

FOR FURTHER INFORMATION CONTACT:

Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

SUPPLEMENTARY INFORMATION:

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than \$500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR Part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administration Committee (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the California-Arizona lemon marketing policy for 1988-89. The Committee met publicly on May 23, 1989, in Los Angeles, California, to consider the

current and prospective conditions of supply and demand and, by a 9 to 4 vote, recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that demand for lemons is strong.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been appraised of such provisions and the effective time.

List of Subjects in 7 CFR Part 901

Marketing agreements and orders, California, Arizona, Lemons.

For the reasons set forth in the preamble, 7 CFR Part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR Part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 901.967 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 910.967 Lemon Regulation 667.

The quantity of lemons grown in California and Arizona which may be handled during the period May 28, 1989, through June 3, 1989, is established at 400,000 cartons.

Dated: May 24, 1989.

Robert C. Keeney,
Deputy Director, Fruit and Vegetable
Division.

[FR Doc. 89-12812 Filed 5-25-89; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration****21 CFR Part 133**

[Docket No. 84P-0133]

Pasteurized Process Cheese Spread; Amendment of Standard of Identity; Confirmation of Effective Date

AGENCY: Food and Drug Administration.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) is confirming the effective date for compliance with the amendment of the standard of identity for pasteurized process cheese spread and, by cross-reference, three other cheese standards to permit the optional use of nisin.

EFFECTIVE DATE: Effective date confirmed: April 10, 1989, for all affected products initially introduced or initially delivered for introduction into interstate commerce on or after this date.

FOR FURTHER INFORMATION CONTACT:

Karen L. Carson, Center for Food Safety and Applied Nutrition (HFF-414), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-485-0110.

SUPPLEMENTARY INFORMATION: In the *Federal Register* of February 8, 1989 (54 FR 6120), FDA issued a final regulation amending the U.S. standard of identity for pasteurized process cheese spread (21 CFR 133.179) and, by cross reference, pasteurized cheese spread (21 CFR 133.175), pasteurized cheese spread with fruits, vegetables, or meats (21 CFR 133.176), and pasteurized process cheese spread with fruits, vegetables, or meats (21 CFR 133.180) to provide for the optional use of nisin, an antimicrobial agent, to prevent the outgrowth of *Clostridium botulinum* spores and toxin formation in packaged cheese. Any person who would be adversely affected by the regulation could have, at any time on or before March 10, 1989, filed written objections to the final regulation and requested a hearing on the specific provisions to which there were objections. No objections or requests for a hearing were received.

List of Subjects in 21 CFR Part 133

Cheese, Food grades and standards.

PART 133—CHEESES AND RELATED CHEESE PRODUCTS

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 401, 701(e), 52 Stat. 1046, 70 Stat. 919 as

amended (21 U.S.C. 341, 371(e)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Food Safety and Applied Nutrition (21 CFR 5.62), notice is given that the effective date for compliance with the standard of identity for pasteurized process cheese spread (21 CFR 133.179) and, by cross-reference, pasteurized cheese spread (21 CFR 133.175), pasteurized cheese spread with fruits, vegetables, or meats (21 CFR 133.176), and pasteurized process cheese spread with fruits, vegetables, or meats (21 CFR 133.180), as amended in the Federal Register of February 8, 1989 (54 FR 6120), was April 10, 1989.

Dated: May 15, 1989.

Richard J. Ronk,
Acting Director, Center for Food Safety and
Applied Nutrition.

[FR Doc. 89-12578 Filed 5-25-89; 8:45 am]

BILLING CODE 4160-01-M

21 CFR Parts 510 and 514

New Animal Drugs; Removal of Obsolete Regulations

AGENCY: Food and Drug Administration.
ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its animal drug regulations by removing those sections containing procedures for the certification of new animal drugs that are composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, or bacitracin. These sections have become obsolete because of enactment of the Generic Animal Drug and Patent Term Restoration Act.

DATE: This revocation becomes effective on May 26, 1989.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Frank G. Pugliese, Center for Veterinary Medicine (HFV-102), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4500.

SUPPLEMENTARY INFORMATION: On November 16, 1988, the President signed into law the Generic Animal Drug and Patent Term Restoration Act (the new law) (Pub. L. 100-670, 102 Stat. 3971). The new law amended the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 et seq.). The primary thrust of the new law is to establish eligibility for the submission of abbreviated new

animal drug applications (ANADA's) for drug products first approved in new animal drug applications (NADA's) after the 1962 amendments to the act. The new law also amended 35 U.S.C. 156 and 271 to authorize the extension of patents for animal drug products. The new law removes from the act all provisions for the certification of antibiotic drugs for animal use: Sections 201(w)(3), 512(a)(1)(C) and (n) of the act (21 U.S.C. 321(w)(3), 360b(a)(1)(C) and (n)).

In 1945, Congress added section 507 to the act (21 U.S.C. 357) requiring the agency to certify batches of drugs composed wholly or partly of any kind of penicillin. No distinction was made between the use of the drugs in man or other animals. Section 507 has been amended several times to include streptomycin, chlortetracycline, bacitracin, chloramphenicol, and their derivatives. The Animal Drug Amendments of 1968 consolidated provisions of the act with respect to new animal drugs (including antibiotics) into new section 512 (21 U.S.C. 360b). Over the years, FDA has determined that batch-by-batch certification is no longer required to assure the safety of antibiotics. For example, in the Federal Register of September 3, 1953 (18 FR 5347), the agency published an exemption from certification for animal feeds containing certifiable antibiotic drugs, provided that the medicated animal feeds were labeled for specific conditions of use that were published in the regulations. Also, in the Federal Register of September 7, 1982 (47 FR 39155), the agency published regulations revoking certification of all antibiotics for human and animal use based upon a finding of an extremely low rejection rate for the certifiable antibiotics.

Against this background, Congress elected to remove from the act all antibiotic certification provisions for animal drugs when it enacted the Generic Animal Drug and Patent Term Restoration Act. Under section 553(b), (d), and (e) of the Administrative Procedure Act (5 U.S.C. 553(b), (d), and (e)) and under 21 CFR 10.40(c)(4)(i), (d), and (e), the Commissioner has determined for good cause that public procedure and delayed effective date are unnecessary and contrary to the public interest. The Commissioner finds that the regulation conforms the regulations to the amendments made by the new law. This revocation will become effective May 26, 1989.

This document is intended solely for the removal of the existing antibiotic procedural regulations. Removal of the technical regulations concerning specific

antibiotic drugs will be the subject of a future document.

List of Subjects in 21 CFR

Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Part 514

Administrative practice and procedure, Animal drugs, Confidential business information, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Parts 510 and 514 are amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR Part 510 continues to read as follows:

Authority: Secs. 512, 701(a) (21 U.S.C. 360b, 371(a)); 21 CFR 5.10 and 5.83.

§ 510.3 [Amended]

2. Section 510.3 *Definitions and interpretations* is amended in paragraph (g)(2) by removing “; or” and replacing it with a period “.” and by removing paragraph (g)(3).

§ 510.5 [Removed]

3. Section 510.5 *Certification of new animal drugs containing any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, or bacitracin, or derivative thereof* is removed.

§ 510.6 [Removed]

4. Section 510.6 *New animal drugs; transitional provisions re section 512 of the act* is removed.

§ 510.55 [Removed]

5. Section 510.55 *Labeling requirements for antibiotic drugs for animal use* is removed.

§ 510.350 [Removed]

6. Section 510.350 *Records of distribution of animal drugs subject to section 512(n) of the act* is removed.

§ 510.510 [Removed]

7. Section 510.510 *Antibiotic drugs for use in medicated animal feed (antibiotic medicated feed premixes)* is removed.

§ 510.520 [Removed]

8. Section 510.520 *Exemption from batch certification requirements for antibiotic drugs for animal use subject to section 512(n) of the act* is removed.

§ 510.521 [Removed]

9. Section 510.521 *Conditions on the effectiveness of exemptions of antibiotic drugs for animal use from batch certification requirements* is removed.

PART 514—NEW ANIMAL DRUG APPLICATIONS

10. The authority citation for 21 CFR Part 514 continues to read as follows:

Authority: Secs 512(i), (n), 701(a), 52 Stat. 1055; 82 Stat. 343-351 (21 U.S.C. 360b(i), (n), 371(a)); 21 CFR 5.10, 5.11.

§ 514.1 [Amended]

11. Section 514.1 *Applications* is amended by removing paragraph (b)(9) and reserving it.

§ 514.50 [Removed]

12. Section 514.50 *Requests for certification, check tests and assays, and working standards for animal drugs subject to section 512(n) of the act; information and samples required* is removed.

§ 514.51 [Removed]

13. Section 514.51 *Certification of animal drugs subject to section 512(n) of the act* is removed.

§ 514.55 [Removed]

14. Section 514.55 *Forms for certification or exemption of antibiotic drugs for animal use subject to section 512(n) of the act* is removed.

§ 514.60 [Removed]

15. Section 514.60 *Fees for certification of animal drugs subject to section 512(n) of the act* is removed.

§ 514.150 [Removed]

16. Section 514.150 *Conditions on the effectiveness of certificates for animal drugs subject to section 512(n) of the act* is removed.

§ 514.155 [Removed]

17. Section 514.155 *Suspension of certification service for sponsors of animal drugs* is removed.

§ 514.160 [Removed]

18. Section 514.160 *Disposition of outdated animal drugs subject to section 512(n) of the act* is removed.

Dated: May 8, 1989.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 89-12577 Filed 5-25-89; 8:45 am]

BILLING CODE 4160-01-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**29 CFR Part 1615****Enforcement of Nondiscrimination on the Basis of Handicap in Equal Employment Opportunity Commission Programs**

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This regulation provides for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to programs or activities conducted by the Equal Employment Opportunity Commission. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for "individual with handicaps" and "qualified individual with handicaps" and establishes a complaint mechanism for resolving allegations of discrimination.

EFFECTIVE DATE: June 26, 1989.

FOR FURTHER INFORMATION CONTACT: Irene L. Hill, Assistant Legal Counsel for Coordination, at (202) 663-4688 (Voice) or (202) 663-4399 (TDD).

SUPPLEMENTARY INFORMATION: On November 5, 1987, the Equal Employment Opportunity Commission published a Notice of Proposed Rulemaking, 52 FR 42450. The Notice invited comments from all interested parties. The Commission received comments from one national organization representing individuals with disabilities and two agencies of state government that administer programs for such individuals. The Commission has carefully considered these comments and has made revisions to the rule and to the discussion of the rule below, in response. The revisions to the rule modify the definition of a "qualified individual with handicaps" and provide greater detail on procedures for filing and processing complaints of discrimination. The discussion below summarizes the comments that were received and the changes made in response to these comments.

The rule and the comments are available for public inspection at the Commission's library at 1801 "L" Street NW., Washington, DC between the hours of 9:00 am and 5:30 pm Monday through Friday. Copies of the rule are available on tape for those with impaired vision from the Commission's Handicap Program Manager, (202) 663-4392; TDD (202) 663-4399.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies be submitted to the appropriate authorizing committees of Congress and that such regulations take effect no earlier than the thirtieth day after they have been so submitted. Concurrent with the publication of this final rule the Commission is submitting this regulation to the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor, pursuant to this requirement.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Equal Employment Opportunity Commission. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Sec. 119, Pub. L. No. 95-602, 92 Stat. 2982), and the Rehabilitation Act Amendments of 1986 (Pub. L. No. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. 29 U.S.C. 794.

The substantive nondiscrimination obligations of the Commission, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *Id.*; 124 Cong. Rec. 13,897 (remarks

of Rep. Brademas); *Id.* at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this rule and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *Id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 for federally assisted programs are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access" (*Id.* at 301, n.21) (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the courts: the Supreme Court in *Davis*, subsequent lower court cases interpreting *Davis*, and the Supreme Court in *Alexander*; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the Commission believes that there are no significant differences between this proposed rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an

adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies. It has also been reviewed by the Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

It is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared.

This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

Section-by-Section Analysis

Section 1615.101 Purpose

Section 1615.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 1615.102 Application

The regulation applies to all programs or activities conducted by the Commission. Under this section, a federally conducted program or activity is, in simple terms, anything the Commission does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Commission for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Commission's facilities. Activities in the second category include programs that provide Federal services or benefits.

Section 1615.103 Definitions

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or

activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 1615.160(a)(1), they may also be necessary to meet other requirements of this part. The regulatory definition of "auxiliary aids" has been amended to include examples of aids for persons who are impaired in their ability to reach or grasp objects. Although aids for such persons were clearly intended to be included within the scope of the definition, the proposed rule only provided examples of aids for visually and hearing-impaired persons. Two commentators requested that we add other specified aids to those listed in the regulation for persons with impaired hearing. We do not think it is necessary to do so. The aids listed in the regulation are examples only and are not intended to be all-inclusive; the regulation refers to "similar services and devices." The Commission has not specified many other aids that would be appropriate for persons with other types of disabilities. We have added language to the regulation stating that the examples provided are not intended to be exclusive either as to the persons entitled to such aids or the type of aids that may be required.

"Commission." For purposes of this regulation "Commission" means the Equal Employment Opportunity Commission.

"Complete complaint." The definition of "complete complaint" enables the Commission to determine the beginning of its obligation to investigate a complaint (see § 1615.170(h)). The definition is necessary because the 180 day period for the Commission's investigation begins when it receives a complete complaint. A commentator expressed concern that this definition, requiring a complainant to provide details on the nature and date of an alleged violation when filing a complaint, is too restrictive and may lead to delays or EEOC inaction on valid complaints. Another commentator made a similar point, in requesting revisions to § 1615.170. These comments reflect a misunderstanding of the procedures that the Commission routinely follows to assure that complaints contain needed information. Section 1615.170 of the proposed rule provided for correction of technically incomplete complaints. However, to assure that the public fully understands the Commission's procedures, we have expanded § 1615.170, as described below, to further clarify this process.

"Facility." The definition of "facility" is similar to that in the section 504

coordination regulation for federally assisted programs 29 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted to clarify its coverage. The phrase, "or interest in such property," is deleted because the term "facility," as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the Commission regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the Commission. The term "facility" is used in §§ 1615.149, 1615.150 and 1615.170(f).

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

A commentor requested that we revise the definition to include a person who has a "physical, sensory or mental impairment," because deafness is a sensory impairment that should not be lumped under the category of physical impairment. We have not made this revision because the Commission's regulation repeats the statutory definition of an "individual with handicaps."

"Qualified individual with handicaps." Paragraph (1) of the definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32(b)).

The Commission has amended the definition of "qualified individual with handicaps" that appeared in the proposed rule to better reflect the nature of its programs and activities and to clarify its obligation to make modifications that will enable individuals with handicaps to participate in these programs and activities. The Commission has deleted subsection (1) of the definition that

appeared in the proposed rule, which applied to programs and activities (except employment) under which a person is "required to perform services or reach a level of accomplishment." On reconsideration, the Commission has determined that this part of the definition, which it had adopted from a prototype regulation drafted by the Department of Justice, is unnecessary in its rule, because the Commission does not conduct programs or activities of this nature, other than employment.

Subsection (2) of the proposed rule, which applied to all other programs and activities (except employment), has been redesignated (1) and amended in response to concerns expressed by commentors. The commentors' major concern was that the definition of "qualified individual with handicaps" in the proposed rule might allow the Commission to disqualify an individual without initial consideration of its obligation to provide modifications or aids that would allow the individual to participate in a program or activity.

To ensure that this does not occur, the Commission was urged to incorporate the requirement to make such modifications in this definition. The Commission believed that the proposed rule did require it to make needed modifications to enable individuals with handicaps to participate in its programs, and had stated this specifically in the preamble to the rule. However, to avoid any possibility of a misconception such as that reflected by the commentors, we have revised the definition to make these obligations more explicit in the rule itself. As revised, the definition states that a qualified individual with handicaps, with respect to any program other than employment, is "an individual with handicaps who, with or without modifications or aids required by this part, meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity." The revision makes clear that determining whether a person is qualified is a two step process, which includes, where necessary, the provision of auxiliary aids or program modifications as set out in § 1615.130, § 1615.150 and § 1615.160 of the rule. Sections 1615.150 and 1615.160 also reflect recent Supreme Court rulings indicating limits to such obligations under Section 504 of the Rehabilitation Act.

Paragraph (2) of the definition provides that, for purposes of employment, "qualified individual with handicaps" is defined in 29 CFR 1613.702(f), which is made applicable to this part by § 1615.140. Nothing in this

part changes existing regulations applicable to employment.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the Commission and not to programs or activities to which it provides Federal financial assistance.

Section 1615.110 Self-evaluation

The Commission shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

Individuals and groups with information to offer the agency concerning its self-evaluation study may contact the Commission's Handicap Program Manager, Equal Employment Opportunity Commission, 1801 "L" Street NW., Washington, DC 20507, (202) 663-4392, TDD (202) 663-4399.

Section 1615.111 Notice

Section 1615.111 requires the Commission to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the Commission's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

A commentor requested revision of the first sentence of this section to state that the Commission will "effectively apprise" persons of the protections of the regulation. The Commission considers this modification to be unnecessary. It is committed under the regulation and by terms of this section to assure that individuals with handicaps are aware of their rights for access to its programs.

Section 1615.130 General prohibitions against discrimination

Section 1615.130 is an adaptation of the corresponding section of the section

504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 1615.130 establish the general principles for analyzing whether any particular action of the Commission violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. Whenever the Commission has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in § 1615.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits the denial of equal opportunities for individuals with handicaps to participate in or benefit from Commission programs as well as overt denial of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its programs simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., individuals with epilepsy, hearing impairments, or heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Exclusion of an individual with handicaps from a program or activity based on stereotyped characterizations of persons with his or her handicap is prohibited. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question.

Section 504, however, prohibits more than just exclusionary practices. As the Supreme Court recognized in *Alexander*, in enacting section 504, Congress intended to reach some conduct, such as the maintenance of architectural barriers, that have a discriminatory effect upon individuals with handicaps. 464 U.S. at 297. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 1615.149–1615.151) and communications

(§ 1615.160) are specific applications of this principle.

Paragraph (d) mandates that the Commission administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps. Paragraph (b)(1)(iv) permits the agency to develop separate or different aids, benefits, or services only when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the Commission from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the Commission from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the Commission from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits explicit denials of opportunities to benefit from Commission programs due to handicap. It also prohibits nonessential policies and practices that are neutral on their face, but that operate to deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 1615.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the Commission. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the Commission, in the selection of procurement contractors, from using

criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to a Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e. in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

A commentator requested the Commission to reinstate a provision of the regulations for federally assisted programs that was omitted from these regulations. The provision prohibits recipients of federal financial assistance from providing "significant assistance" to an organization that discriminates. Such a provision would be inappropriate in this regulation that applies to the Commission's federally conducted programs.

Section 1615.140 Employment

Section 1615.140 prohibits discrimination on the basis of handicap in employment. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. U.S. Postal Service*, 742 F.2d 257, 259–260 (6th Cir. 1984); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 302–04 (5th Cir. 1981); *Contra, McGuiness v. U.S. Postal Service*, 744 F.2d 1318, 1220–21 (7th Cir. 1984); *Boyd v. U.S. Postal Service*, 752 F.2d 410, 413–14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Morgan v. U.S. Postal Service*, 798 F.2d 1161, (8th Cir. 1986); *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly, § 1615.140 (Employment) of this rule adopts the definitions, requirements and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. In addition to this section, § 1615.170(b) (Compliance Procedures) of this regulation specifies that the Commission will use the existing EEOC procedures to resolve

allegations of employment discrimination. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap.

Section 1615.149 Program accessibility: Discrimination prohibited

Section 1615.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 1615.150 and 1615.151.

Section 1615.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 1615.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. However, § 1615.150, unlike 28 CFR 41.56-41.57, places explicit limits on the agency's obligation to ensure program accessibility (§ 1615.150 (a)(2)). The regulation also makes clear that the Commission is not necessarily required to make each of its existing facilities accessible (§ 1615.150(a)(1)).

A commenter requested that the Commission delete § 1615.150(a)(1) from its regulation, arguing that failure to require handicapped access to all EEOC programs contravenes the legal requirement of section 504 that all programs be accessible. As noted above, the Commission's regulations adopts the concept in the existing regulations for federally assisted programs that a program or activity in its entirety must be accessible. This does not necessarily require that each of its facilities meet this standard, although the Commission has striven to achieve this goal and will continue to do so. However, in some cases, it may be more effective to provide a program or a service in another facility, in order to achieve accessibility.

Paragraph (a)(2) generally codifies case law that defines the scope of the Commission's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the Commission is not required to take any action that would result in a fundamental alteration in the nature of

its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 1615.160(d). This provision is based on the Supreme Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis (APTA)*, 655 F.2d 1272 (D.C. Cir. 1981). Thus, in *APTA* the United States Court of Appeals for the District of Columbia Circuit applied the *Davis* language and invalidated the section 504 regulations of the Department of Transportation. The court in *APTA* noted "that at some point a transit system's refusal to take modest, affirmative steps to accommodate handicapped persons might well violate section 504. But DOT's rules do not mandate only modest expenditures. The regulations require extensive modifications of existing systems and impose extremely heavy financial burdens on local transit authorities." 655 F.2d at 1278.

In *Dopico* the United States Court of Appeals for the Second Circuit looked at the potential expenditure of \$6 million of New York City's total federal capital and operating subsidy for mass transit of \$490 million for 1980 and concluded that "[w]hile this is a considerable sum of money, it is not 'massive' either in absolute terms or relative to the City's total receipt of mass transportation. . . ." 687 F.2d at 650.

Paragraphs (a)(2) and § 1615.160(d) are also supported by *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination prohibited by section 504 or its implementing regulation. (*Id.* at 299).

Relying on *Davis*, the Court said that section 504 guarantees qualified individuals with handicaps "meaningful access to the benefits that the grantee offers" (*id.* at 301) and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." (*Id.*, n.21) (emphasis added). However, section 504 does not require "'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' or that would constitute 'fundamental alteration(s) in the nature of a program'." (*Id.*, n.20) (citations omitted).

Alexander supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain modifications for a handicapped person may so alter the Commission's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the modifications is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the Commission of all obligations to individuals with handicaps. Although the Commission is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with § 1615.150(a) would in most cases not result in undue financial and administrative burdens on the Commission. In determining whether financial and administrative burdens are undue, all Commission resources available for use in the funding and operation of the conducted program or activity are to be considered. The burden of proving that compliance with § 1615.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Commission. The decision that compliance would result in such alteration or burdens must be made by the Chairman of the Commission and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the

Chairman's decision or failure to make a decision may file a complaint under the compliance procedures established in § 1615.170. Finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Commission must still take action, short of that outer limit, that will open participation in the Commission program to disabled persons to the fullest extent possible.

A commentor requested that this section and § 1615.160 require EEOC to consider the budget of the agency as a whole—rather than the budget of a particular program—in determining undue financial burdens. We have not adopted this recommendation. The regulation provides that a finding that compliance with requirements of this section would result in "undue financial and administrative burden" can be made only by the head of the agency after consideration of all available Commission resources. (Emphasis added). This clearly requires the Commission to consider resources beyond line item funds allotted to a particular program, but necessarily excludes funds that are legally obligated for specific purposes and thus cannot be made available. Because of this commitment to consider all resources available, the Commission believes, as stated above, that it rarely will be faced with "undue burdens" in meeting the program accessibility or communications requirements of the regulation.

A commentor asked EEOC to add a requirement that it will inform individuals of their right to have decisions on accessibility made at the highest level of the Commission. Another commentor requested that more information be provided on how the head of the agency will determine if an action imposes an undue burden. The Commission has not adopted these suggestions. Section 1615.111 (Notice) provides that the Commission will make available information necessary to inform persons of the protections against discrimination assured by this regulation. The Commission intends to issue a management directive to its staff, implementing the regulation, that will emphasize that decisions of this nature must be made by the Chairman of the Commission, and cannot be made at lower levels. It will also make such information available to the public through appropriate means. For example, if the Commission conducts conferences or seminars, registration forms will include such information. The

Commission's implementing management directive also will provide that when an accessibility issue raising resource concerns arises at any of its offices, the Handicap Program Manager must be contacted. That official will provide technical guidance and will be responsible for assuring that decisions regarding "undue burdens" will be made within a timeframe that assures that accessibility will not be denied due to untimely consideration.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the Commission shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the Commission's program accessible. The Commission may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the Commission must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 1615.151 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 1615.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101–19.600 to 101–19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). We

believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the Commission after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 1615.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 1615.151.

A commentor requested that the rule require that any leased space must comply with Architectural Barriers Act requirements when EEOC renews or initiates a lease. The proposed rule noted that it has been Federal practice to subject newly leased buildings to the lesser accessibility standard for existing buildings, rather than the ABA standard, because retrofitting such buildings raises similar cost problems. In practice, the Commission has endeavored to assure accessibility of its leased buildings in accordance with the Architectural Barriers Act, but it cannot make this a requirement of its regulations because the facilities it occupies are leased by and under the control of the General Services Administration (GSA). However, the Commission has moved field offices from leased buildings that were not accessible and has refused prospective locations offered by GSA because they were not accessible. The Commission recently obtained agreement from GSA that all locations leased for Commission occupancy will be accessible.

In *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of the lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The Commission may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 1615.160 Communications

Section 1615.160 requires the Commission to take appropriate steps to ensure effective communication with

personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 1615.160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the Commission's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the Commission (§ 1615.160(a)(1)(ii)). The Commission shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 1615.160(d). That paragraph limits the obligation of the Commission to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see supra*, preamble § 1615.150(a)(2)). Unless not required by § 1615.160(d), the Commission shall provide auxiliary aids at no cost to the individual with handicaps.

While in some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person, in many circumstances they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then a sign language or oral interpreter or assistive listening device may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the Commission intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the Commission's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The Commission shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the Commission. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings. If sign language interpreters are necessary, the Commission may require that it be given

reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the Commission need not provide devices of a personal nature (§ 1615.160(a)(1)(ii)). For example, the Commission need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the Commission to provide wheelchairs to persons with mobility impairments. Readers will be provided if necessary, to make program materials accessible. Readers will not be available for reading nonprogram materials.

A commentor requested revision of subsection § 1615.160(a)(1)(ii) to state that the Commission need not provide individually prescribed devices or readers for "nonprogram material." The commentor asserted that this would clarify that the distinction is not whether the disabled person receives "personal" assistance, but whether the aid is necessary to assure accessibility to the agency's program. The Commission has not made this revision because § 1615.160(a)(1) already states that it will furnish appropriate auxiliary aids necessary to provide a disabled person an equal opportunity to participate in or benefit from its programs, and that it will give primary consideration to the type of aid requested by the individual. Subsection (a)(1)(ii), which is identical to the language in the Department of Health and Human Services regulations for federally assisted programs (45 CFR 84.44(d)(2)), merely provides added clarification, as indicated by the examples cited above.

Paragraph (b) requires the Commission to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the Commission to provide signs at inaccessible facilities that direct users to locations with information about accessible facilities.

A commentor requested that the rule state in § 1615.160(c) that EEOC will provide the international symbol for deafness at each public telephone accessible by amplifier or TDD, and at each primary entrance to a facility where other devices are provided to aid hearing-impaired persons. We have not adopted this recommendation. The Commission is committed by this regulation to provide accessibility for all disabled persons. It would be unduly cumbersome to require special signage indicating devices needed to achieve accessibility for every disability. The Commission will provide directions to locations where individuals may obtain

information on special aids or devices that will provide accessibility for them.

Section 1615.160(d) limits the obligation of the Commission to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see supra*, discussion of § 1615.150(a)(2)). The discussion under § 1615.150, *Program accessibility: Existing facilities*, regarding the determination of undue financial and administrative burdens also applies to this section and should be referred to for a complete understanding of the Commission's obligation to comply with § 1615.160.

Section 1615.170 Compliance procedures

Paragraph (a) specifies that paragraphs (c) through (m) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the Commission will process employment complaints according to procedures established in its existing regulations (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

Paragraph (c) designates the official responsible for coordinating the implementation of § 1615.170.

Paragraph (d) requires complainants to file section 504 complaints within 180 days of the alleged discriminatory act unless they show good cause for a delay in filing. One hundred and eighty days is a time period that the Commission has recommended that other agencies could use in setting up complaint procedures. It is also consistent with the time period for filing charges pursuant to Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act of 1967, as amended (in areas without a state or local deferral Commission).

The Commission is required to accept and investigate all complete complaints (§ 1615.170(d)). A commentor requested EEOC to add a provision to this section stating that if it receives a complaint that is not "complete" it will promptly notify the complainant that additional information is needed, and that if EEOC dismisses a complaint after providing opportunity for the complainant to amend it, notice of such dismissal will be given to the complainant.

The Commission routinely utilizes such procedures in processing complaints of employment discrimination; however, specific information of this nature was not provided in this rule, which was modeled on the Department of Justice

prototype regulation. The Commission agrees with the commentor that greater specificity will assist potential complainants. Therefore, it has revised subsection 1615.170(d) and added a new subsection 1615.170(e) to provide more detail on procedures for filing and processing complaints, including procedures requested by the commentor.

If the Commission determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (§ 1615.170(f)). A commentor requested revision of subsection (f) to require the Commission to refer a complaint to the appropriate agency when it does not have jurisdiction, rather than merely making "reasonable efforts" to do so. Although the Commission will make every effort to refer complaints over which it does not have jurisdiction to an appropriate federal agency, we have not adopted this suggestion because there may be circumstances in which such referral is not possible. For example, the Commission may receive a complaint over which no Federal agency has jurisdiction or a complaint that does not contain sufficient information to identify the appropriate agency.

Paragraph (g) requires the Commission to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (h) requires the Commission to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal. One appeal within the Commission shall be provided (§ 1615.170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (§ 1615.170(i)). A commentor requested EEOC to provide more information in subsection 1615.170(i) describing the basic parameters for submitting and obtaining evidence used by the Commission to decide an appeal. The Commission has not adopted this suggestion. Details of this nature may be provided in an implementing directive, but are not appropriate in this regulation.

Two commentors requested that we add a provision to this section stating that a complainant can pursue a private

cause of action in the courts, either without invoking EEOC administrative procedures or without exhausting those procedures. Section 504 does not explicitly establish a private right of action. Courts have ruled that complainants have such a right under section 504 in federally assisted programs, *see Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1377-78 (10th Cir. 1981) and cases listed therein. One Circuit Court of Appeals has recognized such a right in regard to programs conducted by a Federal agency, *Cousins v. Secretary, Department of Transportation*, 47 FEP Cases (1st Cir. Sept. 20, 1988). However, in the latter case, the agency has not yet issued Section 504 regulations for its federally conducted programs. Because the procedures established in this regulation for its federally conducted programs differ from procedures applicable to federally assisted programs, the Commission believes that the availability and scope of judicial review of its actions remains for the courts to determine, and thus cannot be specified in this regulation.

A commentor recommended that the regulation provide a statement with regard to the availability of money damages or other compensatory relief. The lower courts that have ruled on this issue are in disagreement as to whether monetary relief may be awarded under section 504. *See, e.g., Miener v. Missouri*, 673 F.2d 969 (8th Cir.) cert. denied, 459 U.S. 909 (1982) (damages available to vindicate rights established by section 504). *But see, Ruth Anne M. v. Alvin Independent School District*, 523 F. Supp. 460 (S.D. Tex. 1982) (damages remedy not available). Thus, this issue also remains for the courts to decide.

Paragraph (m) permits the Commission to delegate its authority for investigating complaints to other Federal agencies or to contract for such investigations with non-Federal entities. However, the statutory obligation of the Commission to make a final determination of compliance or noncompliance may not be delegated.

List of Subjects in 29 CFR 1615

Blind, Buildings, Civil rights, Deaf, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

Signed at Washington, DC this 19th day of May 1989.

For the Commission.

Clarence Thomas,
Chairman.

For the reasons set forth in the preamble, Chapter XIV, Title 29 of the

Code of Federal Regulations is amended as follows:

Part 1615 is added to read as follows:

PART 1615—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sec.

- 1615.101 Purpose.
- 1615.102 Application.
- 1615.103 Definitions.
- 1615.104-1615.109 [Reserved]
- 1615.110 Self-evaluation.
- 1615.111 Notice.
- 1615.112-1615.129 [Reserved]
- 1615.130 General prohibitions against discrimination.
- 1615.131-1615.139 [Reserved]
- 1615.140 Employment.
- 1615.141-1615.148 [Reserved]
- 1615.149 Program accessibility: Discrimination prohibited.
- 1615.150 Program accessibility: Existing facilities.
- 1615.151 Program accessibility: New construction and alterations.
- 1615.152-1615.159 [Reserved]
- 1615.160 Communications.
- 1615.161-1615.169 [Reserved]
- 1615.170 Compliance procedures.
- 1615.171-1615.999 [Reserved]

Authority: 29 U.S.C. 794.

§ 1615.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1615.102 Application.

This part applies to all programs or activities conducted by the Commission.

§ 1615.103 Definitions.

For purposes of this part, the term—"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary

aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices. Auxiliary aids useful for persons with impaired ability to reach or grasp include goose neck telephone headsets, mechanical page turners, and raised or lowered furniture. These examples are not intended to be exclusive either as to the persons who are entitled to such aids or as to the type of aids that may be required. Although auxiliary aids are required explicitly only by § 1615.160(a)(1), they may also be necessary to meet other requirements of this part.

"Commission" means the Equal Employment Opportunity Commission.

"Complete complaint" means written statement that contains the complainant's name and address and describes the Commission's actions in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease,

diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having such an impairment" means—(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having an impairment.

"Qualified individual with handicaps" means—

(1) With respect to any Commission program or activity (except employment), an individual with handicaps who, with or without modifications or aids required by this part, meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(2) With respect to employment, an individual with handicaps as defined in 39 CFR 1613.702(f), which is made applicable to this part by § 1615.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617), the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 1615.104-1615.109 [Reserved]

§ 1615.110 Self-evaluation.

(a) The Commission shall, by [insert date one year after the effective date of this part] evaluate its current policies and practices, and the effects thereof, that do not or may not meet the

requirements of this part, and, to the extent modification of any such policies and practices is required, the Commission shall proceed to make the necessary modifications.

(b) The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self evaluation process by submitting comments (both oral and written).

(c) The Commission shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 1615.111 Notice.

The Commission shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Commission, and make such information available to them in such manner as the Chairman of the Commission finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1615.112-1615.129 [Reserved]

§ 1615.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not, directly or through contractual, certifying, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Commission may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Commission may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Commission may not, in determining the site or location of a facility, make selections the purpose or effect of which would—(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Commission; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Commission, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Commission shall administer programs and activities in the most integrated setting appropriate to the

needs of qualified individuals with handicaps.

§§ 1615.131–1615.139 [Reserved]

§ 1615.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Commission. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by this Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1615.141–1615.148 [Reserved]

§ 1615.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1615.150, no qualified individual with handicaps shall, because the Commission's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

§ 1615.150 Program accessibility: Existing facilities.

(a) *General.* The Commission shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—(1) Necessarily require the Commission to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) Require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 1615.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman of the Commission after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in

such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Commission may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Commission is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Commission, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Commission shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Commission shall comply with the obligations established under this section by August 25, 1989 except that where structural changes in facilities are undertaken, such changes shall be made by June 26, 1992 but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Commission shall develop, by December 26, 1989 a transition plan setting forth the steps necessary to complete such changes. The Commission shall provide an opportunity to interested persons, including individuals with handicaps and organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection.

The plan shall, at a minimum—(1) Identify physical obstacles in the Commission's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 1615.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR Subpart 101-19.6, apply to buildings covered by this section.

§§ 1615.152-1615.159 [Reserved]

§ 1615.160 Communications.

(a) The Commission shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Commission shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission.

(i) In determining what type of auxiliary aid is necessary, the Commission shall give primary consideration to the requests of the individual with handicaps.

(ii) The Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Commission communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The Commission shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Commission shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities.

The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 1615.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman of the Commission after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 1615.161-1615.169 [Reserved]

§ 1615.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by EEOC in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Director, Equal Employment Opportunity Staff.

(d) Filing a complaint. (1) Who may file? Any person who believes that he or she has been subjected to discrimination prohibited by this part, or authorized representative of such person, may file a complaint with the Director, Equal Employment Opportunity Staff. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member

of that class may file a complaint with the Director. A charge on behalf of a person or member of a class of persons claiming to be aggrieved may be made by any person, agency or organization.

(2) Where and when to file. Complaints shall be filed with the Director, Equal Employment Opportunity Staff, 1801 "L" Street NW., Washington, DC 20507, within one hundred and eighty calendar days of the alleged act of discrimination. A complaint shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received in the Office of the Director. The Commission shall extend the time period for filing a complaint upon a showing of good cause. For example, the Commission shall extend this time limit if a complainant shows that he or she was not notified of the time limits and was not otherwise aware of them, or that he or she was prevented by circumstances beyond his or her control from submitting the matter within the time limits. A technically incomplete complaint shall be deemed timely if the complainant cures any defect upon request.

(e) Acceptance of complaint. (1) The Commission shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which it has jurisdiction. The EEO Director shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the EEO Director receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Director shall dismiss the complaint without prejudice and shall so inform the complainant.

(f) If the Commission receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(g) The Commission shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(h) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the

investigation in a letter containing—(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(i) Appeals of the findings of fact and conclusions of law or remedies must be filed with the Chairman of the Commission by the complainant within ninety calendar days of receipt from the Commission of the letter required by § 1615.170(h). The Commission shall extend this time for good cause when a complainant shows that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of an appeal within the prescribed time limit. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Chairman at 1801 "L" Street NW., Washington, DC 20507. It should be clearly marked "Appeal of section 504 decision" and should contain specific objections explaining why the person believes the initial decision was factually or legally wrong. Attached to the appeal letter should be a copy of the initial decision being appealed.

(j) Timely appeals shall be decided by the Chairman of the Commission unless the Commission determines that an appeal raises a policy issue which should be addressed by the full Commission. The full Commission shall then decide such appeals.

(k) The Commission shall notify the complainant of the results of the appeal within sixty days of the receipt of the request. If the Commission determines that it needs additional information from the complainant, it shall have sixty days from the date it receives the additional information to make its determination on the appeal.

(l) The time limits cited in (h) and (k) of this section may be extended with the permission of the Assistant Attorney General.

(m) The Commission may delegate its authority for conducting complaint investigations to other Federal agencies, or may contract with non-Federal entities to conduct such investigations except that the authority for making the final determination may not be delegated.

§§ 1615.171–1615.999 [Reserved]

[FR Doc. 89-12634 Filed 5-25-89; 8:45 am]

BILLING CODE 6570-05-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR PART 165

[COTP Hampton Roads; Reg. 89-37]

Safety Zone; Chesapeake Bay, off Fort Story, Virginia Beach, VA

AGENCY: Coast Guard, DOT.

ACTION: Final Rule with request for comments.

SUMMARY: The Coast Guard is establishing a safety zone around a U. S. Navy exercise off Fort Story in Virginia Beach, Virginia. The exercise is scheduled to begin May 28, 1989 and end June 8, 1989. The safety zone is intended to minimize the risk of collision between military exercise vessels and other vessels. The Captain of the Port will close all access to the safety zone to non-exercise vessels in the interest of safety. Vessels or individuals will not be permitted to enter the safety zone, except in an emergency and then only in accordance with Captain of the Port orders or directions. In the event of an emergency, the Captain of the Port may be reached at phone: (804) 441-3299 and on VHF-FM channels 13 or 16.

DATES: These regulations are effective from 5:00 a.m., May 28, 1989 to 11:59 p.m., June 8, 1989, unless terminated sooner by the Captain of the Port Hampton Roads, Virginia. Comments are due June 26, 1989.

ADDRESSES: Comments should be mailed to Commanding Officer, U. S. Coast Guard Marine Safety Office Hampton Roads, 200 Granby Street, Norfolk, Virginia 23510-1888. The comments and other materials referenced in this notice will be available for inspection and copying at the above address. Normal working hours are between 7:30 a.m. and 4:00 p.m., Monday through Friday except holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant J. S. Martin at the above address, telephone number (804) 441-3284.

SUPPLEMENTARY INFORMATION: Under 5 U.S.C. 553 a Notice of Proposed Rulemaking was not published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impractical. Final arrangements for the exercise did not provide adequate time to prepare and publish a notice of proposed rulemaking and this final rule.

Although this regulation is published as a final rule without prior notice, an opportunity for public comment is nevertheless desirable to ensure that the regulation is both reasonable and workable. Accordingly, persons wishing to comment may do so by submitting written comments to the office listed under "ADDRESS" in this preamble. Persons submitting comments should include their names and addresses, identify this notice (COTP Hampton Roads, Regulation 89-37), the specific section of the rule to which their comments apply and give the reasons for each comment. The regulations may be changed in light of the comments received.

Drafting Information

The drafters of this notice are Lieutenant J.S. Martin, Project Officer, and Lieutenant Commander R.K. Kutz, project attorney, Fifth Coast Guard District Legal Staff.

Discussion of Regulations

The Coast Guard is establishing a safety zone around a U.S. Navy exercise in the waters off Fort Story in Virginia Beach, Virginia from May 28, 1989 to June 8, 1989. The safety zone is needed to minimize the risk of collision between military exercise vessels and other vessels. The Captain of the Port will close all access to the safety zone to non-exercise vessels in the interest of safety. Vessels or individuals will not be permitted to enter the safety zone, except in an emergency and then only in accordance with Captain of the Port orders or directions. The boundaries of the safety zone will be marked by special purpose buoys with flashing yellow lights and Coast Guard patrol boats will be stationed along the boundaries of the safety zone. Coast Guard patrol vessels will be on scene at all times while the safety zone is in effect to notify boaters of the zone restrictions and to enforce the safety zone. Coast Guard patrol vessels will be monitoring channels 13 and 16 VHF-FM. Members of other Federal, state, local and private agencies may assist the Captain of the Port in enforcing these regulations.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Final Regulation

In consideration of the foregoing, Subpart D of Part 165 of Title 33, Code of Federal Regulations, the Coast Guard proposes to amend as follows: