corporate information about registrants widely followed in the marketplace. Similarly, evolving continuous due diligence practices as described above address concerns about due diligence by enhancing the ability of underwriters to conduct due diligence investigations of widely followed registrants.

The Commission also believes that Rule 415 should continue to be available for traditional primary and secondary shelf offerings. Examples of traditional primary shelf offerings include those where securities are sold to employees, customers or existing shareholders; those involving interests in limited partnerships; those related to acquisitions and other business combinations; and those of securities underlying options, warrants, rights or conversions. The Commission is not aware of any disclosure, due diligence or other concerns having been raised about the registration of these securities on a continuous or delayed basis. Moreover, these types of shelf offerings may only be feasible on a traditional shelf basis.

For registrants not eligible to use short form registration, however, the Commission believes that concerns about disclosure and due diligence outweigh the benefits of Rule 415. The Commission also notes that shelf registration may not be as advantageous for such registrants because they cannot rely on subsequently filed Exchange Act reports for certain updating of the information in the shelf registration

[T125] 17 CFR 230.176, Release No. 33-6383 (March 3, 1982).

[26] Rule 176 lists the following factors: (1) The type of issuer; (2) the type of security; (3) the type of person; (4) the office held when the person is an officer; (5) the presence or absence of another relationship to the issuer when the person is a director or proposed director; (6) reasonable reliance on officers, employees, and others whose duties should have given them knowledge of the particular facts (in light of the functions and responsibilities of the particular person with respect to the issuer and the filing); (7) when the person is an underwriter, the type of underwriting arrangement, the role of the particular person as underwriter and the availability of information with respect to the registration; and (8) whether, with respect to a fact or document incorporated by reference, the particular person had any responsibility for the fact or document at the time of the filing from which it was incorporated.

statement.[27] Such updating requires the filing of post-effective amendments. Indeed, few non-S–3 or F–3 registrants have used Rule 415 for other than traditional shelf offerings.

VI. Operation of Revised Rule 415

For the reasons stated above, the Commission has determined to limit the availability of Rule 415 to continuous and delayed offerings of securities which may be registered on Form S–3 or F–3 [28] and traditional shelf offerings. Major revisions have been made to paragraph (a)(1)(i) of the Rule, which details those securities which may be registered for an offering to be made on a continuous or delayed basis in the future, to reflect this modification in the scope of the Rule. Corresponding revisions have been made elsewhere in the Rule.

A. Offerings Permitted Under Revised Rule

1. *Traditional Shelf Offerings.* A number of traditional shelf offerings were enumerated in former paragraphs (a)(1) (ii) through (vii). [29] These provisions have been retained and redesignated as paragraphs (a)(1) (i) through (vi).

Other traditional shelf offerings came within former paragraph (a)(1)(i). Because the primary offerings which may be made under Rule 415 are now limited, paragraph (a)(1)(i) has been deleted. That paragraph provided that any securities not falling within one of the categories specifically enumerated in the balance of paragraph (a)(1) could be registered under the Rule, but were limited to an amount reasonably expected to be offered and sold within two years. Those traditional offerings covered by former paragraph (a)(1)(i) are now set forth in paragraphs (a)(1) (vii) through (ix).

Mortgage related securities, such as mortgage backed debt and mortgage participation or pass through certificates, are listed in paragraph (a)(1)(vii). Generally, the securities are registered and then offered from time to time as series of mortgage backed debt are established or pools of mortgages are formed. Shelf registration is essential to sale of these securities. Together with the formation of blind pools, shelf registration allows registrants to match capital demands with portfolio holdings. They can form pools of mortgages as sales of securities backed by those mortgages take place. It is not necessary for the mortgages to be purchased before the securities are priced and sold. With an effective shelf registration statement, pricing and sales can occur contemporaneously with mortgage acquisition.[30]

Paragraph (a)(1)(viii) relates to securities to be issued in connection with business combination transactions. All other traditional shelf offerings are covered by paragraph (a)(i)(ix), which permits offerings that (1) will be commenced promptly, (2) will be made on a continuous basis and (3) may continue for a period in excess of 30 days from the date of initial effectiveness.

Examples of the traditional shelf offerings which come within paragraph (a)(1)(ix) are: customer purchaser plans; exchange, rights, subscription and rescission offers; offers to employees, consultants or independent agents; offerings on a best efforts basis; tax shelter and other limited partnership interests; commodity funds; condominium rental pools; time sharing agreements; real estate investment trusts; farmers' cooperative organizations or others making distributions on a membership basis; and continous debt sales by finance companies to their customers.

2. *Short Form Registration Shelf Offerings.* New paragraph (a)(1)(x) relates to primary delayed or continuous offerings of securities registered, or qualified to be registered, on Form S–3 or F–3. Unless an offering falls within one of the categories of offerings specified in paragraphs (a)(1)(i) through (a)(1)(ix), it must come within paragraph (a)(1)(x) or it **cannot** be registered pursuant to **Rule 415**. Thus, only traditional **shelf offerings** and primary shelf offerings **that** qualify for short form registration may be offered or sold under the Rule.

Examples of offerings which fall within paragraph (a)(1)(x) are: notes rated as investment grade to be offered from time to time at varying interest rates and maturities; debt or equity securities to be sold from time to time according to a plan of distribution that includes a number of options, such as sales directly to purchasers, through agents, through underwriters and through dealers; debt or equity securities to be sold from time to time pursuant to a plan of distribution that indicates they may be sold in one or more transactions and lists such options as ordinary brokerage transactions, block transactions on an exchange, negotiated transactions, fixed price offerings, or any combination of methods described; and "dribble" programs, in which common stock is offering through an underwriter acting as exclusive sales agent into an existing trading market on a regular basis. Offerings such as these may no longer be made unless the securities are qualified to be registered on Form S–3 or F–3.

B. Shelf Registration Statements Filed for Procedural Convenience

The revised Rule specifically relates only to securities to be offered on a traditional shelf basis or S–3/F–3 securities to be offered on a continuous or delayed basis. It does not relate to any other offerings and, accordingly, nor do the procedures and techniques applicable under the Rule.

In adopting Rule 415, the Commission recognized that offers and sales of securities under the Rule may not be made immediately after the effective

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[27] Item 512(a) of Regulation S-K [17 CFR 229.512(a)] requires that registrants, in offerings under Rule 415, furnish undertakings to file post-effective amendments: (1) to include updated financial statements as required by Section 10(a)(3) of the Securities Act; (2) to reflect a fundamental change in the information set forth in the registration statement; and (3) to include any new or changed material information with respect to the plan of distribution. Because Forms S–3 and S–8 [17 CFR 239.16b] automatically incorporate by reference all subsequently filed reports pursuant to Sections 13, 14 and 15(d) of the Exchange Act, registrants filing shelf registration statements on these forms may rely on their subsequently filed Exchange Act reports in lieu of post effective amendments for the first two purposes if the Exchange Act reports contain the required information. Other registrants, however, are required to file post-effective amendments in all instances specified in Item 512(a), as well as for purposes of filing required exhibits, such as underwriting agreements, opinions of counsel and supplemental indentures.

[28] These forms may be used if their float tests are met or the securities to be registered are of investment grade. Form S–3 requires that the aggregate market value of stock held by non-affiliates must be either (1) $150 million or more or (2) $100 million or more and the registrant must have had an annual trading volume of such stock of 3 million shares or more. Form F–3 requires that the aggregate market value worldwide of voting stock held by non-affiliates is the equivalent of $300 million or more. Both forms define non-convertible debt or preferred securities as investment grade if, at the time of effectiveness of the registration statement, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3–1[c)(2)(vi)(F] under the Exchange Act [17 CFR 240.15c3–1(c)(2)(vi)(F)]) has rated the security in one of its generic categories that signifies investment grade. The instructions in both forms note that the four highest rating categories (within which there may be subcategories or gradations indicating relative standing) typically signify investment grade.

[29] These offerings are: secondary offerings; securities offered pursuant to dividend or interest reinvestment or employee benefit plans; securities underlying options, warrants or rights or issuable upon conversions; securities pledged as collateral; and despositary shares evidenced by American Depositary Receipts registered on Form F-6.

[30] Mortgage related securities are the subject of pending legislation. S. 2040 (replaces S. 1821). S. Rep. No. 98–293 (1983). Section 104 of S. 2040 would provide for shelf registration of such securities.

date of the registration statement. Thus, shelf registration statements must be declared effective without certain information such as price, interest rate, maturity and redemption provisions.[31] Post-effective amendments and prospectus supplements[32] serve to ensure that investors are provided with complete, accurate and current information at the time of the offering or sale of securities.

In allowing shelf registration statements to become effective without all required information, however, the Commission did not intend for registrants making offerings on other than a delayed or continuous basis to use the shelf registration rule as a basis for omitting required information from their registration statements when they become effective. Where securities are not to be offered and sold on a delayed or continuous basis, offers and sales generally take place promptly after the effective date and all required information should be included in the registration statement when it becomes effective.

In this regard, the Commission notes that, during the eighteen months that Rule 415 has been in effect, a number of registrants engaged in offerings made other than on a delayed or continuous basis have filed under the Rule for the procedural conveniences it affords prior to effectiveness. In particular, they have used the Rule to avoid the need to file pre-effective amendments reflecting the final terms and conditions of the offering.

As revised, Rule 415 is no longer available for this purpose. Accordingly, the Rule as revised reflects two changes which make clear that Rule 415 techniques are not available for offerings made on other than a delayed or continuous basis. First, the word "only" has been added to the introductory phrase of paragraph (a)(1) to clarify that the Rule pertains exclusively to the offerings enumerated in paragraphs (a)(1) (i) through (x).[33] Second, paragraph (a)(1)(x) is limited to S–3 or F–3 securities to be offered and sold "on a continuous or delayed basis."

C. Other Provisions of Revised Rule

1. *Two Year Amount Limitation.* The two year amount limitation is now contained in a separate provision, new paragraph (a)(2), which specifies that it is applicable to offerings of securities covered by paragraphs (a)(1) (viii) through (x). These are the same offerings which were subject to the two year limit under the former Rule, except for mortgage related securities. The Commission believes that it is no longer necessary to subject these securities to the two year amount limitation.

2. *Undertakings.* Paragraph (a)(2), requiring the registrant to furnish the undertakings in Item 512(a) of Regulation S–K, has been redesignated as paragraph (a)(3). No other change has been made in this provision and the provisions of Item 512(a) remain unchanged as well.

3. *At the Market Equity Offerings.* Paragraph (a)(3), relating to primary at the market offerings of equity securities, has been redesignated as paragraph (a)(4). In addition, the requirement for Form S–3 eligibility has been revised to refer to paragraph (a)(1)(x), in light of the Form S–3 or F–3 limitation now contained in that paragraph.

D. Currently Effective Registration Statements for Offerings Not Permitted Under Revised Rule

When Rule 415 was adopted on a temporary basis, the Commission contemplated that registrants with then-effective shelf registration statements would be subject immediately to the final action taken on the Rule.[34] After December 31, 1983, registrants having effective registration statements pertaining to offerings no longer permitted under the Rule will not be able to offer or sell the securities as registered.[35]

Such registrants have several alternatives. First, securities registered on effective registration statements for types of offerings no longer permissible under the Rule may be removed from registration. Second, if registrants do not wish to deregister the securities, those securities may remain registered but no offerings may be made until the registration statement is post-effectively amended.[36] The post-effective amendment is required to describe the material change to the plan of distribution because the offering may not be made on a shelf basis.[37] Once the offering is commenced, it must be made on a non-Rule 415 basis and any securities then remaining unsold must be deregistered.[38]

VII. Public Utility Holding Companies

Utility companies have been frequent users of Rule 415. Some of these companies are subject to the Public Utility Holding Company Act of 1935 and, as such, are subject to certain additional requirements in connection with their financings. For example, paragraph (b) of Rule 50 requires that offerings of securities by registered holding companies and their subsidiaries be made in accordance with the formal competitive bidding procedures specified therein.

In September 1982, however, the Commission issued a statement of policy concerning the application of Rule 50 in the context of offerings of securities under Rule 415.[39] Determining that the formal competitive bidding procedures specified in paragraph (b) of Rule 50 were inconsistent with those possible under the shelf registration rule, the Commission stated that registered holding companies and their subsidiaries could adopt alternative procedures to those described in paragraph (b) of Rule 50 to develop and procure two or more competitive offers for securities which have been authorized for sale by the Commission. The Commission continues to believe that this policy with respect to Rule 50 is appropriate and it remains in effect.

VIII. Foreign Governments

While Rule 415, by its terms, is not available to foreign governments,[40] foreign governments have been permitted to use a shelf registration

[31] Release No. 6383 (March 3, 1982).

[32] *See* Rule 424 [17 CFR 230.424].

[33] This change does not preclude using a single registration statement to register both securities to be offered and sold on a shelf basis and securities to be offered and sold otherwise than on a shelf basis. Of course, the Rule 415 provisions and techniques apply only to those securities registered for offer and sale on a shelf basis.

[34] Release No. 6383 (March 3, 1982) [47 FR 11380], p. 11395, note 77. *See* Rule 401(f) [17 CFR 230.401(f)].

[35] In a related vein, if registrants with effective S–3 or F–3 shelf registration statements are ineligible to use those Forms at such time as updating for purposes of Section 10(a)(3) of the Securities Act is required, they may not thereafter make shelf offerings. *See* Item 512(a)(1)(i) of Regulation S–K and Rule 401. In such cases, they have the same alternatives as described herein.

[36] *See* Item 512(a)(1)(iii) of Regulation S–K, pursuant to which the registrant will have undertaken to file a post-effective amendment "to include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement."

[37] Where a registrant chooses not to deregister and then wishes to make a non-shelf offering of an amount of securities exceeding the remaining registered securities, it may file a new registration statement with respect to the additional securities and use the new registration statement to take the place of the post-effective amendment changing the plan of distribution in the earlier shelf registration statement from a Rule 415 to a non-Rule 415 basis. *See* Rule 429 [17 CFR 230.429].

[38] *See* Item 512(a)(3) of Regulation S–K, pursuant to which the registrant will have undertaken "to remove from registration by means of a post-effective amendment any of the securities . . . which remain unsold at the termination of the offering."

[39] Release No. 35–22623 (September 2, 1982) [47 FR 39810].

[40] Rule 405 defines foreign government as "the government of any foreign country or of any political subdivision of a foreign country."

procedure since September 1980.[41] The Commission revised this staff interpretive position in September 1982 to be consistent with Rule 415 to the extent practicable.[42] Under the revised staff interpretation, seasoned foreign governments [43] are permitted to use shelf registration in a manner substantially similar to that specified in Rule 415. The revised shelf procedure for seasoned foreign government issuers generally has operated well and has not been altered by the granting of any waivers. Accordingly, the Commission affirms the staff position for shelf registration by foreign governments as outlined in September 1982.

IX. Statutory Authority

This rulemaking action is being taken pursuant to Sections 6, 7, 10 and 19(a) of the Securities Act of 1933 [15 U.S.C. 77f, 77g, 77j and 77s(a)].

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities

X. Text of Rule

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. By revising § 230.415 (Rule 415) to read as follows:

§ 230.415 Delayed or continuous offering and sale of securities.

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, *Provided*, That—

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities;

(v) Securities which are pledged as collateral;

(vi) Securities which are registered on Form F-6 (§ 239.36 of this chapter);

(vii) Mortgage related securities, including such securities as mortgage backed debt and mortgage participation or pass through certificates;

(viii) Securities which are to be issued in connection with business combination transactions;

(ix) Securities the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness; or

(x) Securities registered (or qualified to be registered) on Form S-3 or Form F-3 (§ 239.13 of 239.33 of this chapter) which are to be offered and sold on a continuous or delayed basis by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary.

(2) Securities in paragraphs (a)(1) (viii) through (x) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S-K (§ 229.512 of this chapter).

(4) In the case of a registration statement pertaining to an at the market offering of equity securities by or on behalf of the registrant:

(i) The offering comes within paragraph (a)(1)(x); (ii) where voting stock is registered, the amount of securities registered for such purposes must not exceed 10% of the aggregate market value of the registrant's outstanding voting stock held by non-affiliates of the registrant (calculated as of a date within 60 days prior to the date of filing); (iii) the securities must be sold through an underwriter or underwriters, acting as principal(s) or as agent(s) for the registrant; and (iv) the underwriter or underwriters must be named in the prospectus which is part of the registration statement. As used in this paragraph, the term "at the market offering" means an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on or through the facilities of a national securities exchange or to or through a market maker otherwise than on an exchange.

(b) This section shall not apply to any registration statement pertaining to securities issued by a face-amount certificate company or redeemable securities issued by an open-end management company or unit investment trust under the Investment Company Act of 1940 or any registration statement filed by any foreign government or political subdivision thereof.

(Secs. 6, 7, 10, 19[a], 48 Stat 78, 81, 85; secs. 205 209, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; sec. 1, 79 Stat. 1051; sec. 308[a][2], 90 Stat. 57; 15 U.S.C. 77f, 77g, 77j, 77s[a])

By the Commission (Chairman Shad and Commissioners Evans, Longstreth and Treadway); Commissioner Thomas concurring in part and dissenting in part.*

George A. Fitzsimmons,

Secretary.

November 17, 1983.

Special Concurring Opinion of Chairman Shad

The revised shelf rule offers significant advantages to issuers and their shareholders, and mitigates the risks to investors by limiting such offerings to S-3 and F-3 corporations, the largest, most creditworthy and widely followed corporations.

However, concepts suggested under which underwriters might conduct due diligence investigations under the shelf rule are of limited practical value. Issuers can solicit competitive bids from underwriters and effect distributions of securities on the same day. In preparation for shelf offerings, it has been suggested that prospective issuers invite groups of underwriters and their counsel to attend several meetings a year. These would include meetings following release by the companies of their quarterly and annual reports, and when they are preparing their prospectuses, proxies, annual, quarterly and other SEC filing documents.

It would be very expensive for top management executives, underwriters and their counsels to spend hundreds of thousands of hours annually attending such meetings on the speculative possibility that the individual issuer will decide to do a public offering, and that one of the underwriters attending such meetings will be the high bidder for the issue. It therefore seems likely that over time, few top management executives will attend such meetings and that investment bankers will begin sending junior observers, rather than qualified participants.

It has also been suggested that the underwriters rely on due diligence reviews by attorneys hired by the issuer. It is of course the underwriter that is liable for failure to conduct an adequate due diligence investigation, and it is the underwriter's capital and reputation that are at risk if the offering is unsuccessful or performs worse than the general market following the offering.

[41] *See* Release No. 33-6240 (September 10, 1982) [45 FR 61609].

[42] Release No. 33-6424 (September 2, 1980) [47 FR 39809].

[43] Foreign governments that have registered their securities (or guarantees of securities of another issuer) under the Securities Act within five years and have not defaulted on any principal or interest are considerd to be seasoned.

* Special Concurring Opinion of Chairman Shad and Opinion of Commissioner Thomas follow.

While due diligence reviews by issuer hired attorneys are useful in defending actions brought by investor-plaintiffs, this is not the principal purpose of such reviews. The principal purpose is to protect investors.

Assessment of the risk of adverse market performance following an offering requires a careful due diligence investigation and the judgment of an experienced underwriter. However, the accelerated time schedules of such offerings limit the opportunity for such assessments.

Issuer hired attorneys have been used in certain utility offerings. While the approach suffers the foregoing infirmities, utilities are the most predictable of corporate enterprises. They are not subject to the vagaries to which industrial and other issuers are subject.

The bulk of shelf offerings to date have occurred during the broadest and strongest stock, bond and new issue markets in history. Investors do not seek rescission or other redress, unless the security declines in price. The test of the shelf rule will come during the next bear market.

The revised shelf rule offers significant advantages to issuers and their shareholders, and mitigates the risks to investors, but the due diligence techniques suggested are of limited practical value. Other due diligence techniques should therefore be reviewed in the light of the shelf rule, as adopted, and the rapidly changing marketplace.

Commissioner Thomas, Concurring in Part and Dissenting in Part

I respectfully dissent from that portion of the Commission's decision today to adopt Rule 415 for offerings qualified to be registered on Forms S-3 and F-3 insofar as it relates to equity securities only. Although I am gratified at the compromise adopted by the Commission and sincerely believe that such a compromise was only reached because of the strong opposition to the Rule voiced by many during the experimental period, I must continue to express my reservations about the Rule on the basis of principle.

I am convinced that the Rule as applied to equities encourages changes in our capital market system substantially in excess of those necessary to facilitate the financings for which it was fashioned. In so doing the Commission risks injuring our capital market system, which is widely regarded as one of our great national assets. As I stated before, I continue to favor, however, adoption of the praiseworthy portion of the Rule that permits major companies rapid access to the markets for the sale of their debt securities.

After studying the comment letters and conferring with issuers, representatives of the securities industry, and institutional and individual investors, I continue to believe that the Rule as applied to equity offerings (1) reduces the quality and timeliness of disclosure available to investors when making their investment decisions, and (2) jeopardizes the liquidity and stability of both our primary and secondary securities markets by encouraging greater concentration of underwriters, market-makers, and other financial intermediaries and by discouraging individual investor participation in the capital market, thereby furthering the trend toward institutionalization of securities holders.

Although I do not believe that it is possible at this time to quantify the various elements of these risks due to the exceptionally strong market we have been experiencing during most of the experimental period and the inactive market experienced at the beginning of the experimental period, I am convinced that many of these risks are real. Incurring these risks is antithetical to the statutory duty of the Commission to protect investors and to maintain the integrity of our capital markets.

[FR Doc. 83-31506 Filed 11-21-83; 8:45 am]
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DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 162

[T.D. 83-238]

Boarding and Search of Vessels by Customs Officers

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the boarding and search of vessels to: (1) permit Customs officers to board and search an American vessel on the high seas without a requirement that there be probable cause to believe that such vessel is violating or has violated the laws of the United States; and (2) provide that Customs officers are authorized to assist any other agency in the enforcement of United States laws on any vessel.

Customs believes that these changes are in the interest of the efficient and effective administration of its enforcement responsibility.

EFFECTIVE DATE: December 23, 1983.

FOR FURTHER INFORMATION CONTACT: Stuart P. Seidiel, Assistant Chief Counsel (Enforcement and Operations), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2482).

SUPPLEMENTARY INFORMATION:

Background

Section 162.3(a), Customs Regulations (19 CFR 162.3(a)), presently states that a Customs officer, for the purpose of examining the manifest and other documents and papers, and examining, inspecting, and searching a vessel, may at any time go on board:

(1) Any vessel at any place in the United States or within the Customs waters of the United States;

(2) Any American vessel on the high seas, when there is probable cause to believe that such vessel is violating or has violated the laws of the United States; or

(3) Any vessel within a Customs-enforcement area designated such under the provisions of the Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat. 517; 19 U.S.C. 1701, 1703-1711), but Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned.

In a notice published in the **Federal Register** on September 14, 1981 (46 FR 45626), Customs proposed to amend § 162.3(a)(2) by eliminating the requirement that there be probable cause to believe that an American vessel is violating or has violated the laws of the United States before it is boarded and searched on the high seas.

The notice also proposed to add a new section 162.3(c) which would state that Customs officers are authorized to assist any other agency in the enforcement of United States laws on any vessel.

Comments

In response to the notice, Customs received four comments, one of which supports the proposed rule.

One commenter simply contends that Customs does not have the authority to make the proposed changes.

Another commenter states that the proposed rule does not present a convincing legal basis for the changes, and that the notice does not adequately address the question of the protection afforded by the Fourth Amendment to the Constitution. The commenter states, with respect to the reference in the notice that Customs authority under 19 U.S.C. 1581(a) is substantially similar to Coast Guard authority under 14 U.S.C. 89(a), that 14 U.S.C. 89(a) specifically authorizes Coast Guard inspections, searches and seizures "upon the high seas," whereas 19 U.S.C. 1581 contains no such general reference to Customs enforcement seaward of Customs waters.

A final commenter maintains that Customs does not have statutory authorization for the proposed rule in that, pursuant to 19 U.S.C. 1581(a), Customs authority with respect to boarding, inspecting, and searching a vessel, is limited to the customs waters. In this regard, *United States* v. *Warren*, 578 F. 2d 1058 (5th Cir. 1978) *(en banc), rev'g* 550 F. 2d 219 and *United States* v. *Williams*, 617 F. 2d 1063 (5th Cir. 1980) are cited. The commenter contrasts the functions of Customs and the Coast

Guard, and concludes that Customs has a well-defined, narrow task compared to the general and pervasive powers of the Coast Guard on the high seas. The commenter further states that, even if Customs did have the statutory authority for the proposed rule, such authority could not be exercised consistently with the Fourth Amendment, particularly with respect to generalized searches, as opposed to stops for documentary checks or safety checks. The commenter contends that the case law indicates that there must be reason to suspect that a border crossing or a violation of law has occurred before even a documentary check or safety check can be made. Thereafter, a generalized search subsequent to an investigatory stop requires probable cause.

Formulation of Final Rule

The comments did not address the proposal to add a new § 162.3(c) to the Customs Regulations. The proposal is being adopted.

After a review of the comments and further consideration of the matter, Customs has decided to adopt the proposal to amend § 162.3(a)(2) to permit Customs officers to board and search an American vessel on the high seas without a requirement that there be probable cause to believe that such vessel is violating or has violated the laws of the United States.

Section 581(a), Tariff Act of 1930, as amended (19 U.S.C. 1581(a)), states as follows:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, *or at any other authorized place*, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance. (Emphasis supplied.)

Under 14 U.S.C. 89(a), the Coast Guard is authorized to:

> Make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

As stated by the court in *Warren, supra* at 1064–65, pursuant to 14 U.S.C. 89(a), the Coast Guard may apprehend and board any vessel of the American flag on the high seas; such authority does not need to be founded upon any particularized suspicion.

In *United States* v. *Freeman*, 579 F. 2d 942, 946 (5th Cir. 1978), the court, in holding that Customs officials had statutory authority pursuant to 19 U.S.C. 1581(a) to detain and board a vessel in customs waters for the purpose of a document check, described 14 U.S.C. 89(a) as being "analogous" to 19 U.S.C. 1581(a), and stated that the language of the two statutes was "nearly identical." The court further stated that "the authority embodied within section 1581 may be traced back to the commencement of the Republic when the First Congress statutorily granted Customs officials *broad powers*." (Emphasis supplied.)

In *United States* v. *Gollwitzer*, 697 F. 2d 1357 (11th Cir. 1983), which involved the boarding and search of a vessel on inland waters by Customs officers, the court spoke of "the broad authority vested in Customs and Coast Guard officers."

Customs believes that the authority for the promulgation of amended section 162.3(a)(2), is as follows:

1. 19 U.S.C. 1581(a), particularly the words "at any other authorized place." 19 U.S.C. 1581(a) authorizes boardings within the United States (internal waters and the territorial sea to the three-mile limit), within the customs waters (generally from the coast to the 12-mile limit of the contiguous zone), or within customs-enforcement areas (50 miles from the limits of customs waters). The only area remaining is international waters beyond the customs waters.

2. The substantial similarity of 19 U.S.C. 1581(a) and 14 U.S.C. 89(a).

3. The fact that the Coast Guard may stop and board any American vessel on the high seas; prior to 1936, the Coast Guard's authority was based upon the predecessor statute to 19 U.S.C. 1581(a). See *Maul* v. *United States*, 274 U.S. 501, 507 (1927).

4. 46 U.S.C. 277 which authorizes customs officers to inspect a vessel's documents at any time.

5. The fact that customs laws clearly contemplate actions beyond the 12-mile limit. See 19 U.S.C. 1581 (g) and (h), 1583, 1586 (b), (c), and (e), and 1587.

6. 19 U.S.C. 66, which states in part that the Secretary of the Treasury "shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

One of the commenters points out language in *United States* v. *Williams, supra* at 1073, which states:

> Section 1581(a) empowers both the Customs Service and the Coast Guard to board vessels and conduct customs searches, but only in customs waters within the twelve-mile limit.

Customs does not believe that this language of *Williams* precludes the amendment to § 162.3(a). The issue of a Customs officer boarding an American vessel on the high seas was not presented in *Williams*, which involved the Coast Guard's seizure of a foreign vessel on the high seas. Further, Customs believes that the court in *Williams*, in writing of section 1581(a), merely repeated the limitations recognized by the court in *Warren*, which were based on the restrictive language of § 162.3(a)(2). Customs does not believe that the court in *Williams* considered the "at any other authorized place" language of 19 U.S.C. 1581(a).

Customs believes that § 162.3(a) should be consistent with the language of the corresponding statute, 19 U.S.C. 1581(a). If additional interpretation of the statute or regulation is necessary, it should be done by the courts. Over the last few years, there have been numerous cases in several circuits involving vessel searches and seizures.

Customs believes that the amendment to § 162.3(a) is constitutional. In *Williams, supra* at 1081–82, the court spoke of:

> * * * The cases holding that section 89(a) constitutionally authorizes the Coast Guard to stop American vessels beyond the twelve-mile limit for routine safety and documentary checks. E.g. *United States* v. *Warren*, 578 F. 2d 1058; *United States* v. *One (1) 43 Foot Sailing Vessel*, 538 F. 2d 694; *United States* v. *Odom*, 526 F. 2d 339. These cases reconfirm the notion that the fourth amendment does not necessarily require any sort of suspicion of criminal activity before a vessel may be stopped at sea; in addition, they imply that Congress's authority to enact statutes providing for "groundless" searches of vessels is not limited by the Constitution to United States customs waters.

The *Williams* court, *supra* at 1083, also stated that:

> The United States obviously has a vital interest in preventing the smuggling of illegal narcotics into the country and in apprehending those who may reasonably be suspected of violating the criminal narcotics laws.
>
> Furthermore, the seizure of a nautical vessel is a very limited and foreseeable intrusion.

In *Freeman, supra* at 946, the court stated:

[No] case holds that the stop of a vessel on the seas for a document or safety check is constitutionally proscribed by the Fourth Amendment. Indeed, our cases have upheld the right of government agents to stop vessels for routine safety and document checks under the analogous statutory authority granted to the Coast Guard by 14 U.S.C. 89(a).

In *Gollwitzer, supra* at 1657, the court recognized that ocean going vessels have a diminished expectation of privacy:

The potential for provoking fear by randomly stopping vessels capable of ocean travel is therefore less onerous than that in the context of random automobile stops or airport seizures.

The United States Supreme Court in *U.S.* v. *Villamonte-Marquez*,—U.S.— (1983) recognized the constitutionality of 19 U.S.C. 1581 and held that the standards which govern vessel boardings are different than those governing land vehicles.

The proposal to amend § 162.3 will improve the effectiveness of maritime interdiction activities. Operations on the high seas will continue to be governed by the 1978 interagency agreement between the Coast Guard and Customs which sets forth the framework for such activities.

The Fourth Amendment prohibits searches and seizures which are unreasonable. The actions authorized by the amendment to § 162.3(a) are not unreasonable in view of the role of Customs; the fact that Customs frequently acts in concert with the Coast Guard; and the fact that no case holds that the stop and search of a vessel on the high seas is constitutionally prohibited by the Fourth Amendment.

Executive Order 12291

These amendments will not result in a "major rule" as defined in section 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Regulatory Flexibility Act

It is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that these amendments will not have a significant economic impact on a substantial number of small entities. The amendments are an enforcement measure which is not expected to have incidental effects on a substantial number of small entities.

Drafting Information

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 162

Law enforcement, Customs duties and inspection, Imports.

Amendments to the Regulations

Part 162, Customs Regulations (19 CFR Part 162), is amended as set forth below.

William von Raab,

Commissioner of Customs.

Approved: November 2, 1983.

John M. Walker, Jr.,

Assistant Secretary of the Treasury.

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

Section 162.3 is revised to read as follows:

§ 162.3 Boarding and search of vessels.

(a) *General authority.* A Customs officer, for the purpose of examining the manifest and other documents and papers and examining, inspecting and searching the vessel, may at any time go on board:

(1) Any vessel at any place in the United States or within the Customs waters of the United States;

(2) Any American vessel on the high seas;

(3) Any vessel within a Customs-enforcement area designated such under the provisions of the Anti-Smuggling Act (Act of August 5, 1935, as amended, 49 Stat. 517; 19 U.S.C. 1701, 1703–1711), but Customs officers shall not board a foreign vessel upon the high seas in contravention of any treaty with a foreign government, or in the absence of a special arrangement with the foreign government concerned.

(b) *Search of army or navy vessel.* If the district director or special agent in charge believes that sufficient grounds exist to justify a search of any army or navy vessel, the facts shall be reported to the commanding officer or master of the vessel with a request that he cause a full search to be made, and advise the district director or special agent in charge of the result of such search. If, after the cargo has been discharged, passengers and their baggage landed, and the baggage of officers and crewmembers examined and passed, the district director or special agent in charge believes that sufficient grounds exist to justify the continuance of Customs supervision of the vessel, the commanding officer or master of the vessel shall be advised accordingly.

(c) *Assistance of other agencies.* Customs officers are authorized to assist any other agency in the enforcement of United States laws on any vessel.

(R.S. 251, as amended, sec. 581, 46 Stat. 747, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1581, 1624))

[FR Doc. 83-31495 Filed 11-22-83; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket Nos. 75F-0355 and 82F-0305]

Food Additives Permitted for Direct Addition to Food for Human Consumption; Aspartame

AGENCY: Food and Drug Administration.

ACTION: Final rule; denial of request for stay of effective date; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) is denying requests to stay the amendment to the food additive regulations that provides for the safe use of aspartame in carbonated beverages and carbonated beverage syrup bases. After reviewing a request for a stay submitted with objections to the amendment and requests for a hearing, FDA has concluded that the public interest would not be served by a stay of the amendment while the agency analyzes the objections and makes a decision whether to grant a hearing.

DATE: This document confirms July 8, 1983, as the effective date of the regulation authorizing the use of aspartame in carbonated beverages and carbonated syrup bases (21 CFR 172.804).

FOR FURTHER INFORMATION CONTACT: Anthony P. Brunetti, Bureau of Foods (HFF-334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204; 202-472-5690.

SUPPLEMENTARY INFORMATION:

I. Introduction

Aspartame is the methyl ester of a digestible dipeptide, which has a nutritive value of four calories per gram. G. D. Searle & Co., Skokie, IL, originally petitioned in 1973 for approval of its use as a sweetener and flavor enhancer. FDA approved the petition in a final regulation published in the **Federal Register** of July 26, 1974 (39 FR 27317), and codified at 21 CFR 172.804.

FDA received formal objections to this regulation and requests for a hearing to investigate certain alleged toxic effects of aspartame. FDA granted the request for a hearing and

established a Public Board of Inquiry (the Board) to evaluate the scientific issues.

Subsequently, FDA stayed the regulation (40 FR 56907; Dec. 5, 1975) while an audit of the authenticity of certain toxicological studies on aspartame was carried out. Following this evaluation, the Board convened a public hearing; it completed the hearing and issued its report in 1980 (Aspartame, Decision of the Public Board of Inquiry, Docket No. 75F-0355) (Board's decision).

In the **Federal Register** of July 24, 1981 (46 FR 38285), the Commissioner of Food and Drugs reviewed the safety issues debated at the hearing and announced his final decision that aspartame was safe within the meaning of section 409(c) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(c)). He specifically determined that, on the basis of available data, aspartame consumption would not cause brain damage resulting in mental retardation or endocrine dysfunction, nor would it cause brain tumors. FDA approved aspartame for the following uses as a sweetener: dry sugar substitutes in free-flowing and tablet form; cold cereals; chewing gum; and dry bases for beverages, instant coffees and teas, puddings and gelatins, and dairy analog toppings (21 CFR 172.804(c)).

II. Aspartame for Use in Carbonated Beverages

A. Regulations Approving Use

On July 8, 1983 (48 FR 31376), FDA issued a final rule amending the regulation authorizing the use of aspartame to permit its use as a sweetener in carbonated beverages and carbonated beverage syrup bases. That regulation responded to a petition filed by G. D. Searle & Co. (47 FR 46140; Oct. 15, 1982). Before approving this new use, the agency reviewed, among other safety issues, the potential neurotoxicity of the components and decomposition products of aspartame, the stability of aspartame in carbonated beverages, and the potential impact on health of increased consumption of aspartame resulting from its additional use in carbonated beverages.

In reaching his decision that aspartame is safe as a food additive in carbonated beverages at projected consumption levels, the Commissioner determined that there was no evidence that aspartame's component amino acids adversely alter brain levels of neurotransmitters. Based on all the evidence before him, the Commissioner also concluded that there was no cause for concern about the safety of aspartame's decomposition products, diketopiperazine (DKP) and methanol, even at dosages of aspartame well above the 99 percent consumption level.

FDA based its determination on the evaluation of additional studies submitted by the petitioner, data from other relevant scientific studies, and data furnished in comments responding to the notice of the filing of the petition. These data are included in the administrative record for Docket No. 82F-0305.

B. Objections and Requests for a Hearing and a Stay

Two objections were filed to the July 8, 1983 regulation. The objections argued that numerous safety issues had not been adequately considered by the agency prior to promulgation of the regulation, and requested that the regulation be stayed or revoked pending examination of those issues in a public hearing. The two parties objecting to the regulation on the basis of unresolved safety issue were James S. Turner, 1424 16th St. NW., Washington, DC 20036, objecting on behalf of himself and the Community Nutrition Institute, 1146 19th St. NW., Washington, DC 20036 (hereinafter referred to as Turner objection); and Woodrow C. Monte, Director, Food Science and Nutrition Laboratories, Arizona State University, Tempe, AZ (hereinafter referred to as Monte objection). In addition, Richard J. Wurtman, M.D., Massachusetts Institute of Technology, Cambridge, Mass., commented on the regulation, but did not request a hearing or a stay of the regulation. Prior to publication of the final rule approving the use of aspartame in soft drinks, Dr. Wurtman wrote a number of letters to FDA in which he expressed his concern about certain alleged adverse effects of aspartame on brain function. Dr. Wurtman's letters and FDA's responses are in Docket No. 82F-0305. Because Dr. Wurtman's comment and the two objections raise that same issue, this document is also responsive to his comment. (See discussion in Section D.1. below.)

C. Standard for Granting a Discretionary Stay

Under section 409(e) of the act, a petition for a hearing or a stay of a food additive regulation does not operate automatically to stay or delay the effectiveness of that regulation. FDA regulations provide that the Commissioner may grant a stay of a challenged regulation in those situations where the public interest so warrants (21 CFR 10.35(d)(1)).

Promulgation of the regulation approving aspartame's additional use as a beverage sweetener was preceded by the Commissioner's determination, based on all available evidence, that aspartame is safe for human consumption, including this use. Because adoption of the regulation constitutes a finding by the Commissioner that the regulation is in the public interest, a substantial showing to the contrary must be made to justify a stay (40 FR 40682, 40687; Sept. 3, 1975). Under these circumstances, a stay of the regulation would be appropriate only upon a determination by the Commissioner that the objections create significant doubt as to the soundness of the initial finding of safety. If that were the case, the Commissioner could find that a stay would be in the public interest because the possibility of a risk to public health and safety would exist.

D. Scientific Issues Raised in Objections

This section discusses the specific issues identified by Dr. Monte and Mr. Turner in their objections to the regulation approving the use of aspartame in carbonated beverages. Citations are included to relevant **Federal Register** discussions of these issues, and to portions of the administrative record (Docket No. 75F-0355 or 82F-0305) where these points have been discussed or reviewed. Wherever issues raised by the two objections are similar, they have been combined for ease of discussion and analysis. In responding to the various issues raised by the objections, the agency incorporates by reference all materials in the administrative record (Docket Nos. 75F-0355 and 82F-0305).

For ease of discussion, each topic of an objection is listed below as a heading, followed by the agency's analysis of the topic.

1. *Brain Damage:* Mental retardation, brain lesions, potential changes in important brain chemicals leading to possible behaviorial modification, and the related need to test for this effect prior to approval of use in beverages.

The potential for brain damage resulting from aspartame-derived amino acids was one of the main safety concerns addressed in the hearing before the Public Board of Inquiry. The Board evaluated objections received in response to the publication of the original regulation authorizing aspartame for use in certain dry foods (39 FR 27317; July 26, 1974) and heard extensive testimony on the issue in its public hearing. With regard to aspartame's potential for causing mental retardation, brain lesions, or

undesirable effects on the neuroendocrine regulatory systems, the Board rejected the position of the objectors and concluded that aspartame did not cause brain lesions (Board's Decision, p. 38). The Commissioner's final decision discussed the matter in detail, and concurred with the Board's findings (46 FR 38285; July 24, 1981).

One of the present objections alleged that ingestion of combined high levels of aspartame and carbohydrates may result in nontoxic, but adverse, changes in the brain levels of important neurotransmitters. The preamble to the regulation authorizing the use of aspartame in carbonated beverage discussed that issue (48 FR 31376, 31378–31380). The relevance of specific experimental data submitted to the agency in support of this hypothesis was addressed in detail in a letter from the Director of the Bureau of Foods to Dr. Richard Wurtman, dated August 12, 1983. The agency sent Dr. Wurtman a letter, dated September 8, 1983, responding specifically to his comment. Those letters are in the administrative record (Docket No. 82F–0305).

2. *Decomposition Products:* Toxicity of diketopiperazine, methyl alcohol; detection of nitrosation products with modern methods; possible toxic, unidentified decomposition products.

The administrative record (Docket No. 75F–0355) contains the results of bioassays, including tests for fetal toxicity, which demonstrate the safety of DKP, a known decomposition product of aspartame. The validity of the DKP bioassay results was reviewed by the Commissioner in his decision (46 FR 38285, 38302). The safety aspects of DKP, methyl alcohol, and other decomposition products that may be present in carbonated beverages were reviewed in the preamble to the carbonated beverage regulation (48 FR 31376). That discussion contains citations to specific studies in the administrative record as well as to the scientific literature. Searle submitted data bearing on the formation of nitrosamines in support of its petition for approval of the use of aspartame in dry food. The results of these studies and the agency's evaluation of them are part of the administrative record (Docket No. 75F–0355).

3. *Cancer:* Brain tumors in rats, cancer in two human clinical participants, precancerous uterine polyps in rats, cancer from aspartame-derived methyl alcohol or its formaldehyde metabolite.

A possible association between aspartame ingestion and increased incidence of brain neoplasms in the rat was the second issue reviewed by the Public Board of Inquiry. The Board's decision on this issue (Board's decision, p. 39), as well as the Commissioner's detailed review of and decision on this point (46 FR 38285), are discussed again in the preamble to the carbonated beverage regulation (48 FR 31376).

The occurrence of a breast and a stomach cancer in two subjects participating in clinical testing of aspartame was evaluated in a pathology report contained in the administrative record supporting the approval of aspartame for use as a table top sweetener and for dry drink mixes (Docket No. 75F–0355, entry E–65, March 6, 1973). FDA determined that the tumors were unrelated to aspartame ingestion. The formation of uterine polyps in test animals treated with diketopiperazine was fully evaluated and resolved prior to the convening of the Board. (See Docket No. 75F–0355, memoranda, June–August 1975.)

4. *Consumption:* Improper or inadequate estimates of human exposure to aspartame from carbonated beverage consumption.

The highest likely level of daily aspartame consumption has been repeatedly considered: By the Board (Board's Decision, pp. 13–14); by the Commissioner in his decision on aspartame in dry foods (46 FR 38285, 38289); by the agency in promulgating the carbonated beverage rule (48 FR 31376, 31377). The regulation requires Searle to submit quarterly survey results of consumption, as well as production reports to the agency. (See 46 FR 38285, 38303.)

5. *Quality of data:* Flawed or inadequate test results.

Prior to the convening of the Board, the petitioner contracted with Universities Associated for Research and Education in Pathology, Inc. (UAREP), to review and evaluate the authenticity of certain animal studies with aspartame and DKP (44 FR 31716). A report prepared by UAREP verified the reliability of the studies. Other studies were authenticated after review by an agency task force. Only after FDA had concurred with the UAREP authentication of the test results did the agency proceed with the Board's hearing (Aspartame; Ruling on Objections and Notice of Hearing; 44 FR 31716, 31717). The Commissioner's decision discussed the issue in detail and reviewed all the evidence relied upon by the agency in reaching its conclusion (46 FR 38285, 38286).

6. *Labeling:* Inadequate notice to the public of potential harm; no requirement for notice in restaurants.

The original aspartame regulation requires a label notice on foods containing aspartame to alert individuals with phenylketonuria that the product contains phenylalanine (21 CFR 172.804(e)(1)). The Commissioner reviewed the need for additional label information in response to the earlier objection (46 FR 38285, 38303), and addressed this question again in the preamble to the carbonated beverage rule (48 FR 31376, 31381).

III. Evaluation of the Objections and Request for a Stay

After a careful review of the specific safety issues raised in the current objections, the agency has concluded that the objections do not provide evidence that potential public harm may result from the use of aspartame in carbonated beverages, and therefore the safety issues raised in the objections do not warrant a stay of § 172.804(c)(6).

The physiological and neurological effects of aspartame have been comprehensively studied over the past 10 years. The agency has subjected the data from these studies to exhaustive and searching analysis, and most of the issues raised in the objections currently under review are substantially identical to issues that FDA has already examined and resolved in its prior determinations of aspartame's safety. (See 46 FR 38285, July 24, 1981; and 48 FR 31376, July 8, 1983.) Those points which purport to raise new issues or novel interpretations of issues previously considered by FDA do not present public health questions that, even if resolved in favor of the persons filing the objections, are serious enough to warrant a stay of the regulation. Accordingly, the request for a stay is denied.

The agency is carefully reviewing the objections and requests for a hearing but has not yet completed this review. The Commissioner will publish the agency's decision on this matter in a future issue of the **Federal Register.**

Dated: November 16, 1983.

Mark Novitch,

Acting Commissioner of Food and Drugs.

[FR Doc. 83-31451 Filed 11-22-83; 8:45 am]

BILLING CODE 4160-01-M

ENVIRONMENTAL PROTECTION AGENCY

21 CFR Parts 193 and 561

[FAP 2H5349/R626; FAP 2H5349/R627; PH-FRL 2476-2]

Tolerances for Pesticides in Food and Animal Feeds Administered by the Environmental Protection Agency; Propetamphos

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: These rules establish a food and a feed additive regulation to permit residues of the insecticide propetamphos in or on food and feed resulting from application in food-handling establishments of the insecticide propetamphos containing a maximum of 1.0 percent active ingredient. These regulations to establish maximum permissible levels for residues of the insecticide were requested pursuant to a petition by Sandoz, Inc., Crop Protection.

EFFECTIVE DATE: Effective on November 23, 1983.

ADDRESS: Written objections may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St. SW., Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT:
By mail: William Miller, Product Manager (PM) 16, Registration Division (TS-767C), Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460.
Office location and telephone number: Rm. 211, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703-557-2600).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of June 30, 1982 (47 FR 28453), which announced that Sandoz, Inc., Crop Protection, 480 Camino Del Rio South, San Diego, CA 92108, had submitted a food additive petition (FAP 2H5349) proposing to amend 21 CFR Part 193 by permitting residues of .01 part per million (ppm) of the insecticide propetamphos [[(e)]-methylethyl 3-[[(ethylamino)methoxyphosphinothioyl]-oxy]-2-butenoate]) in food-handling establishments.

In the **Federal Register** of December 22, 1982 (47 FR 57129), EPA gave notice that Sandoz, Inc., had amended the petition. This amendment proposed amending 21 CFR Part 561 by establishing a regulation permitting residues of the insecticide propetamphos in or on animal feed exposed to the insecticide during treatment of animal feed-handling establishments with a tolerance limitation of 0.1 ppm and by amending 21 CFR Part 193 by permitting residues of 0.1ppm of propetamphos in or on food resulting from application of the insecticide in food-handling establishments.

There were no comments received in response to the notices of filing.

The scientific data submitted in the petition and other relevant material have been evaluated. The toxicological data considered in support of the regulation include a rabbit teratology study with a no-observed-effect level (NOEL) of 10.0 mg/kg (highest dose tested); a neurotoxicity study with a NOEL of 147 mg/kg (highest dose tested); a 6-month dog-feeding study with a NOEL of 2 ppm (0.05 mg/kg); a 13-week rat-feeding study with a NOEL of 4 ppm (0.2 mg/kg); a 2-year rat oncogenic/feeding study with a NOEL of 6 ppm (0.3 mg/kg); a mouse lifetime oral feeding study with a NOEL of 0.05 mg/kg/day; no oncogenic effects observed under the conditions of the studies at 6, 12, or 120 ppm (0.3, 0.6, or 3 mg/kg/day) in rats or mice at doses of 0.05, 1, 6, or 21 mg/kg/day; and the reproduction phase of a 3-generation rat reproduction/teratology study with a NOEL of 20 ppm (1.05 mg/kg).

Based on the chronic mouse-feeding study with a NOEL of 0.05 mg/kg/day, using a safety factor of 10, the acceptable daily intake (ADI) for humans is 0.005 mg/kg/day, and the maximum permissible intake (MPI) is 0.3000 mg/day for a 60-kg human.

The theoretical maximum residue contribution (TMRC) in the human diet from this regulation is 0.1500 mg/day per 1.5 kilograms of diet. There are no permanent tolerances established currently for this pesticide. This regulation uses 50.00 percent of the ADI.

Desirable data currently lacking include a rat teratology study that uses a maximum tolerated dose which would cause toxicity in addition to cholinesterase depression.

There are no regulatory actions pending against continued registration of the insecticide, and no other considerations are involved in establishing these food and feed additive regulations. The metabolism of the insecticide is adequately understood, and an adequate analytical method, gas chromatography using a flame photometric detector (P-mode) or an alkali flame ionization detector, is available.

The pesticide is considered useful for the purpose for which the regulations are sought. It is concluded that the pesticide may be safely used in the prescribed manner when such use is in accordance with the label and labeling registered pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (86 Stat. 751, 7 U.S.C. 135(a) et seq.). Therefore, the regulations are established set forth below.

Any person adversely affected by these regulations may, within 30 days after publication of this notice in the **Federal Register** file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted these rules from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexiblility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new food or feed additive levels or conditions for safe use of additives, or raising such food or feed additive levels, do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24945).

(Sec. 409(c)(1), 72 Stat. 1786 (21 U.S.C. 348(c)(1))

List of Subjects in 21 CFR Parts 193 and 561

Food additives, Animal feeds, Pesticides and pests.

Dated: November 9, 1983.

Edwin L. Johnson,

Director, Office of Pesticide Programs.

PART 193—[AMENDED]

Therefore 21 CFR, Chapter I, is amended as follows:

1. In Part 193, § 193.375 is revised to read as follows:

§ 193.375 Propetamphos.

A tolerance of 0.1 part per million is established for residues of the insecticide propetamphos [[(e)-]-methylethyl 3-[[(ethylamino)

methoxyphosphinothioyl]oxy]-2-butenoate]) in food commodities exposed to the insecticide during treatment of food-handling establishments.

(a) Direct application shall be limited solely to spot and/or crack and crevice treatment in food-handling establishments where food and food products are held, processed, prepared, or served. Spray and dust concentrations shall be limited to a maximum of 1 percent active ingredient. For crack and crevice treatment, equipment capable of delivering a dust or a pin-stream of spray directly into cracks and crevices shall be used. For spot treatment, a coarse, low-pressure spray shall be used to avoid contamination of food or food-contact surfaces.

(b) To ensure safe use of the insecticide, its label and labeling shall conform to that registered by the U.S. Environmental Protection Agency, and it shall be used in accordance with such label and labeling.

PART 561—[AMENDED]

2. In Part 561, new § 561.434 is added to read as follows:

§ 561.434 Propetamphos.

A tolerance of 0.1 part per million is established for residues of the insecticide propetamphos ([e]-]-methylethyl 3-[[(ethylamino) methoxyphosphinothioyl]oxy]-2-butenoate]) in animal feed exposed to the insecticide during treatment of animal feed-handling establishments.

(a) Direct application shall be limited soley to spot and/or crack and crevice treatment in feed-handling establishments where feed and feed products are held, processed, prepared, or sold. Spray and dust concentrations shall be limited to a maximum of 1 percent active ingredient. For crack and crevice treatment, equipment capable of delivering a dust or a pinstream of spray directly into cracks and crevices shall be used. For spot treatment, a coarse, low-pressure spray shall be used to avoid contamination of feed or feed-contact surfaces.

(b) To ensure safe use of the insecticide, its label and labeling shall conform to that registered by the U.S. Environmental Protection Agency, and it shall be used in accordance with such label and labeling.

[FR Doc. 83-31489 Filed 11-22-83; 8:45 am]
BILLING CODE 6560-50-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 5

[T.D. 7921]

Income Tax; Credit for Employment of Certain New Employees

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations under sections 44B, 52, 53, and 381 of the Internal Revenue Code of 1954 relating to a credit for the employment of certain new employees. It reflects certain changes made by the Revenue Act of 1978, the Technical Corrections Act of 1979, and the Economic Recovery Tax Act of 1981. These final regulations provide taxpayers desiring to qualify for the credit with the guidance needed to comply with the law.

EFFECTIVE DATE: The amendments are effective, generally, with respect to wages paid or incurred after December 31, 1978.

FOR FURTHER INFORMATION CONTACT: John G. Schmalz of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Ave. NW., Washington, D.C. 20224. Attention: CC:LR:T, 202-566-3516.

SUPPLEMENTARY INFORMATION:

Background

On December 28, 1979 (44 FR 76817), the **Federal Register** published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 44B, 51, 52, 53, 280C, and 381 of the Internal Revenue Code of 1954. The amendments were proposed to conform the regulations to section 202(d)(3)(A) of the Tax Reduction and Simplification Act of 1977 (91 Stat. 148), and section 321 of the Revenue Act of 1978 (92 Stat. 2830). The proposed amendments were issued under the authority contained in sections 44B, 381(c)(26), and 7805 of the Internal Revenue Code of 1954 (92 Stat. 2834, 26 U.S.C. 44B; 91 Stat. 148, 26 U.S.C. 381(c)(26); 68A Stat. 917, 26 U.S.C. 7805). A public hearing was held on April 24, 1980 (45 FR 16500). After consideration of all comments regarding the proposed amendments, these amendments are adopted as revised by this Treasury decision. The proposed amendments, as published by the notice of proposed rulemaking, included § 1.51-1 dealing with the amount of credit. Section 1.51-1 is reserved in this Treasury decision and is being reproposed with additional rules to reflect the changes made by the Economic Recovery Tax Act of 1981. The new notice of proposed rulemaking appears in the same issue of the **Federal Register** as this Treasury decision.

The final regulations in this document also reflect the amendments made by section 103(a)(6)(B) of the Technical Corrections Act of 1979 (94 Stat. 209), and sections 207 and 261(e) of the Economic Recovery Tax Act of 1981 (95 Stat. 225, 262).

The amendments to the regulations create no new recordkeeping or reporting requirements. Evaluation of the effectiveness of the regulations after issuance will be based on comments received from offices within the Treasury Department, other government agencies, state and local governments, and the public.

Explanation of the Provisions

Section 321 of the Revenue Act of 1978 provides a targeted jobs credit for the employment of individuals qualifying as members of a targeted group. The targeted jobs credit replaces the new jobs credit allowable under section 44B (as in effect prior to enactment of the Revenue Act of 1978). In general, a taxpayer may elect to claim a credit under section 44B for amounts paid or incurred after December 31, 1978, for taxable years ending after that date, to members of a targeted group. Generally, to qualify for the credit, the amounts must be paid or incurred to members of a targeted group first hired after September 26, 1978. However, amounts paid or incurred after December 31, 1978, to a vocational rehabilitation referral hired before September 27, 1978, may qualify for the credit if a credit under section 44B (as in effect prior to enactment of the Revenue Act of 1978) was claimed for the individual by the taxpayer for a taxable year beginning before January 1, 1979.

Section 53 of the Code relating to the amount of tax liability that can be eliminated by the credit for a taxable year is also amended by the Revenue Act of 1978. As amended, the amount of the credit may not exceed 90 percent of a taxpayer's tax liability reduced by certain credits. Prior to the amendment, a taxpayer could eliminate 100 percent of tax liability. The Revenue Act of 1978 also repealed section 53(b) which limited the amount of the credit that is passed through to a partner, a beneficiary of an estate or trust, or a shareholder of a subchapter S corporation to a limitation separately computed with respect to the partner's,

beneficiary's or shareholder's interest in the entity. This repeal was made effective for taxable years beginning after December 31, 1978.

Public Comments and Changes in Response to Public Comments

Comments were received concerning the repeal of section 53(b) stating that the regulations should provide that a credit earned in a taxable year beginning before January 1, 1979 (*i.e.*, before the effective date of the repeal of section 53(b)) and carried over to a taxable year beginning after December 31, 1978, should not be subject to the requirement of separate computation of the limitation in the carryover year. The final regulations adopt this rule and provide other rules clarifying the repeal of section 53(b).

Drafting Information

The principal author of these regulations is John G. Schmalz of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Treasury Department participated in developing these regulations, both on matters of substance and style.

Special Analysis

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required. Pursuant to 5 U.S.C. 605(b), the Secretary of the Treasury has certified that the requirements of the Regulatory Flexibility Act do not apply to this final rule because it will not have a significant economic impact on a substantial number of small entities.

List of Subjects

26 CFR 1.0–1 through 1.58–8

Income taxes, Tax liability, Tax rates, Cedits.

26 CFR Part 5

Income taxes, Revenue Act of 1978.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

PART 1—[AMENDED]

Paragraph 1. There is inserted immediately after § 1.44A–4 the following new section.

§ 1.44 B–1 Credit for employment of certain new employees.

(a) *In general*—(1) *Targeted jobs credit.* Under section 44B a taxpayer may elect to claim a credit for wages (as defined in section 51(c) paid or incurred to members of a targeted group (as defined in section 51(d)). Generally, to qualify for the credit, the wages must be paid or incurred to members of a targeted group first hired after September 26, 1978. However, wages paid of incurred to a vocational rehabilitation referral (as defined in section 51(d)(2)) hired before September 27, 1978, may qualify for the credit if a credit under section 44B (as in effect prior to enactment of the Revenue Act of 1978) was claimed for the individual by the taxpayer for a taxable year beginning before January 1, 1979. The amount of the credit shall be determined under section 51. Section 280C(b) (relating to the requirement that the deduction for wages be reduced by the amount of the credit) and the regulations thereunder will not apply to taxpayers who do not elect to claim the credit.

(2) *New jobs credit.* Under section 44B (as in effect prior to enactment of the Revenue Act of 1978) a taxpayer may elect to claim as a credit the amount determined under sections 51, 52, and 53 (as in effect prior to enactment of the Revenue Act of 1978). Section 280C(b) (relating to the requirement that the deduction for wages be reduced by the amount of the credit) and the regulations thereunder will not apply to taxpayers who do not elect to claim the credit.

(b) *Time and manner of making election.* The election to claim the targeted jobs credit and the new jobs credit is made by claiming the credit on an original return, or on an amended return, at any time before the expiration of the 3-year period beginning on the last date prescribed by law for filing the return for the taxable year (determined without regard to extensions). The election may be revoked within the above-described 3-year period by filing an amended return on which the credit is not claimed.

(c) *Election by partnership, electing small business corporation, and members of a controlled group.* In the case of a partnership, the election shall be made by the partnership. In the case of an electing small business corporation (as defined in section 1371(a)), the election shall be made by the corporation. In the case of a controlled group of corporations (within the meaning of section 52(a) and the regulations issued thereunder) not filing a consolidlated return under section 1501, the election shall be made by each member of the group. In the case of an affiliated group filing a consolidated return under section 1501, the election shall be made by the group.

Par. 2. Section 1.51–1 is removed.

Par. 3. There is inserted immediately after § 1.50B–5 the following new section:

§ 1.51–1 Amount of Credit. [Reserved]

Par. 4. Section 1.52–1 is amended by revising paragraph (a) to read as follows:

§ 1.52–1 Trades or businesses that are under common control.

(a) *Apportionment of jobs credit among members of a group of trades or businesses that are under common control*—(1) *Targeted jobs credit.* (i) In the case of a group of trades or businesses that are under common control (within the meaning of paragraph (b) of this section) at any time during the calendar year, the amount of the targeted jobs credit (computed under section 51 as if all the organizations that are under common control are one trade or business) under section 4–1B must be apportioned among the members of the group on the basis of each member's proportionate share of the wages giving rise to such credit. If the group of trades or businesses that are under common control have different taxable years, the credit shall be computed as if all the organizations have the same taxable year as the organization for which a determination of the proportionate share of the credit is being made. For taxable years beginning before January 1, 1982, the amount of the qualified first-year wages cannot exceed 30 percent of the aggregate unemployment insurance wages paid by the group of trades or businesses under common control during the calendar year ending in the taxable year of the organization for which a determination of the proportionate share of the credit is being made. The limitations in section 53 and the regulations thereunder apply to each organization individually (although, in applying these limitations, an affiliated group of corporations electing to make a consolidated return shall be treated as one organization).

(ii) The application of the subparagraph may be illustrated by the following examples:

Example (1). (a) Corporation M and its three subsidiaries, Corporations N, O, and P, are a group of businesses that are under common control and each uses the cash receipts and disbursements method of accounting and has a calendar year taxable year. Corporations M, N, O, and P paid out the following amounts in unemployment insurance wages, qualified first-year wages and qualified second-year wages during 1980.

	Unemployment insurance wages	Qualified 1st-Year wages	Qualified 2d-year wages
Corporation:			
M	$500,000	$184,000	$75,000
N	300,000	85,000	90,000
O	360,000	120,000	115,000
P	24,000	24,000	0
Total	1,284,000	413,000	280,000

(b) Since Corporations M, N, O, and P are under common control, the amount of qualified first-year wages paid by the group is limited to 30 percent of the aggregate unemployment insurance wages paid by the group in the calendar year ending in the group's taxable year. Since the qualified first-year wages of $413,000 exceeds 30% of the aggregate unemployment insurance wages, the group is limited to qualified first-year wages of $385,200 (30% of $1,284,000). The amount of the targeted jobs credit attributable to qualified first-year wages is equal to $192,600 (50% of $385,200). The amount of the credit attributable to qualified second-year wages is equal to $70,000 (25% of $280,000).

(c) The credit is apportioned among Corporations M, N, O, and P on the basis of their proportionate share of the qualified first-year wages or qualified second-year wages giving rise to the credit. Each corporation's share of the credit attributable to qualified first-year wages would be computed as follows:

Corporation:				Amount of credit
M	$192,600	×	$184,000 / $413,000	= $85,807.26
N	$192,600	×	$85,000 / $413,000	= $39,639.23
O	$192,600	×	$120,000 / $413,000	= $55,961.26
P	$192,600	×	$24,000 / $413,000	= $11,192.25

Each corporation's share of the credit attributable to qualified second-year wages is computed as follows:

Corporation:				Amount of credit
M	$70,000	×	$75,000 / $280,00	= $18,750
N	$70,000	×	$90,000 / $280,000	= $22,500
O	$70,000	×	$115,000 / $280,000	= $28,750
P	$70,000	×	0 / $280,000	= 0

Example (2). Assume the facts in example (1) with these additional facts. A, a member of a targeted group, worked for more than one of the members of the controlled group in the taxable year. A first began work for Corporation M on January 1, 1980, and later worked for Corporations N and O during 1980. For services rendered by A during 1980, the following wages were paid to A: Corporation M paid A $2,500 of qualified first-year wages; Corporation N paid A $1,500 of qualified first-year wages; Corporation O paid A $3,000 of qualified first-year wages. Corporations M, N, and O paid A a total of $7,000 of wages during 1980. Only $6,000 of qualified first-year wages per year per employee may be taken into account for purposes of the credit. See § 1.51–1(d)(1). Since Corporations M, N, and O are treated as a single employer under section 52(a), the maximum $6,000 of qualified first-year wages paid A by the group must be apportioned among Corporations M, N, and O as follows:

Corporation:				Qualified 1st-Year wages
M	$6,000	×	$2,500 / $7,000	= $2,142.86
N	$6,000	×	$1,500 / $7,000	= $1,285.71
O	$6,000	×	$3,000 / $7,000	= $2,571.43

Example (3). (a) Corporation Q and its two subsidiaries, Corporations R and S, are a group of businesses that are under common control and each uses the cash receipts and disbursements method of accounting. Corporation Q has a calendar year taxable year. Corporation R has a July 1 through June 30 taxable year. Corporation S has an October 1 through September 30 taxable year. For purposes of determining Corporation R's proportionate share of the credit, the credit is computed as if Corporations Q and S have the same taxable year as Corporation R. Accordingly, Corporation R would compute its share of the credit for its 1979–1980 taxable year as set forth below.

	Unemployment insurance wages, 1979	Qualified wages paid from July 1, 1979, to June 30, 1980	
		1st year wages	2d year wages
Corporation:			
Q	$500,000	$150,000	$80,000
R	300,000	110,000	50,000
S	100,000	25,000	10,000
Total	900,000	285,000	140,000

(b) Since Corporations Q, R, and S are under common control, the amount of qualified first-year wages is limited to 30 percent of the aggregate unemployment insurance wages paid by the group during the calendar year ending in Corporation R's taxable year. Since the qualified first-year wages of $285,000 exceeds 30 percent of the aggregate unemployment insurance wages, the group is limited to qualified first-year wages of $270,000 (30% of $900,000). The amount of the targeted jobs credit attributable to qualified first-year wages paid by members of the group during the period of the taxpayer's taxable year is $135,000 (50% of $270,000). The amount of the credit attributable to qualified second-year wages paid or incurred by members of the group during the period of the taxpayer's taxable year is $35,000 (25% of $140,000).

(c) The credit is apportioned to Corporation R on the basis of its proportionate share of the qualified first-year wages and qualified second-year wages giving rise to the credit. Corporation R's share of the credit attributable to qualified first-year wages is $52,105.26

$$\$135,000 \times \frac{\$110,000}{\$285,000}$$

Corporation R's share of the credit attributable to qualified second-year wages is $12,500

$$\$35,000 \times \frac{\$50,000}{\$140,000}$$

Corporation R's share of the credit for its 1979–1980 taxable year is $64,605.26 ($52,105.26 + $12,500).

(2) *New jobs credit.* In the case of a group of trades or businesses that are under common control at any time during the calendar year, the amount of the new jobs credit (computed under section 51 as if all the organizations that are under common control are one trade or business) under section 44B (as in effect prior to enactment of the Revenue Act of 1978) must be apportioned among the members of the group on the basis of each member's proportionate contribution to the increase in unemployment insurance wages for the entire group. The limitations in section 53 (as in effect prior to enactment of the Revenue Act of 1978) and the regulations thereunder apply to each organization individually (although, in applying these limitations, an affiliated group of corporations electing to make a consolidated return shall be treated as one organization). The application of this subparagraph may be illustrated by the following example:

Example. (a) Corporation T and its three subsidiaries, U, V, and W, are a group of businesses that are under common control and each has a calendar year taxable year. Corporations T, U, V, and W have paid out the following amounts in unemployment insurance wages during 1976 and 1977:

	1976	1977	Increase in FUTA wages in 1977 over 1976
Corporation:			
T	$1,000,000	$1,015,000	+$15,000
U	500,000	650,000	+150,000
V	600,000	580,000	−20,000
W	40,000	100,000	+60,000
Total	2,140,000	2,345,000	205,000

(b) Since all employees of trades or businesses that are under common control are treated as employed by a single employer, the computations in section 51 are performed as if all the organizations which are under common control are one trade or business. Consequently, the amounts of the total unemployment insurance wages of the group in 1976 (*i.e.*, $2,140,000) and 1977 (*i.e.*,

$2,345,000) are used to determine the increase in unemployment insurance wages in 1977 over the 1976 wage base. Since the amount equal to 102 percent of the 1976 unemployment insurance wages ($2,182,800) is greater than the amount equal to 50 percent of the 1977 unemployment insurance wages ($1,172,500), the increase in unemployment insurance wages in 1977 over the 1976 wage base is $162,200 ($2,345,000–$2,182,800). The limitations in section 51(c), (d), and (g) (as in effect prior to enactment of the Revenue Act of 1978) must also be computed as though all the organizations under common control are one trade or business. For purposes of this example, it is assumed that none of those limitations reduce the amount of increase in unemployment insurance wages. As a result, the amount of the new jobs credit allowed to the group of business is $81,100 (50% of $162,200).

(c) The credit is apportioned among Corporations T, U, and W on the basis of their proportionate contributions to the increase in unemployment insurance wages. No credit would be allowed to Corporation V because it did not contribute to the increase in the group's unemployment insurance wages. Corporation T's share of the credit would be $5,406.66 ($81,100 × ($15,000 ÷ $225,000 (*i.e.*, $15,000 + $150,000 + $60,000))). Corporation U's share would be $54,066.67 ($81,100 × ($150,000 ÷ 225,000)), and Corporation W's share would be $21,626.67 ($81,100 × ($60,000 ÷ $225,000)).

* * * * *

Par. 5. Section 1.52–2 is amended by revising paragraph (a) to read as follows:

§ 1.52–2 Adjustments for acquisitions and dispositions.

(a) *General rule.* The provisions in this section only apply to the computation of the new jobs credit. If, after December 31, 1975, an employer acquires the major portion of a trade or business or the major portion of a separate unit of a trade or business, then, for purposes of computing the new jobs credit for any calendar year ending after the acquisition, both the amount of unemployment insurance wages and the amount of total wages considered to have been paid by the acquiring employer, for both the year in which the acquisition occurred and the preceding year, must be increased, respectively, by the amount of unemployment insurance wages and the amount of total wages paid by the predecessor employer that are attributable to the acquired portion of the trade or business or separate unit. If the predecessor employer informs the acquiring employer in writing of the amount of unemployment insurance wages and the amount of total wages attributable to the acquired portion of the trade or business that have been paid during the periods preceding the acquisition, then, for purposes of computing the credit for any calendar year ending after the acquisition the amount of unemployment insurance wages and the amount of total wages considered paid by the predecessor employer shall be decreased by those amounts. Regardless of whether the predecessor employer so informs the acquiring employer, the predecessor employer shall not be allowed a credit for the amount of any increase in the employment insurance wages or the total wages in the calendar year of the acquisition attributable to the acquired portion of the trade or business over the amount of such wages in the calendar year preceding the acquisition.

* * * * *

Par. 6. Section 1.52–3 is revised to read as follows:

§ 1.52–3 Limitation with respect to certain persons.

(a) *Mutual savings institutions.* In the case of an organization to which section 593 applies (that is, a mutual savings bank, a cooperative bank or a domestic building and loan association), the amount of the targeted jobs credit (new jobs credit in the case of wages paid before 1979) allowable under section 44B shall be 50 percent of the amount otherwise determined under section 51, or, in the case of an organization under common control, under § 1.52–1 (a) and (b).

(b) *Regulated investment companies and real estate investment trusts.* In the case of a regulated investment company or a real estate investment trust subject to taxation under subchapter M, chapter 1 of the Code, the amount of the targeted jobs credit (new jobs credit in the case of wages paid before 1979) allowable under section 44B shall be reduced to the company's or trust's ratable share of the credit. The ratable share shall be determined in accordance with rules similar to the rules provided in section 46(e)(2)(B) and the regulations thereunder. For purposes of computing the ratable share, the reduction of the deduction for wage or salary expenses under § 1.280C–1 shall not be taken into account.

(c) *Cooperatives*—(1) *Taxable years ending after October 31, 1978.* For taxable years ending after October 31, 1978, in the case of a cooperative organization described in section 1381(a), rules similar to rules provided in section 46(h) and the regulations thereunder shall apply in determining the distribution of the amount of the targeted jobs credit (new jobs credit in the case of wages paid before 1979) allowable to the cooperative organization and its patrons under section 44B.

(2) *Taxable years ending before November 1, 1978.* For taxable years ending before November 1, 1978, in the case of a cooperative organization described in section 1381(a), the amount of new jobs credit allowable under section 44B shall be reduced to the cooperative's ratable share of the credit. The ratable share shall be the ratio which the taxable income of the cooperative for the taxable year bears to its taxable income increased by the amount of the deductions allowed under section 1382 (b) and (c). For purposes of computing the ratable share, the reduction of the deduction for wage or salary expenses under § 1.280C–1 shall not be taken into account.

Par. 7. Section 1.53–1 is redesignated as § 1.53–3 and new §§ 1.53–1 and 1.53–2 are added immediately after § 1.52–3 to read as follows:

§ 1.53–1 Limitation based on amount of tax.

(a) *General rule*—(1) *Targeted jobs credit.* For taxable years beginning after December 31, 1978, the amount of the targeted jobs credit allowed by section 44B (as amended by the Revenue Act of 1978) shall not exceed 90 percent of the tax imposed by chapter 1, reduced by the credits enumerated in section 53(a).

(2) *New jobs credit.* For taxable years beginning before January 1, 1979, the amount of the new jobs credit allowed by section 44B (as in effect prior to enactment of the Revenue Act of 1978) shall not exceed the tax imposed by chapter 1, reduced by the credits enumerated in section 53(a).

(b) *Special rule for 1978–79 fiscal year.* In the case of a taxable year beginning before January 1, 1979, and ending after that date, the sum of the targeted jobs credit (determined without regard to the tax liability limitation in paragraph (a)(1) of this section) and the new jobs credit (determined without regard to the tax liability limitation in (a)(2) of this section) shall not exceed the tax imposed by chapter 1, reduced by the credits enumerated in section 53(a).

§ 1.53–2 Carryback and carryover of unused credit.

(a) *Allowance of unused credit as a carryback or carryover*—(1) *In general.* Section 53(b) (formerly designated as section 53(c) for taxable years beginning before 1979) provides for carrybacks and carryovers of unused targeted jobs credit (new jobs credit in the case of wages paid before 1979). An unused credit is the excess of the credit determined under section 51 for the taxable year over the limitation

provided by § 1.53–1 for such taxable year. Subject to the limitations contained in paragraph (b) of this section and paragraph (f) of § 1.53–3, an unused credit shall be added to the amount allowable as a credit under section 44B for the years to which an unused credit can be carried. The year with respect to which an unused credit arises shall be referred to in this section as the "unused credit year."

(2) *Taxable years to which unused credit may be carried.* An unused targeted jobs credit (new jobs credit in the case of wages paid before 1979) shall be a new employee credit carryback to each of the 3 taxable years preceding the unused credit year and a new employee credit carryover to each of the 15 taxable years succeeding the unused credit year. An unused credit must be carried first to the earliest of the taxable years to which it may be carried, and then to each of the other taxable years (in order of time) to the extent that the unused credit may not be added (because of the limitation contained in paragraph (b) of this section) to the amount allowable as a credit under section 44B for a prior taxable year.

(b) *Limitations on allowance of unused credit*—(1) *In general.* The amount of the unused targeted jobs credit (new jobs credit in the case of wages paid before 1979) from any particular unused credit year which may be added under section 53(b)(1) (section 53(c)(1) in the case of a new jobs credit) to the amount allowable as a credit under section 44B for any of the preceding or succeeding taxable years to which such credit may be carried shall not exceed the amount by which the limitation in § 1.53–1 for such preceding or succeeding taxable year exceeds the sum of (i) the credit allowable under section 44B for such preceding or succeeding taxable year, and (ii) other unused credits carried to such preceding or succeeding taxable year which are attributable to unused credit years prior to the particular unused credit year. Thus, in determining the amount, if any, of an unused credit from a particular unused credit year which shall be added to the amount allowable as a credit for any preceding or succeeding taxable year, the credit earned for such preceding or succeeding taxable year, plus any unused credits originating in taxable years prior to the particular unused credit year, shall first be applied against the limitation based on amount of tax for such preceding or succeeding taxable year. To the extent the limitation based on amount of tax for the preceding or succeeding year exceeds the sum of the credit earned for such year and other unused credits attributable to years prior to the particular unused credit year, the unused credit from the particular unused credit year shall be added to the amount allowable as a credit under section 44B for such preceding or succeeding year. If any portion of the unused credit is a carryback to a taxable year beginning before January 1, 1977, section 44B shall be deemed to have been in effect for such taxable year for purposes of allowing such carryback as a credit under section 44B. To the extent that an unused credit cannot be added for a particular preceding or succeeding taxable year because of the limitation contained in this paragraph, such unused credit shall be available as a carryback or carryover to the next succeeding taxable year to which it may be carried.

(2) *Special rules for an electing small business corporation.* An unused targeted jobs credit (new jobs credit in the case of wages paid before 1979) under section 44B of a corporation which arises in an unused credit year for which the corporation is not an electing small business corporation (as defined in section 1371(b)) and which is a carryback or carryover to a taxable year for which the corporation is an electing small business corporation shall not be added to the amount allowable as a credit under section 44B to the shareholders of such corporation for any taxable year. However, a taxable year for which the corporation is an electing small business corporation shall be counted as a taxable year for purposes of determining the taxable years to which such unused credit may be carried.

(3) *Corporate acquisitions.* For the carryover of unused credits under section 44B in the case of certain corporate acquisitions, see section 381(c)(26) and § 1.381(c)(26)–1.

(4) *Examples.* This paragraph may be illustrated by the following examples.

Example (1). In 1978, A, a calendar year taxpayer, had an unused new jobs credit of $2,000. In 1979, A has a targeted jobs credit of $2,000 and a tax liability imposed by chapter 1 of the Code of $4,000 after all credits listed in section 53(a) have been taken into account. The amount of A's targeted jobs credit allowable under section 44B for 1979 is 90 percent of A's tax liability. The amount of the new jobs credit that may be carried to 1979 is limited to $1,600 ($3,600 [90% of $4,000]—$2,000).

Example (2). In 1979, B, a calendar year taxpayer, has a tax liability imposed by chapter 1 of the Code of $10,000 after all credits listed in section 53(a) have been taken. B's targeted jobs credit for that taxable year is limited to 90 percent of his income tax liability or $9,000. B had a $15,000 targeted jobs credit in 1979 resulting in an unused targeted jobs credit of $5,000 for that year. In 1976 and 1977 B had tax liabilities imposed by chapter 1 of the Code of $3,000 and $4,000 respectively after all credits listed in section 53(a) had been taken. For purposes of carrying back an unused targeted jobs credit to a taxable year beginning before January 1, 1977, section 44B as amended by the Revenue Act of 1978 is deemed to have been in effect for such taxable year. Accordingly, the applicable tax liability limitation for 1976 would be governed by section 53(a) (as amended by the Revenue Act of 1978) which limits the amount of targeted jobs credit allowed to 90 percent of the tax imposed by chapter 1 of the Code after all credits listed in section 53(a) have been taken. B may carry back $2,700 (90% of $3,000) of the 1979 unused targeted jobs credit to 1976. B may carry back $4,000 of the unused targeted jobs credit to 1977 because section 53(a) as it applied to the 1977 taxable year limited the amount of the credit to 100 percent of the taxpayer's tax liability imposed by chapter 1 of the Code after all credits listed in section 53(a) had been taken.

Par. 8. Section 1.53–3, as redesignated in Paragraph 7, is amended as follows:

1. Paragraph (a) is amended to read as set forth below.

2. Paragraph (f) is revised to read as set forth below.

§ 1.53–3 Separate rule for pass-through of jobs credit.

(a) *In general.* Under section 53(b), in the case of a new jobs credit or targeted jobs credit earned under section 44B by a partnership, estate or trust, or subchapter S corporation, the amount of the credit that may be taken into account by a partner, beneficiary, or shareholder may not exceed a limitation under section 53(b) separately computed with respect to the partner's, beneficiary's, or shareholder's interest in the entity. A credit is subject to the limitation of section 53(b) with respect to a partner, beneficiary, or shareholder if it is earned by a partnership, estate or trust, or subchapter S corporation in a taxable year ending within, or ending before, a taxable year beginning before January 1, 1979 of the partner, beneficiary, or shareholder. See paragraph (f) of this section for rules on carryback or carryover of a credit subject to separate limitation. This section prescribes rules, under the authority of section 44B(b), relating to the computation of the separate limitation. For purposes of this section, references to section 53(a) and (b) are to that section as it existed before it was amended by the Revenue Act of 1978. This paragraph may be illustrated by the following examples:

Example (1). A, a calendar year taxpayer, is a partner in P, a calendar year partnership.

A's pro rata portion of the credit earned by P in 1978 is $200. The $200 credit to be claimed on A's 1978 return is subject to the separate limitation in section 53(b) because the limitation applies to taxable years of the taxpayer beginning before January 1, 1979.

Example (2). B, a calendar year taxpayer, is a shareholder in Corporation M, a subchapter S corporation with a July to June fiscal year. B's pro rata portion of the credit earned by Corporation M in its taxable year beginning in 1978 is $100. The $100 credit to be claimed on B's 1979 return is not subject to the separate limitation requirement of section 53(b) because the limitation only applies to taxable years of the taxpayer beginning before 1979, notwithstanding the credit was earned by Corporation M before 1979.

* * * * *

(f) *Carryback or carryover of credit subject to separate limitation.* A credit subject to the separate limitation under section 53(b) that is carried back or carried over to a taxable year beginning before January 1, 1979, is also subject to the separate limitation in the carryback or carryover year. For purposes of the preceding sentence, a credit that is earned by a partnership, a trust, or estate, or a subchapter S corporation in a taxable year of such entity ending within, or after, the taxable year of a partner beneficiary or shareholder beginning after December 31, 1978, will not be subject to the separate limitation in section 53(b) with respect to such partner, beneficiary, or shareholder. The taxpayer to whom the credit has been passed through shall not be prevented from applying the unused portion in a carryback or carryover year merely because the entity that earned the credit changes its form of conducting business if the nature of its trade or business essentially remains the same. The computation of the separate limitation in such a case shall reflect the income attributable to the taxpayer's interest in the entity in its revised form. Thus, a shareholder carrying over a credit from a subchapter S corporation may include dividends declared by that corporation after the subchapter S election had been terminated as income attributable to that person's interest in the entity. Similarly, if a partnership incorporates in a carryover year, any income attributable to an interest in the corporation will be regarded, for purposes of computing the separate limitation under section 53(b), as income attributable to an interest in the entity. This paragraph may be illustrated by the following examples:

Example (1). A, a calendar year taxpayer, is a shareholder in Corporation M, a subchapter S corporation. In 1977, A's pro rata share of the new jobs credit earned by Corporation M was $10,000. A could only use $2,000 of the credit in 1977 because of the separate limitation under section 53(b). In 1978, A carries the unused credit over from 1977. The carryover credit is subject to the separate limitation under section 53(b).

Example (2). Assume the same facts as in example (1) except that the unused credit is carried over to 1979. The carryover credit is not subject to the separate limitation under section 53(b) because that limitation does not apply to taxable years of a taxpayer beginning after December 31, 1978.

Example (3). B, a calendar year taxpayer, is a shareholder in Corporation W, a subchapter S corporation. In 1979, B's pro rata share of the targeted jobs credit covered by Corporation W was $5,000 but B could only use $3,000 of the credit in 1979. B carries back the unused credit to 1978. The carryback credit is not subject to the separate limitation under section 53(b).

Par. 9. Section 1.280C–1 is amended to read as follows:

§ 1.280C–1 Disallowance of certain deductions for wage or salary expenses.

If an employer elects to claim the targeted jobs credit under section 44B (as amended by the Revenue Act of 1978), or elects to claim the new jobs credit under section 44B (as in effect prior to enactment of the Revenue Act of 1978), the employer must reduce its deduction for wage or salary expenses paid or incurred in the year the credit is earned by the amount allowable as credit (determined without regard to the provisions of section 53). In the case in which wages and salaries are capitalized the amount subject to depreciation must be reduced by an amount equal to the amount of the credit (determined without regard to the provisions of section 53) in determining the depreciation deduction. In the case of an employer who uses the full absorption method of inventory costing under § 1.471–11, the portion of the basis of the inventory attributable to the wage or salary expenses giving rise to the credit and paid or incurred in the year the credit is earned must be reduced by the amount of the credit allowable (determined without regard to the provisions of section 53). If the employer is an organization that is under common control (as described in § 1.52–1), it must reduce its deduction for wage or salary expenses by the amount of the credit apportioned to it under § 1.52–1 (a) or (b). The deduction for wage and salary expenses must be reduced in the year the credit is earned, even if the employer is unable to use the credit in that year because of the limitations imposed by section 53.

Par. 10. There is inserted immediately after § 1.381(c)(25)–1 the following new section:

§ 1.381(c)(26)–1 Credit for employment of certain new employees.

The computation of carryovers and carrybacks of unused targeted jobs credit (new jobs credit in the case of wages paid before 1979) under section 44B in a transaction to which section 381 applies shall be made under the principles of § 1.381(c)(23)–1 (relating to the computation of carryovers and carrybacks of unused investment credit), except that provisions of paragraph (c)(4) and paragraph (e) (6), (7), and (8) of such section shall not apply.

PART 5—[AMENDED]

§ 5.44B–1 [Removed]

Par. 11. Section 5.44B–1 is hereby removed.

This Treasury decision also conforms the regulations to the amendments made to sections 44B, 52 and 53 by the Technical Corrections Act of 1979 and the Economic Recovery Tax of 1981. To this extent, this Treasury decision is issued solely under the authority contained in section 7805 of Internal Revenue Code of 1954. The rules prescribed reflecting these changes are favorable to taxpayers. For this reason and because these rules are interpretative regulation, the requirement for notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code and the effective date limitation of subsection (d) of that section are found to be inapplicable.

This Treasury decision is issued under the authority contained in sections 44B, 381, and 7805 of the Internal Revenue Code of 1954 (92 Stat. 2834, 26 U.S.C. 44B; 91 Stat. 148, 26 U.S.C. 381(c)(26); 68A Stat. 917, 26 U.S.C. 7805).

James I. Owens,

Acting Commissioner of Internal Revenue.

Approved: November 5, 1983.

John E. Chapoton,

Assistant Secretary of the Treasury.

[FR Doc. 83-31461 Filed 11-18-83; 12:31 pm]

BILLING CODE 4830-01-M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 178

[T. D. ATF-160]

State Laws and Published Ordinances; Incorporation by Reference

AGENCY: The Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Final rule (Treasury decision).

SUMMARY: This final rule incorporates by reference the compiled list of State laws and published ordinances, entitled "State Laws and Published Ordinances—Firearms (ATF Publication 5300.5 (12-82))." This compiled list is annually revised and is developed from State firearms laws obtained from federal libraries, and from copies of firearms ordinances published by political subdivisions and furnished ATF. The published ordinances are those which the Director determines to be relevant to the enforcements of 18 U.S.C. Chapter 44—firearms.

DATES: Effective date: November 23, 1983. Approval for Incorporation by Reference in this document by the Director of the Federal Register is effective on November 23, 1983.

FOR FURTHER INFORMATION CONTACT: Gary D. Caplan, Firearms and Explosives Operations Branch (202) 566-7591.

SUPPLEMENTARY INFORMATION:

Reason for Incorporation by Reference

Historically, the list of State laws and published ordinances, pursuant to 18 U.S.C. 921(a)(19), has been annually published in the **Federal Register** in its entirety.

ATF seeks to reduce operating costs by no longer publishing in the **Federal Register** the list in its entirety but rather incorporate it by reference under 5 U.S.C. 552(a)(1). The list, however, will continue to be revised annually and furnished to Federal firearms licensees in accordance with the law and regulations.

"State Laws and Published Ordinances—Firearms (ATF Publication 5300.5)" is eligible for incorporation by reference under 1 CFR Part 51 since the incorporation will help reduce the volume of matter printed in the **Federal Register**, will not reduce the usefulness of the publication system of the Office of the Federal Register, and will continue to be easily available to the public for purchase and inspection. The use of the term "incorporation by reference" was authorized by Congress in 5 U.S.C. 552 to reduce the volume of material published in both the **Federal Register** and the Code of Federal Regulations. The legal effect of an incorporation by reference is that the material is treated as if it actually were published in full text in the **Federal Register** and in the Code of Federal Regulations.

Amendments

The definition of "published ordinance" in § 178.11 is amended and § 178.24 is revised to reflect the incorporation by reference of the list of State laws and published ordinances.

Executive Order 12291

It has been determined that this final rule is not a "major rule" within the meaning of Executive Order 12291 of February 17, 1981 (46 FR 13193), because it will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State or local agencies, or geographic regions; and it will not have 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.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act, relating to a regulatory flexibility analysis, are not applicable because neither 5 U.S.C. 553 nor any other law requires the publication of a general notice of proposed rulemaking for this final rule.

List of Subjects in 27 CFR Part 178

Administrative practice and procedure, Arms and ammunition, Authority delegations, Customs duties and inspection, Exports, Imports, Military personnel, Penalties, Reporting and recordkeeping requirements, Research, Seizures and forfeitures, and Transportation.

Drafting Information

The principal author of this final rule is Lori D. Weins of the Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms. Other personnel of the Bureau of Alcohol, Tobacco and Firearms and offices of the Department of the Treasury participated in developing this final rule both as to matters of substance and style.

Authority and Issuance

Because this final rule merely makes procedural changes authorized by the Office of the Federal Register and editorial changes to improve the clarity of the regulations, it is unnecessary and impractical to issue this final rule with notice and public procedure under 5 U.S.C. 553(b). Similarly, it is unnecessary and impractical to subject this final rule to the effective date limitation of 5 U.S.C. 553(d).

Accordingly, this final rule is issued under the authority contained in 5 U.S.C. 552(a) (80 Stat. 383, as amended). As amended, 27 CFR Part 178 reads as follows:

PART 178—COMMERCE IN FIREARMS AND AMMUNITION

1. The Table of Sections is amended to revise the heading of § 178.24 to read as follows:

Sec.

* * * * *

178.24 List of State laws and published ordinances.

* * * * *

2. Section 178.11 is amended by revising the definition listed to read as follows:

§ 178.11 Meaning of terms.

* * * * *

Published ordinance. A published law of any political subdivision of a State which the Director determines to be relevant to the enforcement of this part and which is contained on a list compiled by the Director, which list is incorporated by reference in the **Federal Register**, revised annually, and furnished to licensees under this part.

* * * * *

3. Section 178.24 is revised to read as follow:

§ 178.24 List of State laws and published ordinances.

(a) The Director is authorized to compile, annually revise, and furnish to Federal fireamrs licensees a list of State laws and published ordinances which are relevant to the enforcement of this part.

The Director annually revises the list and publishes it as "State Laws and Published Ordinances—Firearms" which is furnished free of charge to licensees under this part.

(b) "State Laws and Published Ordinances—Firearms" is incorporated by reference in this part. It is ATF Publication 5300.5, 1982 ed. and is for sale from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. It is also available for inspection at the Office of the Federal Register Room 8401, 1100 L Street, NW, Washington, DC. This incorporation by reference was approved by the Director of the Federal Register. A notice of any change in the publication will be published in the **Federal Register**.

Signed: January 13, 1983.

Stephen E. Higgins,

Director.

Approved: October 25, 1983.

John M. Walker, Jr.,

Assistant Secretary, (Enforcement and Operations).

October 25, 1983.

[FR Doc. 83-31475 Filed 11-22-83; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD 6010.8-R, Amdt. No. 23]

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Hearing Impairment Critieria Under the Program for the Handicapped

AGENCY: Office of the Secretary, DoD.

ACTION: Amendment of final rule.

SUMMARY: This amends the CHAMPUS Regulation by revising the criteria for determining when a hearing impairment is a serious handicap. The revised criteria reflect current professional opinion regarding the handicapping effects of hearing impairments. The amendment will make benefits available to a greater number of handicapped beneficiaries.

EFFECTIVE DATE: This amendment is effective November 23, 1983.

FOR FURTHER INFORMATION CONTACT: Rose M. Sabo, Health Care Policy Specialist, Policy Branch, OCHAMPUS, Aurora, CO 80045; telephone (303) 361-4014.

SUPPLEMENTARY INFORMATION: We published our proposed amendment on pages 38538 and 38539 of the **Federal Register** on July 28, 1981, and invited the public to comment for 30 days. We received eight comments from individuals and five from professional organizations and interested agencies. The following summarizes the comments, suggestions and actions taken:

1. All the comments endorsed the proposal; however, a few people requested we make the amendment retroactive to the effective date of the CHAMPUS Regulation, which is June 1, 1977. Going back 6 years and authorizing benefits would create numerous administrative problems and increased Program costs, precluding adoption of the suggestion. Alternatively, the amendment will be effective the date the final rule is published in the **Federal Register.**

2. One comment recommended that we use the Veterans Administration's Schedule of Rating Disabilities instead of the proposed criteria. Adopting the VA criteria would not be appropriate. The Veterans Administration's Schedule of Rating Disabilities is used primarily to evaluate disabilities in veterans for monetary entitlement. It is not used as a basis for determining whether the veteran is entitled to a hearing aid or associated medical services, whereas the CHAMPUS criteria were specifically developed for that purpose.

3. Another comment requested we clarify that the criteria represent hearing threshold levels without amplification. We have accepted this suggestion and clarified the criteria.

4. One person requested that we modify the rule for preauthorization under the Program for the Handicapped. While this request is outside the scope of this amendment, the issue is under separate consideration.

List of Subjects in 32 CFR Part 199

Claims, Handicapped, Health insurance and military personnel.

PART 199—[AMENDED]

Accordingly, 32 CFR, Chapter I, is amended as follows:

§ 199.11 is amended by revising paragraph (e)(2) (iii) and (iv) to read as follows:

§ 199.11 Program for the Handicapped.

* * * * *

(e) *Serious Physical Handicap.* * * *

(2) *Examples of conditions which may cause serious physical handicaps.* * * *

(iii) *Hearing Impairment—Testable Patients.* A hearing impairment is a serious physical handicap when, unaided by amplification, it is manifested by:

(*a*) A 45 decibel Hearing Threshold Level (HL) or poorer in either ear tested at 1,000; 2,000; or 3,000 Hz frequencies; or by

(*b*) A 30 decibel HL or poorer in *each* ear tested at 1,000; 2,000; or 3,000 Hz frequencies; or by

(*c*) Speech discrimination of 60% or poorer with either ear.

(iv) *Hearing Impairment—Nontestable Patients.* Where pure tone audiometry or speech discrimination testing is not available or not reliable because of the patient's age or condition, the attending physician must submit documentation which demonstrates the patient is unable to engage in basic productive activities of daily living expected of unimpaired persons of the same age group. An example of acceptable documentation would be electrophysiological tests of hearing such as auditory evoked potential testing or a behavioral assessment which shows that, without special help, and infant with a hearing impairment will not develop normal language. Each case will be reviewed on its own merits.

* * * * *

Note.—We have determined that this amendment only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It is not, therefore, a "major rule" under Executive Order 12291. We certify that this amendment will not have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

(10 U.S.C. 1079, 1086; 5 U.S.C. 301)

M. S. Healy,

OSD Federal Register Liaison Officer, Washington Headquarters Services, Department of Defense.

November 18, 1983.

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ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1151

General Statement of Policy

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (ATBCB) occasionally receives requests to participate in litigation as *amicus curiae* (friend of the court). Such requests were previously dealt with pursuant to the procedures in 36 CFR 1151.2—Amicus Curiae Policies. When the ATBCB adopted Authorities and Delegations at its July 12, 1983, meeting, published separately as 36 CFR Part 1153, 36 CFR § 1151.2 (c) and (d) of the above policy were amended. The amendment rescinds the prior authority of the General Counsel to reject requests to the ATBCB to participate as *amicus curiae* in litigation and of the ATBCB Executive Committee to approve such requests. The amended *amicus* policy delegates to the ATBCB Executive Committee the authority to disapprove *amicus* requests, to recommend to the Board that it approve such requests and to request that the Chairperson special ATBCB meetings to consider such requests. The section requires ATBCB