The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–3813.

Dated: June 10, 1987.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 87–13668 Filed 6–11–87; 11:39 am]

BILLING CODE 6714–01–M

FEDERAL DEPOSIT INSURANCE CORPORATION

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 1:30 p.m. on Wednesday, June 17, 1987, the Federal Deposit Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors, pursuant to sections 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(II), and (c)(9)(B) of Title 5, United States Code, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Note.—Some matters falling within this category may be placed on the discussion agenda without further public notice if it becomes likely that substantive discussion of those matters will occur at the meeting.

Discussion Agenda:

Recommendation regarding the Corporation's assistance agreement with an insured bank.

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsections (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

Memorandum regarding the Corporation's corporate activities.

Request for financial assistance pursuant to section 13(c) of the Federal Deposit Insurance Act.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550 17th Street, NW., Washington, DC.

Requests for further information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 898–3813.

Dated: June 10, 1987.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 87–13669 Filed 6–11–87; 11:39 am]

BILLING CODE 6714–01–M

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Change in Subject of Meeting

The National Credit Union Administration Board determined that its business required that the previously announced closed meeting (**Federal Register**, Vol. 52, No. 108, page 21408, June 5, 1987) on June 10, 1987, include an additional item, which was closed to public observation: Ratification of conversion agreement. Closed pursuant to exemptions (8) and (9)(A)(ii).

The Board unanimously voted to add this item to the closed agenda.

The previously announced items were:

1. Approval of Minutes of Previous Closed Meetings.

2. Establishment of Board Policy With Regard to Providing Form 5300 Data. Closed pursuant to exemption (8).

3. Board Continuance of Direct Agent Membership in the Central Liquidity Facility for Agent Member. Closed pursuant to exemption (8).

4. Appeal of Decision Denying Insurance Application. Closed pursuant to exemptions (8) and (9)(A)(ii).

5. Special Assistance under section 208 of the Federal Credit Union Act. Close pursuant to exemptions (8) and (9)(A)(ii).

6. Review of Delegations of Authority. Closed pursuant to exemption (2).

7. Board Briefings. Closed pursuant to exemptions (2), (8), (9)(A)(ii), and (9)(B).

The meeting was held at 1:45 p.m., in the Filene Board Room, 7th Floor, 1776 G Street, NW., Washington, DC 20456.

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 357–1100.

Becky Baker,

Secretary of the Board.

[FR Doc. 87–13692 Filed 6–11–87; 2:24 pm]

BILLING CODE 7535–01–M

NATIONAL LABOR RELATIONS BOARD

TIME AND DATE: 9:00 a.m., Tuesday 23 June 1987, followed by adjudicated case meeting.

PLACE: Board Conference room, Sixth Floor 1717 Pennsylvania Avenue, NW.

STATUS: The first part of this meeting will be open to public observation. The remaining part of this meeting will be closed to public observation.

MATTERS TO BE CONSIDERED:

Portion open to public observation

Rulemaking on appropriate units in the health care industry

Portion closed to public observation

Adjudicated cases

CONTACT PERSON FOR MORE INFORMATION: John C. Truesdale, Executive Secretary, NLRB, Washington, DC 20570, Telephone: (202) 254–9430.

Dated, Washington, DC June 10, 1987.

By direction of the Board.

John C. Truesdale,

Executive Secretary, National Labor Relations Board.

[FR Doc. 87–13616 Filed 6–10–87; 4:39 pm]

BILLING CODE 7545–01–M

PAROLE COMMISSION

I, Cameron M. Batjer, Vice Chairman of the United States Parole Commission, acting in the absence of the Chairman, presided at a meeting of said Commission which started at the 11:45 a.m. (EDT) on Friday, June 5, 1987, by conference telephone call initiated at 5550 Friendship Boulevard, Chevy Chase, Maryland 20815. The meeting ended at or about 12:00 noon (E.D.T.). The purpose of the meeting was to decide an application for a certificate of exemption under 29 U.S.C. 1111. Eight Commissioners were present, constituting a quorum, when the vote to close the meeting was submitted.

Public announcements further describing the subject matter of the meeting and a certification of General Counsel that this meeting may be closed by vote of the Commissioners present were submitted to the Commissioners prior to the conduct of any other business. Upon motion duly made, seconded, and carried, the following Commissioners voted that the meeting be closed: Saundra Brown Armstrong

(Belmont, California); Jasper Clay, Jr. (Chevy Chase, Maryland); Vincent J. Fechtel (Chevy Chase, Maryland); Carol P. Getty (Kansas City, Missouri); Daniel R. Lopez (Philadelphia, Pennsylvania); G. MacKenzie Rast (Atlanta, Georgia); and Victor M.F. Reyes (Dallas, Texas). Cameron M. Batjer did not vote on the motion to close. The Commissioners and two attorneys from the Office of the General Counsel attended.

In Witness Whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: June 5, 1987.

Cameron M. Batjer,

Vice Chairman, United States Parole Commission.

[FR Doc. 87-13638 Filed 6-11-87; 11:41 am]

BILLING CODE 4410-01-M

federal register

Monday
June 15, 1987

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Income Tax; Continuation Coverage Requirements of Group Health Plans; Notice of Proposed Rulemaking

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[EE-143-86]

Income Tax; Continuation Coverage Requirements of Group Health Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the requirement that a group health plan offer continuation coverage to people who would otherwise lose coverage as a result of certain events. They reflect changes made by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and the Tax Reform Act of 1986. The regulations will generally affect sponsors of and participants in group health plans, and they provide plan sponsors with guidance necessary to comply with the law.

DATES: Written comments and requests for a public hearing must be delivered or mailed on or before August 14, 1987. These regulations are proposed to be effective when final regulations are published in the **Federal Register** as a Treasury decision.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (EE-143-86) Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Mark Schwimmer of the Employee Plans and Exempt Organizations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T). Telephone 202-566-6212 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 106(b), 162(i)(2), and 162(k) of the Internal Revenue Code of 1986 (Code). The proposed regulations conform the regulations to section 10001 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (100 Stat. 222) and to section 1895(d) of the Tax Reform Act of 1986 (100 Stat. 2936), which made technical corrections to the COBRA provisions.

COBRA added a new section 162(k) of the Code to specify continuation coverage requirements for employer-provided group health plans. In general, a group health plan must offer each "qualified beneficiary" who would otherwise lose coverage under the plan as a result of a "qualifying event" an opportunity to elect continuation of the coverage being received immediately before the qualifying event. A qualified beneficiary who properly elects continuation coverage can be charged an amount no greater than 102 percent of the "applicable premium." The "applicable premium" is based on the plan's cost of providing coverage.

If a group health plan fails to comply with these continuation coverage requirements, the employer will be unable to deduct contributions made to that or any other group health plan (section 162(i)(2)), and certain highly compensated individuals will be unable to exclude from income any employer-provided coverage under that or any other group health plan (section 106(b)).

In addition, there may be non-tax consequences if a group health plan fails to comply with parallel requirements that section 10002 of COBRA added to Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Title I of ERISA is administered by the Department of Labor. Governmental plans (as defined in section 414(d) of the Code) are exempt from both the tax and ERISA provisions. However, State and local governmental group health plans are subject to parallel requirements that section 10003 of COBRA added to the Public Health Service Act, which is administered by the Department of Health and Human Services.

The proposed regulations do not reflect section 9501 of the Omnibus Budget Reconciliation Act of 1986, which extended the COBRA continuation coverage requirements to certain individuals receiving retiree medical benefits from employers that are involved in bankruptcy proceedings. The changes made by that act will be addressed in a later issuance.

The proposed regulations clarify which plans must offer COBRA continuation coverage and the tax consequences of failing to do so. They also provide guidance on a variety of details, including the scope of the continuation coverage, who is a qualified beneficiary, what is a qualifying event, how elections are made, and when payment must be made. Rules regarding computation of the applicable premium under section 162(k)(4) will be addressed in a later issuance.

Section 414(t) as added by the Tax Reform Act of 1986 extends the employer aggregation rules of sections 414 (b), (c), (m), and (o) to a variety of employee benefit provisions. The list of those provisions includes section 106 (denying an income exclusion to highly compensated employees of an employer maintaining a group health plan that fails to comply with section 162(k)), but does not include section 162(i)(2) (denying deductions to such an employer) or section 162(k) itself. A technical correction to add sections 162(i)(2) and 162(k) to the list was included in H.Con.Res. 395. Although the 99th Congress adjourned without enacting that concurrent resolution, the correction was identical in both House and Senate versions. Accordingly, the proposed regulations set forth employer aggregation rules that anticipate a similar technical correction with retroactive effect being enacted in the current session of Congress.

There is no connection between the proposed regulations and section 89 of the Code. For example, the definitions set forth in the proposed regulations will not affect the meaning of "core benefits," "non-core benefits," or any other terms for purposes of section 89. Also, the computation of applicable premiums for COBRA continuation coverage will not affect the determination of the value of group health plan benefits for purposes of section 89.

Effective Date

The regulations are proposed to be effective when final regulations are published in the **Federal Register** as a Treasury decision. Group health plans become subject to the COBRA continuation coverage requirements at different times, however, depending on the plan year of a plan and whether the plan is a collectively bargained plan. With respect to qualifying events that occur on or after the date that a plan became or becomes subject to those requirements and before the effective date of final regulations, the plan and the employer must operate in good faith compliance with a reasonable interpretation of the statutory requirements (i.e., title X of COBRA). For the period before the effective date of final regulations, the Internal Revenue Service will consider compliance with the terms of these proposed regulations to constitute good faith compliance with a reasonable interpretation of the statutory requirements (other than the statutory requirements regarding the computation of the applicable premium or the treatment, under section 9501 of the Omnibus Budget Reconciliation Act of 1986, of certain bankruptcies as qualifying events, which are not addressed in these proposed regulations). Moreover, plans and employers will be considered to be in

compliance with the terms of these proposed regulations if, between June 15, 1987 and September 14, 1987, they operate in good faith compliance with a reasonable interpretation of the statutory requirements and, from September 15, 1987 until the effective date of final regulations, they operate in compliance with the terms of these proposed regulations. In addition, the Internal Revenue Service will not consider actions inconsistent with the terms of these proposed regulations necessarily to constitute a lack of good faith compliance with a reasonable interpretation of the statutory requirements; whether there has been good faith compliance with a reasonable interpretation of the statutory requirements will depend on all the facts and circumstances of each case.

Special Analyses

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not consitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Comments and Requests for Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A pubic hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the Federal Register.

Drafting Information

The principal author of these proposed regulations is Mark Schwimmer of the Employee Plans and Exempt Organizations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR 1.61–1 Through 1.281–4

Income taxes, Taxable Income, Deductions, Exemptions.

Proposed Amendments to the Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

PART 1—[AMENDED]

Paragraph 1. The authority citation for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805. * * * Sections 1.106–1 and 1.162–26 also issued under 26 U.S.C. 106(b), 162(i)(2), and 162(k).

Par. 2. Section 1.106–1 is amended by redesignating the existing text as paragraph (a), revising the first sentence of paragraph (a), and adding a new paragraph (b) to read as follows:

§ 1.106–1 Contributions by employer to accident and health plans.

(a) Except as set forth in paragraph (b) of this section, the gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152. * * *

(b) In situations involving group health plans that do not comply with section 162(k), the exclusion described in paragraph (a) of this section is not available to highly compensated employees (as defined in section 414(q)). See § 1.162–26 (regarding continuation coverage requirements of group health plans).

Par. 3. A new § 1.162–26 is added immediately after § 1.162–25T to read as follows:

§ 1.162–26 Continuation coverage requirements of group health plans.

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Cobra in General

Question 1: What are the new health care continuation coverage requirements added to the Internal Revenue Code by the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")?

Answer 1: Section 10001 of COBRA added a new section 162(k) to the Code to provide generally that a group health plan must offer each qualified beneficiary who would otherwise lose coverage under the plan as a result of a qualifying event an opportunity to elect, within the applicable election period, continuation coverage under the plan. That continuation coverage is referred to in this section as "COBRA" continuation coverage" and a group health plan that is subject to section 162(k) is referred to as being "subject to COBRA" (see Q&A–8 of this section). A qualified beneficiary can be required to pay for COBRA continuation coverage. A qualified beneficiary is defined in Q&A–15 of this section. A qualifying event is defined in Q&A–18 of this section. The election procedures are described in Q&A–32 through Q&A–37 of this section. COBRA continuation coverage is described in Q&A–22 through Q&A–31 of this section. Payment for COBRA continuation coverage is addressed in Q&A–44 through Q&A–48 of this section. Unless otherwise specified, any reference in this section to "COBRA" refers to section 10001 of COBRA and to section 162(k) of the Code as added by COBRA (as amended).

Question–2: What is the effect of a group health plan's failure to comply with section 162(k)?

Answer–2: If a group health plan subject to COBRA fails to comply with section 162(k), certain deductions are disallowed to the employer under section 162(i)(2) (see Q&A–3 of this section) and the income exclusion under section 106(a) is denied to certain highly compensated employees of the employer under section 106(b)(1) (see Q&A–4 of this section). There may be additional non-tax consequences if the plan fails to comply with parallel requirements that were added by section 10002 of COBRA to Title I of the Employee Retirement Income Security Act of 1974 (ERISA), which is administered by the Department of Labor. Although governmental plans are not subject to section 162(k) because they are not "subject to COBRA" (see Q&A–8 of this section), certain governmental plans are subject to parallel requirements that were added by section 10003 of COBRA to the Public Health Service Act, which is administered by the Department of Health and Human Services.

Question 3: How are employer deductions affected by a group health plan's failure to comply with section 162(k)?

Answer 3: (a) Under section 162(i)(2), if a group health plan subject to COBRA fails to comply with section 162(k), each employer maintaining the plan is denied a deduction for any contributions or other expenses paid or incurred in connection with any group health plan that it maintains. The deduction is denied for any taxable year of the taxpayer during which there are one or more days on which plan is not in compliance with section 162(k). Thus, if a failure to comply with section 162(k) arises in one taxable year of a taxpayer and is not corrected until after the beginning of the following taxable year, the deduction for contributions or expenses for both of those taxable years is denied. Section 162(i)(2) operates each taxable year to permanently deny a deduction for amounts paid or incurred in that year, and is applied before applying any provision of the Code that governs the timing of an otherwise available deduction. Examples of such provisions include sections 263A (capitalization and inclusion in inventory costs), 419 (treatment of funded welfare benefit plans), and 460 (special rules for long-term contracts). In addition, section 162(i)(2) operates with respect to each employer maintaining the group health plan, without regard to whether the employers are treated as a single employer (see Q&A–5 of this

section) and without regard to whether the failure to satisfy section 162(k) occurs with respect to only an employee of one of the employers. See Q&A–10 of this section regarding when an arrangement is treated as two or more separate group health plans.

(b) A failure of a group health plan to comply with section 162(k) that occurs before, and is not corrected by, the date that an employer maintaining the plan and another entity are first treated as a single employer under Q&A–5 of this section ("the combination date") will not result in a denial of a deduction to the other entity under paragraph (a) of this Q&A–3, so long as (1) the other entity did not also maintain the plan before the combination date, and (2) the failure is corrected before the end of the first taxable year of the other entity that begins after the combination date.

(c) The rules of this Q&A–3 are illustrated by the following examples:

Example 1: Plan A is a group health plan subject to COBRA that is maintained by two unrelated employers, X and Y. Section 162(k) became effective with respect to plan A before April 1, 1988. The taxable year of employer X ends on March 31, and the taxable year of employer Y ends on April 30. If Plan A fails to comply with section 162(k) on April 1, 1988, by not offering COBRA continuation coverage to a qualified beneficiary of an employee of employer X, and the failure is not corrected until June 1, 1988, both employers X and Y are disallowed deductions for their contributions and other expenses relating to all their group health plans (including any group health plan that is maintained only by employer X or only by employer Y) for each taxable year that includes one or more days of noncompliance. Thus, the disallowance applies to employer X for its taxable year ending March 31, 1989, and to employer Y for both its taxable year ending April 30, 1988, and its taxable year ending April 30, 1989. (However, see Q&A–10 of this section regarding when an arrangement is considered to be two or more separate group health plans.)

Example 2: Assume that companies Z and W are treated as a single employer under section 414(b) at all relevant times (see Q&A–5 of this section), that Z maintains group health plans P and Q, that W maintains group health plans R and S, and that none of these plans is excepted from COBRA (see Q&A–8 of this section). Assume further that the taxable year of company Z ends on May 31, that the taxable year of company W ends on July 31, and that section 162(k) becomes effective with respect to the group health plans as follows: for plan P on February 1, 1987; for plan Q on April 1, 1987; and for plans R and S on July 1, 1987. If at any time during February through May of 1987 plan P is not in compliance with section 162(k), then company Z is disallowed all deductions with respect to plans P and Q for its taxable year ending May 31, 1987, and company W is disallowed all deductions with respect to plans R and S for its taxable year ending July 31, 1987.

Example 3: Assume that a group health plan maintained only by M, a calendar year employer, is subject to COBRA and fails to comply with section 162(k) during February of 1988, that the failure is corrected during April of 1988, and that on June 1, 1988 employer M becomes a wholly-owned subsidiary of N, a previously unrelated corporation with a taxable year ending July 31. For 1988, M is disallowed a deduction for all its contributions with respect to any group health plan. Because M and N were not treated as a single employer (see Q&A–5 of this section) during the period of noncompliance by M's plan (i.e., February to April of 1988), the failure of M's plan to comply with section 162(k) during that period will not result in a disallowance of any deductions to N, the new parent corporation. Even if the failure to comply that arises in February of 1988 is not corrected until after June 1, 1988, it will not result in a disallowance of any deductions to N, so long as the failure to comply is corrected by July 31, 1989 (the end of N's first taxable year that begins after June 1, 1988). However, if the failure is not corrected until August of 1989, N will be disallowed a deduction for all its contributions with respect to any group health plan for its taxable years ending on July 31 of 1988, 1989, and 1990. Also, if another failure of M's plan to comply with section 162(k) arises on or after June 1, 1988, that second failure will result in a disallowance of deductions to N.

Example 4: Assume that a calendar year employer maintaining a group health plan through a welfare benefit fund contributes $800,000 to the fund in 1988 and $500,000 in 1989. Assume further that only $600,000 of the 1988 contribution would be deductible under section 419 for 1988, and that the remaining $200,000 would be deemed to be contributed in 1989 and deductible under section 419 for 1989 along with the $500,000 actually contributed in that year. However, the deduction under section 419 is only available if these amounts are otherwise deductible under section 162. Therefore, if at any time during 1988 the group health plan is not in compliance with section 162(k), the $800,000 contributed in 1988 is disallowed in full as a deduction for 1988 and for all later years. However, if the plan does comply with section 162(k) throughout 1988 but at some time during 1989 is not in compliance, the $600,000 deduction for 1988 is unaffected while the $700,000 otherwise deductible for 1989 is permanently disallowed.

Question 4: How is the gross income of certain individuals affected by a group health plan's failure to comply with section 162(k)?

Answer 4: (a) Under section 106(a), employer-provided coverage under an accident or health plan is generally excluded from the gross income of an employee. Under section 106(b), however, if a group health plan that is subject to COBRA fails to comply with section 162(k), certain individuals shall have certain employer-provided coverage included in their gross income for each of their taxable years during which the plan is not in compliance, even if the coverage would otherwise be excludable from income under section 106(a). The individuals referred to in the preceding sentence consist of each person who is, at any time during which the plan is not in compliance with section 162(k), a highly compensated employee (within the meaning of section 414(q) and the regulations under that section) of any employer maintaining the plan. The coverage included in the individual's gross income for each such taxable year shall consist of all coverage provided by the employer to the individual and his or her spouse and dependent children during that taxable year under any group health plan (other than a plan that is excepted from COBRA—see Q&A–8 of this section). For purposes of section 106(b) and this Q&A–4, whether an individual is a highly compensated employee shall be determined on the basis of plan years or any alternative period permitted under section 414(q) and the regulations under that section. As used in the preceding sentence, "plan year" means the plan year as defined in Q&A–13 of this section.

(b) A failure of a group health plan to comply with section 162(k) that occurs before, and is not corrected by, the date that an employer maintaining the plan and another entity are first treated as a single employer under Q&A–5 of this section ("the combination date") will not result in an income inclusion for highly compensated employees of the other entity under paragraph (a) of this Q&A–4, so long as (1) the other entity did not also maintain the plan before the combination date, and (2) the failure is corrected before the end of the first taxable year of the other entity that begins after the combination date.

(c) The rules of this Q&A–4 are illustrated by the following examples, in which it is assumed that all individuals are calendar year taxpayers:

Example 1: Employer Z maintains group health plan T, and maintains no other group health plans. If plan T fails to comply with section 162(k) on November 10, 1988, and the failure is not corrected until February 15, 1989, each individual who is a highly compensated employee of Z at any time from November 10, 1988, through February 15, 1989, shall have coverage included in gross income for that individual's 1988 and 1989 taxable years. If the individual was covered under plan T throughout those years, the coverage included in 1988 is all coverage provided by employer Z under plan T on behalf of the individual and the individual's family during 1988, and the coverage included in 1989 is all coverage provided by employer Z under plan T on behalf of the individual and the individual's family during 1989.

Example 2: The facts are the same as in Example 1, except that employer Z's highly compensated employees are covered under plan U. Even if plan U complies with section 162(k) at all times, each individual who is a highly compensated employee of Z at any time for November 10, 1988, through February 15, 1989 (the period of plan T's noncompliance), shall have coverage included in gross income for that individual's 1988 and 1989 taxable years. If the individual was covered under plan U throughout those years, the coveage included in 1988 is all coverage provided by employer Z under plan U on behalf of the individual and the individual's family during 1988, the coverage included in 1989 is all coverage provided by employer Z under plan U on behalf of the individual and the individual's family during 1989.

Example 3: The facts are the same as in Example 1, except that the failure to comply with section 162(k) is corrected on December 20, 1988, rather than on February 15, 1989. The income inclusion for highly compensated employees applies only for the 1988 taxable year and only to those individuals who are highly compensated employees of Z at some time from November 10 to December 20, 1988.

Example 4: The facts are the same as in Example 1. In addition, employer W maintains group health plan V, and maintains no other group health plans. Employer W's taxable year ends on May 31. Employer W becomes a wholly-owned subsidiary of employer Z on December 1, 1988. Plan T's failure to comply with section 162(k) that arises on November 10, 1988, does not result in an income inclusion to any of employer W's highly compensated employees because the failure is corrected on February 15, 1989, which is before May 31, 1990 (the end of employer W's first taxable year that begins after December 1, 1988). However, if another failure of Plan T to comply with section 162(k) arises on December 15, 1988, and that failure to comply is also corrected on February 15, 1989, each employee of employer W who is a highly compensated employee at any time from December 15, 1988, through February 15, 1989, is also subject to the income inclusion set forth in this Q&A–4.

Question 5: What is the employer?

Answer 5: For purposes of this § 1.162–26 and sections 106(b), 162(i), and 162(k), the term "employer" refers to the employer and any entity that is a member of a group described in section 414(b), (c), (m), or (o) that includes the employer, and to any successor of either the employer or such an entity. However, the rule of this Q&A–5 does not apply for purposes of determining whether a group health plan is a small-employer plan (see Q&A–9 of this section).

Question 6: How does COBRA apply to a group health plan before the effective date of this section?

Answer 6: This section is proposed to be effective when final regulations that include it are published in the **Federal Register** as a Treasury decision. Group health plans become subject to the COBRA continuation coverage requirements at different times, however, as set forth in Q&A–11 of this section. With respect to qualifying events that occur on or after the date that a plan became or becomes subject to those requirements and before the effective date of final regulations, the plan and the employer must operate in good faith compliance with a reasonable interpretation of the statutory requirements (i.e., title X of COBRA). For the period before the effective date of final regulations, the Internal Revenue Service will consider compliance with the terms of these proposed regulations to constitute good faith compliance with a reasonable interpretation of the statutory requirements (other than the statutory requirements regarding the computation of the applicable premium or the treatment, under section 9501 of the Omnibus Budget Reconciliation Act of 1986, of certain bankruptcies as qualifying events, which are not addressed in these proposed regulations). Moreover, plans and employers will be considered to be in compliance with the terms of these proposed regulations if, between June 15, 1987 and September 14, 1987, they operate in good faith compliance with a reasonable interpretation of the statutory requirements and, from September 15, 1987 until the effective date of final regulations, they operate in compliance with the terms of these proposed regulations. In addition, the Internal Revenue Service will not consider actions inconsistent with the terms of these proposed regulations necessarily to constitute a lack of good faith compliance with a reasonable interpretation of the statutory requirements; whether there has been good faith compliance with a reasonable interpretation of the statutory requirements will depend on all the facts and circumstances of each case.

Which Plans Must Comply and When

Question 7: What is a group health plan?

Answer 7: (a) A group health plan is any plan maintained by an employer to provide medical care (as defined in section 213(d)) to the employer's employees, former employees, or the families of such employees or former employees, whether directly or through insurance, reimbursement, or otherwise, and whether or not provided through an on-site facility (except as set forth in paragraph (e) of this Q&A-7), or through a cafeteria plan (as defined in section 125) or other flexible benefit arrangement. For purposes of this Q&A-7, insurance includes not only group insurance policies but also one or more individual insurance policies in any arrangement that involves the provision of medical care to two or more employees. A plan "maintained by an employer" is any plan of, or contributed to (directly or indirectly) by, an employer. Thus, a group health plan is "maintained by an employer," regardless of whether the employer contributes to it, if coverage under the plan would not be available at the same cost to an employee in the event that he or she were not employed by the employer. However, a plan that is maintained by an employee representative is not "maintained by an employer" if the employer does not contribute to the plan and has no involvement (e.g., payroll checkoff) in the operation of the plan. See Q&A-10 of this section for rules governing when a single arrangement is considered to be two or more separate group health plans.

(b) Medical care (as defined in section 213(d)) includes the diagnosis, cure, mitigation, treatment, or prevention of disease, and any other undertaking for the purpose of affecting any structure or function of the body. Medical care also includes transportation primarily for and essential to medical care as described in the preceding sentence. However, medical care does not include anything that is merely beneficial to the general health of an individual, such as a vacation. Thus, if an employer maintains a program that furthers general good health, but the program does not relate to the relief or alleviation of health or medical problems and is generally accessible to and used by employees without regard to their physical condition or state of health, that program is not considered a program that provides medical care and so is not a group health plan for purposes of this section.

(c) For example, if an employer maintains a spa, swimming pool, or exercise/fitness program that is normally accessible to and used by employees for reasons other than relief of health or medical problems, such a facility would not constitute medical care. In contrast, if the employer maintains a drug or alcohol treatment program or a health clinic, or any other facility or program that is intended to relieve or alleviate a physical condition or health problem (whether the condition or problem is chronic or acute), the facility or program is considered to be the provision of medical care and so is considered a group health plan for purposes of this section.

(d) Whether a benefit provided to employees constitutes medical care is not affected by whether the benefit is excludable from income under section 132 (relating to certain fringe benefits). For example, if a department store provides its employees discounted prices on all merchandise, including health care items such as drugs or eyeglasses, the mere fact that the discounted prices also apply to health care items will not cause the program to be a plan providing medical care, so long as the discount program would normally be accessible to and used by employees without regard to health needs or physical condition. If, however, the employer maintaining the discount program is a health clinic, so that the program is used exclusively by employees with health or medical needs, the program is considered as a plan providing medical care and so is considered a group health plan for purposes of this section.

(e) The provision of medical care at a facility that is located on the premises of an employer does not constitute a group health plan if (1) the medical care consists primarily of first aid that is provided during the employer's working hours for treatment of a health condition, illness, or injury that occurs during those working hours, (2) the medical care is available only to the employer's current employees, and (3) employees are not charged for the use of the facility.

Question 8: What group health plans are subject to COBRA?

Answer 8: (a) All group health plans are subject to COBRA (i.e., subject to section 162(k)) except group health plans described in section 106(b)(2). However, a group health plan is not subject to COBRA before the effective date prescribed for that plan in Q&A–11 of this section.

(b) The following group health plans are described in section 106(b)(2): (1) Small-employer plans (see Q&A–9 of this section), (2) church plans (within the meaning of section 414(e)), and (3) governmental plans (within the meaning of section 414(d)). Plans that are described in section 106(b)(2) are referred to in this § 1.162–26 as "excepted from COBRA." The income inclusion rule of section 106(b)(1), the deduction denial rule of section 162(i), and the continuation coverage requirements of section 162(k) do not apply with respect to group health plans that are excepted from COBRA. Certain governmental plans, however, are governed by parallel requirements that were added by section 10003 of COBRA to the Public Health Service Act, which is administered by the Department of Health and Human Services.

Question 9: What is a small.employer plan?

Answer 9: (a) A "small-employer plan" is a group health plan maintained by one or more employers where each of the employers maintaining the plan for a calendar year normally employed fewer than 20 employees during the preceding calendar year. For purposes of this definition, each employer maintaining the plan shall, in combination with all other entities under common control with that employer (as determined under section 52 (a) and (b)), be considered a single employer. See Q&A–10 of this section for rules governing when a single arrangement is considered to be two or more separate group health plans.

(b) An employer is considered as having normally employed fewer that 20 employees during a particular calendar year if, and only if, it had fewer than 20 employees on at least 50 percent of its working days during that year.

(c) In determining the number of its employees, an employer shall treat as employees all full-time and part-time employees, and all employees within the meaning of section 401(c)(1). For example, partners in a law firm are treated as employees for this purpose. An employer shall also treat as employees for this purpose all agents and independent contractors (and their employees, agents, and independent contractors, if any), and all directors (in the case of a corporation), but only if such individuals are eligible to participate in a group health plan maintained by the employer.

(d) The determination of whether a plan is a small-employer plan on any particular date depends on which employers are maintaining the plan on that date and on the workforce of those employers during the preceding calendar year. If a plan that is otherwise subject to COBRA ceases to be a small-employer plan because of the addition during a calendar year of an employer that did not normally employ fewer than 20 employees on a typical business day during the preceding calendar year, the plan ceases to be excepted from COBRA and section 162(k) becomes effective with respect to it immediately upon the addition of the new employer. In contrast, if the plan ceases to be a small-employer plan by reason of an increase during a calendar year in the workforce of an employer maintaining the plan, the plan ceases to be excepted from COBRA and section 162(k) becomes effective with respect to it on the January 1 immediately following the calendar year in which the employer's workforce increased. However, a plan described in the preceding sentence will be treated as not having become subject to section 162(k) on that January 1 (i.e., still excepted from COBRA) if all the employers who did not normally employ fewer than 20 employees in the preceding calendar year have ceased to maintain the plan by February 1 immediately following that January 1. For example, if each employer maintaining a group health plan normally employs fewer than 20 employees during each of 1986 and 1987 but two of the employers do not normally employ fewer than 20 employees during 1988, the entire plan becomes subject to COBRA and must begin to comply with section 162(k) on January 1, 1989, even if the plan year is not a calendar year, unless those two employers depart from the plan before February 1, 1989.

Question 10: When is an arrangement considered to be two or more separate group health plans rather than a single group health plan?

Answer 10: (a) The rules below in paragraphs (b) through (g) of this Q&A-10 determine when an arrangement is considered to be two or more separate group health plans. If more than one of those paragraphs applies to a particular arrangement, the paragraphs are applied in succession to break the arrangement into the smallest possible group health plans. For example, if an arrangement offers high option and low option benefit schedules (see paragraph (c)) and constitutes a multiple employer welfare arrangement maintained by three different employers (see paragraph (d)), the arrangement consists of six separate group health plans: Three high-option plans (one for each employer) and three low-option plans (one for each employer).

(b) The rules in this Q&A-10 apply without regard to whether the arrangement is maintained by one or more than one employer. Moveover, the fact that a particular arrangement has been traditionally referred to as a single plan or has reported as a single plan (e.g., by filing a single Form 5500) is not controlling in the determination of whether the arrangement will be considered as two or more separate plans for purposes of section 162(k). All references elsewhere in this section to a "group health plan" are references to a separate group health plan as determined under this Q&A-10. The identification of separate group health plans is relevant to determinations such as those involving which coverage must be separately electable, the effective

date of section 162(k), which employers will be denied deductions in the event of a failure to comply with section 162(k), the cost of continuation coverage, and the availability of the exception for small-employer plans (see Q&A-9 of this section). The relevance of treating an arrangement as two or more separate group health plans is illustrated by the following examples:

Example 1: If an employee is covered under more than one group health plan at the time of a qualifying event, the qualified beneficiaries must be offered an opportunity to elect COBRA continuation coverage with respect to each of the plans. In contrast, if the arrangement in which the employee participates is treated as a single group health plan with several features, no individual features of the plan would have to be made available to a qualified beneficiary unless the qualified beneficiary elects coverage under the entire plan. (But see Q&A-24 of this section regarding the election to receive only core coverage.)

Example 2: If an arrangement that involves many employers is considered to be a single group health plan, that plan will fail to qualify for the small-employer plan exception if any one of those employers had too many employees during the preceding calendar year. However, if the arrangement is considered to be a separate plan with respect to each employer, then the exception would be available for each of those particular employers that normally employed fewer than 20 employees during the preceding calendar year.

Example 3: An arrangement covering the employees of unrelated employers A and B fails to comply with section 162(k) by failing to offer COBRA continuation coverage to an employee of employer A, but complies with section 162(k) in all other respects. If the arrangement consists of two separate group health plans, one covering the employees of A and one covering the employees of B, employer A will lose deductions under section 162(i) and A's highly compensated employees will lose the benefit of the section 106(a) exclusion, but employer B and its employees will be unaffected. In contrast, if the arrangement consists of a single group health plan, the consquences of failing to comply with section 162(k) will apply to both employers A and B.

(c) Each different benefit package or option offered under an arrangement is treated as a separate group health plan. For this purpose, self-only coverage and self-and-family coverage are not considered to be separate packages or options. The rule of this paragraph (c) is illustrated by the following examples:

Example 1: If an arrangement offers "high option" and "low option" benefit schedules and the alternatives of self-only and self-and-family coverage, the arrangement is considered to be two separate plans: One offering high option coverage (whether self-only or self-and-family), and one offering low option coverage (whether self-only or self-and-family).

Example 2: If two types of coverage differ only because one has a $100 deductible and the other has a $250 deductible, or because one has a $1500 catastrophic limit and the other has a $2500 catastrophic limit, each type of coverage is a different benefit package and so is treated as a separate group health plan.

Example 3: An arrangement has a deductible equal to 1 percent of compensation, but consists of a single plan in all other respects. The fact that employees with different levels of compensation will have different deductibles will not cause the arrangement to be treated as separate group health plans for each resulting deductible.

Example 4: If an arrangement consists of a single plan in all respects except that an employee can choose to have either hospital benefits or hospital benefits combined with mental health benefits, there are two separate plans: One providing hospital coverage, and one providing hospital-and-mental-health coverage. If an employee could instead choose independently whether to have hospital benefits and whether to have mental-health benefits, there would also be two separate plans: One providing hospital-only coverage and one providing mental-health-only coverage. In such a case an employee receiving both hospital and mental-health benefits would be covered under two separate group health plans and would have separate COBRA election rights under each plan.

(d) An arrangement that constitutes a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (ERISA), is considered a separate group health plan with respect to each employer maintaining the arrangement. Solely for purposes of this paragraph (d), the rules of section 3(40)(B) of ERISA (regarding trades or businesses under common control) shall apply in determining whether two or more employers are treated as a single employer.

(e) In the case of an insured arrangement, if two or more groups of employees are covered under separate contracts between a participating employer or employers and an insurer or insurers, each separate contract is considered a separate group health plan, even if the coverage under the separate contracts is identical.

(f) In the case of a self-funded arrangement, each segregated portion of the arrangement shall be considered a separate group health plan. A portion of an arrangement is a segregated portion if and only if (1) assets available to pay benefits under that portion are unavailable to pay benefits under any other portion, and (2) assets available to pay benefits under any other portion are unavailable to pay benefits out of that portion. For example, if several employers contribute to a trust that provides medical benefits but each employee's benefits are payable only out of contributions (and earnings on contributions) made by that employee's employer, each employer's portion of the arrangement is considered a separate group health plan. The rule of this paragraph (f) shall apply whether or not a trust is used, and whether or not the arrangement is partially insured through stop-loss insurance, insurance for some but not all benefits, or some other method.

(g) Arrangements providing medical benefits are broken down as described in Q&A-12 of this section into their collectively bargained portion (if any) and non-collectively-bargained portion (if any), each of which is considered a separate group health plan.

Question 11: When must group health plans comply with section 162(k)?

Answer 11: (a) *Non-collectively bargained plans:* For plans that are not excepted from COBRA (see Q&A–8 of this section) and that do not constitute collectively bargained group health plans (see Q&A–12 of this section), the requirements of section 162(k) apply as of the first day of the first plan year beginning on or after July 1, 1986. For example, if such a plan has a February 1 to January 31 plan year, it must begin to comply with section 162(k) by February 1, 1987.

(b) *Collectively bargained plans:* For plans that are not excepted from COBRA and that constitute collectively bargained group health plans (see Q&A–12 of this section), the requirements of section 162(k) apply as of the first day of the first plan year beginning on or after the later of (1) January 1, 1987, or (2) the date on which the last of the collective bargaining agreements relating to the plan terminates (determined without regard to any extension thereof agreed to after April 7, 1986). This rule is illustrated by the following example:

Example: Assume that the plan year of a collectively bargained group health plan is the calendar year and that, as of April 7, 1986, the plan is maintained pursuant to three collective bargaining agreements having expiration dates in October 1987, February 1988, and July 1988. The plan must comply with section 162(k) beginning on January 1, 1989. Of course, the plan must begin to comply by January 1, 1987, with respect to a collective bargaining unit that was not, as of April 7, 1986, covered by one of those three agreements.

Question 12: What is a collectively bargained group health plan?

Answer 12: (a) A collectively bargained group health plan is a group health plan covering only employees

and former employees (and their families) who are covered by an agreement that is a collective bargaining agreement entered into between employee representatives and one or more employers (as determined under section 7701(a)(46)). Thus, if an arrangement that would otherwise be considered to be a single group health plan under the standards set out in Q&A–10 of this section covers both (1) employees and former employees (and their families) who are covered by a collective bargaining agreement described in the preceding sentence and (2) employees and former employees (and their families) who are not covered by such an agreement, the arrangement consists of two separate group health plans: one plan that is a collectively bargained group health plan and one that is not. The plan that is collectively bargained will have an effective date determined under paragraph (b) of Q&A–11 of this section, and the other plan will have an effective date determined under paragraph (a) of Q&A–11 of this section. For example, if the plan year is the calendar year and the only collective bargaining agreement in effect as of April 7, 1986, expires March 31, 1988, the effective date of section 162(k) is January 1, 1989, for the plan covering bargaining-unit employees and their families, and January 1, 1987, for the plan covering the other employees and their families.

(b) For purposes of this Q&A–12, employees of an employee representative that is a party to a collective bargaining agreement described in paragraph (a) of this Q&A–12, and employees of a trust or fund maintained to pay benefits to individuals covered by the collective bargaining agreement, are considered to be employees covered by that collective bargaining agreement. Thus, a plan that is otherwise considered a single, collectively bargained plan will not fail to be a single, collectively bargained plan merely because it also covers employees or former employees (and their families) of the employee representative or of a trust or fund from which the benefits are paid.

Question 13: What is the plan year of a group health plan?

Answer 13: (a) For purposes of determining when a group health plan must begin to comply with section 162(k) (see Q&A–11 of this section), the plan year of a group health plan is the year that is designated as the plan year in the plan document. However, if the plan document does not designate a plan year, or if there is no plan document, the plan year is determined under paragraph (b) of this Q&A–13. The designation of a plan year on a Form 5500 filed by a group health plan is not controlling in the determination of the plan year under this Q&A–13.

(b) If the plan year of a group health plan is determined under this paragraph (b), the plan year is the plan's limit/deductible year except that (1) in the case of an insured group health plan, the plan year is the policy year if that is later than the limit/deductible year or if the plan has no limit/deductible year, and (2) in the case of a self-funded group health plan having no limit/deductible year, the plan year is the later of the calendar year or the employer's taxable year. For purposes of this paragraph (b), a plan's "limit/deductible year" means the year that is used by the plan in applying benefit limits and deductibles, except that if different years are used for benefit limits and for deductibles, it means the later of those years. For purposes of this paragraph (b), one year is "later" than another if it begins later in relation to the underlying date from which the effective date of section 162(k) is determined for the plan under Q&A–11 of this section. Compare, for example, a year that begins on March 1 with a year that begins on December 1. The March 1 year is later than a December 1 year in the case of a non-collectively-bargained plan, because the first March 1 occurring on or after July 1, 1986, is March 1, 1987, which is later than December 1, 1986 (the first December 1 occurring on or after July 1, 1986). If, however, the plan is a collectively-bargained plan and becomes subject to section 162(k) for the first plan year beginning on or after February 1, 1987, a December 1 year is later than a March 1 year.

Question 14: How do the COBRA continuation coverage requirements apply to cafeteria plans and other flexible benefit arrangements?

Answer 14: The provision of medical care through a cafeteria plan (as defined in section 125) or other flexible benefit arrangement constitutes a group health plan. However, the COBRA continuation coverage requirements of section 162(k) apply only to those medical benefits under the cafeteria plan or other arrangement that a covered employee has actually chosen to receive (if any). The application of this rule to a cafeteria plan is illustrated by the following examples:

Example 1: Under the terms of a cafeteria plan, employees can choose among life insurance coverage, membership in a Health Maintenance Organization (HMO), coverage for medical expenses under an indemnity arrangement, and cash compensation. Of these available choices, the HMO and the indemnity arrangement constitute separate group health plans. Assume that these group health plans are subject to COBRA (see Q&A–8 of this section) and that the employer does not provide any group health plan outside of the cafeteria plan. Assume further that B and C are unmarried employees, that B has chosen the life insurance coverage, and that C has chosen the indemnity arrangement. B does not have to be offered COBRA continuation coverage upon terminating employment, nor must a subsequent open enrollment period for active employees be made available to B. However, if C terminates employment and the termination constitutes a qualifying event, C must be offered an opportunity to elect COBRA continuation coverage under the indemnity arrangement. If C makes such an election and an open enrollment period for active employees occurs while C is still receiving the COBRA continuation coverage, C must be offered the opportunity to switch from the indemnity arrangement to the HMO (but not to the life insurance coverage because that does not constitute a group health plan).

Example 2: An employer maintains a group health plan under which all employees receive employer-paid coverage. Employees can arrange to cover their families by paying an additional amount. The employer also maintains a cafeteria plan, under which one of the options is to pay part or all of the charge for family coverage under the group health plan. Thus, an employee might pay for family coverage under the group health plan partly with before-tax dollars and partly with after-tax dollars. If an employee's family is receiving coverage under the group health plan when a qualifying event occurs, each of the qualified beneficiaries must be offered an opportunity to elect COBRA continuation coverage, regardless of how that qualified beneficiary's coverage was paid for before the qualifying event.

Example 3: One of the choices available under a cafeteria plan is an individual medical expense reimbursement arrangement. At the beginning of each calendar year, an employee can choose, instead of being paid a specified dollar amount of compensation, to have that amount placed in an account to be used for reimbursement of medical expenses incurred during the year by the employee or the employee's spouse or dependent children. Any amount remaining in the account as of the end of the year is forfeited. The reimbursement of medical expenses through these arrangements constitutes a group health plan.

Qualified Beneficiaries

Question–15: Who is a qualified beneficiary?

Answer–15: (a) Except as set forth in paragraphs (b) through (d) of this Q&A–15, a qualified beneficiary is any individual who, on the day before a qualifying event, is covered under a group health plan maintained by the employer of a covered employee by virtue of being on that day either (1) the

covered employee, (2) the spouse of the covered employee, or (3) the dependent child of the covered employee.

(b) An individual is not a qualified beneficiary if, on the day before the qualifying event referred to in paragraph (a) of this Q&A–15, the individual (1) is covered under the group health plan by reason of another individual's election of COBRA continuation coverage and is not already a qualified beneficiary by reason of a prior qualifying event, or (2) is entitled to Medicare benefits under Title XVIII of the Social Security Act.

(c) A covered employee can be a qualified beneficiary only in connection with a qualifying event that consists of the termination (other than by reason of the covered employee's gross misconduct), or reduction of hours, of the covered employee's employment.

(d) An individual is not a qualified beneficiary if the individual's status as a covered employee is attributable to a period in which the individual was a nonresident alien who received no earned income (within the meaning of section 911(d)(2)) from the individual's employer that constituted income from sources within the United States (within the meaning of section 861(a)(3)). If, pursuant to the preceding sentence, an individual is not a qualified beneficiary, then a spouse or dependent child of the individual shall not be considered a qualified beneficiary by virtue of the relationship to the individual.

Question–16: Who is a covered employee?

Answer–16: (a) A covered employee is any individual who is (or was) provided coverage under a group health plan (other than a plan that is excepted from COBRA on the date of the qualifying event; see Q&A–8 of this section) by virtue of the individual's employment or previous employment with an employer. For example, a retiree or former employee who is covered by such a group health plan is a covered employee if the coverage results in whole or in part from his or her previous employment. An individual (whether a present or former employee) who is merely eligible for coverage under a group health plan is not a covered employee if the individual is not and has not been actually covered under the plan. The reason for an individual's lack of actual coverage (such as the individual's having declined participation in the plan or failed to satisfy the plan's conditions for participation) is not relevant for this purpose.

(b) The following individuals are also covered employees, but only if they are (or were) actually covered under a group health plan by virtue of their relationship to an employer maintaining the plan, and only if that plan or some other group health plan maintained by the employer covers one or more common-law employees of the employer: (1) Employees within the meaning of section 401(c)(1), (2) agents and independent contractors (and their employees, agents, and independent contractors), and (3) directors (in the case of a corporation). The rule of this paragraph (b) is illustrated by the following example:

Example: A law firm maintains a group health plan for its common-law employees. If the firm also provides group health coverage for its partners, the partners are covered employees regardless of whether their coverage is provided under the same group health plan as the common-law employees or under a separate plan. In contrast, if the partners are the only individuals who receive any health coverage, they are not covered employees.

Question 17: Other than those individuals who are qualified beneficiaries as of the day before a qualifying event, can any other person (such as a newborn or adopted child or a new spouse) obtain qualified beneficiary status for COBRA continuation coverage purposes?

Answer 17: (a) No. The group of qualified beneficiaries entitled to elect COBRA continuation coverage as a result of a qualifying event is closed as of the day before the qualifying event. Thus, newborn children, adopted children, and spouses who join the family of a qualified beneficiary after that day do not become qualified beneficiaries. The new family members do not themselves become qualified beneficiaries even if they become covered under the plan. (For situations in which a plan is required to make coverage available to new family members of a qualified beneficiary who is receiving COBRA continuation coverage, see Q&A–31 of this section and paragraph (c) of Q&A–30 of this section.)

(b) A qualified beneficiary who fails to elect COBRA continuation coverage in connection with a qualifying event ceases to be a qualified beneficiary at the end of the election period (see Q&A–32 of this section). Thus, for example, if such a former qualified beneficiary is later added to a covered employee's coverage (e.g., during an open enrollment period) and then another qualifying event occurs with respect to the covered employee, the former qualified beneficiary will not be treated as a qualified beneficiary

(c) The rules of this Q&A–17 are illustrated by the following examples:

Example 1: Assume that A is a single employee who voluntarily terminates employment and properly elects COBRA continuation coverage under a group health plan. Under the terms of the plan, a covered employee who marries can choose to have his or her spouse covered under the plan as of the date of marriage. One month after electing COBRA continuation coverage, A marries and chooses, to cover A's spouse under the plan. A's spouse is not a qualified beneficiary. Thus, if A dies during the period of COBRA continuation coverage, the plan does not have to offer A's surviving spouse an opportunity to elect COBRA continuation coverage.

Example 2: Assume that B is a married employee who terminates employment, B properly elects COBRA continuation coverage for B but not B's spouse, and B's spouse declines to elect such coverage. B's spouse thus ceases to be a qualified beneficiary. Later, at the next open enrollment period, B adds the spouse as a beneficiary under the plan. The addition of the spouse during the open enrollment period does not make the spouse a qualified beneficiary. The plan will thus not have to offer the spouse an opportunity to elect COBRA continuation coverage upon a later divorce from or death of B.

Example 3: Assume that, under the terms of a group health plan, a covered employee's child ceases to be a dependent eligible for coverage upon attaining age 18. At that time, the child must be offered an opportunity to elect COBRA continuation coverage. If the child elects COBRA continuation coverage, the child marries during the period of the COBRA continuation coverage, and the child's spouse becomes covered under the group health plan, the child's spouse would not become a qualified beneficiary upon a later qualifying event as a result of that coverage.

Example 4: Assume that C is a single employee who, upon retirement, is given the opportunity to elect COBRA continuation coverage but declines it in favor of an alternative offer of 12 months of employer-paid retiree health benefits. C ceases to be a qualified beneficiary and will not have to be given another opportunity to elect COBRA continuation coverage at the end of those 12 months. Assume further that C marries D during the period of retiree health coverage and, under the terms of that coverage, D becomes covered under the plan. If a divorce from or death of C will result in D's losing coverage, D will be a qualified beneficiary because D's coverage under the plan on the day before the qualifying event (i.e., the divorce) will have been by reason of C's acceptance of 12 months of employer-paid coverage after the prior qualifying event (C's retirement) rather than by reason of an election of COBRA continuation coverage.

Example 5: Assume the same facts as in Example 4 except that, under the terms of the plan, the divorce or death does not cause D to lose coverage so that D continues to be covered for the balance of the original 12-month period. D does not have to be allowed to elect COBRA continuation coverage because the divorce of death does not

constitute a qualifying event. See Q&A–18 of this section.

Qualifying Events

Question 18: What is a qualifying event?

Answer 18: (a) A qualifying event is an event that satisfies paragraphs (b), (c), and (d) of this Q&A–18.

(b) An event satisfies this paragraph (b) if the event is either (1) the death of a covered employee, (2) the termination (other than by reason of the employee's gross misconduct), or reduction of hours, of a covered employee's employment, (3) the divorce or legal separation of a covered employee from the employee's spouse, (4) a covered employee becoming entitled to Medicare benefits under Title XVIII of the Social Security Act, or (5) a dependent child ceasing to be a dependent child of the covered employee under the generally applicable requirements of the plan. In the case of a covered employee who is not a commonlaw employee, termination of "employment" for this purpose means termination of the relationship (e.g., directorship of a corporation or membership in a partnership) giving rise to the individual's treatment as a covered employee under paragraph (b) of Q&A–16 of this section.

(c) An event satisfies this paragraph (c) if, under the terms of the group health plan, the event causes the covered employee, or the spouse or a dependent child of the covered employee, to lose coverage under the plan. For this purpose, to "lose coverage" means to cease to be covered under the same terms and conditions as in effect immediately before the qualifying event. If coverage is reduced or eliminated in anticipation of an event, the reduction or elimination is disregarded in determining whether the event causes a loss of coverage. Moreover, for purposes of this paragraph (c), a loss of coverage need not occur immediately after the event, so long as the loss of coverage will occur before the end of the maximum coverage period (see Q&A–39 and Q&A–40 of this section). However, if neither the covered employee nor the spouse or a dependent child of the covered employee will lose coverage before the end of what would be the maximum coverage period, the event does not satisfy this paragraph (c).

(d) An event satisfies this paragraph (d) if it occurs while the plan is subject to COBRA. Thus, an event will not satisfy this paragraph (d) if it occurs before the plan becomes subject to section 162(k) (see Q&A–11 of this section) or while the plan is excepted from COBRA (see Q&A–8). See Q&A–20 and Q&A–21 of this section.

(e) The rules of this Q&A–18 are illustrated by the following examples, each of which assumes that paragraph (d) is satisfied:

Example 1: If an employee who is covered by a group health plan terminates employment (other than by reason of the employee's gross misconduct) and, as of the date of separation, is given 3 months of employer-paid coverage under the same terms and conditions as before that date, the termination is a qualifying event because it satisfies both paragraphs (b) and (c) of this Q&A–18.

Example 2: Upon the retirement of an employee who, along with the employee's spouse, has been covered under a group health plan, the employee is given identical coverage for life but the spousal coverage will not be continued beyond 6 months unless premiums are then paid by the employee or spouse. The spouse will "lose coverage" 6 months after the employee's retirement when the premium requirement takes effect, so the retirement is a qualifying event and the spouse must be given an opportunity to elect COBRA continuation coverage.

Example 3: F is a covered employee who is married to G, and both are covered under a group health plan maintained by F's employer. F and G are divorced and, under the terms of the plan, the divorce will cause G to lose coverage. The divorce is a qualifying event. If G elects COBRA continuation coverage and then remarries during the period of COBRA continuation coverage, G's new spouse might become covered under the plan. (See Q&A–31 of this section and paragraph (c) of Q&A–30 of this section.) However, G's later death or divorce from G's new spouse will not be a qualifying event because G is not a covered employee.

Question 19: Can a qualifying event result from a voluntary termination of employment?

Answer 19: Yes. Apart from gross misconduct, the facts surrounding a termination or reduction of hours are irrelevant. It does not matter whether the employee voluntarily terminated or was discharged. For example, a strike or walkout is a termination or reduction of hours that constitutes a qualifying event if the strike or walkout results in a loss of coverage as described in paragraph (c) of Q&A–18 of this section. Similarly, a layoff that results in such a loss of coverage is a qualifying event.

Question 20: Can a qualifying event occur before the effective date of section 162(k) (as described in Q&A–11 of this section)?

Answer 20: No. An event that occurs before section 162(k) becomes effective for a group health plan does not satisfy paragraph (d) of the definition of qualifying event in Q&A–18 of this section. A group health plan does not have to offer individuals whose coverage ends as a result of such an event the opportunity to elect COBRA continuation coverage. For example, if an employee terminated employment on July 15, 1986, and the plan covering the employee had a November 1 to October 31 plan year (so that the plan became subject to section 162(k) on November 1, 1986), the plan does not have to permit the employee to elect COBRA continuation coverage. Even if that employee is given 6 months of additional coverage from the July 15, 1986, termination date (whether merely as a result of the terms of the plan, or pursuant to state or local law or otherwise) so that the coverage extends beyond the November 1 effective date, the employee does not have to be given the opportunity to elect COBRA continuation coverage at the end of the 6 months' coverage because there will be no qualifying event at that time. In contrast, if the employee's spouse is covered by the 6 months' coverage and, as a result of the employee's death after the November 1 effective date and before the end of the 6–month period, the spouse will lose coverage for the balance of the 6–month period, the death will constitute a qualifying event and the spouse will be a qualified beneficiary entitled to elect COBRA continuation coverage. See Q&A–42 of this section regarding the maximum coverage period in such a case.

Question 21: Can a qualifying event occur while a group health plan is excepted from COBRA (see Q&A–8 of this section)?

Answer 21: No. An event that occurs while a group health plan is excepted from COBRA does not satisfy paragraph (d) of the definition of qualifying event in Q&A/18 of this section. Even if the plan later becomes subject to COBRA, it does not have to provide COBRA election rights to anyone whose coverage ends as a result of such an event. For example, if a group health plan is excepted from COBRA as a small-employer plan during 1988 (see Q&A–9 of this section) and an employee terminates employment on December 31, 1988, the termination is not a qualifying event and the plan does not have to permit the employee to elect COBRA continuation coverage. This is the case even if the plan ceases to be a small-employer plan as of January 1, 1989. Also, the same result will follow even if the employee is given 3 months of coverage beyond December 31 (i.e., through March of 1989), because there will be no qualifying event as of the termination of coverage in March. However, if the employee's spouse is initially provided with the 3-month coverage through March 1989, but the spouse divorces the employee before the end of the 3 months and loses coverage

as a result of the divorce, the divorce will constitute a qualifying event during 1989 and so entitle the spouse to elect COBRA continuation coverage. See Q&A–42 of this section regarding the maximum coverage period in such a case.

COBRA Continuation Coverage

Question 22: What is COBRA continuation coverage?

Answer 22: If a qualifying event occurs, each qualified beneficiary (other than a qualified beneficiary for whom the qualifying event will not result in any immediate or deferred loss of coverage) must be offered an opportunity to elect to continue to receive the group health plan coverage that he or she received immediately before the qualifying event. This continued coverage is "COBRA continuation coverage." Except as set forth in Q&A–23 through Q&A–31 of this section, if the continuation coverage offered differs in any way from the coverage enjoyed immediately before the qualifying event, the coverage offered does not constitute COBRA continuation coverage and the group health plan is not in compliance with section 162(k) unless other coverage that does constitute COBRA continuation coverage is also offered. Any elimination or reduction of coverage in anticipation of a qualifying event is disregarded for purposes of this Q&A–22 and for purposes of any other reference in this section to coverage in effect immediately before (or on the day before) a qualifying event. COBRA continuation coverage must not be conditioned upon, or discriminate on the basis of lack of, evidence of insurability.

Question 23: How is COBRA continuation coverage affected by changes in the coverage that is provided to similarly situated beneficiaries with respect to whom a qualifying event has not occurred?

Answer 23: COBRA continuation coverage must generally be the same as the group health plan coverage enjoyed by the qualified beneficiary immediately before the qualifying event. However, if the coverage provided to similarly situated active employees is changed or eliminated but the employer continues to maintain one or more group health plans (so that the qualified beneficiary's COBRA continuation coverage cannot be terminated at that time—see Q&A–37 of this section), the employer must permit the qualified beneficiary receiving COBRA continuation coverage to elect to be covered under any of the remaining group health plans maintained by the employer or similarly situated active employees. If the coverage of the qualified beneficiary was subject to deductibles and the change in coverage occurs before the end of the prescribed period for accumulating such deductibles, the new coverage selected by the qualified beneficiary must credit him or her with the amounts incurred under the original coverage. The rule in the preceding sentence also applies to those limits that are in the nature of deductibles, such as copayment limits or catastrophic limits on a covered individual's out-of-pocket expenses. The qualified beneficiary can be charged the amount determined under Q&A–44 of this section for the coverage selected.

Question 24: Can a group health plan require a qualified beneficiary who wishes to receive COBRA continuation coverage to elect to receive a continuation of all of the coverage that he or she was receiving under the plan immediately before the qualifying event?

Answer 24: (a) In general, no. A qualified beneficiary who, immediately before the qualifying event, is covered by a plan that provides both core coverage and non-core coverage must be able to elect to receive either (1) the coverage that he or she had immediately before the qualifying event (including the core coverage and any non-core coverage), or (2) the core coverage only. However, there are two exceptions to this rule, as set forth in paragraphs (b) and (c) of this Q&A–24.

(b) If the applicable premium for core coverage would be at least 95 percent of the applicable premium for core coverage and non-core coverage combined, the plan does not have to offer qualified beneficiaries the opportunity to elect core coverage only. (See Q&A–44 of this section regarding the applicable premium.)

(c) If an employer maintaining a group health plan that includes non-core coverage also maintains at least one other group health plan for similarly situated active employees that does not provide any non-core coverage, the plan that includes non-core coverage does not have to offer a qualified beneficiary an opportunity to elect core coverage only. However, the qualified beneficiary must instead be offered the opportunity to elect coverage under any other group health plan maintained by the employer for similarly situated active employees.

Question 25: What is core coverage?

Answer 25: (a) "Core coverage" means all of the coverage that a qualified beneficiary was receiving under the group health plan immediately before a qualifying event that gives rise to the qualified beneficiary's COBRA election rights, other than "non-core coverage." "Non-core coverage" means coverage for vision benefits and dental benefits. However, coverage for vision benefits or dental benefits that must be provided under applicable law is core coverage.

(b) For purposes of this Q&A–25, vision benefits include only those benefits related to vision care of a type that is not required under local law to be performed by a physician.

(c) For purposes of this Q&A–25, dental benefits does not include any benefits for dental care or oral surgery in connection with an accidental injury.

(d) The definitions in this Q&A–25 apply only for purposes of this § 1.162–26 and sections 106, 162(i)(2), and 162(k) of the Code.

Question 26: Must a qualified beneficiary be given an opportunity to elect core coverage plus only one of two non-core coverages that the qualified beneficiary had under the plan immediately before the qualifying event?

Answer 26: No. A group health plan is required only to offer qualified beneficiaries the right to elect (a) core coverage, or (b) core coverage plus all non-core coverages that the qualified beneficiary had immediately before the qualifying event. Thus, a qualified beneficiary who has core coverage plus vision and dental coverage upon the occurrence of a qualifying event must be offered the opportunity to continue either the core coverage or the core coverage and both dental and vision coverage. Such a qualified beneficiary would not have to be offered the opportunity to elect core coverage plus vision coverage only or core coverage plus dental coverage only. Of course, if the vision and dental coverage are provided under two separate plans that are independent of the core plan, a qualified beneficiary would be able to continue one or both of the coverages. Assume, for example, that an employer maintains three group health plans—a core plan, a vision plan, and a dental plan—and that each active employee can elect to be covered under one or more of the three plans. (Thus, an employee could have vision-only, dental-only, or core-only coverage, or any combination of the three.) A qualified beneficiary who is covered under all three plans at the time of a qualifying event would have separate election rights with respect to each plan, and so would be able to elect coverage under the dental-only and core-only plans.

Question 27: Must a qualified beneficiary who is covered under a single plan providing both core coverage and non-core coverage be offered the opportunity to elect non-core coverage only?

Answer 27: No. A qualified beneficiary who is covered by a single plan providing both core coverage and non-core coverage need not be offered the opportunity to elect only non-core coverage. Of course, if immediately before the qualifying event the qualified beneficiary is covered by a group health plan that provides non-core coverage but no core coverage, the qualified beneficiary must be offered the opportunity to continue that non-core coverage. Moreover, such an individual generally would not have to be given the opportunity to elect core coverage. (But see Q&A–30 of this section regarding open enrollment periods.)

Question 28: What deductibles apply if COBRA continuation coverage is elected?

Answer 28: (a) Qualified beneficiaries electing COBRA continuation coverage are generally subject to the same deductibles as similarly situated employees for whom a qualifying event has not occurred. If a qualified beneficiary's COBRA continuation coverage begins before the end of the prescribed period for accumulating amounts toward deductibles, the qualified beneficiary must retain credit for expenses incurred toward those deductibles before the beginning of COBRA continuation coverage as though the qualifying event had not occurred. The specific application of this rule depends on the type of deductible, as set forth in paragraphs (b) through (d) of this Q&A–28. Special rules are set forth in paragraphs (e) and (f), and examples appear in paragraph (g).

(b) If a deductible is computed separately for each individual receiving coverage under the plan, each individual's remaining deductible amount (if any) on the date that COBRA continuation coverage begins is equal to that individual's remaining deductible amount immediately before that date.

(c) If a deductible is computed on a family basis, the deductible for each new family unit after the beginning of COBRA continuation coverage (or the existing family unit, in the case of a qualifying event that does not result in there being more than one family unit) is computed as follows: On the date that COBRA continuation coverage begins, the remaining deductible amount for each new family unit (or the remaining number of individual deductibles, in the case of a family deductible that is satisfied by completing a specified number of individual deductibles) is equal to the preexisting family unit's remaining deductible amount (or remaining number of individual deductibles, as applicable) immediately before that date. This rule applies regardless of whether the plan provides that the family deductible is an alternative to individual deductibles or an additional requirement.

(d) Deductibles that are not described in paragraphs (b) or (c) of this Q&A–28 must be treated in a manner consistent with the principles set forth in those paragraphs.

(e) If a deductible is computed on the basis of a covered employee's compensation instead of being a fixed dollar amount, the plan can treat the employee's compensation as frozen for the duration of the COBRA continuation coverage at the level that was used to compute the deductible in effect immediately before the COBRA continuation coverage began.

(f) If a single deductible is prescribed for core coverage and non-core coverage and a qualified beneficiary electing COBRA continuation coverage elects to receive core coverage only, the treatment of expenses for non-core coverage depends on when the expenses were incurred, as follows: If the expenses were incurred before the beginning of COBRA continuation coverage, they must continue to be counted toward satisfaction of the deductible, but they need not be counted if they were incurred after the begining of COBRA continuation coverage.

(g) The rules of the Q&A–28 are illustrated by the following examples; in each example it is assumed that deductibles are determined on a calendar year basis:

Example 1: A group health plan applies a separate $100 annual deductible to each individual whom it covers. The plan provides that the spouse and dependent children of a covered employee will lose coverage on the last day of the month after the month of the covered employee's death. A covered employee dies on June 11, 1988. The spouse and the two dependent children elect COBRA continuation coverage, which will begin on August 1, 1988. As of July 31, 1988, the spouse has incurred $80 of covered expenses, the older child has incurred no covered expenses, and the younger one has incurred $120 (i.e., already satisfied the deductible). At the beginning of COBRA continuation coverage on August 1, the spouse has a remaining deductible of $20, the older child still has the full $100 deductible, and the younger one has no further deductible.

Example 2: A group health plan applies a separate $200 annual deductible to each individual whom it covers, except that each family member will be treated as having satisfied the individual deductible once the family has incurred $500 of covered expenses during the year. The plan provides that upon the divorce of a covered employee, coverage will end immediately for the employee's spouse and any children who do not remain in the employee's custody. Assume that a covered employee with four dependent children is divorced, that the spouse obtains custody of the two oldest children, and that the spouse and those children all elect COBRA continuation coverage to begin immediately. Assume also that the family had accumulated $420 of covered expenses before the divorce, as follows: $70 by each parent, $200 by the oldest child, $80 by the youngest child, and none by the other two children. Each new family unit after the divorce (i.e., the employee plus two children, still receiving regular coverage under the plan, and the spouse plus two children, receiving COBRA continuation coverage) has a remaining family deductible amount of $80 ($500 minus $420).

Example 3: The facts are the same as in Example 2, except that the family deductible is defined as two individual $200 deductibles instead of a $500 aggregate (i.e., the plan disregards all remaining individual deductibles after the satisfaction of any two individual deductibles). Before the divorce, the family has satisfied one individual deductible (the oldest child's). At the beginning of COBRA continuation coverage, therefore, each new family unit is treated as having already satisfied one individual deductible even though the oldest child is included in only one of the new family units.

Example 4: Each year a group health plan pays 70 percent of the cost of an individual's psychotherapy after that individual's first three visits. A qualified beneficiary who elects COBRA continuation coverage beginning August 1, 1988, and has already made two visits as of that date need only pay for one more visit before the plan must begin to pay 70 percent of the cost of the remaining visits during 1988.

Example 5: A group health plan has a $250 annual deductible per covered individual. The plan provides that if the deductible is not satisfied in a particular year, expenses incurred during October through December of that year are credited toward satisfaction of the deductible in the next year. A qualified beneficiary who has incurred covered expenses of $150 from January through September of 1988 and $40 during October elects COBRA continuation coverage begining November 1, 1988. The remaining deductible amount for this qualified beneficiary is $60 at the beginning of the COBRA continuation coverage. If this individual incurs covered expenses of $50 in November and December of 1988 combined (so that the $250 deductible for 1988 is not satisfied), the $90 incurred from October through December of 1988 are credited toward satisfaction of the deductible amount for 1989.

Question 29: How do a plan's limits apply to COBRA continuation coverage?

Answer 29: (a) Limits are treated in the same way as deductibles (see Q&A–28 of this section). This rule applies both to limits on plan benefits (e.g., a maximum number of hospital days or dollar amount of reimbursable expenses) and limits that are in the nature of deductibles (e.g., a copayment limit, or a catastrophic limit on a covered employee's out-of-pocket

expenses). This rule applies equally to annual and lifetime limits.

(b) The rule of this Q&A–29 is illustrated by the following examples; in each example it is assumed that limits are determined on a calendar year basis:

Example 1: A group health plan pays for a maximum of 150 days of hospital confinement per individual per year. A covered employee who has had 20 days of hospital confinement as of May 1, 1989, terminates employment and elects COBRA continuation coverage as of that date. During the remainder of 1989 the plan need only pay for a maximum of 130 days of hospital confinement for this individual.

Example 2: A group health plan reimburses a maximum of $20,000 of covered expenses per family per year, and the same $20,000 limit applies to unmarried covered employees. A covered employee and spouse who have no children divorce on May 1, 1989, and the spouse elects COBRA continuation coverage as of that date. If the employee and spouse together incurred $15,000 of reimbursable expenses during January through April of 1989, each of these individuals has a $5,000 maximum benefit for the remainder of 1989, regardless who incurred what portion of the $15,000.

Example 3: A group health plan pays for 80 percent of covered expenses after satisfaction of a $100-per-individual deductible, and 100 percent of them after a family has incurred out-of-pocket costs of $2,000. An employee and spouse with three dependent children divorce on June 1, 1989, and one of the children remains with the employee. The spouse elects COBRA continuation coverage as of that date for the spouse and the other two children. During January through May of 1989, all five individual deductibles were satisfied and the family incurred $4,000 of covered expenses, resulting in out-of-pocket expenses totalling $1,200 (five $100 deductibles, plus the non-reimbursed 20 percent of the other $3,500, or $700). For the remainder of 1989, each new family unit has an out-of-pocket limit of $800.

Question 30: Can a qualified beneficiary who elects COBRA continuation coverage ever change from the coverage received by that individual immediately before the qualifying event?

Answer 30: (a) In general, a qualified beneficiary need only be given an opportunity to continue the coverage that he or she was receiving immediately before the qualifying event. This is true regardless of whether the coverage received by the qualified beneficiary before the qualifying event ceases to be of value to the qualified beneficiary, such as in the case of a qualified beneficiary covered under a region-specific Health Maintenance Organization (HMO) who leaves the HMO's service region. The only situations in which a qualified beneficiary must be allowed to change from the coverage received immediately before the qualifying event are as set forth in paragraphs (b) and (c) of this Q&A–30, in Q&A–24 of this section (regarding core coverage), and in Q&A–23 of this section (regarding changes to or elimination of the coverage provided to similarly situated active employees).

(b) If a qualified beneficiary participates in a region-specific plan (such as an HMO or an on-site clinic) that will not service his or her health needs in the area to which he or she is relocating (regardless of the reason for the relocation) and the employer has employees in the area to which the qualified beneficiary relocates, the qualified beneficiary must be given an opportunity to elect alternative coverage if (and on the same basis as) a similarly situated active employee who transfers to that new location while continuing to work for the employer would be given the opportunity to elect alternative coverage at the time of transfer.

(c) If an employer maintains more than one group health plan and an open enrollment period is available to similarly situated active employees with respect to whom a qualifying event has not occurred, the same open enrollment period rights must be available to each qualified beneficiary receiving COBRA continuation coverage. An open enrollment period means a period during which an employee covered under a plan can choose to be covered under another group health plan, or to add or eliminate coverage of family members.

(d) The rules of this Q&A–30 are illustrated by the following examples:

Example 1: Assume that (1) E is an employee who works for an employer that maintains several group health plans; (2) under the terms of the plans, if an employee chooses to cover any family members under a plan, all family members must be covered by the same plan and that plan must be the same as the plan covering the employee; (3) immediately before E's termination of employment (for reasons other than gross misconduct), E is covered along with E's spouse and children by a plan that provides only core coverage, and (4) the coverage under that plan will end as a result of the termination of employment. Upon E's termination of employment, each of the four family members is a qualified beneficiary. Even though the employer maintains various other plans and options, it is not necessary for the qualified beneficiaries to be allowed to switch to a new plan when E terminates employment. Assume further that none of the four family members declines to elect COBRA continuation coverage, and that 3 months after E's termination of employment there is an open enrollment period during which similarly situated active employees are offered an opportunity to choose to be covered under a new plan or to add or eliminate family coverage. During the open enrollment period, each of the four qualified beneficiaries must be offered the opportunity to switch to another plan (as though each beneficiary were an individual employee). For example, each member of E's family could choose coverage under a separate plan, even though the family members of employed individuals could not choose coverage under separate plans. Of course, if each family member chooses COBRA continuation coverage under a separate plan, each family member can be required to pay an amount for that coverage that is based on the applicable premium for individual coverage under that separate plan. See Q&A–44 of this section.

Example 2: The facts are the same as in Example 1, except that E's family members are not covered under E's group health plan when E terminates employment. Although the family members do not have to be given an opportunity to elect COBRA continuation coverage, E must be allowed to add them to E's COBRA continuation coverage during the open enrollment period. This is true even though the family members are not, and cannot become, qualified beneficiaries (see Q&A–17 of this section).

Question 31: Aside from open enrollment periods, can a qualified beneficiary who has elected COBRA continuation coverage choose to cover individuals (such as newborn children, adopted children, or new spouses) who join the qualified beneficiary's family on or after the date of the qualifying event?

Answer 31: If the plan covering the qualified beneficiary provides that such new family members of active employees can become covered (either automatically or upon an appropriate election) before the next open enrollment period, then the same right must be extended to the new family members of a qualified beneficiary. Of course, if the addition of a new family member will result in a higher applicable premium (e.g., if the qualified beneficiary was previously receiving COBRA continuation coverage as an individual, or if the applicable premium for family coverage depends on family size), the plan can require the qualified beneficiary to pay a correspondingly higher amount for the COBRA continuation coverage. See Q&A–44 of this section.

Electing COBRA Continuation Coverage

Question 32: What is the minimum period during which a group health plan must allow a qualified beneficiary to elect COBRA continuation coverage (i.e., the election period)?

Answer 32: A group health plan can condition the availability of COBRA continuation coverage upon a qualified beneficiary's timely election of such coverage. An election of COBRA continuation coverage is a timely election if it is made during the election period. The election period must begin

on or before the date that the qualified beneficiary would lose coverage on account of the qualifying event. (See paragraph (c) of Q&A–18 of this section for the meaning of "lose coverage.") The election period must not end before the date that is 60 days after the later of (a) the date that the qualified beneficiary would lose coverage on account of the qualifying event, or (b) the date that the qualified beneficiary is sent notice of his or her right to elect COBRA continuation coverage. An election is considered to be made on the date that it is sent to the employer or plan administrator. The rules of this Q&A–32 are illustrated by the following example:

Example: An unmarried employee who is receiving employer-paid coverage under a group health plan voluntarily terminates employment on June 1, 1988. *Case 1:* If the plan provides that the employer-paid coverage ends immediately upon the termination of employment, the election period must begin on or before June 1, 1988, and must not end earlier than July 31, 1988. If the notice of the right to elect COBRA continuation coverage is not sent to the employee until June 15, 1988, the election period must not end earlier than August 14, 1988. *Case 2:* If the plan provides that the employer-paid coverage does not end until 6 months after the termination of employment, the employee does not lose coverage until December 1, 1988. The election period can therefore begin as late as December 1, 1988, and must not end before January 30, 1989. *Case 3:* If employer-paid coverage for 6 months after the termination of employment is offered only to those qualifed beneficiaries who waive COBRA continuation coverage, the employee "loses coverage" on June 1, 1988, so the election period is the same as in Case 1. The difference between Case 2 and Case 3 is that in Case 2 the employee can receive 6 months of employer-paid coverage and then elect to pay for up to an additional 12 months of COBRA continuation coverage, while in Case 3 the employee must choose between 6 months of employer-paid coverage and paying for up to 18 months of COBRA continuation coverage. In all three cases, COBRA continuation coverage need not be provided for more than 18 months after the termination of employment (see Q&A–39 of this section), and in certain circumstances might be provided for a shorter period (see Q&A–38 of this section).

Question 33: Must a covered employee or qualified beneficiary inform the employer or plan administrator of the occurrence of a qualifying event?

Answer 33: In general, the employer or plan administrator must determine when a qualifying event has occurred. However, each covered employee or qualified beneficiary is responsible for notifying the employer or other plan administrator of the occurrence of a qualifying event that is either a dependent child ceasing to be a dependent child of the covered employee or a divorce or legal separation of a covered employee. If the notice is not sent to the employer or other plan administrator within 60 days after the later of (a) the date of the qualifying event, or (b) the date that the qualified beneficiary would lose coverage on account of the qualifying event, the group health plan does not have to offer the qualified beneficiary an opportunity to elect COBRA continuation coverage. For purposes of this Q&A-33, if more than one qualified beneficiary would lose coverage on account of a divorce or legal separation of a covered employee, a timely notice of the divorce or legal separation that is sent by the covered employee or any one of those qualified beneficiaries will be sufficient to preserve the election rights of all of the qualified beneficiaries.

Question 34: During the election period and before the qualified beneficiary has made an election, must coverage be provided?

Answer 34: (a) In general, each qualified beneficiary has until at least 60 days after the date that the qualifying event would cause him or her to lose coverage to decide whether to elect COBRA continuation coverage. If the election is made during that period, coverage must be provided from the date that coverage would otherwise have been lost (but see Q&A-35 of this section). This can be accomplished as described in paragraph (b) or (c) of this Q&A-34.

(b) In the case of an indemnity or reimbursement arrangement, the employer can provide for plan coverage during the election period or, if the plan allows retroactive reinstatement, the employer can drop the qualified beneficiary from the plan and reinstate him or her when the election is made. Of course, claims incurred by a qualified beneficiary during the election period do not have to be paid before the election (and, if applicable, payment for the coverage) is made.

(c) In the case of a group health plan that provides health services (such as a Health Maintenance Organization or a walk-in clinic), the plan can require that a qualified beneficiary who has not yet elected and paid for COBRA continuation coverage choose between (1) electing and paying for the coverage or (2) paying the reasonable and customary charge for the plan's services, but only if a qualified beneficiary who chooses to pay for the services will be reimbursed for that payment within 30 days after electing COBRA continuation coverage (and, if applicable, paying any balance due for the coverage). In the alternative, the plan can provide continued coverage and treat the qualified beneficiary's use of the facility as a constructive election. In such a case, the qualified beneficiary is obligated to pay any applicable charge for the coverage, but only if the qualified beneficiary is informed of the meaning of the constructive election before using the facility.

Question 35: Is a waiver before the end of the election period effective to end a qualified beneficiary's election rights?

Answer 35: A qualified beneficiary who, during the election period, waives COBRA continuation coverage can revoke the waiver at any time before the end of the election peirod. However, if a qualified beneficiary who waives COBRA continuation coverage later revokes the waiver, coverage need not be provided retroactively (i.e., from the date of the loss of coverage until the waiver is revoked). Waivers and revocations of waivers are considered made on the date that they are sent to the employer or plan administrator, as applicable.

Question 36: Can an employer withhold money or other benefits owed to a qualified beneficiary until the qualified beneficiary either waives COBRA continuation coverage, elects and pays for such coverage, or allows the election period to expire?

Answer 36: No. An employer must not withhold anything to which a qualified beneficiary is otherwise entitled (by operation of law or other agreement) in order to compel payment for COBRA continuation coverage or to coerce the qualified beneficiary to give up rights to COBRA continuation coverage (including the right to use the full election period to decide whether to elect such coverage). Such a withholding constitutes a failure to comply with section 162(k), and any purported waiver obtained by means of such a withholding is invalid.

Question 37: Can each qualified beneficiary make an independent election under COBRA?

Answer 37: Yes. Each qualified beneficiary must be offered the opportunity to make an independent election to receive COBRA continuation coverage and, if applicable, an independent election (a) to receive COBRA continuation coverage that is limited to core coverage and (b) to switch to another group health plan during an open enrollment period. However, if a qualified beneficiary who is either a covered employee or the spouse of a covered employee makes an election to provide any other qualified beneficiary with COBRA continuation

coverage (whether for core coverage only or core plus non-core coverage), the election shall be binding on that other qualified beneficiary. An election on behalf of a minor child can be made by the child's parent or legal guardian. An election on behalf of a qualified beneficiary who is incapacitated or dies can be made by the legal representative of the qualified beneficiary or the qualified beneficiary's estate, as determined under applicable state law, or by the spouse of the qualified beneficiary. The rules of this Q&A–37 are illustrated by the following examples:

Example 1: Assume that employee H and H's spouse are covered under a group health plan immediately before H's termination of employment (for reasons other than gross misconduct), the plan provides only core coverage, and the coverage under the plan will end as a result of the termination of employment. Upon H's termination of employment both H and H's spouse are qualified beneficiaries and each must be allowed to elect COBRA continuation coverage. Thus, H might elect COBRA continuation coverage while the spouse declines to elect such coverage. However, if H elects to provide COBRA continuation coverage for both of them, that election is binding on the spouse, and the spouse cannot decline COBRA continuation coverage. In contrast, H cannot decline COBRA continuation coverage on behalf of H's spouse. Thus, if H does not elect COBRA continuation coverage on behalf of the spouse, the spouse must still be allowed to elect COBRA continuation coverage.

Example 2: The facts are the same as in Example 1, except that coverage under the plan includes both core coverage and non-core coverage, and H and H's spouse have two dependent children who are also covered under the plan immediately before H's termination of employment. All four family members are qualified beneficiaries, each of whom must be offered the opportunity to elect COBRA continuation coverage either with or without non-core coverage. One possible result, therefore, is for the children to continue their full coverage while the parents continue only core coverage. This result can be achieved in a variety of ways, including separate elections by each family member, or a single election by H that binds the entire family.

Duration of COBRA Continuation Coverage

Question 38: How long must COBRA continuation coverage be available to a qualified beneficiary?

Answer 38: Except for an interruption of coverage in connection with a waiver as described in Q&A–35 of this section, COBRA continuation coverage that has been elected by a qualified beneficiary must extend for at least the period beginning on the date of the qualifying event and ending not before the earliest of the following dates: (a) The last day of the maximum coverage period (see Q&A–39 of this section); (b) the first day for which timely payment is not made to the plan with respect to the qualified beneficiary (see Q&A–48 of this section); (c) the date upon which the employer ceases to maintain any group health plan (including successor plans); (d) the first date after the date of the election upon which the qualified beneficiary is covered (i.e., actually covered, rather than merely eligible to be covered) under any other group health plan that is not maintained by the employer, even if that other coverage is less valuable to the qualified beneficiary than COBRA continuation coverage (e.g., if the other coverage provides no benefits for preexisting conditions); or (e) the date the qualified beneficiary is entitled to Medicare benefits under Title XVIII of the Social Security Act. However, a group health plan can terminate for cause the coverage of a qualified beneficiary receiving COBRA continuation coverage on the same basis that the plan terminates for cause the coverage of similarly situated active employees with respect to whom a qualifying event has not occurred. For purposes of the preceding sentence, termination for cause does not include termination based on a failure to make timely payment to the plan. (See Q&A–48 of this section regarding timely payment.)

Question 39: When does the maximum coverage period end?

Answer 39: The maximum coverage period ends (a) 18 months after the qualifying event, if the qualifying event that gives rise to COBRA continuation coverage election rights is a termination or reduction of hours; and (b) 36 months after the qualifying event, for any other type of qualifying event. The end of the maximum coverage period is measured from the date of the qualifying event even if the qualifying event does not result in a loss of coverage under the plan until some later date. See also Q&A–40 of this section in the case of multiple qualifying events. Nothing in section 162(k) or this section prohibits a group health plan from proving coverage that continues beyond the end of the maximum coverage period.

Question 40: Can the maximum coverage period ever be expanded?

Answer 40: No, with one exception. The exception involves a qualifying event that gives rise to an 18–month maximum coverage period and is followed, within that 18–month period, by a second qualifying event (e.g., a death or divorce). In such a case, the original 18–month period is expanded to 36 months, but only for those individuals who were qualified beneficiaries under the group health plan as of the first qualifying event and were covered under the plan at the time of the second qualifying event. No qualifying event can give rise to a maximum coverage period that ends more than 36 months after the date of the first qualifying event. For example, if an employee covered by a group health plan that is subject to COBRA terminates employment (for reasons other than gross misconduct) on December 31, 1987, the termination is a qualifying event giving rise to a maximum coverage period that extends for 18 months to June 30, 1989. If the employee dies after the employee and the employee's spouse and dependent children have elected COBRA continuation coverage and before June 30, 1989, the spouse and children (except anyone among them whose COBRA continuation coverage had already ended for some other reason) will be able to elect COBRA continuation coverage through December 31, 1990.

Question 41: If coverage is provided to a qualified beneficiary after a qualifying event without regard to COBRA continuation coverage (e.g., as a result of state or local law, industry practice, a collective bargaining agreement, or plan procedure), will such alternative coverage extend the maximum coverage period?

Answer 41: (a) The alternative coverage will not extend the maximum coverage period. The end of the maximum coverage period is measured solely from the date of the qualifying event, as described in Q&A–39 and Q&A–40 of this section.

(b) If the alternative coverage does not satisfy all the requirements for COBRA continuation coverage, the group health plan covering the qualified beneficiary immediately before the qualifying event is not in compliance with section 162(k) unless the qualified beneficiary receiving the alternative coverage was also offered the opportunity to elect COBRA continuation coverage and rejected COBRA continuation coverage in favor of the alternative coverage. At the end of that alternative coverage, the individual need not be offered a COBRA election. However, if the individual is a covered employee and the spouse or a dependent child of the individual would lose that alternative coverage as a result of a qualifying event (such as the death of the covered employee), the spouse or dependent child must be given an opportunity to elect to continue that alternative coverage, with a maximum coverage period of 36 months measured from the date of that qualifying event.

(c) If the alternative coverage does satisfy the requirements for COBRA continuation coverage, it can be credited toward satisfaction of the 18- or 36-month maximum coverage period. Moreover, in the case of a covered employee who receives more than 18 months of alternative coverage that satisfies the requirements for COBRA continuation coverage, if the spouse or a dependent child of the covered employee loses coverage as a result of a second qualifying event (such as the death of the covered employee) that occurs after the 18–month period, that spouse or dependent child need not be given an election to continue coverage.

Question 42: How can an event that occurs before a group health plan becomes subject to section 162(k) affect the maximum coverage period when a later, qualifying event occurs?

Answer 42: (a) If there are two events that satisfy the conditions set forth in paragraph (b) of this Q&A–42, then the first event is treated as though it were a qualifying event that occurred on the date that the plan became subject to section 162(k) (i.e., with a maximum coverage period that began on that date), so that the second event is not merely a qualifying event but a second qualifying event. This treatment applies solely for purposes of determining the maximum coverage period under Q&A–39 through Q&A–41 of this section in connection with that second qualifying event. It does not give rise to any right to elect COBRA continuation coverage in connection with the first event.

(b) The conditions referred to in paragraph (a) of this Q&A–42 are as follows: (1) The first event is listed in paragraph (b) of Q&A–18 of this section (regarding what is a qualifying event) but occurs before the date that the plan becomes subject to section 162(k), (2) the plan provides coverage to a qualified beneficiary after the first event that continues to or beyond the date that the plan becomes subject to section 162(k), and (3) a second event then occurs and is a qualifying event.

(c) The rule of this Q&A–42 is illustrated by the following examples:

Example 1: Assume that a group health plan became subject to section 162(k) on January 1, 1987. Employee F, who was covered by the plan, voluntarily terminated employment on January 1, 1986, and was given employer-paid coverage that would continue for 5 more years. F's spouse was also to be covered for the 5 years, except that the spouse's coverage would terminate upon divorce or F's death. F dies on January 1, 1988. F's death is a qualifying event, so F's spouse can elect COBRA continuation coverage (unless the election is precluded for some independent reason, such as the spouse's entitlement to Medicare benefits). F's termination of employment on January 1, 1986, is treated as though it were a qualifying event that occurred on January 1, 1987. F's death is thus a *second* qualifying event, for which the spouse's maximum coverage period ends on January 1, 1990 (i.e., 36 months after the first qualifying event). The spouse can thus elect up to 24 months of COBRA continuation coverage.

Example 2: Assume the same facts as in Example 1, except that F's death occurs after January 1, 1990. The plan does not have to give F's spouse an opportunity to elect COBRA continuation coverage.

Question 43: Must a qualified beneficiary be given the right to enroll in a conversion health plan at the end of the maximum coverage period for COBRA continuation coverage?

Answer 43: If a qualified beneficiary's COBRA continuation coverage under a group health plan ends as a result of the expiration of the maximum coverage period, the group health plan must, during the 180-day period that ends on that expiration date, provide the qualified beneficiary the option of enrolling under a conversion health plan if such an option is otherwise generally available to similarly situated active employees under the group health plan. If such a conversion option is not otherwise generally available, COBRA does not require that it be made available to qualified beneficiaries.

Paying for COBRA Continuation Coverage

Question 44: Can a qualified beneficiary be required to pay for COBRA continuation coverage?

Answer 44: Yes. For any period of COBRA continuation coverage, a group health plan can require a qualified beneficiary to pay an amount that does not exceed 102 percent of the applicable premium for that period. The "applicable premium" is defined in section 162(k)(4) of the Code. A group health plan can terminate a qualified beneficiary's COBRA continuation coverage as of the first day of any period for which timely payment is not made to the plan with respect to that qualified beneficiary (see Q&A–38 of this section). For the meaning of "timely payment," see Q&A–48 of this section.

Question 45: After a qualified beneficiary has elected COBRA continuation coverage under a group health plan, can the plan increase the amount that the qualified beneficiary must pay for COBRA continuation coverage?

Answer 45: Yes, if the applicable premium increases. However, the applicable premium for each determination period must be computed and fixed by the plan before the determination period begins. A determination period is any 12-month period selected by the plan, but it must be applied consistently from year to year. Thus, each qualified beneficiary does not have a separate determination period beginning on the date (or anniversaries of the date) that COBRA continuation coverage begins for that qualified beneficiary.

Question 46: Must a qualified beneficiary be allowed to pay for COBRA continuation coverage in installments?

Answer 46: Yes. A group health plan must allow a qualified beneficiary to pay for COBRA continuation coverage in monthly installments. A group health plan can also allow qualified beneficiaries the alternative of paying for COBRA continuation coverage at other intervals (e.g., quarterly or semiannually).

Question 47: Can a qualified beneficiary choose to have the first payment for COBRA continuation coverage applied prospectively only?

Answer 47: No. The first payment for COBRA continuation coverage is applied to the period of coverage beginning immediately after the date that coverage under the plan would have been lost on account of the qualifying event. Of course, if the group health plan allows a qualified beneficiary to waive COBRA continuation coverage for any period before electing to receive COBRA continuation coverage, the first payment is not applied to period of the waiver.

Question 48: What is timely payment for COBRA continuation coverage?

Answer 48: (a) If a qualified beneficiary's election of COBRA continuation coverage is made after the date of the qualifying event, timely payment for any COBRA continuation coverage during the period before the date of the election means payment that is made to the plan within 45 days after the date of the election. Timely payment for any other period of COBRA continuation coverage is governed by paragraph (b) of this Q&A–48.

(b) In general, timely payment for a period of COBRA continuation coverage under a group health plan means payment that is made to the plan by the date that is 30 days after the first day of that period. However, payment that is made to the plan by a later date is also considered timely payment if either (1) under the terms of the plan, covered employees or qualified beneficiaries are allowed until that later date to pay for their coverage during the period, or (2) under the terms of an arrangement between the employer and an insurance company, Health Maintenance

Organization, or other entity that provides plan benefits on the employer's behalf, the employer is allowed until that later date to pay for coverage of similarly situated employees during the period.

Lawrence B. Gibbs,
Commissioner of Internal Revenue.

J. Roger Mentz,
Assistant Secretary of the Treasury.

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Monday
June 15, 1987

Part III

Department of Transportation

Federal Aviation Administration

14 CFR Parts 91 and 135

Special Flight Rules in the Vicinity of the Grand Canyon National Park; Final Rule; Request for Comments

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 135

[Docket No. 25149; SFAR No. 50-1]

Special Flight Rules in the Vicinity of the Grand Canyon National Park

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: This action revises the procedures for operation of aircraft in the airspace above the Grand Canyon up to an altitude of 9,000 feet above mean sea level (MSL), and extends the duration of those procedures to June 15, 1992. In recent years, the high volume of air traffic over the park has increased the risk of midair collision. The overflights also generated noise impacts on park surface areas to a degree which may be inconsistent with Federal policies for operation of the park. The restrictions adopted will: (1) Retain the Special Flight Rules Area established by SFAR 50 from the surface to 9,000 feet MSL in the area of the Grand Canyon; (2) prohibit flights in this area unless operated in accordance with specific routes, altitudes, and procedures or otherwise specifically authorized by the local FAA Flight Standards District Office; (3) established boundaries of certain noise-sensitive areas of the Grand Canyon National Park to be avoided by aircraft overflight up to 9,000 feet MSL; and (4) establish certain terrain avoidance and communications requirements for flights in the area. The rules adopted will reduce the risk of midair collision, will reduce the risk of terrain contact accidents below the rim level, and will reduce the impact of aircraft noise on the park environment.

DATES: *Effective date:* June 15, 1987.

Comment date: Comments must be received on or before October 15, 1987.

Expiration date: Special Federal Aviation Regulation No. 50-1 expires on June 15, 1992.

ADDRESSES: Comments on the proposed permanent rule regulation may be mailed in duplicate to:

Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-204), Docket No. 25149, 800 Independence Avenue SW., Washington, DC 20591

or delivered in duplicate to:

FAA Rules Docket, 800 Independence Avenue SW., Washington, DC

Comments may be examined in the Rules Docket weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: David L. Bennett, Office of the Chief Counsel, AGC-230, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, Telephone: (202) 267-3491.

SUPPLEMENTARY INFORMATION:

Comments Invited

Even though this rule is final, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire on any portion of the rule. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions. Communications should identify the regulatory docket number and be submitted in duplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25149." The postcard will be date/time stamped and returned to the commenter. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments.

Availability of Document

Any person may obtain a copy of this document by submitting a request to the Federal Aviation Administration, Office of Public Affairs, APA-200, 800 Independence Avenue, SW., Washington, DC 20591; or by calling (202) 267-3479. Communications must identify the special rule number of the document.

Background

On December 4, 1986, the FAA issued Notice No. 86-21 (51 FR 44422; December 9, 1986) proposing to establish temporary flight restrictions in the vicinity of the Grand Canyon National Park (GCNP) up to an altitude of 9,000 feet above mean sea level (MSL). The notice also proposed a follow-on final rule to take effect upon expiration of the temporary Special Federal Aviation Regulation (SFAR) in June 1987. As proposed in Notice 86-21, the temporary SFAR would: (1) Establish a Special Flight Rules Area from the surface to 9,000 feet MSL in the area of the Grand Canyon; (2) prohibit flights in this area unless specifically authorized by the local FAA Flight Standards District Office; and (3) establish certain terrain avoidance and communications requirements for flights in the area. The proposed follow-on rule (which could also be an SFAR) would include, in addition to the general restrictions contained in the temporary rule: (1) Provisions to permit access to the special flight rules area by general aviation operators, and (2) if supported by evidence, provisions for avoidance of certain noise-critical sites in the park by low-flying aircraft.

The comment period for the temporary SFAR closed on January 10, 1987, and for the proposed follow-on rule on March 1, 1987.

On March 23, 1987, the FAA issued SFAR 50 (52 FR 9768, March 26, 1987), a temporary rule identical to the rule proposed in Notice 86-21. SFAR 50 reopened the comment period on Docket No. 25149 for public comment until April 15, 1987, to permit further comment based on the actual provisions of the temporary rule.

The Need for Regulatory Action

In proposing the flight restrictions, the FAA cited both operational reasons of safety and efficiency and environmental reasons arising from concern for the impact of aircraft noise on the Park surface.

Safety and Efficiency

The Grand Canyon constitutes an attraction to sightseers from the air as well as the ground, which results in an unusual level of air traffic in the airspace above the canyon. Because of the terrain of the canyon and the relatively low level of most sightseeing flights over the Grand Canyon, traffic over the canyon is not controlled by FAA air traffic control. The result is a situation in which a substantial number of aircraft operate in the same general airspace over the canyon under the flight rules that apply to sparsely populated areas and low traffic volume airspace. While the total area of the canyon is large, most sightseeing pilots are attracted to particular areas of the canyon, which increases the relative number of aircraft in those areas. Separation of aircraft in this airspace is accomplished only by the see-and-avoid responsibility of each pilot and, above 3,000 feet AGL, the 1,000-foot separation of eastbound and westbound traffic under 14 CFR 91.109.

While the safety record in the vicinity of the canyon compares favorably with the general accident rates for general aviation and air taxi operators, there have been accidents in the canyon itself. The most recent tour operator accident

was a collision between an air tour airplane and a tour helicopter in June 1986. The FAA attributes the relatively good safety record in the canyon area in large part to the voluntary use by the commercial tour operators, whose flights represent more than 80 percent of the lower-altitude traffic in the area, of standard route, altitude, and communications procedures. Because each tour operator flies a standard route over the canyon and periodically announces its location and altitude on a common radio frequency at designated reporting points, the pilot of each such aircraft is aware of the location of all other tour aircraft in the area.

Notwithstanding this past record, however, the FAA believes that there are two general reasons why some degree of additional regulation of canyon overflights is necessary. First, the existing procedures used by the air tour operators are voluntary and not regulatory. While some degree of control over Part 135 commercial operators can be exercised through the operations specifications of each operator, commercial air tours may be conducted under Part 91 by virtue of an exception to the applicability of Part 135. Section 135.1(b)(2) provides that a person conducting nonstop sightseeing flights within 25 miles of the airport at which the aircraft takes off and lands is not covered by Part 135.

Second, the voluntary procedures do not apply to general aviation and military flights. The voluntary procedures, therefore, have substantially contributed to the safe operation of commercial tour operators but have little safety benefit with respect to general aviation, military, and nonparticipating air tour operators. The FAA believes that there is a need to require that commercial operators use the standard procedures and to separate transient general aviation traffic from the regular tour operations through the designation of certain routes and altitudes for both Part 135 and non-Part 135 operators.

Noise Impact on the Surface

The FAA believes that there is also a public interest in promoting a quiet environment in the canyon and minimizing the intrusion of aircraft noise on this environment, consistent with operational air safety and efficiency considerations. Congress, in the Grand Canyon National Park Enlargement Act of 1975, expressly provided for protection of the natural quiet of the park. Under section 8 of the Act (16 U.S.C. 228g), if the Secretary of the Interior finds that aircraft or helicopter activity within the park is likely to cause a significant adverse effect on the "natural quiet and experience of the Park," he is required to submit recommendations to the Administrator of the FAA for measures to mitigate that impact.

The NPS held a series of public hearings in 1985 and 1986 and solicited comments from the public, including environmental groups and air tour operators, on the subject of aircraft operations at the canyon. Following the above process, the Department of the Interior, in a letter from the Assistant Secretary for Fish and Wildlife and Parks, submitted recommendations to the FAA Administrator on November 17, 1986. The Department did not find a significant impact of aircraft noise on the Park, but rather found that the data available was insufficient for management decisions or recommendations at this time. The Department, therefore, recommended specific actions relating to the safety of aircraft operations, but with respect to aircraft noise recommended further study. The recommendations may be summarized as follows:

(1) Adopt airspace/flight regulations which:
- —Provide for the separation of aircraft, including helicopters;
- —Prohibit flights in the inner gorge of the canyon;
- —Provide for some regulation of flights between the inner gorge and the upper rim of the canyon; and
- —Establish flight paths over the canyon which avoid major visitor overlooks and peregrine nesting areas.

(2) Install radar at the Grand Canyon National Park Airport to assist in aircraft separation;

(3) Undertake a joint 2-year study, with the NPS, of the impacts of aircraft noise on the Park with the object of additional regulation to reduce those impacts.

Finally, the Department offered to consult and cooperate with the FAA in the implementation of these actions.

Various provisions of this regulation implement each of the flight recommendations listed under (1) above. Also, in developing this regulation, the FAA consulted with the Office of the Secretary of the Interior and the National Park Service in the development of regulatory measures to mitigate noise impacts on certain areas of the Grand Canyon National Park. The FAA has agreed to provide all necessary technical assistance to the Department of Interior in the Department's study of aircraft noise at the Park, and the results of that study may be used to develop additional mitigation measures in the future. The recommendation to install radar at the Grand Canyon National Park Airport is still under review by the agency.

Comments on the Proposed SFAR

Comments on the long-term rule, as with those on the temporary rule now in effect, tended to address one of four general areas: The noise/environmental impact of aircraft operations on the Park; impact of the proposal on general aviation operations; impact of the proposal on commercial tour operations generally; and impact of the proposal on commercial helicopter operations.

Aircraft Noise—Minimum Altitudes

A majority of commenters, mostly individuals but also several major environmental groups, including the Audubon Society, the Sierra Club, and the Wilderness Society, stated that aircraft flights should not be permitted over the Grand Canyon or should be limited to altitudes above the rim of the canyon, or higher, to minimize aircraft noise in the Park. The Maricopa Audubon Society and the Sierra Club supported the "quiet canyon" option of prohibiting all aircraft flight above the Park to an altitude of 18,000 feet MSL. The National Parks and Conservation Association supported the need for regulations but urged that a minimum altitude be established at 2,000 feet above the uppermost rim level, in accordance with FAA Advisory Circular 91-36C. A river raft tour company requested a minimum overflight altitude of 7,500 MSL. Other commenters supported minimum flight altitudes from 2,000 feet above the rim to 40,000 feet MSL.

The National Park Service supported the issuance of regulations, but suggested that the regulations incorporate noise mitigation measures such as routing aircraft away from noise-sensitive areas. NPS also requested that the FAA use the definition of "rim level" developed by the NPS in its 1986 environmental assessment of the proposed GCNP Aircraft Management Plan—generally the uppermost rim of the canyon in each sector. Several commenters, including Senator John McCain, requested a minimum altitude of 2,000 feet above the rim as suggested in FAA Advisory Circular 91-36C.

A common theme in virtually all of the comments relating to minimum altitudes was some reference to the canyon rim. Many of the individual commenters simply requested no flights below the rim of the canyon. Other commenters

acknowledged the fact that the rim does not provide a usable altitude reference for pilots, and that any minimum altitude would need to be expressed in terms of feet above mean sea level (MSL). However, the rim was still cited as a benchmark for the establishment of such MSL altitudes. Few of the comments offered specific information relating mitigation of surface noise impacts to the restriction of aircraft flight to particular altitudes at near rim level elevations.

An exception was a "Sound Level Experiment" conducted by National Part Service personnel in August 1976. The results of the experiment were submitted to the docket by another commenter and do not necessarily represent National Park Service opinions or findings. Also, the procedure was conducted at one location on one day, with flyovers by one fixed-wing aircraft and one helicopter, and cannot be considered a comprehensive or authoritative study of aircraft noise impacts on the canyon surface. However, the report does provide some indication of the relative surface noise impacts of aircraft overflight below, at, and above rim level elevations.

The test involved multiple flyovers of a sound meter, set up on a plateau at 4,400 feet MSL, at altitudes of 6,400 feet MSL, 7,400 feet MSL, 9,500 feet MSL, 11,500 feet MSL, and 13,500 feet MSL. South rim elevation in the area was 7,400 MSL; river elevation in the area was 2,400 MSL. Flyovers were conducted by a fixed-wing single-engine Cessna 206 and a Bell 206 helicopter. Because FAA has not proposed to restrict flights above 9,000 feet MSL in this rulemaking, the 6,400 feet MSL and 7,400 feet MSL flyovers were of primary interest.

Measurements were taken in A-weighted decibels (sound levels in the human hearing frequency spectrum). The overall mean of the sound levels recorded for the Cessna were 62.48 dBA at 6,400 feet MSL and 59.4 dBA at 7,400 MSL. For the helicopter, the overall mean levels were 62.68 dBA at 6,400 feet MSL and 61.35 dBA at 7,400 MSL. The results indicate that the sound level decreased noticeably as the fixed-wing aircraft moved from 1,000 feet below the rim up to rim level. The helicopter, however, registered only a slight reduction in surface noise impact in the rim level flyover from 1,000 feet lower. Presumably, actual noise levels would be lower at the floor of the canyon, 2,000 feet below the elevation of the test equipment.

The FAA recognizes that the conclusions that can be drawn from such a test are limited, and that full consideration of actual noise impacts on the Park surface will not be possible until the completion of the 2-year noise study contemplated by the Department of the Interior. However, the preliminary conclusions of the August 1986 test tend to support the FAA's approach in the rule adopted, which is to restrict fixed-wing traffic to altitudes at or above the approximate level of the south rim, and to place helicopters 500 feet to 1,000 feet lower for traffic separation.

The rule adopted by the FAA provides that an aircraft may not be operated within the Special Flight Rules Area below 9,000 feet MSL, unless operated in accordance with certain route and altitude restrictions or otherwise authorized by the FAA Las Vegas Flight Standards District Office. The rule specifies different altitudes for transient operators and tour operators, eastbound and westbound traffic, and helicopter and fixed-wing traffic, to separate different types of operations to the maximum extent practical. In order to obtain a sufficient number of operating altitudes for traffic separation below the base of controlled airspace at 9,000 feet MSL, the rule uses the airspace for several thousand feet below 9,000 feet MSL. However, with the exception of the routes west of Diamond Creek, discussed below, the minimum altitudes used are above or only slightly below the elevation of the canyon's south rim. In most cases, the minimum altitudes are 4,00 feet or more above the Colorado River. In addition to minimum altitudes, the rule defines certain especially noise-sensitive areas, discussed in more detail below, in which no transient flights or commercial tours are permitted below 9,000 feet MSL.

The altitude restrictions for transient aircraft are 8,000 feet MSL eastbound and 8,500 feet MSL westbound, with a 6,500 feet MSL route in the west canyon area. Operation by transient aircraft at lower altitudes would not be permitted without express authorization from the Flight Standards District Office, which would normally not be granted for sightseeing flights. Therefore, general aviation flights, which before the implementation of SFAR 50 could operate virtually down to the surface of the canyon floor under FAR § 91.79, will be required to operate at or above those altitudes. With the exception of one area of high terrain near the north rim overlook, the general aviation altitudes are above both the north and south rims of the canyon in all areas.

The Las Vegas (LAS) Flight Standard District Office (FSDO) will authorize qualifying commercial air tour operators to operate in the area, under specific conditions contained in their operations specifications. The minimum altitudes at which the tour operations will be authorized will be as follows. In the western sector (western boundary of the area to Diamond Creek), the minimum authorized altitudes will be 2,500 feet MSL for helicopters and 3,000 feet MSL for fixed wing aircraft. While these altitudes are below the south rim elevation in this area, the interest in minimizing aircraft noise in this sector is reduced by the fact that the river in this area already experiences heavy motorboating and recreational use. Also, NPS has not identified any noise sensitive areas in this sector. Finally, the minimum altitudes are substantially higher than some tour operators have flown in the past.

In the central sector (Diamond Creek to Havasu Canyon), the minimum altitudes authorized will be 5,500 feet MSL for helicopters and 6,000 feet MSL for fixed wing generally, and 6,500 feet MSL helicopter and 7,500 feet MSL fixed-wing above Supai Village. The north rim elevation in this sector averages about 6,000 feet, while the south rim varies from about 5,500 feet to 6,600 feet. In general, the tour routes will climb to higher altitudes heading eastbound as the terrain rises.

In the eastern sector (Havasu Canyon to the eastern boundary), the minimum authorized altitudes will be 6,500 feet MSL for helicopters and 7,500 feet MSL for fixed wing. The elevation of the north rim in this area varies from approximately 5,800 feet to 8,500 feet; the south rim elevation varies from approximately 5,500 feet to 7,500 feet. For comparison, the elevation of the Colorado River in this area averages about 2,400 feet.

In the central and eastern sectors, which contain several noise-sensitive areas, the minimum altitude imposed by the FAA in the tour operators' operations specifications will be higher than altitudes used by some of the operators in the past. These altitudes are not above the highest point of both rims at every point, but the altitudes do approximate the level of the lower rim of the canyon through that area and virtually preclude sustained operation "in" the canyon. As a result, the minimum altitudes required by the rule for tour operators, general aviation aircraft, and military aircraft are substantially higher than required by existing FAA regulations, 14 CFR 91.79, and higher than the previous flight altitudes used by some operators.

Many of the commenters who criticized the altitudes proposed by the FAA suggested that FAA was simply preserving the existing aircraft

overflight situation, which they considered unacceptable. The FAA disagrees. The agency believes that the minimum altitudes imposed by the rule are a beneficial change in current procedures and will have a positive effect on aircraft noise impact at the Park. Setting those altitudes a few hundred feet higher in the central and eastern sectors to coincide with the precise rim level, even if it could be determined, would produce very little additional reduction of noise on the Park surface and would cause substantial operational problems for pilots, by compressing traffic into a smaller vertical airspace. Setting minimum altitudes substantially above the surface of the canyon rim, as requested by some commenters, was not proposed by the FAA. Such altitude restrictions would interfere with ATC-controlled traffic in the National Airspace System; would act as a bar to flight through the area for many aircraft due to decreased aircraft performance at high density altitudes and/or pilot and passenger oxygen use requirements; and would have potential impacts on the air tour industry which are not supportable on the basis of noise impact data available at this time.

The imposition of rim-level minimum altitudes in the western sector of the Special Flight Rules Area was not considered warranted, in view of the lesser impact of aircraft noise on the surface in that sector.

Aircraft Noise—Avoidance of Noise-Sensitive Areas.

A number of commenters suggested that the avoidance of certain noise-sensitive sites in the canyon was preferable to, or necessary in addition to, the restriction of aircraft to high altitudes. The primary criteria for noise sensitivity in the sites suggested were the number of people present in an area and the particular expectation of quiet by persons in a particular area, even if the number of such persons is relatively small. It was also suggested that areas of bighorn sheep populations and peregrine falcon nesting areas should be avoided.

As with recommendations for certain minimum altitudes, the comments requesting avoidance of particular areas by aircraft generally were not supported by technical data. Also, the locations of wildlife populations were not specified, and the information submitted on the impact of aircraft overflight on wildlife in the canyon to date is inconclusive. The FAA expects that the comprehensive study under consideration by the Department of the Interior would provide much more detailed and authoritative information on these subjects.

However, notwithstanding the lack of definitive technical supporting information, the commenters who requested avoidance of certain areas by overflying aircraft were nearly unanimous in the areas suggested for such protection. Moreover, the support for avoidance of low-altitude flight over certain areas was very broadly based, including not only environmental groups but also air tour operators, the Aircraft Owners and Pilots Association, and general aviation pilots. Accordingly, the FAA believes it appropriate at this time to proceed with designation of areas for avoidance of aircraft overflight up to the upper limit of the Special Flight Rules Area, 9,000 feet MSL.

Many of the tour operators commenting on the proposal either now operate, or have proposed to operate, on routes that avoid certain areas of the canyon identified as particularly noise-sensitive. The Las Vegas FSDO, in approving commercial tour routes, has notified operators that their routes must avoid the Grand Canyon Village area, Deer Creek and Thunder Falls, the north rim lookout at Cape Royal, Desert View, Point Sublime, and Toroweap to the maximum extent practical.

To make these restrictions regulatory, and to apply them to all operators equally, the regulation adopted specifically identifies the following areas as noise-sensitive areas:

—Toroweap Overlook.
—The Thunder River/Deer Creek Falls/Tapeats Creek area north of a line 1 mile north of the Colorado River. (The southern boundary will permit westbound transient aircraft to follow the river through the area at 8,500 feet MSL. Eastbound transient aircraft and all tour operators will be routed well to the south of area.)
—The South Rim/Grand Canyon Village area extending north to Phantom Ranch.
—The North rim area from Outlet Canyon to Cape Royal.
—The watchtower at Desert View Overlook.

The areas are defined in the rule in terms consistent with air navigation. The regulation prohibits flight in the areas except when required by safety or some Park-related purpose. An additional limited exception to the South Rim/Phantom Ranch area is provided for aircraft landing at or taking off from Grand Canyon National Park Airport or Tusayan Airport.

Several commenters also requested that the Point Sublime area be designated a flight-free zone. The NPS did not include this area, however, and the FAA believes that the 500-foot terrain clearance restriction is sufficient to avoid the archeological site at Point Sublime.

General aviation operations.

SFAR-50 originally restricted general aviation flights to 9,000 feet temporarily to provide separation of transient general aviation traffic from the regulated commercial operations until procedures could be developed for transient general aviation flight below that altitude. Comments on Notice 86–21 or on the SFAR were received from the Aircraft Owners and Pilots Association (AOPA), the Arizona Pilots Association, the Experimental Aircraft Association (EAA), the Soaring Society of America, and several individual pilots. These commenters criticized the exclusion of general aviation operations from airspace in which commercial operations would be permitted, on grounds of fairness and on the basis that general aviation aircraft were not involved in the June 1986 accident and are not the primary source of aircraft noise in the Park. Several of the commercial tour operators commenting on the proposal also supported the right of general aviation operators for access to the same general airspace as the tour operators.

The Arizona Pilots Association also objected to the characterization of general aviation pilots as exclusively transient operations by pilots inexperienced with flying above the canyon. While the FAA agrees that many local pilots are undoubtedly experienced in flying in that area, the agency continues to believe that many of the general aviation pilots operating above the canyon are on a one-time or infrequent flight in the area and do not have such experience.

Various alternatives to the 9,000 foot limitation were suggested by the Arizona Pilots Association, EAA, AOPA, and several other commenters, including development of standard procedures and indication of these procedures on flight charts.

The rule adopted contains procedures for four basic transient procedures for flight in the Special Flight Rules Area. The routes are regulatory rather than advisory, but incorporate some degree of flexibility for varying operational needs. The four basic routes are an eastbound route at 8,000 feet MSL; a westbound route at 8,500 feet MSL; a west canyon route between Pearce Ferry and Diamond Creek at 6,000 feet MSL eastbound and 6,500 feet MSL westbound; and a direct route from

Grand Canyon National Park Airport to Las Vegas, also used by tour operators. Pilots flying the routes will be required to remain to the right of the river and to avoid the noise-sensitive areas identified in the rule.

Designation of specific transient routes and commercial tour routes generally reserves different altitudes for opposite-direction traffic and different types of operations (such as fixed-wing and helicopter). The routes do not in any way assure separation of individual aircraft. Pilots using the routes are in a VFR environment and remain fully responsible for seeing and avoiding other aircraft. Also, the routes do not relieve the pilot from compliance with any other Federal Aviation Regulation, including FAR 91.79, Minimum Safe Altitudes.

The routes will be indicated on the sectional aeronautical chart to be published on September 24, 1987, and in the meantime will be indicated in Class II Notices to Airmen (NOTAM's). The procedures as described in the rule are clear and simple even without a chart depiction, however. Because all information will be furnished in charts and publications, no briefing will be required before operation on the routes. The FAA, in Notice 86–21, requested comments on whether a briefing should be required before operation in the area. Most comments on the briefing opposed the idea. The FAA believes that a briefing requirement, if adopted, would impose an unacceptable burden on the FAA facility or facilities responsible for providing the briefings. Also, it would be difficult to track which pilots had had a recent briefing and which had not. Accordingly, the FAA will publish the procedures and information needed to operate the routes, but the agency does not see the further need for a briefing and will not require a briefing for such operations.

The routes permit transient flight in the same areas of the canyon as the routes authorized for the air tour operators. The transient routes are at different altitudes than the tour routes, simply for separation of the transient traffic from the relatively heavy tour operator operations. Because helicopter routes are assigned to the altitudes immediately below the fixed-wing tour routes, the transient routes are the next available higher altitudes which can be maintained throughout the Special Flight Rules Area. Basically, these altitudes are 8,000 feet MSL eastbound and 8,500 feet westbound. These altitudes vary from 500 feet to 2,000 feet above the comparable fixed-wing tour route altitudes. While at most locations the altitudes are to some degree above the rim of the canyon, they provide a view of the canyon comparable to that available to the tour operators throughout the canyon. Finally, pilots who elect to operate above 9,000 feet MSL may avoid all restrictions associated with the Special Flight Rules Area.

Accordingly, transient operations are distinguished from commercial tour operations only to the extent that they are assigned a slightly higher altitude stratum, for separation.

Several commenters requested that the FAA simply adopt a single set of tour routes and permit or require all operators to use them, as is done on an advisory basis at Niagara Falls, NY. The FAA rejected this suggestion for several reasons. First, it would tend to concentrate all aircraft overflights of the canyon at certain altitudes, resulting in compression of traffic. Second, the tour routes are more complex than those appropriate for a transient operator's one-time flight over the canyon, and it was not practical to develop a single set of routes which served both purposes. Also, conveying the degree of information required to operate on the existing air tour routes would require a briefing of the transient pilot.

Commenters objected to such a briefing requirement, and the FAA found it to be impractical from a resource standpoint in any event. Finally, the models offered for common routes, such as Niagara Falls, NY, involved small areas with very simple procedures. The size of the Grand Canyon, the complexity of the canyon terrain, and the high altitudes involved make a simple, common procedure for all operators impractical.

Impacts on commercial air tour operations.

In comments on Notice 86–21, the Grand Canyon Flight Operators Association (GCFOA) and others expressed concern about delays in approval of the operators' Part 135 operations specifications prior to implementation of the temporary rule. However, all operators that have applied for the operations specifications amendments have received approval at this time.

GCFOA and several individual tour operators generally supported the regulation. Grand Canyon Airlines suggested that commuter airline standards be applied to all Part 135 operators conducting tour flights at the canyon. The FAA believes that the application of Part 135 standards to all commercial tour operators is sufficient, and that the added imposition of commuter standards to all operators is not required.

The National Transportation Safety Board (NTSB) strongly supported the prohibition on commercial operations conducted under Part 91 in the Special Flight Rules Area. The NTSB also supported the requirement that commercial operators comply with approved routes and altitudes and make position reports on common frequencies. No other comments were received objecting to the prohibition on commercial tour flights under Part 91.

Commercial helicopter operations.

Individual commercial helicopter tour operators at the Grand Canyon, as well as the GCFOA and the Helicopter Association International (HAI), objected to the requirement to remain at least 500 feet from terrain in the canyon. HAI and the individual helicopter operators also requested that helicopters be authorized to operate below the rim of the canyon. The primary objection to the 500-foot restriction was that it would make helicopter tours of the Anasazi ruins near Point Sublime commercially infeasible, because the ruins could not be viewed adequately from 500 feet away. One operator stated that it currently hovers approximately 100 feet away from the ruins on its current tours. Operators also claimed that the restriction made helicopter tours less competitive with fixed-wing tours.

The FAA proposed the 500-foot limitation for both environmental and operational reasons. The rule does not affect fixed-wing Part 135 operations, which are already required by FAR 135.203 to remain 500 feet from terrain. The rule does serve a safety purpose with respect to Part 91 operations, which are not restricted as to distance from terrain in sparsely populated areas (as long as they remain 500 feet from persons, vehicles, boats, and structures). In addition, the limit provides an environmental buffer against aircraft flight which is unnecessarily close to the terrain and the wildlife of the GCNP. While neither environmental groups nor the NPS provided information to support any specific impact of aircraft overflight on wildlife or other park values (such as the Point Sublime archeological site), the FAA believes that the unique characteristics of the Park, and the congressional statement of policy in the Grand Canyon National Park Enlargement Act of 1975, warrant a greater degree of protection for the surface of the Park than is provided by the general minimum safe altitude restrictions in FAR 91.79.

One helicopter operator enclosed a copy of a study by Professor D.S. Brumbaugh on the effects of helicopter flights on the Point Sublime Anasazi site. The study did not consider long term fatigue effects on the structure, but concluded that excessive ground velocity/acceleration and resonant shaking of the walls by a single helicopter would not result in damage. However, the study was based on a minimum distance of 300 feet. The operator who submitted the study represented that "current lateral separation from the ruins is maintained at approximately 100 feet." Because the study did not address long term effects, and because the study conditions were more favorable than those of actual tour flights, the FAA does not agree that information available at this time warrants a conclusion that no protection for the site is appropriate.

Boundaries of the Special Flight Rules Area

The Truxton Canyon Agency noted FAA's statement in the preamble to the proposal that commercial operations to Indian reservations in the Special Flight Rules Area would be authorized, but the Agency requested that this be included in the language of the rule itself. The FAA will not deny any landowners in the Special Flight Rules Area aerial access to their land, including the Indian reservations in the area. Accordingly, the FAA does not believe that it is necessary to include in the rule a statement to the effect that access will continue to the reservations.

The Bureau of Land Management of the Department of the Interior and the Forest Service of the Department of Agriculture both requested that the northern boundary of the Special Flight Rules Area be amended to exclude certain lands administered by these agencies. Both commenters were concerned that the regulation would interfere with their air operations over the government land. The FAA has not altered the boundaries of the Special Flight Rules Area as it was proposed, and that area is indicated on the April 9 edition of the Las Vegas Sectional Aeronautical Chart. However, in response to these comments, the purposes for which authorizations for operation in the Special Flight Rules Area have been expanded to include "aerial access to and maintenance of other property located within the Special Flight Rules Area." Accordingly, the Las Vegas Flight Standards District Office will accommodate any requests by pilots for these agencies for operations over their respective land north of the Grand Canyon National Park.

The National Park Service and several other commenters requested that the Special Flight Rules Area be expanded to include the entire Grand Canyon National Park, especially the northern area up to Marble Canyon. The Special Flight Rules Area boundaries are simpler than the Park boundaries, and several small areas of the Park are excluded. The FAA does not intend to alter the Special Flight Rules Area boundary for this purpose at this time. However, the FAA will monitor the effect of excluding the Marble Canyon area from the rule, and will consider the possible extension of the Special Flight Rules Area to Marble Canyon in the future.

The Special Rule

For the reasons discussed above, the FAA is revising Special Federal Aviation Regulation 50, with the revisions to take effect on the expiration of SFAR 50 on June 15, 1987, and to expire on June 15, 1992. SFAR 50 as amended, designated as SFAR 50–1, will do the following:

1. Continue the Grand Canyon National Park Special Flight Rules Area from the surface to 9,000 feet MSL. The area will be marked on aeronautical charts and described in other pilot information publications.

2. Prohibit operation by any aircraft in the defined area unless (a) the operator complies with specific route and altitude procedures for transient aircraft; (b) the operator is authorized in writing by the FAA Las Vegas Flight Standards District Office to operate in the airspace, (c) the operator holds a Part 135 certificate and has express authorization in its Part 135 operations specifications to operate in the airspace, or (d) the aircraft is on an official search and rescue mission. For flights authorized under paragraph (b) or (c), the authorization will contain specific limitations on the operation, including minimum altitudes. Minimum allowable flight altitudes will be approximately the rim level of the canyon unless there is an operational need for flight below that level (such as landing at one of the reservations). The terms "rim" or "rim level" are not used to describe altitude restrictions in the authorizations because the north and south rims are at different levels and because the rim is too variable in elevation to constitute a practical flight reference for pilots.

3. Prohibit operation in certain noise-sensitive areas unless necessary for emergency or Park-related purposes.

4. Prohibit commercial tour operations below 9,000 feet MSL by Part 91 operators unless they obtain a Part 135 certificate and operations specifications which authorize operation in the Grand Canyon National Park Special Flight Rules Area.

5. Prohibit, except when necessary or when specifically authorized for certain purposes, flight closer than 500 feet to any terrain or structure in the canyon.

6. Require pilots to monitor certain common frequencies and make position reports as specified in their authorization to enter the airspace.

Analysis by section

Section 1 provides that the rule applies to all persons operating under VFR in certain airspace from the surface to 9,000 feet MSL and defines the boundaries of that airspace. Applying the rule to all persons has the effect of applying the rule to military as well as civil pilots. Aircraft operating under IFR would not be operating at the altitudes or in the area covered by the rule. (With the exception of a small portion of VOR airway in the northeast corner of the area, the base of controlled airspace within the designated area is at 9,000 feet MSL or higher.)

Airspace up to 9,000 feet MSL is restricted to include sufficient airspace to permit aircraft to operate at different altitudes for nonconflicting eastbound and westbound operations, for fixed-wing and helicopter operations, and for commercial air tour and transient sightseeing flights. Capping the special area at 9,000 feet MSL permits overflight of the canyon at 9,500 feet without restriction.

The lateral boundaries of the area extend beyond the limits of the park itself to include all of the areas that are commonly subject to canyon sightseeing overflights, including certain Indian reservation land, and to provide simplified boundaries for practical compliance by pilots. Were possible, the boundaries have been established coincident with VOR radials to enable pilots to use aircraft navigation equipment to locate their their position in relation to a boundary line. A cutout from the area has been provided for the GCMP Airport control zone, in recognition of the need for aircraft to descend to and climb out from the airport. The two published instrument approaches to the GCMP Airport are from the southwest and will not be affected by procedures established by this rule.

Section 2 of the rule defines the term "Park" as the Grand Canyon National Park, and "Special Flight Rules Area" as the Grand Canyon National Park Special Flight Rules Area.

Section 3 of the rule sets forth the requirement for authorization for aircraft to operate in the Special Flight Rules Area. An exception to the general requirements is made for emergencies, to clarify that a bona fide emergency landing in the canyon would not violate this rule.

Section 3 prohibits flight in the Grand Canyon National Park Special Flight Rules Area unless the operator complies with specific procedures, routes, and altitudes; unless authorization is obtained from the Las Vegas Flight Standards District Office; or unless the aircraft is on an Air Force-directed search and rescue mission.

Paragraph (a) permits operation over the canyon without further authorization from the FAA if the pilot complies with one of four specific procedures. The four basic routes are an eastbound route at 8,000 feet MSL; a westbound route at 8,500 feet MSL; a west canyon route between Pearce Ferry and Diamond Creek at 6,000 feet MSL eastbound and 6,500 feet MSL westbound; and a direct route from Grand Canyon National Park Airport to Las Vegas. Pilots flying the three tour routes will be required to remain to the right of the river and to avoid the noise-sensitive areas identified in the rule.

Paragraph (b) provides that operation in the area is not prohibited if authorized in writing by the Las Vegas FSDO and conducted in accordance with the conditions of that authorization. The rule states that authorization will normally be provided only for operations of aircraft necessary for law enforcement, firefighting, emergency medical treatment or evacuation of persons in or near the park; for support of park maintenance or activities; or for aerial access to or maintenance of property located within the area. As mentioned earlier, the NPS has a continuing need for aircraft access to the canyon surface by NPS and contractor aircraft for a wide range of purposes related to operation of the park. The written authorization for such operations will contain conditions similar to those included in the air tour operator's operations specifications. This will ensure that operations in the Special Flight Rules Area are using common procedures and radio frequencies and that the incidence of low altitude aircraft flights is kept to the minimum necessary for operation of the park.

It is not the FAA's intent to deny air access to any surface point within the Special Flight Rules Area. Flights requested by the NPS, Bureau of Land Management, Forest Service, or by representatives of the Indian reservation landing areas will be authorized subject to the standard conditions imposed on all operators within the area. Other requests for flight through the area below the altitude of the routes described in section 3(a), including general aviation and military sightseeing flights, will normally be denied. However, the FAA acknowledges that there may be circumstances in which it would be appropriate to grant authorization for a Part 91 operator to operate in the Special Flight Rules Area using the same routes and procedures used by the Part 135 operators.

Paragraph (c) provides that specific authorization may be incorporated in the operations specifications issued to a Part 135 operator. Operations specifications are detailed rules and conditions for commercial operations which are issued to each holder of a Part 135 certificate. To FAA's knowledge all of the operators currently conducting commercial air tours of the Grand Canyon hold Part 135 certificates. The Las Vegas FSDO, in cooperation with the active tour operators, has developed specific conditions and limitations on the Grand Canyon operation of each such operator. Those conditions and limitations will be included in the operations specifications of each tour operator and will be enforced by the FAA. The provisions will include detailed requirements for routes, altitudes, communications and other procedures, and for pilot experience and equipment.

Authorization through operations specifications will permit continuation of the air tour industry at the Grand Canyon. The industry successfully serves a certain segment of the demand for tourist access to the Grand Canyon and has done so with an impressive safety record over the years. The restrictions promulgated in this rule will, however, make the procedures now voluntarily used by most operators mandatory and enforceable. Second, the prescription of certain minimum altitudes will require some operators to fly at higher altitudes on their tours, in some areas, than they have in the past. The minimum altitudes specified in the operations specifications will in most cases be an MSL altitude near to the approximate elevation of the south rim in each sector of the canyon.

Paragraph (c) will also permit continuation of commercial operations to Indian reservations within the Special Flight Rules Area. Such flights are routinely conducted for tourism at the reservations, for pick-up of river rafters, and for aerial supply and transportation services to the reservations. Operators conducting these flights must hold Part 135 certificates and operations specifications and will be subject to the same general restrictions as the tour operators consistent with the nature of their operations.

Paragraph (d) permits search and rescue (SAR) aircraft under the direction of the U.S. Air Force Rescue Coordination Center to enter the area without prior coordination with the Las Vegas FSDO. SAR missions over the canyon are very infrequent.

Section 4 prohibits operation by all aircraft in 5 defined areas of the Grand Canyon, except in an emergency or when otherwise necessary for safety of flight, or unless authorized by the Las Vegas Flight Standards District Office for a purpose listed in section 3(b). These areas are:

(a) *Toroweap overlook.*

(b) *Thunder River/Deer Creek Falls/ Tapeats Creek.*

(c) *South Rim/Phantom Ranch.*

(d) *North rim Overlook.*

(e) *Desert View.*

Section 5 requires all commercial sightseeing operations to be conducted under a Part 135 certificate, notwithstanding the exception to Part 135 applicability contained in § 135.1(b)(2). The requirement will prohibit tour operations by Part 91 operators, under § 135.1(b)(2), over the canyon below 9,000 feet MSL. To the agency's knowledge all operators currently providing commercial sightseeing flights over the Grand Canyon hold Part 135 certificates, although operations by Part 91 operators have been common in the past.

Section 6 prohibits operation within 500 feet of terrain in the canyon except (1) as necessary for takeoff or landing; (2) if authorized by the Las Vegas FSDO for one of the park operation purposes listed in section 3; or (3) in an emergency. This provision applies the Part 135 restrictions of § 135.203(a)(1) to all operators. The restriction provides certain minimum protections to unique park terrain, wildlife, and archaeological sites until the effect of low altitude aircraft flight can be determined.

Section 7 requires that pilots operating in the area monitor certain frequencies and make radio position reports at the points specified in their authorization. Transient operators will be required to monitor the common frequencies but not to make position reports, in consideration of their lesser familiarity with the terrain features used for reporting points. The FAA believes that the use of common frequencies and periodic reporting of aircraft location, similar to the procedure for a Common Traffic Advisory Frequency at

uncontrolled airports, significantly reduces the risk of midair collision. Therefore, this procedure is made mandatory. Exceptions are incorporated for aircraft required to be in contact with the GCNP control tower or on a USAF-directed search and rescue mission.

The requirement in section 7(b) that all operators monitor certain frequencies has the effect of requiring that all aircraft operating in the Special Flight Rules Area have an operating radio transceiver. The FAA believes that this requirement is important not only for receiving traffic information, through reports by other aircraft, but also for receiving the current Grand Canyon altimeter setting. The altimeter setting in the area often varies considerably from that at Las Vegas or other airports from which Grand Canyon overflights frequently originate. Failure to obtain a current setting could result in operation less than 500 feet from traffic operating at another assigned altitude. The agency believes the impact of the requirement is minimal because virtually all overflying aircraft have radios and because no-radio aircraft may still overfly the canyon above 9,000 feet MSL.

Section 8 provides that SFAR 50–1 will expire on June 15, 1992. The expiration in 5 years will provide for a review of the rule following completion of a Department of Interior noise study and after an extended period of experience with flight operations under the rule.

Request for Comments

While this SFAR is a final rule, the FAA is requesting comments on the provisions of the rule adopted. This further request for comments is in consideration of the great diversity of opinion expressed in the comments received to date, and in recognition of the fact that the transient routes and noise-sensitive areas, while proposed in substance, were not identified in detail until publication of this rule. This rule may be amended in consideration of comments received.

The agency specifically requests comments on the following issues:

1. The dimensions of the Special Flight Rules Area.

Boundaries

The northern boundary of the Special Flight Rules Area could be adjusted to provide more operating space for the Tuweep and Whitmore airports, and to avoid inclusion of Bureau of Land Management and Forest Service lands not related to the Grand Canyon. Second, it may be appropriate to add a northeast extension of the Special Flight Rules Area along the Grand Canyon to Marble Canyon, in consideration of operational and environmental problems with low-altitude aircraft flight in this area. Such an extension would be approximately the width of the Grand Canyon and would extend northeast from the existing boundary as far as the Page Airport Traffic Area.

Altitude

Minimum altitudes for air tour operations and transient sightseeing flights have been established by this rule. Because of the lower terrain of the Grand Canyon in the central and western areas of the canyon, it would be possible to reduce the upper limit of the Special Flight Rules Area in these areas. Possible altitudes could be surface to 8,000 feet MSL in the central sector (Diamond Creek to Havasu Canyon), with a 9,000-foot area around Toroweap Overlook, and surface to 6,000 feet MSL in the western sector (west of Diamond Creek).

Such an action would not reduce the minimum altitudes for aircraft flight over the canyon and would not affect the noise-sensitive area restrictions. It would continue to separate transient and air tour traffic, but could relieve the need to provide special routes for transient aircraft in the western part of the canyon.

2. The dimensions of the noise-sensitive areas described in Section 4 of the SFAR.

Specifically, comments are requested on any operational problems of the areas adopted and, conversely, whether any of the areas could be expanded without significant operational impacts.

3. The transient operating routes and altitudes established in section 3(a) of the SFAR.

Comments are due by October 15, 1987, to the address listed under **"ADDRESSES"** earlier in this document.

Regulatory Evaluation

Benefit-Cost Analysis

The regulatory evaluation prepared for this final rule examines the costs and benefits of special flight rule requirements in the vicinity of the Grand Canyon National Park. This rule impacts operators of airplanes and helicopters under FAR Parts 91 and 135 by adopting the following flight restrictions:

(1) Retain the Special Flight Rules Area established by SFAR 50 from the surface to 9,000 feet MSL in the area of the Park; (2) prohibit flights in this area unless operated in accordance with specific routes, altitudes, and procedures or otherwise specifically authorized by the Las Vegas FSDO; (3) establish boundaries of certain noise-sensitive areas of the Park to be avoided by aircraft overflight up to 9,000 feet MSL; and (4) establish certain terrain avoidance and communications requirements for flights in the area.

Costs

The FAA estimates that the total incremental cost of compliance expected to accrue from implementation of the rule to be negligible. This rule potentially impacts two types of operators (airplane and helicopter) under Parts 91 and 135.

Under Part 91, there are three general classes of operators. The cost impact, if any, on each these operators is briefly described below:

Transient operators represent those local or cross-country general aviation operators who overfly the Park, primarily for sightseeing but also for point-to-point transit. This rule will permit such operators to fly only at specific altitudes while in the Special Flight Rules Area. Although such altitudes will be higher than in recent years, the gratification from viewing the Park is not expected to be significantly reduced. Also, because of the altitude of the terrain, the minimum altitudes specified in the rule will not significantly increase the cost of climbing to altitude for overflight of the canyon.

Part 91 Commercial Tour Operators. Prior to SFAR 50, commercial tour operations under Part 91 in the area were conducted under an exemption from Part 135. This rule will eliminate such operations. It will prohibit commercial tour operations below 9,000 feet MSL by Part 91 operators, although an operator may obtain a Part 135 certificate. Ordinarily, the additional Part 135 training, maintenance requirements, etc., would impose additional costs. However, such costs are not expected to materialize. According to personnel at the Las Vegas FSDO, there have not been any Part 91 commercial operations in the Park since June 1986, though prior to this time there were a small number. The lack of these operators in the area is borne out by the fact that no comments were received from any such operator. Therefore, the FAA estimates that the number of such operators who would have entered the Park over the next four years, if any, would be small. For this reason, the cost impact, if any, on Part 91 commercial tour operators is expected to be negligible.

Other aircraft operators in the area include law enforcement officials, fire fighters, emergency medical teams, Park

maintenance staff, Bureau of Land Management and Forest Service contractors, etc., which may be conducted under Part 91 or Part 135 depending on the operator and the nature of the operation. Prior to SFAR 50, they operated freely over the Park. This rule will allow them to continue operations if they obtain written authorization from the Las Vegas FSDO and comply with conditions of the authorization. Thus, since this rule will not cause any significant changes in necessary flights for such operators, the cost impact, if any, is estimated to be negligible.

Under Part 135, operators of airplanes and helicopters will potentially be impacted. This rule will impose three requirements on these operators. Two of these requirements represent specific routes and altitudes. These two requirements will not significantly affect their operations because virtually all of the operators already voluntarily limit their flight to specific routes that roughly coincide with the routes that will be required by the Las Vegas FSDO under this rule. The new routes will avoid noise-sensitive areas, and the deviations around these areas are neither expected to have an increase in air tour operation costs nor to reduce the quality of the air tour package by excluding popular sites from the routes. Most of these operators voluntarily maintain separation between their respective tours and have traditionally operated at altitudes similar to those in this rule. Although prior to SFAR 50, they could deviate from those altitudes and routes at will, the new regulatory procedures, which include 500– or 1,000–foot separation between helicopters and airplanes, along with the specified higher altitudes, are not perceived by tour operators to impose significant, if any, costs. The third requirement will prevent operators from operating within 500 feet of terrain or structures. For airplanes, this requirement has no cost, because the 500–foot restriction is already incorporated in Part 135, § 135.203. Part 135 helicopter operations are not subject to the § 135.203 restriction, however, and will be affected by the provision in this rule. This requirement is not expected to have a significant cost impact in terms of loss of revenue from sightseeing as some operators have indicated, because most passengers on these helicopter tours take the tours largely for the experience of the helicopter ride rather than close inspection of any particular terrain or structure.

The requirement in section 7(b) that all operators monitor certain frequencies has the effect of requiring that all aircraft operating in the Special Flight Rules Area have an operating radio receiver. While all Part 135 operators would be equipped with radios, there may have been a few no-radio Part 91 operations in the past. The agency believes the impact of the requirement will be minimal because virtually all overflying aircraft have radios and because those few aircraft without radios may still overfly the canyon above 9,000 feet MSL.

Benefits

This rule is expected to generate benefits in terms of enhanced safety and to some extent reduced noise in the Park. Safety benefits will take the form of reduced likelihood of fatalities from midair and canyon wall collisions. Aircraft noise will be reduced by rerouting Parts 91 and 135 traffic around noise-sensitive areas.

This rule will improve safety by regulating both Part 91and Part 135 operators in the Special Flight Rules Area. In the past, there have been a few cases of Part 91 aircraft colliding with the terrain, and one case of a midair collision involving a Part 135 aircraft. This rule is expected to reduce the likelihood of such accidents, especially those involving general aviation pilots unfamiliar with terrain and wind patterns. Further, by specifying procedures, routes, and minimum separation distances for Parts 91 and 135 operators, this rule will enhance safety. The FAA estimates safety benefits in monetary terms by assigning a value of $1 million to each of the lives that are expected to be saved annually as a result of implementing this rule. A recent review of the NTSB data base for Parts 91 and 135 accidents in the vicinity of the Park, revealed that over the past 12 years at least four accidents have occurred and resulted in 41 fatalities. Over this 12–year period, the safety situation near the Park has resulted, on average, in three fatalities annually. While the large majority of the fatalities occurred in two incidents involving air tour aircraft, the projection of three fatalities per year as an average is useful for the purpose of estimating economic benefits of the rule. Therefore, estimates of safety benefits are based on the belief that this rule will reduce the likelihood of three fatalities annually. Supporting this premise is the fact that two of the four accidents noted previously involved only Part 91 operators, and the rule will substantially restrict such operations at low altitude in the canyon area. In monetary terms, safety benefits are expected to amount to an estimated $3 million annually (in 1986 dollars) as the result of this rule.

Another benefit of this rule is aircraft noise reduction. This benefit is extremely difficult to quantify in monetary terms due to its intangible nature. Thus, it is viewed in this evaluation as a qualitative benefit and is assumed to be measured only in terms of gratification. The reduction in aircraft noise that will result from the deviation around noise-sensitive areas and from the higher flight altitudes, especially by Part 91 operators, is expected to increase enjoyment from sightseeing on the ground on the part of tourists and environmentalists, though to what extent cannot be estimated by the FAA.

On balance, in view of the expected cost of compliance and benefits, the FAA concludes that this rule is cost-beneficial.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress in order to insure, among other things, that small entities are not disproportionately affected by Government regulations. The RFA requires agencies to review rules which may have a "significant impact on a substantial number of small entities." For purposes of the RFA, small entities are considered to include small businesses, non-profit organizations, and municipalities but not private individuals. The vast majority of the small entities potentially impacted by this rule are unscheduled Part 135 air taxi operators with nine or less aircraft owned. As a result of using the cost of compliance, which is estimated to be negligible, per small entity and comparing it to the annualized threshold of significant economic impact ($3,700 in 1986 dollars) the FAA concludes that a substantial number of small entities will not be substantially impacted by this rule.

Trade Impact Assessment

This rule is expected to have neither an adverse impact on the trade opportunities for U.S. firms doing business abroad nor on foreign firms doing business in the United States. This assessment is based on the fact that Part 135 air tour operators impacted by this rule do not compete with similar operators abroad, and their competitive environment is confined to the Grand Canyon area.

Conclusions

For the reasons set forth above under Regulatory Evaluation, the FAA has determined that this final rule [1] is not a major rule under Executive Order

12291, and (2) is not considered significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). For the reasons set forth above under Regulatory Flexibility Determination, I certify that, under the criteria of the Regulatory Flexibility Act, this rule will not have a significant impact on a substantial number of small entities.

Publication Date

This amendment is effective on June 15, 1987, less than 30 days after publication in the **Federal Register**, in order to prevent the expiration of SFAR 50 before the amendment, SFAR 50–1, takes effect. The provisions of SFAR 50 are already in effect, and the Special Flight Rules Area is charted on the current Las Vegas Sectional Aeronautical chart. This amendment continues certain of the restrictions in SFAR 50 and relieves other restrictions (as in the case of the minimum altitudes for transient operations), but does not impose any additional restrictions. Accordingly, I find that 30 days notice before publication is not required by 5 U.S.C. 553(d) and that, in any event, good cause exists for publication less than 30 days before the effective date.

List of Subjects in 14 CFR Parts 91 and 135

Aircraft, Aviation safety, Air taxi and commercial operators, Grand Canyon.

Adoption of the Special Federal Aviation Regulation

For the reasons set out above, 14 CFR Parts 91 and 135 are amended as follows:

1. The authority citation for Part 91 continues to read:

PARTS 91 AND 135—[AMENDED]

Authority: 49 U.S.C. 1301(7), 1303, 1344, 1348, 1352 through 1355, 1401, 1421 through 1431, 1471, 1472, 1502, 1510, 1522, and 2121 through 2125; Articles 12, 29, 31, and 32(a) of the Convention on International Civil Aviation (61 Stat. 1180); 42 U.S.C. 4321 et seq.; E.O. 11514; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

2. The authority citation for Part 135 continues to read:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

3. Special Federal Aviation Regulation No. 50 in Parts 91 and 135 is redesignated as Special Federal Aviation Regulation No. 50–1 and is revised to read as follows:

Special Federal Aviation Regulation No. 50–1

Special Flight Rules in the Vicinity of the Grand Canyon National Park, AZ

Section 1. Applicability

This rule prescribes special operating rules for all persons operating aircraft under VFR in the following airspace, designated as the Grand Canyon National Park Special Flight Rules Area:

That airspace extending upward from the surface to and including 9,000 feet MSL within an area bounded by a line beginning at lat. 36°09'30" N., long. 114°03'00" W.; northeast to lat. 36°14'00" N., long. 113°12'00" W.; to lat. 36°30'00" N., long. 112°36'00" W.; to lat. 36°30'00" N., long. 111°42'00" W.; to lat. 35°59'30" N., long. 111°42'00" W.; to lat. 35°57'30" N., long. 112°03'20" W.; thence counterclockwise via the 5 statute mile radius of the Grand Canyon Airport airport reference point (lat. 35°57'09" N., long. 112°08'4.7" W.); to lat. 35°57'30" N., long. 112°14'00" W.; to lat.35°58'00" N., long. 113°11'00" W.; to 35°42'30" N; long. 113°11'00" W; to lat. 35°38'50" N; long. 113°27'00" W; thence counterclockwise via the 5 statute mile radius of the Peach Springs VORTAC to lat. 35°41'20" N; long. 113°36'00" W; thence to the point of beginning.

Section 2. Definitions

For the purposes of this special regulation.

"Park" means the Grand Canyon National Park.

"Special Flight Rules Area" means the Grand Canyon National Park Special Flight Rules Area.

Section 3. Aircraft operations: General

Except in an emergency, no person may operate an aircraft in the Special Flight Rules Area unless the operation—

(a) Is conducted in accordance with the following procedures:

Note: The following procedures do not relieve the pilot from see-and-avoid responsibility or compliance with FAR 91.79.

(1) Unless necessary to maintain a safe distance from other aircraft or terrain—(i) Avoid all areas described in section 4; and

(ii) Remain to the right of the Colorado River, with the river off of the left wing of the aircraft.

(2) *Eastbound*—(i) *Entry. From LAS/west:* From LAS/Lake Meade area, enter the Special Flight Rules Area (crossing the Peach Springs VOR 308° radial) at 8,000 feet MSL. Cross the Shivwits Plateau. Cross the Colorado River and turn to follow the river eastbound.

Alternate LAS entry: Follow Alternate 2 of the west canyon procedure under paragraph (a)(5)(ii) of this section and transition to the eastbound route east of the Shivwits Plateau.

From Peach Springs area: From Pleach Springs/south, cross the Peach Springs VOR 058° radial northbound at 8,000 feet MSL. Intercept and follow the Colorado River north, and maintain 8,000 feet MSL.

(ii) *En route.* Maintain 8,000 feet MSL and follow the Colorado River. Approaching Great Thumb Mesa (at or before intercepting Grand Canyon VOR 300° radial) turn to the southeast for approach to Grand Canyon National Park Airport or for transit through the airport traffic area. Remain south of the south canyon rim and the Grand Canyon VOR 300° radial.

(3) *Northbound from GCN.* Depart Grand Canyon National Park Airport to the east and climb to 8,000 feet MSL. When clear of the Desert View Overlook noise-sensitive area (Grand Canyon VOR 19 DME), turn north along the 19 DME arc to intercept the Colorado River. Follow the river to the north.

(4) *Westbound—(i) Entry. From the east/northeast:* Enter the Special Flight Rules Area in the vicinity of the Little Colorado River at 8,500 feet MSL. Cross the Colorado River and follow the river westward. Remain close to the river except as necessary to avoid noise-sensitive areas identified in Section 4.

From the north/Marble Canyon: Enter the Special Flight Rules Area along the Colorado River at 8,500 feel MSL. Follow the river to the west. Remain close to the river except as necessary to avoid noise-sensitive areas identified in Section 4.

From GCN: Depart the airport to the east and climb to 8,500 feet MSL. When clear of the South Rim/Phantom Ranch noise-sensitive area (Grand Canyon VOR 10 DME), turn north and intercept the Colorado River. Cross the river and turn left to follow the river to the west. Maintain 8,500 feet MSL. Remain close to the river except as necessary to avoid noise-sensitive areas identified in Section 4.

(ii) *En route.* Maintain 8,500 feet MSL and follow the river to the west. Approaching the Shivwits Plateau (Peach Springs VOR 005 degree radial), proceed west across the Plateau or continue to follow the river at 8,500 feet MSL until clear of the Special Flight Rules Area. Remain alert for other aircraft using the GCN-LAS direct route described in paragraph 3. (a)(6).

(5) *West canyon procedure*—(i) *Eastbound leg.* Cross the Peach Springs VOR 310° radial eastbound at 6,000 feet MSL. Intercept and follow the Colorado

River on a southeasterly heading. Maintain 6,000 feet MSL.

(ii) *Return/transition to enroute.* At Diamond Creek (between Peach Springs 025° to 030° radials), where the river turns to the north, comply with one of the following procedures:

Alternate 1. Begin climb to 6,500 feet MSL, turn left to cross the river and follow the river back to the west. Maintain 6,500 feet MSL.

Alternate 2. Begin climb to 8,000 feet MSL and continue to follow the river to the north. Level off at 8,000 feet MSL by Parashant Canyon (or Peach Springs VOR 010° radial) and join main eastbound route described in paragraph (a)(2)(ii) of this section.

(7) *GCN-LAS direct route.* Proceed direct from GCN to Pearce Ferry at 8,500 feet MSL. Remain alert for commercial tour aircraft using the same route.

(8) *Exit from the area.* A pilot operating on one of the routes listed in section 3(a) may exit the area at any time by climbing to an altitude above 9,000 feet MSL.

(b) Is authorized in writing by the Las Vegas Flight Standards District Office and is conducted in compliance with the conditions contained in that authorization. Normally authorization will be granted only for operations of aircraft necessary for law enforcement, firefighting, emergency medical treatment/evacuation of persons in the vicinity of the Park; for support of Park maintenance or activities; or for aerial access to and maintenance of other property located within the Special Flight Rules Areas. Authorization may be issued on a continuing basis.

(c) Is conducted in accordance with a specific authorization to operate in that airspace incorporated in the operator's Part 135 operations specifications and approved by the Las Vegas Flight Standards District Office. Normally, operations specifications for tour operators will not contain authorization to operate below 2,500 feet MSL in the canyon west of Diamond Creek; 5,500 feet MSL between Diamond Creek and Havasu Canyon; and 6,500 feet MSL from Havasu Canyon east. *Or*

(d) Is a search and rescue mission directed by the U.S. Air Force Rescue Coordination Center.

Section 4. Noise—sensitive areas

Except in an emergency or if otherwise necessary for safety of flight, or unless otherwise authorized by the Las Vegas Flight Standards District Office for a purpose listed in section 3(b), no person may operate an aircraft in the Special Flight Rules Area within the following areas:

(a) *Toroweap Overlook.* Within a 1½ statute mile radius of Toroweap Overlook (north rim at Lava Falls).

(b) *Thunder River/Deer Creek Falls/Tapeats Creek.* Within an area bounded on the south by a line 1 statute mile north of the Colorado River and on all other sides by a circle with a 5-statute mile radius centered on Thunder River Falls.

(c) *South Rim/Phantom Ranch.* Within an area bounded on the west by the Grand Canyon VOR 335° radial; on the south by the Grand Canyon VOR 5 DME arc and the 072° radial to 10 DME; and on all other sides by the 10 DME arc of the Grand Canyon VOR (except when necessary for arrival or departure at Grand Canyon National Park Airport or Tusayan Airport on a route authorized by the Las Vegas Flight Standards District Office).

(d) *North Rim Overlook.* Within an area bounded on the north by the Grand Canyon 20 DME arc; on the west by the Grand Canyon VOR 350° radial; on the south by the Grand Canyon VOR 13 DME arc; and on the east by the Grand Canyon VOR 035° radial to 16 DME, then on a north-south line to the 20 DME arc.

(e) *Desert View.* Within an area between the 14 DME arc and the 19 DME arc of the Grand Canyon VOR, south of the Grand Canyon VOR 050° radial and north of the southern boundary of the Special Flight Rules Area.

Section 5. Commercial sightseeing flights

(a) Notwithstanding the provisions of Federal Aviation Regulations § 135.1(b)(2), nonstop sightseeing flights that begin and end at the same airport, are conducted within a 25 statute mile radius of that airport, and operate in or through the Special Flight Rules Area during any portion of the flight are governed by the provisions of Part 135.

(b) No person holding or required to hold an operating certificate under Part 135 may operate an aircraft in the Special Flight Rules Area except as authorized by operations specifications issued under that part.

Section 6. Minimum terrain clearance

Except in an emergency, when necessary for takeoff or landing, or unless authorized by the Las Vegas Flight Standards District Office for a purpose listed in section 3(b), no person may operate an aircraft within 500 feet of any terrain or structure located between the north and south rims of the Grand Canyon.

Section 7. Communications

Except when in contact with the Grand Canyon National Park Airport Traffic Control Tower during arrival or departure or on a search and rescue mission directed by the U.S. Air Force Rescue Coordination Center, no person may operate an aircraft in the Special Flight Rules Area unless he—

(a) Transmits a position report on the appropriate frequency at each reporting point designated in the operator's Part 135 operations specifications or written authorization to operate in that airspace issued under Section 3, and

(b) Monitors the appropriate frequency continuously while in that airspace.

Section 8. Termination date

This Special Federal Aviation Regulation expires on June 15, 1992.

Issued in Washington, DC. on June 5, 1987.

Donald D. Engen,

Administrator.

[FR Doc. 87-13276 Filed 6-12-87;8:45am]

BILLING CODE 4910-13-M

federal register

Monday
June 15, 1987

Part IV

Department of the Interior

National Park Service

36 CFR Part 59

Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities; Final Rule

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 59

Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: This amendment to 36 CFR Part 59 modifies Land and Water Conservation Fund (L&WCF) requirements by permitting wetlands proposed as replacement property to be considered as reasonably equivalent in usefulness with assisted land proposed for conversion to other than public outdoor recreation use. The amendment is necessary in order to implement section 303 of the Emergency Wetlands Resources Act of 1986 which amends section 6 of the L&WCF Act of 1965. The intended effect of this action is the promotion of the conservation of wetlands.

EFFECTIVE DATE: June 15, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Michael D. Wilson, U.S. Department of the Interior, National Park Service, Recreation Grants Division, Washington, DC 20013–7127 (Telephone: 202/343–3700).

SUPPLEMENTARY INFORMATION: Section 6(f)(3) of the L&WCF Act of 1965 stipulates that changes in use to other than public outdoor recreation at assisted sites may only be made with the prior approval of the Secretary of the Interior and that converted properties must be replaced by substitute properties of at least equal fair market value and of reasonably equivalent location and usefulness. On September 25, 1986, the National Park Service (NPS) published a Final Rule describing the post-completion compliance responsibilities of the program. Conversion requirements are outlined in § 59.3 of the Final Rule. Clarification of the equivalent usefulness criterion appears as § 59.3(b)(3)(i) and is currently applicable to *all* conversion situations. The gist of that section is that replacement property must meet recreation needs which are similar in magnitude and impact as those needs met at the assisted site.

As a result of the passage of the Emergency Wetlands Resources Act of 1986 (Pub. L. 99–645), wetlands are now considered to be of reasonably equivalent usefulness with the property proposed for conversion. All other criteria appropriate in conversion proposals are unaffected by this action. This amendment implements only that change in L&WCF conversion policy explicitly required by section 303 of the Wetlands Act as passed by Congress and signed into law by the President on November 10, 1986. The amendment merely reiterates what has already been made law and is the only practicable means of implementation of the statutory provision. Therefore, pursuant to the Administrative Procedure Act, 5 U.S.C. 553(b) and (d), no public comment period is necessary and the amendment is effective immediately on June 15, 1987.

Additional Determinations

1. Compliance with the National Environmental Policy Act (NEPA)

This action does not constitute a major Federal action significantly affecting the quality of the human environment and has been determined to be categorically excluded from the NEPA process. This is a regulation of an administrative nature which responds directly to legislative action (Pub. L. 99–645), the Emergency Wetlands Resources Act of 1986), the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process on a case-by-case basis. Therefore, no environmental assessment or impact statement is required.

2. Executive Order 12291 and the Regulatory Flexibility Act

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This will not have an annual gross effect on the economy of $100 million or more. This document will not result in adverse effects on competition, employment, investment, productivity, or innovation, and does not pertain to U.S. or foreign-based enterprises in domestic or export markets. The rulemaking will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This document is not a major rule and is therefore exempt from the preparation of a Regulatory Impact Analysis.

3. Paperwork Reduction Act

The information collection requirements of 36 CFR Part 59 have been approved through May 31, 1989 (OMB No. 1024–0047). This amendment does not impact the information collection and recordkeeping requirements of Part 59.

List of Subjects in 36 CFR Part 59

Grant programs, Recreation, Outdoor Recreation acquisition, development, and planning.

In consideration of the foregoing, 36 CFR Part 59 is amended as follows:

PART 59—LAND AND WATER CONSERVATION FUND PROGRAM OF ASSISTANCE TO STATES; POST-COMPLETION COMPLIANCE RESPONSIBILITIES

1. The authority citation for Part 59 continues to read as follows:

Authority: Sec. 6, L&WCF Act of 1965, as amended; Pub. L. 88–578; 78 Stat. 897; 16 U.S.C. 4601–4 *et seq.*

2. Section 59.3 is amended by revising paragraph (b)(3)(i) to read as follows:

§ 59.3 Conversion requirements.

* * * * *

(b) * * *

(3) * * *

(i) Property to be converted must be evaluated in order to determine what recreation needs are being fulfilled by the facilities which exist and the types of outdoor recreation resources and opportunities available. The property being proposed for substitution must then be evaluated in a similar manner to determine if it will meet recreation needs which are at least like in magnitude and impact to the user community as the converted site. This criterion is applicable in the consideration of all conversion requests with the exception of those where wetlands are proposed as replacement property. Wetland areas and interests therein which have been identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion regardless of the nature of the property proposed for conversion.

Dated: May 18, 1987.

* * * * *

Susan Recce,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 87–13601 Filed 6–12–87; 8:45 am]

BILLING CODE 4310–10–M

federal register

Monday
June 15, 1987

Part V

Department of Transportation

Coast Guard

46 CFR Parts 32, 77, 92, 96, 190 and 195
Miscellaneous Changes; Tank Vessels, etc.; Correction; Final Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 32, 77, 92, 96, 190 and 195

[CGD 84-073]

Miscellaneous Changes; Tank Vessels, etc.; Correction

AGENCY: Coast Guard, DOT.

ACTION: Correction.

SUMMARY: In the May 15, 1987 issue of the **Federal Register** (52 FR 18360) the Coast Guard published a final rule with the incorrect effective date. That incorrect date also appears in several places in the body of the rule itself.

PARTS 32, 92 and 190—[AMENDED]

This document corrects that date from April 1, 1987, to June 15, 1987. In addition, the April 1, 1987, date is corrected each time it appears, to read June 15, 1987, in the following locations:

§§ 32.01-10, 32.15-15, 32.40-1, 32.40-90, 92.07-10 and 190.07-10 [Amended]

On page 18362; §§ 32.01-10 [d], 32.15-15 [a], 32.15-15 [d], 32.40-1 [a], 32.40-1 [c], and on page 18364: 32.40-90, 92.07-10 [g], 190.07-10 [f].

EFFECTIVE DATE: June 15, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. John Kinsey, (202) 267-2997.

SUPPLEMENTARY INFORMATION: In addition to the corrections noted in the summary, the following changes should be made:

The following typographical errors are also corrected:

§ 32.40-35 [Amended]

In § 32.40-35(d), "ocqupancy" is corrected to read "occupancy".

§ 32.40-40 [Amended]

In § 32.40-40(c), "aingle space" is corrected to read "single space".

In § 32.40-40(c)(1) "wash baain" is corrected to read "washbasin."

Dated: June 5, 1987.

M.J. Schiro,

Captain, U.S. Coast Guard, Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 87-13357 Filed 6-11-87; 8:45 am]

BILLING CODE 4910-14-M