(iii) Use of current research finding and information on model practices in providing the technical assistance.

Eligible Applicants

Institutions of Higher Education (IHEs), State educational agencies (SEAs), Local educational agencies (LEAs), and other public or private non-profit institutions or agencies.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding this proposed priority. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, 330 C Street S.W., Mary Switzer Building, Room 4622, Washington, D.C., between the hours of 8:00 a.m. and 3:30 p.m., Monday through Friday of each week except Federal holidays.

Applicable Program Regulations

34 CFR Part 326 and 34 CFR Part 426.

Program Authority: 20 U.S.C. 1425, 20 U.S.C. 2420a, 29 U.S.C. 761a(b) (4) and (6), 29 U.S.C. 777a(d), and section 430(b) of the General Education Provisions Act (GEPA) as amended by sections 212(b)(1) and 241 of the Improving America's Schools Act of 1994, Pub. L. 103-382, October 20, 1994.

(Catalog of Federal Domestic Assistance Number 84.158, Secondary Education and Transitional Services for Youth with Disabilities Program)

Dated: November 28, 1994.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94-29641 Filed 12-1-94; 8:45 am]

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federal register

Friday
December 2, 1994

Part IX

Department of the Interior

Fish and Wildlife Service

50 CFR Part 15

Importation of Exotic Wild Birds to the United States; Amendment of Final Rule Implementing the Wild Bird Conservation Act of 1992; Final Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 15

RIN 1018–AC51

Importation of Exotic Wild Birds to the United States; Amendment of Final Rule Implementing the Wild Bird Conservation Act of 1992

AGENCY: Fish and Wildlife Service.

ACTION: Final rule.

SUMMARY: On October 23, 1992, the Wild Bird Conservation Act (WBCA) was signed into law, the purposes of which include promoting the conservation of exotic birds by: ensuring that all imports into the United States of species of exotic birds are biologically sustainable and not detrimental to the species; ensuring that imported birds are not subject to inhumane treatment during capture and transport; and assisting wild bird conservation and management programs in countries of origin. This final rule amends the final rule published by the Fish and Wildlife Service (Service) on November 16, 1993, in the **Federal Register** (58 FR 60524), which implements the prohibitions stipulated in the WBCA and provides permit requirements and procedures for some allowed exemptions. As a result of a lawsuit filed on February 15, 1994 by the Humane Society of the United States and Defenders of Wildlife, and a resultant District Court Order that declared a portion of the contested regulation as invalid, the Service hereby amends 50 CFR 15.11 (b) and (c). Notice of the Court Order was published in the **Federal Register** on May 24, 1994 (59 FR 26810). Consistent with that Court Order, the Service announced in that **Federal Register** notice that all exotic birds in listed Appendix III of The Convention on International Trade in Endangered Species (CITES) are covered by the automatic import moratorium of the WBCA, regardless of their country of origin.

EFFECTIVE DATE: This final rule is effective on the December 2, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Susan S. Lieberman, U. S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 420C, Arlington, VA 22203, telephone (703) 358–2093.

SUPPLEMENTARY INFORMATION: This rule amends 50 CFR 15.11 (b) and (c)—Prohibitions, of the final rule published in the **Federal Register**, November 16, 1993 (58 FR 60524).

In the final rule of November 16, 1993, the Service interpreted that Appendix III species are considered CITES-listed species for the purposes of these regulations only if they originate in the country that listed them in Appendix III. The Service noted that the listing of a species in Appendix III is a unilateral action by a particular CITES Party, thereby requiring CITES permits and implementation of CITES permit issuance requirements for that country only; when the species is found in countries that did not list it in Appendix III, only a certificate of origin is required, stating that it did not originate in the country that listed the species in Appendix III. Therefore, when the species is found in countries other than where listed in Appendix III, it is not subject to the same level of CITES controls, and indeed is only listed in the Appendices to assist the listing state in implementing its domestic legislation. Based on its understanding of the intent of Congress, the Service implemented a final rule whereby Appendix III species were subject to the automatic import prohibitions of the law, only if they originated in the listing country. Otherwise, they would be subject to the discretionary prohibitions of the law.

The Humane Society of the United States and Defenders of Wildlife brought a civil action against the Secretary of the Interior in the United States District Court for the District of Columbia challenging that part of 50 CFR 15.11 which restricts the importation of certain Appendix III exotic birds (*Humane Society of the United States* v. *Babbitt*, Civ. No. 94–0296, D.D.C., March 29, 1994). A hearing in the District Court took place on March 7, 1994. Plaintiffs argued that this provision, which was adopted through notice and comment procedures, violates the language of the Wild Bird Conservation Act of 1992. They sought relief to suspend or invalidate the following exception, contained in the final rule, to the prohibition on importation of birds listed in the Convention's appendices: "This paragraph (b) does not apply to an exotic bird species listed in Appendix III to the Convention that originated in a country that has not listed the species in Appendix III" (50 CFR 15.11 (b) (2)). Plaintiffs argued that this provision violates the plain language of the Act, which bars the importation of "any" species listed in "any" appendix to the Convention.

On March 29, 1994, U.S. District Judge Louis F. Oberdorfer found the contested regulation to be invalid. [This Court Order was discussed in a Notice in the **Federal Register** published on May 24, 1994.] Therefore, the Service hereby amends 50 CFR 15.11 (b) and (c) to comply with the Court Order. The Service mandates that all bird species listed in CITES Appendix III (in addition to those in Appendices I or II), wherever found, cannot be imported into the U.S. unless they are either accompanied by an import permit issued pursuant to Subpart C of 50 CFR Part 15, or they are included in an approved list. On March 17, 1994, the Service published in the **Federal Register** (59 FR 12784) a proposed rule that would establish those approved lists. This final rule is a result of the Court Order discussed in the Notice published in the **Federal Register** on May 24, 1994, and is adopted through public notice and comment procedures. Therefore, in accordance with 5 U.S.C. 553(d)(3), the Service has determined that good cause, as reflected by the final Court Order, exists so that this final rule will be made effective upon publication in the **Federal Register**. The Service received a total of three comments on the proposed rule preceding this final rule that was published in the **Federal Register** on June 3, 1994 (59 FR 28826). One commenter endorsed the proposed ruling. One commenter supported the original interpretation by the Service in the WBCA of birds listed in CITES Appendix III, and inquired as to why the Service did not appeal the decision rendered in the Court Order. The decision not to appeal was made by the Service, the Solicitor's Office, and the Justice Department after careful deliberation over the legal, policy, and budgetary implications of continued litigation. The remaining commenter addressed concerns that though valid, were not pertinent to the contents of the proposed rule.

Effects of the Rule

The Service has determined that this final rule is categorically excluded under Departmental procedures in complying with the National Environmental Policy Act (NEPA). See DOI Departmental Manual, 516 DM 2, Appendix 1, 1.10. The regulations are procedural in nature, and the environmental effects are judged to be minimal, speculative, and do not lend themselves to meaningful analysis. The permits and other administrative actions authorized under the WBCA and regulations will be subject to future NEPA documentation requirements, on a case-by-case basis.

Executive Orders 12866, 12612, and 12630 and the Regulatory Flexibility Act

This final rule was not subject to Office of Management and Budget

review under Executive Order 12866. This action would not be expected to have significant taking implications for U.S. citizens, as per Executive Order 12630. Any effects on small entities (importers, shippers, etc.) would likely be minor, and would in any event be the mandatory result of the district court ruling. Future final rulemaking will establish procedures for listing of species approved for import, which may reduce any effects on small entities. No reporting requirements would be added to existing regulations. Therefore, this revision would not have a significant economic effect on a substantial number of small entities as described by the Regulatory Flexibility Act. Since this final rule applies to importation of live exotic birds into the United States, it does not contain any Federalism impacts as described in Executive Order 12612. The Department has certified that this rule meets the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

Paperwork Reduction Act

No new information collection requirement(s) are contained in this final rule for which OMB approval under 44 U.S.C. 3501 is necessary.

Author

The author of this final rule is Mark Phillips, Office of Management Authority, U.S. Fish and Wildlife Service, Arlington, VA 22202 (703/358–2104, ext. 5450)

List of Subjects in 50 CFR Part 15

Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

Accordingly, Part 15 of Chapter I of title 50 of the Code of Federal Regulations is amended as follows:

PART 15—[AMENDED]

1. The authority citation for Part 15 continues to read as follows:

Authority: 16 U.S.C. 4901–4916.

2. Section 15.11 of Subpart B is amended by revising § 15.11 (b) and (c) to read as follows:

§ 15.11 Prohibitions.

* * * * *

(b) It is unlawful to import into the United States any exotic bird species listed in the Appendices to the Convention that is not included in the approved list of species, pursuant to subpart D of this part, except that this paragraph (b) does not apply to any exotic bird that was bred in a foreign breeding facility listed as qualifying pursuant to subpart E of this part.

(c) It is unlawful to import into the United States any exotic bird species not listed in the Appendices to the Convention that is listed in the prohibited species list, pursuant to subpart F of this part.

* * * * *

Dated: November 21, 1994.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 94–29674 Filed 12–1–94; 8:45 am]

BILLING CODE 4310–55–P

50 CFR Part 15

RIN 1018–AC15

Importation of Exotic Wild Birds to the United States; Final Rule Implementing the Wild Bird Conservation Act of 1992

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: On October 23, 1992, the Wild Bird Conservation Act of 1992 (WBCA) was signed into law, the purposes of which include promoting the conservation of exotic birds by: Ensuring that all imports of exotic bird species into the United States are biologically sustainable and not detrimental to the species; ensuring that imported birds are not subject to inhumane treatment during capture and transport; and assisting wild bird conservation and management programs in countries of origin. This final rule implements procedures for the establishment of an approved list of species listed in the Appendices to the Convention on International Trade in Endangered Species of Wild Fauna and Flora that may be imported without a WBCA permit because it has been determined that trade in these species involves only captive-bred specimens.

EFFECTIVE DATE: This rule is effective January 3, 1995.

FOR FURTHER INFORMATION CONTACT: Dr. Susan S. Lieberman, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, room 420C, Arlington VA 22203, telephone (703) 358–2093.

SUPPLEMENTARY INFORMATION: This final rule implements aspects of the WBCA, which was signed into law on October 23, 1992. This is the second of two rulemakings under the WBCA; the first final rulemaking under the WBCA was published in the **Federal Register** on November 16, 1993 (58 FR 60524). The WBCA limits or prohibits imports of exotic bird species to ensure that their wild populations are not harmed by trade. It also encourages wild bird conservation programs in countries of origin by both ensuring that all imports of such species into the United States are biologically sustainable and not detrimental to the species, and by creating an Exotic Bird Conservation Fund to provide conservation assistance in countries of origin. The final rule of November 16, 1993, summarized the effects of the WBCA and established procedures for obtaining import permits authorized by the WBCA.

An immediate moratorium, effective October 23, 1992, was established on the importation of 10 species of wild birds of particular concern that were listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, or Convention), two of which were moved to Appendix I at the March 1992 CITES meeting. The prohibition on importation of those species was announced in the **Federal Register** on December 4, 1992 (57 FR 57510).

During the one-year period immediately following enactment of the WBCA, from October 23, 1992, to October 22, 1993, import quotas were established for CITES-listed bird species. Those quotas were announced in the **Federal Register** on December 4, 1992 (57 FR 57510). A notice published on March 30, 1993 (58 FR 16644), solicited public comments and announced a public meeting, held April 15–16, 1993, to receive input from the public for the development of regulations to implement some of the provisions of the WBCA. Useful input was received from a broad cross-section of interested members of the public who participated in the meeting and submitted comments in writing; that input has been used to develop this final rule. A notice published on April 16, 1993 (58 FR 19840), announced species for which the quotas had been met and no further individual birds could be imported.

With the publication of the final rule of November 16, 1993, imports of all CITES-listed birds (as defined in the final rule) are prohibited, except for (a) species included in an approved list; (b) specimens for which an import permit has been issued; (c) species from countries that have approved management plans for those species; or (d) specimens from approved foreign captive-breeding facilities. The U.S. Fish and Wildlife Service (Service) published a proposed rule in the **Federal Register** on March 17, 1994 (59#FR 12784), that would implement procedures for approval of foreign captive-breeding facilities and

establishment of an approved list of species listed in the CITES Appendices that can be imported without a WBCA permit; that approved list is published herein.

As a result of a lawsuit filed on February 15, 1994, by the Humane Society of the United States and Defenders of Wildlife, and a resultant District Court Order that found a portion of the regulation in the November 16, 1993, **Federal Register** (58 FR 60524) invalid, the Service, consistent with that Court Order, announced in the **Federal Register** on May 24, 1994 (59 FR 26810), that all exotic birds listed in Appendix III of CITES are covered by the automatic import moratorium of the WBCA, regardless of their country of origin. A proposed rule was published on June 3, 1994 (59 FR 28826), to promulgate that regulatory change.

This rule finalizes those proposals made in the **Federal Register** of March 17, 1994, for the approved list of captive-bred species, with some modifications based on comments received and further analysis by the Service. The proposed regulations for the approval of foreign breeding facilities and the approved list for wild-caught CITES-listed species will be addressed in a future final rulemaking.

Comments and Information Received

The Service received roughly 4800 comments from the public, including over 4600 form letters from private aviculturists (bird breeders) and comments from 6 conservation and/or animal welfare organizations, 1 zoological organization, 2 scientific organizations, 1 representative of the pet industry, 2 private companies, 3 importers, 11 avicultural organizations, and 6 falconry/raptor breeder organizations; the remaining comments were from other private individuals.

Comments of a General Nature

Several commenters, including a scientific organization, several conservation organizations, a zoological organization, an avicultural organization, and some private individuals, supported the criteria for listing species on the approved list of captive-bred species and the proposed list of captive-bred species in their entirety.

Numerous comments contended that the proposed list of approved captive-bred species was too restrictive and allowed for the captive breeding of only those species on the approved list. The Service is aware that the proposed list of approved captive-bred species has caused misunderstanding and confusion in the avicultural community and wishes to clarify what the WBCA and the approved list for captive-bred species actually regulates. Neither the Wild Bird Conservation Act nor the Service's regulations implementing Section 106 of the Act impose new burdens or requirements on buying, selling, breeding, transport, interstate commerce, or export of birds bred in the United States. Those activities are not regulated by the WBCA. What the WBCA does is to restrict imports of bird species listed in the CITES Appendices, whether taken from the wild or bred in captivity.

Species listed on the approved list of captive-bred species are those species that can be imported into the United States without a WBCA permit. This approved list of captive-bred species does not regulate the breeding, selling, transport, interstate commerce, or export of birds bred in the United States. Several commenters were under the false impression that, if a species is not on the approved list of captive-bred species, this species could not be possessed or bred in the United States. The Service encourages such captive breeding within the United States to meet the commercial demand for pet birds. The Service also notes that the approved list of captive-bred species only means that the species is approved for import without a WBCA permit; it does not mean that the Service does not approve the breeding of other species. The Service is in the process of working to ease the bird breeding public's concerns by initiating a program of public education on the WBCA and its regulations.

Comments Pertaining to Section 15.31: Criteria for Including Species in the Approved List for Captive-Bred Species

This section establishes the criteria for the inclusion of captive-bred species in the approved list. Pursuant to Section 106 of the WBCA, the Secretary of the Interior (Secretary) is required to publish a list of species of exotic birds that are listed in an appendix to the Convention and that are not subject to a prohibition or suspension of importation otherwise applicable under the WBCA. In order to list a species as exclusively captive-bred, the Service is required by the statute to determine that the species is regularly bred in captivity and that no wild-caught birds of the species are in trade, legally or illegally

These captive-bred species can be imported into the United States without meeting any additional requirements of the Wild Bird Conservation Act or this Part 15; however, all of the existing requirements in Parts 13 and 14, Part 17 (species listed as endangered or threatened under the Endangered Species Act (ESA)), Part 21 (Migratory Bird Treaty Act), and Part 23 (species listed in the Appendices to the Convention, or CITES) must still be complied with.

This section establishes the following criteria for the approval of the importation of captive-bred species:

(a) All specimens of the species known to be in trade (legal or illegal) must be captive-bred;

(b) No specimens of the species can be known to be removed from the wild for commercial purposes;

(c) Any importation of specimens of the species must not be detrimental to the survival of the species in the wild; and

(d) Adequate enforcement controls must be in place in countries of export to ensure compliance with the aforementioned paragraphs. Imports of species approved according to the criteria of this section are not limited to specimens originating from qualifying facilities as described under Subpart E of this Part.

If a species is bred in captivity in large numbers, but individual birds of that species are frequently, sometimes, or even rarely taken from the wild, or if there are enforcement concerns that illegal trade occurs in the species, the statute does not allow that species to be included as a captive-bred species. However, individual captive-bred birds may still be imported into the United States under one of the following conditions: (1) the foreign breeding facility could be approved pursuant to Subpart E of this Part 15; or (2) a permit for an individual import could be obtained pursuant to Subpart C, if the requirements of that Subpart are met.

As established in the WBCA, the Service will periodically review the list of species that meet the approval criteria for the importation of captive-bred species. Any changes [additions and/or deletions] to this approved list will be proposed in the **Federal Register** for public comment, followed by a final rule in which the proposed changes will be made or an explanation provided for not making them.

Numerous commenters, including 762 form letters from aviculturists, requested that all captive-bred birds be exempted from the WBCA and its implementing regulations. The Service disagrees, since that is not allowed by the statute. One of the purposes of the WBCA is to assist wild bird conservation and management in the countries of origin. However, except for the 10 bird families specifically exempted from the WBCA, the WBCA applies to all species of exotic birds

being exported from any country, whether individual birds are of captive or wild origin. In passing the WBCA, Congress recognized that there are serious concerns that wild-caught birds are often intentionally misrepresented as captive-bred. For this reason, the law specifies criteria for the import of captive-bred species; it does not simply exempt them. Furthermore, the Service is aware of illegal trade whereby wild-caught birds are misrepresented as captive-bred and laundered as captive-bred birds. Therefore, it would be inconsistent with both the plain language and intent of the statute to exempt entirely all birds that are claimed to be bred in captivity from the provisions of the law. However, the Service notes that, in addition to the list of approved captive-bred species, several other ways exist to import captive-bred birds into the United States under the WBCA.

Numerous commenters objected to the Service's use of the standards adopted by the State of New York with respect to establishing the criteria for including species in the approved list for captive-bred species, and commented that such standards were too restrictive. The Service disagrees. The Service was advised to adopt such standards by the House of Representatives Committee Report for the WBCA. The House Merchant Marine and Fisheries Committee advised the Service "to use the standards adopted by the State of New York with respect to importation of captive-bred species, and include such species on the approved list under this section, as long as the Secretary believes that trade based on these standards will not result in harm to species in the wild" [House Report No. 102–749 (I) pages 1602–1603]. These standards would include species of exotic birds in the approved list if the species is regularly bred in captivity and none are taken from the wild for trade. Many commenters stated that many more species are bred in captivity than occur on the New York State Approved List of Captive-bred Species and that this list was adopted years ago when avicultural techniques were not as developed as they are today. The Service agrees that many more species are bred in captivity now than when New York State developed its regulations and approved list. The Service has adopted the standards used by New York State in developing its criteria for the approval of captive-bred species, and has included many species that are not found on the New York State approved list of captive-bred species.

Animal welfare organizations and one conservation organization supported the criteria for including species on the approved list of captive-bred species, but requested that additional criteria be added to conform to CITES requirements for the humane transport of live animals. They requested that species experiencing 10% or higher mortality in transit or 15% or higher mortality in quarantine not be included on the approved list of captive-bred species. Although the Service is concerned about the humane treatment and transport of all birds, it disagrees that such criteria are required for including species on the approved list of captive-bred species. The Service implements requirements for the humane and healthful transport of live birds imported into the United States through its implementation of the Lacey Act humane and healthful transport requirements, found in 50 CFR Part 14. In including species on the approved list of captive-bred species, the Service is required to determine that the species is regularly bred in captivity and no wild-caught birds of the species are in trade, legally or illegally. The Service notes as well that mortalities in shipments of birds that are bred in captivity tend to be lower than those of wild-caught birds.

Several aviculturists commented that the approved list of captive-bred species should include species where captive breeding of the species is needed to conserve the species. The Service recognizes the contribution that captive breeding may make to the conservation of some species, but the statute does not instruct the Secretary to list a species on the approved list of captive-bred species using such criteria. If an ex-situ captive-breeding program is needed for a species' conservation, wild-caught or captive-bred birds may be imported from approved overseas breeding facilities, from countries with approved management plans, and for scientific research, zoological breeding, and approved cooperative breeding programs under WBCA permits available from the Service. The Service notes that cooperative breeding programs encourage such conservation efforts.

Several aviculturists commented that the approved list of captive-bred species would cause a loss of genetic diversity in captive populations of birds in the U.S. and restrict access to new bloodlines for a species' conservation. The Service disagrees and notes that birds which are not on the approved list of captive-bred species may still be imported into the U.S. under the WBCA in several other ways: from approved overseas breeding facilities, from countries with approved management plans, and for scientific research, zoological breeding, and approved cooperative breeding programs. Congress included the exemptions for zoological breeding and cooperative breeding programs for just this purpose. The Service notes that it is not the intent of approval of captive-bred species to enhance conservation of a species, but rather to facilitate imports of specimens that in no way impact wild populations.

Numerous aviculturists (including 2318 represented by form letters), a representative of the pet industry, avicultural groups, and several importers commented that any species that is regularly captive-bred, and that is prohibited from export for the pet trade by its country of origin, should be listed on the approved list of captive-bred species (regardless of enforcement concerns). For example, they recommend that all species which are regularly bred in captivity and are indigenous solely to Australia, a country from which there is no legal avian trade in wild-caught birds, should be listed on the approved list of captive-bred species. The Service disagrees. There remain problems in adequate regulatory and enforcement mechanisms in many countries of origin for species which are subject to illegal trade. Adoption of this recommendation would lead to the logically absurd conclusion to list all indigenous parrots of Mexico on the approved list of captive-bred species because Mexico bans their export. Since there exists a flourishing domestic trade in wild-caught parrots in Mexico and their subsequent illegal export to the U.S., such inclusion on the approved list would undermine species conservation, as well as Mexico's enforcement efforts. We cannot adopt this recommendation, which is counter to the purpose of the statute and the intent of Congress.

Several aviculturists, some importers, and a raptor breeders' organization commented that species should be listed on the approved list of captive-bred species, on a country-by-country basis, if they are reliably bred in captivity in a specific country only. For example, Saker falcons from Great Britain would be listed on the approved list of captive-bred species because they are reliably captive-bred in Great Britain. The Service disagrees and is making no changes based on these comments. The statute does not provide for species listings in such a country-by-country manner. However, the qualifying overseas breeding facilities can be listed by the country from which the species is to be imported.

The representative of the pet industry and a national avicultural organization objected to Section 15.31 (a) stating that it is inappropriate for the Service to require that all specimens of the species known to be in trade (legal or illegal) be captive-bred. They consider trade to be legal trade only and that illegal trade should not be considered to be trade. They recommend that the Service not take illegal trade into consideration. The Service strongly disagrees and recognizes that it was Congress' intent to prevent the illegal trade in birds, which is detrimental to species' survival, and the laundering of wild-caught birds as captive-bred specimens. The Service notes that, for any species, trade includes both legal and illegal trade. Article I of the CITES Convention defines trade as "export, re-export, import and introduction from the sea" and does not differentiate legal from illegal. For the purposes of implementing this law, the Service agrees with the authors of the CITES Convention, as well as the reality of international trade, that trade has both legal and illegal components.

The Service originally proposed that Section 15.31 (b) read "no specimens of the species can be known to be removed from the wild for the pet bird market." In its review of the comments, the Service noted that several commenters were confused by this wording and the Service has changed Section 15.31 (b) to read "no specimens of the species can be known to be removed from the wild for commercial purposes." If in the future wild-caught specimens are imported to the U.S. for the exemptions allowed under the WBCA for scientific research, zoological breeding or display, personal pets, or approved cooperative breeding programs, such importations would not preclude listing the species in the approved list of captive-bred species when the species is reliably bred in captivity and all specimens imported for commercial purposes are captive-bred. Commercial purposes includes but is not limited to the pet market (it also includes travelling animal acts, circuses, and other uses which result in financial benefit).

The representative of the pet industry and a national avicultural organization objected to Section 15.31 (c) stating that "inasmuch as the listing process requires that no wild-caught specimens are in trade, there is no necessity even to address the non-detriment issue" and that such a requirement is beyond the scope of the WBCA. The Service disagrees. One of the stated purposes of the WBCA is to ensure that all trade in species of exotic birds involving the U.S. is biologically sustainable and is not detrimental to the species. The WBCA requires the Service to make such a finding before listing species on the approved list of captive-bred species. The Service was also advised to adopt such standards by the House of Representatives Committee Report for the WBCA. In this Committee Report, the Secretary was advised "to use the standards adopted by the State of New York with respect to importation of captive-bred species, and include such species on the approved list under this section, as long as the Secretary believes that trade based on these standards will not result in harm to species in the wild" [House Report No. 102–749 (I) pages 1602–1603].

Furthermore, the Service believes that if the inclusion of any species on an approved list could be detrimental to the survival of the species in the wild, the intent of Congress, the purposes of the WBCA and the "non-detriment" requirements of CITES for Appendix II species are such that the species should not be included in the approved list. The Service cannot list a species in the approved list if such listing could undermine the conservation of wild bird species in the wild. Therefore, the Service is making no changes based on these comments.

Several aviculturists and one conservation organization expressed confusion over Section 15.31 (d). They note that adequate enforcement controls should be in place in countries of export of captive-bred birds, as well as in countries of origin of the wild populations. The Service agrees and notes that it is just as critical that enforcement be in place and adequate in range countries as it be in place in exporting countries. The Service notes that adequate enforcement in exporting countries is critical to ensure that wild-caught birds will not be misrepresented and laundered as captive-bred birds. Adequate enforcement is critical to implementation of CITES, a specified purpose of the WBCA. Therefore, the Service has modified 15.31 (d) accordingly.

General Comments Pertaining to Section 15.33: Species Included in the Approved List for Captive-Bred Species

This section establishes a list of approved captive-bred species, based on the criteria in Section 15.31. The Service used the best information available, including records of imports into the United States of both wild-caught and captive-bred birds for the years 1988–1992, CITES annual reports, published reports on the bird trade, law enforcement data on the commercial trade in captive-bred species, law enforcement and intelligence information on the illegal trade in exotic bird species, information from the CITES Secretariat, and information from other governments. The final list of approved species includes 45 captive-bred exotic bird species and the color mutations for 3 captive-bred species that can be imported from any other country without a WBCA permit; other applicable requirements still apply, including any permits or documents required by CITES, other federal laws, and the exporting country.

The Service has included in the approved list of captive-bred species several exotic bird species that are not listed in any Appendix to the Convention but are regularly bred in captivity and are not taken from the wild. Although these species are not listed in an Appendix and thus are not presently prohibited under the WBCA, these species are included in the list for the convenience of the public. If any of these species were to become listed in CITES Appendix I, II, or III, their importation would remain exempt from the provisions of the WBCA, pursuant to this section. To ensure that there is no confusion, even if the species or higher taxon to which it belongs were subsequently listed in the Appendices to the Convention, the Service would still consider it to be an approved captive-bred species pursuant to this subpart D.

Several commenters supported the approved list of captive-bred species published in the March 17, 1994 **Federal Register** notice, whereas numerous commenters suggested specific additions of parrot and finch species to the approved list. The Service reviewed information available to it for all of these species, based on the criteria in Section 15.31. These comments are addressed below.

Several falconry/raptor breeder organizations commented that all birds in the order Falconiformes should be exempted from the WBCA and its implementing regulations. The Service disagrees and cannot exempt entire families of birds that Congress did not choose to exempt. Except for the 10 bird families specifically exempted by the WBCA, the WBCA applies to all species of exotic birds being exported from any country, whether individual birds are of captive or wild origin. However, the Service notes that raptors can be imported into the United States in several ways, including under permit requirements for scientific research, cooperative breeding programs, or zoological display or breeding.

Several commenters expressed concerns that once this list of approved

captive-bred species is published, no additional species could be added to the list. That is not the case. As new information becomes available, and as captive breeding becomes more successful, the Service may propose modifications to this list of approved captive-bred species, including the inclusion of additional species.

Some of the species recommended by several commenters for inclusion in the list of approved captive-bred species are very rare in aviculture, and there are few records of their international trade, either in the United States or elsewhere. The Service has not included such species in the approved list, and notes that a purpose of the list of approved captive-bred species is to facilitate commercial importation of captive-bred species, whose trade in no way can be detrimental to populations of these species in the wild. The fundamental purpose of the WBCA is conservation of exotic bird species in the wild. For species that are rare in aviculture, individual captive-bred birds may be imported for approved cooperative breeding programs, zoological breeding and display, or scientific research, pursuant to Subpart C of this part.

Comments on Specific Species

Several commenters suggested specific species for inclusion in the approved list of captive-bred species, which are addressed as follows:

Psittacines That Cannot Be Added to the Approved List

The Service found that the following psittacine species could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31(a), and that wild-caught birds are in trade and have been imported into the United States: Red-faced lovebird (*Agapornis pullaria*), Fischer's lovebird (*Agapornis fischeri*), Madagascar or Grey-headed lovebird (*Agapornis cana*), Green-winged king parrot (*Alisterus chloropterus*), Amboina king parrot (*Alisterus amboinensis*), Blue-fronted amazon (*Amazona aestiva*), Yellow-crowned Amazon (*Amazona ochrocephala*), Orange-winged Amazon (*Amazona amazonica*), Mealy Amazon (*Amazona farinosa*), Red-winged Parrot (*Aprosmictus erythropterus*), Scarlet macaw (*Ara macao*), Blue and yellow macaw (*Ara ararauna*), Green-winged macaw (*Ara chloroptera*), Golden-crowned conure (*Aratinga aurea*), Orange-fronted conure (*Aratinga canicularis*), Golden-capped Conure (*Aratinga auricapilla*), Andean or Sierra Parakeet (*Bolborhynchus aymara*), Tovi or orange-chinned Parakeet (*Brotogeris jugularis*), Canary-winged parakeet (*Brotogeris versicolurus*), Citron-crested cockatoo (*Cacatua sulphurea citrinocristata*), White or umbrella cockatoo (*Cacatua alba*), Salmon-crested Cockatoo (*Cacatua moluccensis*), Lesser sulphur-crested Cockatoo (*Cacatua sulphurea*), Greater sulphur-crested cockatoo (*Cacatua galerita*), Triton cockatoo (*Cacatua galerita triton*), Bare-eyed cockatoo (*Cacatua sanguinea*), Ducorp's cockatoo (*Cacatua ducorpsii*), Goffin's cockatoo (*Cacatua goffini*), Red-vented cockatoo (*Cacatua haematuropygia*), Duyvenbode's lory (*Chalcopsitta duivenbodei*), Yellow-streaked lory (*Chalcopsitta scintillata*), Stella's lorikeet (*Charmosyna papou*), Red-flanked lorikeet (*Charmosyna placentis*), Vasa parrot (*Coracopsis vasa*), Eclectus parrot (*Eclectus roratus*), Austral conure (*Enicognathus ferrugineus*), Blue-streaked lory (*Eos reticulata*), Red lory (*Eos bornea*), Pacific parrotlet (*Forpus coelestis*), Green-rumped parrotlet (*Forpus passerinus*), Blue-winged parrotlet (*Forpus xanthopterygius*), Chattering lory (*Lorius garrulus*), Black-headed caique (*Pionites melanocephala*), White-crowned Pionus (*Pionus senilis*), Meyer's parrot (*Poicephalus meyeri*), Senegal parrot (*Poicephalus senegalus*), Moustache parakeet, (*Psittacula alexandri*), Derbyan parakeet (*Psittacula derbiana*), Alexandrine parakeet (*Psittacula eupatria*), Slaty-headed parakeet (*Psittacula himalayana*), African Indian Ringneck (*Psittacula krameri krameri*), Blossom-headed parakeet (*Psittacula roseata*), African grey parrot (*Psittacus erithacus*), Maroon-tailed conure (*Pyrrhura melanura*), Painted conure (*Pyrrhura picta*), Goldie's lorikeet (*Trichoglossus goldiei*), Perfect lorikeet (*Trichoglossus euteles*), Swainson's or blue mountain lorikeet (*Trichoglossus haematodus moluccanus*) and red-collared lorikeet (*Trichoglossus haematodus rubritorquis*).

Although no imports of wild-caught Sun conures (*Aratinga solstitialis*) were recorded for the United States, wild-caught birds were available from Guyana, which had an annual export quota of 600 birds for this species during 1988–1991. Therefore, Sun conures are not included in the approved list.

The Service found that the following species, which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31(a) and wild-caught birds are in international trade: Lineolated or barred parakeet (*Bolborhynchus lineola*), and Spectacled parrotlet (*Forpus conspicillatus*).

The Service found that the following bird species, which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because there was insufficient information to determine that all specimens in trade were captive-bred: Black goshawk (*Accipiter melanoleucus*), Black-cheeked lovebird (*Agapornis nigrigenis*), Black-collared lovebird (*Agapornis swinderniana*), Abyssinian lovebird (*Agapornis taranta*), Buffon's macaw (*Ara ambigua*), Blue-throated [Caninde] macaw (*Ara glaucogularis*), Illiger's macaw (*Ara maracana*), Mountain parakeet (*Bolborhynchus aurifrons*), Blue-eyed cockatoo (*Cacatua ophthalmica*), Slender-billed conure (*Enicognathus leptorhynchus*), Yellow-faced parrotlet (*Forpus xanthops*), Sclater's parrotlet (*Forpus sclateri*), Red-cheeked parrot (*Geoffroyus geoffroyi*), Musk lorikeet (*Glossopsitta concinna*), Purple-crowned lorikeet (*Glossopsitta porphyrocephala*), Little lorikeet (*Glossopsitta pusilla*), Philippine hanging parrot (*Loriculus philippensis*), Purple-capped lory (*Lorius domicellus*), Black-capped lory (*Lorius lory*), Tepui parrotlet (*Nannopsittaca panychlora*), Orange-bellied parakeet (*Neophema chrysogaster*), Rock parakeet (*Neophema petrophila*), White-bellied caique (*Pionites leucogaster*), Coral-billed pionus (*Pionus sordidus*), Plum-crowned pionus (*Pionus tumultuosus*), Ruppell's parrot (*Poicephalus rueppellii*), Paradise parrot (*Psephotus pulcherrimus*), which is probably extinct in the wild, Pesquet's parrot (*Psittrichas fulgidus*), Malabar parakeet (*Psittacula columboides*), Blaze-winged conure (*Pyrrhura devillei*), Fiery-shouldered conure (*Pyrrhura egregria*), Sulphur-winged conure (*Pyrrhura hoffmanni*), Pearly conure (*Pyrrhura perlata*), Crimson-bellied conure (*Pyrrhura rhodogaster*), Black-capped conure (*Pyrrhura rupicola*), all 7 species of Touit parrotlets, Varied lorikeet (*Trichoglossus versicolor*), and Blue-crowned lory (*Vini australis*).

For the above species, there are either no records or very few records of any specimens in trade. The Service was therefore not able to make the determination required by the statute that the above species are regularly bred in captivity and that the importation of specimens of the species is not detrimental to the species survival in the wild. The Service recognizes that with increased captive breeding efforts for these species, they may be able to

meet criteria for approval in § 15.31 in the future.

Birds of Prey That Cannot Be Added to the Approved List

The Service found that the following bird of prey species could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31(a), and that wild-caught birds are in trade: Black kite (*Milvus migrans*), and European eagle owl (*Bubo bubo*).

Toucans That Cannot Be Added to the Approved List

The Service found that the following toucan species, which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because it did not meet the criteria for approval in § 15.31(a) and wild-caught birds are in trade and have been imported into the United States: Toco toucan (*Ramphastos toco*).

Law Enforcement Concerns

The Service found that the following bird species, all of which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31 due to law enforcement concerns that wild-caught birds are in trade illegally and have been imported either into the United States or other countries: Nyasa lovebird (*Agapornis lilianae*), Australian king parrot (*Alisterus scapularis*), Double yellow-headed Amazon (*Amazona ochrocephala oratrix*), Green-cheeked Amazon (*Amazona viridigenalis*), Gang-gang cockatoo (*Callocephalon fimbriatum*), Major Mitchell's cockatoo (*Cacatua leadbeateri*), Western long-billed cockatoo (*Cacatua pastinator*), Long-billed corella (*Cacatua tenuirostris*), Spix's macaw (*Cyanopsitta spixii*), Rose-breasted cockatoo or Galah (*Eolophus roseicapillus*), Mexican parrotlet (*Forpus cyanopygius*), Black Palm cockatoo (*Probosciger aterrimus*), Lanner falcon (*Falco biarmicus*), Saker falcon (*Falco cherrug*), Gyrfalcon (*Falco rusticolus*), Red siskin (*Carduelis cucullata*), and Crimson finch (*Neochmia phaeton*).

Illegal trade in lanner falcons and saker falcons was reported in the Review of Alleged Infractions and Other Problems of Implementation of the Convention (Doc. 9.22), which is a document prepared by the CITES Secretariat for discussion at the Ninth Meeting of the Conference of the Parties to CITES. These species appear to be involved in illegal trade on a fairly regular basis, including the laundering of wild-caught specimens through captive-breeding operations.

The Service received 1708 form letters requesting that all cockatoo species from Australia be added to the approved list of captive-bred species. The Service disagrees, because all cockatoo species do not meet the criteria for approval in § 15.31 due to the illegal trade in wild-caught birds from Australia. A recent three-year covert law enforcement investigation, dubbed Operation Renegade, found that over a 10-year period individuals were hired as couriers and travelled to Australia each fall during the cockatoo nesting season to remove eggs from nests in the wild. Several hundred smuggled eggs were then incubated, hand-reared, and sold as captive-bred birds to collectors in the United States. Among the smuggled species were Rose-breasted cockatoos, Red-tailed black cockatoos, Major Mitchell's cockatoos, and Slender-billed corellas. This investigation was a joint effort with law enforcement officials from Australia, New Zealand, and the United States, and to date, has resulted in criminal convictions against 17 individuals.

CITES-Listed Passerines That Cannot Be Added to the Approved List

The Service found that the following CITES-listed passerine species, which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31(a) and wild-caught birds are in trade and have been imported into the United States or have been in international trade: Strawberry finch (*Amandava amandava*), Greater Indian [Javan] hill myna (*Gracula religiosa*), St. Helena waxbill (*Estrilda astrild*), Orange-cheeked waxbill (*Estrilda melpoda*), Black-rumped waxbill (*Estrilda troglodytes*), Yellow-crowned bishop (*Euplectes afer*), Orange weaver (*Euplectes orix franciscanus*), Village Indigobird or Senegal combassou (*Vidua chalybeata*), Red-billed firefinch (*Lagonosticta senegala*), Quail finch (*Ortygospiza atricollis*), Cordon bleu [red-cheeked finch] (*Uraeginthus benegalus*), and Pin-tailed whydah (*Vidua macroura*).

Non-CITES-Listed Passerines That Cannot Be Added to the Approved List

The Service found that the following non-CITES-listed species, which commenters requested be included in the approved list, could not be added to the approved list of captive-bred species because they did not meet the criteria for approval in § 15.31 (However, since they are not listed in the CITES Appendices, they are not covered by the WBCA): Hooded pitta (*Pitta sordida*), Hartlaub's turaco (*Tauraco hartlaubi*), Blue-faced parrot-finch (*Erythrura trichroa*), Red-headed parrot-finch (*Erythrura psittacea*), Pin-tailed parrot-finch (*Erythrura prasina*), Black-cheeked waxbill (*Estrilda erythronotos*), Violet-eared waxbill (*Uraeginthus granatina*), Peters' twinspot (*Hypargos niveoguttatus*), Chestnut munia (*Lonchura malacca*), Yellow-rumped finch (*Lonchura flaviprymna*), Melba finch (*Pytilia melba*), Orange-winged Pytilia (*Pytilia afra*), Saffron finch (*Sicalis flaveola*), Purple grenadier (*Uraeginthus ianthinogaster*), White-rumped shama thrush (*Copsychus malabaricus*), Silver-eared mesa (*Leiothrix argentauris*), Pekin robin (*Leiothrix lutea*), and Asian Fairy bluebird (*Irena puella*).

Some commenters asked that the Java sparrow (*Padda oryzivora*) be approved as a captive-bred species. The Java sparrow is listed as an injurious wildlife species, under regulations in 50 CFR Part 16, and its importation, transportation, or acquisition is prohibited. Therefore, the Service cannot list it as a species approved for importation.

Several form letters were received recommending that the Northern Cardinal (*Cardinalis cardinalis*) be added to the approved list of captive-bred species. This species is native to the United States and is protected under the Migratory Bird Treaty Act (16 U.S.C. 703–711) and implementing regulations in 50 CFR Subchapter B. Therefore, the Service cannot list it as a species approved for importation.

Comments Pertaining to Section 15.33: Species Included in the Approved List for Captive-bred Species. Inclusion of Species in the Approved List, in Addition to Those in the Proposed Rule of March 17, 1994

The Service found that the following species could be added to the approved list of captive-bred species because they meet the criteria for approval in § 15.31: Cherry finch (*Aidemosyne modesta*), Diamond sparrow (*Emblema guttata*), Red-browed finch (*Aegintha temporalis*), Masked lovebird (*Agapornis personata*), Jendaya conure (*Aratinga jandaya*), Yellow-fronted parakeet (*Cyanoramphus auriceps*), Red-fronted parakeet (*Cyanoramphus novaezelandiae*), Blue-winged parrot (*Neophema chrysostoma*), Elegant parrot (*Neophema elegans*), Northern rosella (*Platycercus venustus*), Western or Stanley rosella (*Platycercus icterotis*), Golden-shouldered parakeet (*Psephotus*

chrysopterygius), Indian ringneck parakeet (*Psittacula krameri manillensis*), Scaly-breasted lorikeet (*Trichoglossus chlorolepidotus*), and Common buzzard (*Buteo buteo*).

Several commenters requested that color mutations of several psittacine species be added to the approved list of captive-bred species. The Service agrees when the color mutation is (a) rare or non-existent in the wild, and therefore not likely to be obtained as wild-caught stock; (b) regularly produced in captivity, and (c) distinguishable from the typical wild form and such ability to distinguish the color mutation is easy for the non-expert. Therefore, the Service is adding the following color mutations for selected species to the approved list of captive-bred species: Pacific parrotlet (*Forpus coelestis*) - lutino, yellow, blue and cinnamon forms; lineolated or barred parakeet (*Bolborhynchus lineola*) - blue, yellow, and white forms; and Alexandrine parakeet (*Psittacula eupatria*) - blue and lutino forms. The Service understands that newly discovered color mutations are continuously appearing and being established in captivity, and would appreciate information as the process occurs, so that additional color mutations could be listed on the approved list of captive-bred species.

Comments Pertaining to Section 15.33: Species Included in the Approved List for Captive-Bred Species. Deletions of Species in the Approved List

Animal welfare organizations and one conservation organization commented that Peach-faced lovebird (*Agapornis roseicollis*) and Plum-headed parakeet (*Psittacula cyanocephala*) do not meet the criteria for approval in § 15.31(a) and wild-caught birds are in trade. The Service has reviewed its own and international import trade records for Peach-faced lovebirds and is satisfied that all specimens of the species known to be in trade are captive-bred. The commenters expressed concern that imports of Peach-faced lovebirds from South Africa could be wild-caught birds, since the species occurs in the wild there. The Service reviewed the wildlife import declarations for all Peach-faced lovebirds imported from South Africa to the U.S. from 1988 through 1992 and is satisfied that the birds imported were captive-bred. Virtually all shipments had been certified by the South African CITES Management Authority as captive-bred. This species meets the criteria for approval in § 15.31 and will remain on the approved list of captive-bred species.

The Service has reviewed import trade records for Plum-headed parakeets and found wild-caught specimens of this species in trade, although none have been imported into the United States. Therefore, this species does not meet the criteria for approval in § 15.31, and the Service is not including the Plum-headed parakeet in the approved list of captive-bred species.

The Government of Australia communicated its concern with listing in the approved list of captive-bred species the following species: the Port Lincoln parrot (*Barnardius zonarius*), Swift Parrot (*Lathamus discolor*), Green rosella (*Platycercus caledonicus*), Yellow rosella (*Platycercus flaveolus*), and Blue-bonnet parakeet (*Psephotus haematogaster*). They stated that these species are not common in captivity in Australia and that there are problems associated with the smuggling of wild-caught specimens of these species. The Service proposed these species for listing in its March 17, 1994, Notice of Proposed Rulemaking, based on the information available to it at that time, which showed that specimens imported into the U.S. were captive-bred. Given this new information from Australia, the Service agrees and is not including these species in the final list of approved captive-bred species.

Animal welfare organizations and one conservation organization recommended that the Gouldian finch (*Chloebia gouldiae*), Long-tailed grassfinch (*Poephila acuticaudata*), and Double-barred finch (*Poephila bichenovii*) be deleted from the approved list of captive-bred species because of the high mortality these species suffer in transit and quarantine. Although the Service recognizes the problems with mortality of birds in trade, the statute does not allow the use of such information in listing captive-bred species on the approved list. The Service is committed, however, to enforcement of the Humane and Healthful Transport Regulations in 50 CFR Part 14, which apply to these and all other bird species imported into the United States.

The representative of the pet industry and two aviculturists commented it was "in error and misleading" for the Service to list Bourke's parrot (*Neophema bourkii*) and the Scarlet-chested parrot (*Neophema splendida*) on the approved list of captive-bred species because they are listed as endangered under the U.S. Endangered Species Act (ESA). The Service disagrees and notes that we are aware of the species' listing under the ESA. The Service did not intend to mislead the public and was aware that these species were listed under the ESA and would require ESA permits to be imported. However, the Service found that these 2 species met the criteria in Section 15.31, and since a few captive-bred birds had been imported into the U.S. in past years, it was appropriate to list them and not require a WBCA permit for their import. The Service notes that, although the species is endangered in the wild in Australia, adequate enforcement controls exist such that wild-caught birds are not threatened by illegal trade. The Service does not have any evidence of any specimens in international trade that are not captive-bred. The Government of Australia agrees with this interpretation for these species. The Service has footnoted the species on the approved list of captive-bred species which require an ESA permit for importation to avoid any confusion.

Effects of the Rule

The Service has determined that this final rule is categorically excluded under Departmental procedures in complying with the National Environmental Policy Act (NEPA). See 516 DM [Departmental Manual] 2, Appendix 1 Paragraph 1.10. The regulations are procedural in nature, and the environmental effects, while crafted to carry out the benign purposes of the WBCA, are judged to be minimal, speculative, and do not lend themselves to meaningful analysis. Future regulations implementing the WBCA may be subject to NEPA documentation requirements, on a case-by-case basis.

Executive Orders 12866, 12612, and 12630 and the Regulatory Flexibility Act

This rule was not subject to Office of Management and Budget review under Executive Order 12866. This action is not expected to have significant taking implications for United States citizens, as per Executive Order No. 12630. It has also been certified that these revisions will not have a significant economic effect on a substantial number of small entities as described by the Regulatory Flexibility Act. Since the rule applies to importation of live wild birds into the United States, it does not contain any Federalism impacts as described in Executive Order 12612.

Paperwork Reduction

This final rule does not contain any increase in information collection or record keeping requirements as defined by the Paperwork Reduction Act of 1980. The information collection requirement(s) contained in this section have been approved by the Office of

Management and Budget, as required by 44 U.S.C. 3501 et seq.

List of Subjects in 50 CFR Part 15

Imports, Reporting and recordkeeping requirements, Transportation and wildlife.

Regulation Promulgation

PART 15—WILD BIRD CONSERVATION ACT

Accordingly, 50 CFR Part 15 is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Pub. L. 102–440, 16 U.S.C. 4901–4916.

2. A new Subpart D, consisting of Sections 15.31, 15.32, and 15.33, is added to Part 15 to read as follows:

Subpart D—Approved List of Species Listed in the Appendices to the Convention

Sec.

15.31 Criteria for including species in the approved list for captive-bred species.
15.32 Criteria for including species in the approved list for non-captive-bred species. [Reserved].
15.33 Species included in the approved list.

15.31 Criteria for including species in the approved list for captive-bred species.

The Director will periodically review the list of captive-bred exotic bird species in paragraph 15.33(a), for which importation into the United States is approved. Any exotic bird species listed in paragraph 15.33(a) pursuant to this section must meet all of the following criteria:

(a) All specimens of the species known to be in trade (legal or illegal) are captive-bred;

(b) No specimens of the species are known to be removed from the wild for commercial purposes;

(c) Any importation of specimens of the species would not be detrimental to the survival of the species in the wild; and

(d) Adequate enforcement controls are in place to ensure compliance with paragraphs (a) through (c) of this section.

§ 15.32 Criteria for including species in the approved list for non-captive-bred species. [Reserved]

§ 15.33 Species included in the approved list.

(a) Captive-bred species. The list in this paragraph includes species of captive-bred exotic birds for which importation into the United States is not prohibited by section 15.11. The species are grouped taxonomically by order.

Species	Common name
Order Falconiiformes:	
Buteo buteo	Common European buzzard.
Order Columbiformes:	
Columba livia	Rock dove.
Order Psittaciformes:	
Agapornis personata	Masked lovebird.
Agapornis roseicollis	Peach-faced lovebird.
Aratinga jandaya	Jendaya conure.
Barnardius barnardi	Mallee ringneck parrot.
Bolborhynchus lineola (blue form)	Lineolated parakeet (blue form).
Bolborhynchus lineola (yellow form)	Lineolated parakeet (yellow form).
Bolborhynchus lineola (white form)	Lineolated parakeet (white form).
Cyanoramphus auriceps	Yellow-fronted Parakeet.
Cyanoramphus novaezelandiae	Red-fronted parakeet.
Forpus coelestis (lutino form)	Pacific parrotlet (lutino form).
Forpus coelestis (yellow form)	Pacific parrotlet (yellow form).
Forpus coelestis (blue form)	Pacific parrotlet (blue form).
Forpus coelestis (cinnamon form)	Pacific parrotlet (cinnamon form).
Melopsittacus undulatus	Budgerigar.
Neophema bourkii	Bourke's parrot.
Neophema chrysostoma	Blue-winged Parrot.
Neophema elegans	Elegant Parrot.
Neophema pulchella[1]	Turquoise parrot.
Neophema splendida[1]	Scarlet-chested parrot.
Nymphicus hollandicus	Cockatiel.
Platycercus adelaide	Adelaide rosella.
Platycercus adscitus	Pale-headed rosella.
Platycercus elegans	Crimson rosella.
Platycercus eximius	Eastern rosella
Platycercus icterotis	Western (stanley) rosella.
Platycercus venustus	Northern rosella.
Polytelis alexandrae	Princess parrot.
Polytelis anthopeplus	Regent parrot.
Polytelis swainsonii	Superb parrot.
Psephotus chrysopterygius[1]	Golden-shouldered parakeet.
Psephotus haematonotus	Red-rumped parakeet.
Psephotus varius	Mulga parakeet.
Psittacula eupatria (blue form)	Alexandrine parakeet (blue form).
Psittacula eupatria (lutino form)	Alexandrine parakeet (lutino form).
Psittacula krameri manillensis	Indian ringneck parakeet.
Purpureicephalus spurius	Red-capped parrot.
Trichoglossus chlorolepidotus	Scaly-breasted lorikeet.
Order Passeriformes:	
Aegintha temporalis	Red-browed Finch.
Aidemosyne modesta	Cherry Finch.
Chloebia gouldiae	Gouldian finch.
Emblema guttata	Diamond Sparrow.

Species	Common name
Emblema picta	Painted finch.
Lonchura castaneothorax	Chestnut-breasted finch.
Lonchura domestica	Society (=Bengalese) finch.
Lonchura pectoralis	Pictorella finch.
Neochmia ruficauda	Star finch.
Poephila acuticauda	Long-tailed grassfinch.
Poephila bichenovii	Double-barred finch.
Poephila cincta	Parson finch.
Poephila guttata	Zebra finch.
Poephila personata	Masked finch.
Serinus canaria	Common Canary.

[1] **Note:** Permits are still required for these species under Part 17 (species listed as endangered or threatened under the Endangered Species Act (ESA)) of this Chapter.

(b) Non-captive-bred species. [Reserved].

Dated: November 21, 1994.

George T. Frampton Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 94–29673 Filed 12–1–94; 8:45 am]

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federal register

Friday
December 2, 1994

Part X

Office of Personnel Management

5 CFR Part 630
Absence and Leave; Sick Leave for Adoption; Final Rule and Interim Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN 3206-AE95

Absence and Leave; Sick Leave

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations on the use and recredit of sick leave for Federal employees. Consistent with the recently enacted Federal Employees Family Friendly Leave Act, the final regulations expand the use of sick leave by permitting most employees to use a total of up to 104 hours of sick leave each leave year (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the number of hours of sick leave normally accrued during a leave year) to provide care for a family member as a result of physical or mental illness; injury; pregnancy; childbirth; or medical, dental, or optical examination or treatment; or to make arrangements necessitated by the death of a family member or attend the funeral of a family member. The final regulations also remove the 3-year break-in-service limitation on the recredit of sick leave for former employees who are reemployed on or after December 2, 1994.

EFFECTIVE DATE: December 2, 1994.

FOR FURTHER INFORMATION CONTACT: Jo Ann Perrini, (202) 606–2858.

SUPPLEMENTARY INFORMATION: On May 11, 1994 (59 FR 24560), the Office of Personnel Management (OPM) published proposed regulations to amend 5 CFR 630.401 to provide that employees may use a total of up to 5 days of sick leave per leave year to provide care for a child, spouse, or parent as a result of sickness, injury, pregnancy, or childbirth; to make arrangements necessitated by the death of a family member; or to attend the funeral of a family member. In addition, OPM proposed to amend 5 CFR 630.502 and 630.504 to remove the 3-year brake-in-service limitation on the recredit of sick leave and permit employees who separate from Federal service to have their unused sick leave recredited in full to their sick leave accounts upon return to Federal service on or after the effective date of the final regulations. These changes were recommended in the Report of the National Performance Review on September 7, 1993. The proposed regulations also included conforming changes in §§ 630.402 (Application for sick leave), 630.403 (Supporting evidence), and 630.405 (Use of sick leave during annual leave).

During the comment period, OPM received comments from 1 Member of Congress, 29 Federal agencies, 1 labor organization, 13 professional organizations and associations, and 99 individuals, for a total of 143 comments. Thirty-four commenters supported the proposed revisions in the sick leave regulations without change. Five individuals opposed the proposed sick leave regulations. These individuals believed sick leave should be granted only for an employee's personal illness or injury and that Federal employees earn and accrue sufficient annual leave to provide care for family members.

After the close of the comment period, Congress passed and the President signed into law the Federal Employees Family Friendly Leave Act, Public Law 103–388, on October 22, 1994. The Act authorizes the use by all covered full-time employees of a total of up to 40 hours (5 workdays) of sick leave per year to (1) give care or otherwise attend to a family member having an illness, injury, or other condition which, if an employee had such a condition, would justify the use of sick leave by the employee; or (2) make arrangements or attend the funeral of a family member. In addition, a covered full-time employee who maintains a balance of at least 80 hours of sick leave may use an additional 64 hours (8 workdays) of sick leave per year for these purposes, bringing the total amount of sick leave available for family care and bereavement purposes to a maximum of 104 hours (13 workdays) per year for employees who satisfy this condition.

The Federal Employees Family Friendly Leave Act will become effective on December 22, 1994. As discussed below, however, we have determined that regulatory provisions consistent with the entitlements provided by this legislation should be made effective immediately under the regulatory authority granted to OPM by the current sick leave statute (5 U.S.C. 6311).

A summary of the comments received by OPM on the proposed sick leave regulations and a description of the revisions made in the regulations as a result of the comments are presented below.

Use of Sick Leave To Care for Family Members

A large proportion of the commenters (65) opposed limiting the use of sick leave to provide care only for certain family members—i.e., a child, spouse, or parent. The commenters believed the proposed rule was unfair and discriminatory to many Federal employees who share close family responsibilities in a family group broader than a traditional nuclear family. Further, they suggested this policy would be inconsistent with the intent of many other OPM initiatives designed to assist Federal employees in balancing work and family needs. For example, one agency suggested that if the purpose of the proposed sick leave regulations is to be sensitive to the needs of all employees, some consideration should be given to those individuals who have legal responsibility for other family members or significant others. One commenter recommended that OPM's definition of family member be changed so that the Federal Government could set an example as an employer of a diverse workforce.

One agency and 11 individuals recommended that the phrase "son or daughter" be substituted for the term "child." The definition of "child" in the proposed rule includes individuals over the age of 18 only if they are disabled. The agency was concerned that the term "child" may be perceived as connoting a lack of maturity and suggested that this connotation is not appropriate to individuals over 18 who are disabled because it may reinforce negative stereotypes about individuals with disabilities. The agency stated that the phrase "son or daughter," as used in the Family and Medical Leave Act of 1993 (FMLA) and in OPM's implementing regulations under the Act, is less likely to connote immaturity, since the phrase identifies the relationship rather than a stage of development.

Many commenters pointed out that the definition of "child" in the proposed rule would prohibit parents from using sick leave to arrange for or attend the funeral of an adult son or daughter who is over 18 years old and is not disabled.

One agency noted that some agencies provide broader coverage for benefits under the FMLA by allowing additional family members to be covered (as encouraged in OPM's interim regulations implementing Title II of the FMLA) and that these agencies will be put in the awkward position of having different coverage for two leave programs that OPM recognizes as having a "similarity of purpose."

Most of the commenters recommended that OPM use the broader definition of "family member" found in the Voluntary Leave Transfer Program. One commenter noted that this definition is more accommodating to the needs of a wide variety of family

compositions. Another suggested that the broader definition would more faithfully fulfill the Federal Government's purpose of being a responsive, competitive, and model employer. One agency noted that the broader definition is consistent with the intent of the National Performance Review recommendations. Furthermore, the agency noted that the broader definition recognizes that in today's society there are both traditional and nontraditional families and that the responsibilities placed on the employee are the same in both cases.

In response to these comments and consistent with the requirements of the Federal Employees Family Friendly Leave Act, the final regulations include the broader definition of "family member" that is used in the Federal leave sharing program. For these purposes, "family member" means (a) spouse and parents thereof; (b) children, including adopted children, and spouses thereof; (c) parents; (d) brother and sisters, and spouses thereof; and (e) any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. The term "children, including adopted children, and spouses thereof," as used in this definition, covers adult sons and daughters, whether disabled or not, and therefore permits an employee to use sick leave to arrange for or attend the funeral of an adult son or daughter who is over 18 years old and is not disabled.

Limitation on Use of Sick Leave for Family Care or Bereavement

A significant number of the commenters (42) opposed OPM's proposed 5-day limitation on the amount of sick leave to be used each leave year for family care or bereavement purposes. One commenter questioned whether 5 days of sick leave each leave year realistically would be sufficient to enable an employee to provide care for family members, especially in situations of terminal or serious illness. One commenter stated that the current move to "empower" employees assumes that employees are able to exercise good judgment about their jobs. Therefore, it was suggested, OPM should assume that employees can make a fair judgment about their own usage of leave. One agency commented that if the absence represents an appropriate use of sick leave, the amount should be determined by the circumstances of each case, not by an arbitrary ceiling.

A professional association commented that the proposed 5-day limit on the use of sick leave to care for a family member is unnecessary and too restrictive and that it contravenes the FMLA, which imposes no such limit. The association believes the FMLA already permits Federal employees to substitute their accrued or accumulated sick leave for any or all of the 12 weeks of unpaid FMLA leave to care for a family member. Under 5 U.S.C. 6382(d), an employee may elect to substitute paid accrued or accumulated annual or sick leave for any part of the 12-week period of FMLA leave, "except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employer would not normally provide any such paid leave."

The association believes the legislative history of the FMLA shows that Congress intended that employees would be entitled to unlimited substitution of sick leave for unpaid leave provided by the FMLA. The association raised these same objections in its comments to the Department of Labor (DOL) on its Notice of Proposed Rulemaking (58 FR 13394, March 10, 1993) requesting assistance in developing interim regulations implementing Title I of the FMLA and to OPM on its interim regulations implementing Title II of the FMLA (58 FR 39596, July 23, 1993). The association further stated that since OPM has not yet issued final regulations on the FMLA and has not resolved the issue of substitution of sick leave, it is premature for OPM to promulgate a sick leave rule that may contradict OPM's final FMLA regulations.

DOL addressed the professional association's objections in its interim regulations implementing Title I of the FMLA in 29 CFR part 825 (58 FR 31794, June 4, 1993). DOL stated that "the history of this provision lacks an explanation that it is so intended and cannot, therefore, overcome the clearer reading of the statutory language." OPM agrees with DOL's assessment that the legislative history does not support the idea that Congress intended unlimited substitution of paid sick leave for FMLA leave without pay. In addition, § 630.1205(b)(1) of OPM's interim regulations implementing Title II of the FMLA specifically states that an employee may elect to substitute annual or sick leave for unpaid FMLA leave, "consistent with current law and regulations governing the granting and use of annual and sick leave."

Most of the agencies commenting on the 5-day limitation suggested that OPM impose no limit on the amount of sick leave that an employee may use to provide care for an ill or injured family member. Two agencies recommended that, because of the similarity of purpose between this initiative and the Family and Medical Leave Act, the sick leave regulations should be amended to permit employees to substitute sick leave for any or all of the 12 weeks of unpaid leave provided by the FMLA. One agency noted that by aligning the sick leave regulations with the FMLA, OPM could reduce the need for another set of tracking systems covering time off to care for family members. Several agencies reported that tracking and monitoring the proposed 5-day limit would impose an additional administrative burden on their payroll and timekeeping functions because they would be required to track two types of sick leave—sick leave used for the employee's own medical needs and sick leave used for family needs. One agency stated that the potential for abuse appears high, since an employer may have difficulty verifying the medical status of family members.

A professional organization stated that limiting the use of sick leave to 5 days per year for family care or bereavement purposes is both inadequate and impractical to administer and would send a mixed message to Federal employees that family-friendly programs are encouraged but only minimally supported. The organization objected to what it characterized as OPM's patronizing tone in expressing a need to exercise caution in making changes in the sick leave regulations that might allow for abuse or harm the employee's ability to save enough sick leave for his or her own personal use. The organization suggested that employees should be viewed as fully responsible for accommodating their own personal and family needs and recommended allowing employees to use an unlimited amount of sick leave for family care purposes.

As noted above, the Federal Employees Family Friendly Leave Act establishes a maximum limitation of 104 hours (13 workdays) of sick leave that may be used by most employees to care for a family member or for bereavement purposes. Consistent with the limitations established by this legislation and in response to the comments described above, the final regulations provide that all covered full-time employees may use a total of up to 40 hours (5 workdays) of sick leave each year for family care or bereavement purposes. In addition, a covered full-time employee who maintains a balance of at least 80 hours of sick leave may use an additional 64 hours (8 workdays) of sick leave per year for these purposes, bringing the total amount of sick leave

available for family care and bereavement purposes to a maximum of 104 hours (13 workdays) per year for employees who satisfy this condition. (See § 630.401 (b) through (d).)

For a part-time employee or an employee with an uncommon tour of duty, the final regulations provide that the basic amount of sick leave to be made available for family care or bereavement purposes shall be equal to the average number of hours of work in the employee's scheduled tour of duty each week. In addition, a part-time employee or an employee with an uncommon tour of duty who maintains a sick leave balance equal to at least *twice* the average number of hours of work in the employee's scheduled tour of duty each week may use an amount equal to the number of hours of sick leave normally accrued by the employee during a leave year for these purposes. These limitations are consistent with the amendments made by the Federal Employees Family Friendly Leave Act, which authorizes OPM to prescribe limitations for such employees that are proportional to those applicable to full-time employees with a tour of duty of 40 hours per week.

OPM believes an annual limit of 104 hours (13 workdays) of sick leave to provide care for an ill or injured family member will be an ample amount of time for most employees to give care and attendance to family members for illness or injury *when viewed in the context of other available options and entitlements.* The entitlement to use a total of up to 104 hours of sick leave, in conjunction with a generous annual leave system, advanced annual leave, the leave transfer and leave bank programs, flexible work schedules, flexiplace, unpaid leave under the FMLA, and compensatory time off will further assist the vast majority of employees to meet their sickness-related family care needs.

Sick Leave for Exposure to a Communicable Disease

A labor organization, an agency, and some individuals commented that the 5-day limit on the use of sick leave for family care purposes would restrict, rather than expand, entitlement to use sick leave in the case of employees who provide care for a family member who is afflicted with a contagious disease. The labor organization pointed out that § 630.401(c) of the current regulations places no limit on the amount of sick leave that may be used under these circumstances and suggested that the 5-day limit would impose an unfair hardship when compared to the current policy.

The current regulatory provision authorizing the use of sick leave to care for "a member of [the employee's] immediate family who is afflicted with a contagious disease" is based primarily on the need to prevent the spread of contagion in the workplace. When the health authorities having jurisdiction or a health care provider determines that an employee's exposure to a communicable disease would jeopardize the health of other employees, we continue to believe it is appropriate to grant sick leave to the employee for the entire period of time during which the danger to the health of other employees exists. However, when it cannot be determined that an employee's exposure to a communicable disease would jeopardize the health of other employees, we do not believe there is any justification for allowing the employee to use more sick leave than would be available to other employees who wish to provide care for a family member whose illness or incapacitation is not the result of a communicable disease. In such cases, employees may request annual leave or leave without pay to provide additional care and may also be eligible for participation in the Federal leave sharing program.

The determination as to whether an employee's exposure to a communicable disease would jeopardize the health of other employees necessarily is a matter of judgment. Supervisors should rely on the expertise of the health authorities having jurisdiction or a health care provider in determining the period of time for which sick leave should be authorized and may require the employee to submit medical documentation to support the use of sick leave under these circumstances for an extended period of time.

OPM also received five comments relating to other aspects of the proposed regulation on the use of sick leave in cases of communicable disease. Some asked for additional clarification concerning what constitutes a "severe communicable disease." One agency recommended that the word "severe" be deleted. The agency reasoned that if the local health authorities or health care provider has determined that a person so exposed is required to be isolated for a specified period of time, the communicable disease must be "severe." The agency suggested that using the modifier "severe," may put management in the difficult position of second-guessing health authorities. We find this observation compelling and have deleted the word "severe." We have not attempted to define the term "communicable disease," however, because the key determination that has to be made is not whether a particular illness constitutes a "communicable disease," but whether an employees's exposure to the illness would jeopardize the health of other employees. This determination can be made only by the health authorities having jurisdiction or a health care provider.

A labor organization objected to the characterization of a "severe communicable disease" as one that requires "isolation for a specified period." It suggested that this characterization implies that if the health authorities or health care provider does not, or cannot, identify a "specified period" of isolation, an application for sick leave will be denied. We agree that this characterization is unnecessary and have revised § 630.401(a)(5) to remove the reference to "isolation" altogether. In addition, we have removed the definition of "contagious disease" in § 630.201(b)(3). In response to another comment, we have also provided a definition of "health care provider" in § 630.201(b)(5).

As a result of these changes, employees will be permitted to use sick leave for the entire period of time during which the health authorities having jurisdiction or a health care provider determines that an employee's exposure to a communicable disease would jeopardize the health of other employees. Full-time employees will be limited to a total of 13 days of sick leave per year (subject to the requirement in § 630.401(c) to maintain 80 hours of sick leave in their account) when it cannot be determined that an employee's exposure to a family member's communicable disease would jeopardize the health of other employees.

Calculation of Sick Leave

The proposed regulations would permit employees to use a total of up to 5 days of sick leave each year (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the average number of hours of work in the employee's scheduled tour of duty each week) to provide care for a family member or for bereavement purposes. Several agencies requested guidance on how to calculate the 5 days of sick leave for part-time employees or employees working compressed work schedules. They asked what period of time an agency should use to determine the average number of hours of work in an employee's tour of duty each week. One agency suggested that OPM use either days or hours, but not both. The agency further recommended the use of hours to calculate the entitlement to sick leave to care for a family member

because granting 5 days of sick leave to a full-time employee on a compressed work schedule amounts to 50 hours for an employee with a 10-hour daily tour of duty (and represents more that 1 week).

OPM agrees that it would be desirable to express these entitlements in terms of "hours" rather than "days." As a result, 5 CFR 630.401 has been revised accordingly. If the number of hours of work in an employee's tour of duty is changed during the leave year, the employee's entitlement to use sick leave to care for a family member or for bereavement purposes must be recalculated based on the new tour of duty. As provided in 5 CFR 630.206, employees may take sick leave to care for a family member in increments of less than 1 hour if the agency's leave policies allow the granting of leave in increments of less than 1 hour.

Recredit of Sick Leave

Nineteen commenters supported OPM's proposal to remove the 3-year break-in-service limitation on the recredit of sick leave; one individual opposed the change, believing that there should be a penalty for voluntary separation. Many agencies and individuals believe the elimination of the 3-year limitation on the recredit of sick leave would be an incentive for employees under the Federal Employees Retirement system (FERS) to save their sick leave as insurance for possible future use. However, several individual employees objected to OPM's intent to make this change prospective. These individuals thought our proposal unfairly discriminated against employees who had forfeited sick leave as a result of returning to Federal service prior to the effective date of the rule change.

OPM agrees that the proposed change in the rules on the recredit of sick leave fosters the conscientious use of sick leave. Employees will no longer feel forced to use their sick leave prior to separating from the Federal Government because there will no longer be a risk of forfeiting accrued sick leave when they return to Federal employment. However, OPM does not believe it is feasible to give this change retroactive effect.

Under the Administrative Procedure Act, retroactivity is not favored where it could work an inequity. OPM believes retroactivity could create as many inequities as it alleviates, since any effective date that OPM selects (except an indefinite retroactive effective date) will be perceived as unfair by employees who do not benefit from the change. An indefinite retroactive effective date for the recredit of sick leave would cause administrative problems for Federal agencies because it may be difficult to identify all employees who were adversely affected. In addition, it may be difficult, if not impossible, to reconstruct affected employees' sick leave records.

Based on the comments we received, there appears to be confusion as to whether the removal of the 3-year break-in-service limitation on the recredit of sick leave applies to an employee who resigns before the effective date of the regulations and returns after the effective date. (OPM also received numerous telephone inquiries on this matter.) Therefore, we have revised § 630.502(b) to state that a former employee is entitled to a recredit of sick leave (*without regard to the date of his or her separation*) if reemployed in the Federal Government on or after the effective date of these regulations, unless the sick leave was forfeited upon reemployment in the Federal Government before the effective date of these regulations. Similar revisions have also been made in §§ 630.502(c), (e), and (f) and 630.504(b).

Reemployed annuitants also are entitled to a recredit of sick leave. However, the elimination of the 3-year restriction on sick leave recredit does not affect the sick leave the reemployed annuitant had at the time of retirement if that sick leave was creditable in the annuity computation. That sick leave balance became part of the annuity computation and is no longer available for use as sick leave. Recredited sick leave will be added to the reemployed annuitant's current sick leave account for use in his or her current employment. If the reemployed annuitant qualifies for a supplemental or redetermined annuity under the Civil Service Retirement System, 5 U.S.C. 8344, any unused sick leave in his or her sick leave account upon separation after reemployment may be included in the computation of the supplemental or redetermined benefit.

Voluntary Leave Transfer and Leave Bank Programs

Three agencies noted that an employee who applies to become a leave recipient under the voluntary leave transfer or leave bank programs to care for a family member with a medical emergency must exhaust all available leave (excluding advanced leave) before he or she becomes eligible for any donated leave. Since an employee was previously not permitted to use sick leave to care for a family member (except in cases of contagious disease), there was no requirement to exhaust available sick leave before requesting donated leave in such cases. The agencies suggested that an employee be required to use the sick leave provided under § 630.401(b) to care for a family member before he or she can become eligible for donated leave. OPM agrees that an employee is required to use the sick leave available under § 630.401(b) through (d) before becoming eligible for donated leave to care for a family member. The regulations have been revised to clarify this matter in the case of applications to become a leave recipient that are approved on or after the effective date of these regulations. (See § 630.405(b).) In addition, the regulations have been revised to require an employee who is in a shared leave status on the effective date of these regulations to use the sick leave available under § 630.401(b) through (d) before he or she can continue using donated leave. (See § 630.405(c).)

Sick Leave for Adoption

Five commenters noted that OPM's proposal to revise the sick leave regulations did not include any provisions authorizing the use of sick leave for purposes related to adoption, as recommended by the Report of the National Performance Review. Under previous law, OPM did not have authority to permit the use of sick leave for adoption. However, section 629(b) of Public Law 103–329, September 30, 1994, the Treasury, Postal Service, and General Government Appropriations Act for fiscal year 1995, amends 5 U.S.C. 6307 to permit the use of sick leave for purposes relating to the adoption of a child. In addition, the new law allows sick leave to be substituted retroactively for any annual leave used by an employee for adoption-related purposes between September 30, 1991, and September 30, 1994. OPM is issuing interim regulations permitting the use of sick leave for adoption-related purposes at the same time as the final sick leave regulations are issued.

Recordkeeping and Reporting Requirements

As required by the Federal Employees Family Friendly Leave Act, OPM must submit a report to Congress by June 22, 1997, to evaluate the use of sick leave under the Federal Employees Family Friendly Leave Act and make a recommendation as to whether or not the entitlements under the Act should continue beyond December 22, 1997. To enable OPM to have access to sufficient information to make such an evaluation, a new section has been added at 5 CFR 630.408 to require agencies to maintain and report to OPM information on each

employee's use of sick leave to care for a family member or for bereavement purposes as provided under the final regulations. Beginning with leave year 1995, the regulations require agencies to maintain records on (1) the grade or pay level and gender of each employee; (2) the total number of hours of sick leave used by each employee for family care or bereavement purposes and for all other purposes; and (3) any additional information OPM may require.

Suggestions for Leave Reform

Three agencies observed that opening up sick leave usage to situations other than the employee's own medical needs blurs the distinction between sick leave and annual leave. One agency suggested that this should be considered in future discussions on how the Federal leave program can be reformed to help Federal employees cope with their work and family responsibilities.

Miscellaneous Comments

A labor organization requested that OPM clarify that the 5-day limitation on the use of sick leave to make arrangements necessitated by the death of a family member or attend the funeral of a family member does not apply to an employee's incapacitation due to sickness, including severe depression or emotional distress, resulting from the death of a family member. OPM concurs with this comment. Employees who are incapacitated as a result of severe emotional distress due to the death of a family member are entitled to use sick leave for their own sickness or illness. This is consistent with an opinion of the Comptroller General (B–207444, October 20, 1982). In response to this comment, § 630.401(a)(2) has been clarified to state that an employee may use sick leave because of incapacitation for the performance of duties by physical or mental illness.

A professional organization suggested that OPM consider permitting Federal employees to transfer their available annual leave to family members who are also employed by the Federal Government. This suggestion would require legislation. Under current law, sections 6332 and 6362 of title 5, United States Code, specifically provide for the transfer of annual leave only for *medical emergencies*.

Several agencies requested guidance as to whether the 5 days of sick leave to care for a family member or for bereavement purposes could be advanced and whether an employee may substitute the 5 days of sick leave for unpaid leave under the FMLA, when appropriate. The sick leave available to covered employees for these purposes under the final regulations may be advanced, and such employees may substitute sick leave for unpaid leave under the FMLA. In addition, an agency questioned whether the 5 days of sick leave may accumulate over the years without limit, like sick leave generally, even though only 5 days of sick leave may be used each leave year. If an employee does not use any or all of the amount of sick leave provided under § 630.401 for family care or bereavement purposes in a leave year, it cannot be accumulated in succeeding years to be used to care for a family member or for bereavement purposes.

Some agencies requested that OPM clearly define the situations in which an employee may use sick leave to care for a family member—e.g., for medical and dental appointments or for a common cold, fever, or vomiting, since a child care facility typically will not permit the attendance of a child with these symptoms. An agency questioned how the sick leave program will be used in conjunction with other leave programs—e.g., the leave sharing program, the FMLA, and advanced leave. Agencies have discretionary authority to administer the Federal leave program, consistent with current law and regulations. OPM encourages agencies to assist employees in balancing their work and family responsibilities. Agencies must apply the same criteria they would apply if an employee were suffering from a similar symptoms or receiving medical, dental, or optical examination or treatment.

Finally, an agency requested that OPM consider revisions that would result in the crediting of sick leave in retirement computations for employees covered by FERS or allow some type of payback for sick leave. This comment is beyond the scope of these regulations and would require a legislative change.

Other Changes

The final regulations at § 630.401(a)(2) have been revised to permit the use of sick leave by an employee who is incapacitated for the performance of his or her duties by physical or mental illness or to care for a family member incapacitated as a result of physical or mental illness. The purpose of this change is to clarify the circumstances in which an employee is entitled to use sick leave.

Waiver of Delay in Effective Date

In the spirit of the President's memorandum of July 11, 1994, directing agencies to establish and support family-friendly work arrangements, and consistent with the recent changes in law on the purposes for which sick leave may be used, I find good cause exists for making these rules effective in less than 30 days pursuant to 5 U.S.C. 553(d)(3). The delay in the effective date is being waived to give affected employees the benefit of these new provisions as of December 2, 1994.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal employees and agencies.

List of Subjects in 5 CFR Part 630

Government employees.
U.S. Office of Personnel Management.

James B. King,
Director.

Accordingly, OPM is amending part 630 of title 5 of the Code of Federal Regulations as follows:

PART 630—ABSENCE AND LEAVE

1. The authority citation for part 630 is revised to read as follows:

Authority: 5 U.S.C. 6311; § 630.303 also issued under 5 U.S.C. 6133(a); subpart D also issued under Pub. L. 103–329 (108 Stat. 2423); § 630.501 and subpart F also issued under E.O. 11228; 30 FR 7739, June 16, 1965, 3 CFR 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332 and Pub. L. 100–566 (102 Stat. 2834), and 103–103 (107 Stat. 1022); subpart J also issued under 5 U.S.C. 6362 and Pub. L. 100–566 and 103–103; subpart K also issued under Pub. L. 102–25 (105 Stat. 92); and subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103–3 (107 Stat. 23).

Subpart B—Definitions and General Provisions for Annual and Sick Leave

2. In § 630.201, paragraph (b)(3) is removed; paragraph (b)(4) is redesignated as paragraph (b)(3); paragraphs (b) (5), (6), and (7) are redesignated as paragraphs (b) (6), (7), and (8), respectively; and new paragraphs (b) (4) and (5) are added to read as follows:

§ 630.201 Definitions.

* * * * *

(b) * * *

(b) *Family member* means the following relatives of the employee:

(i) Spouse, and parents thereof;

(ii) Children, including adopted children and spouses thereof;

(iii) Parents;

(iv) Brothers and sisters, and spouses thereof; and

(v) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

(5) *Health care provider* has the meaning given that term in § 630.1202.

* * * * *

Subpart D—Sick Leave

3. In subpart D, § 630.401 is revised to read as follows:

§ 630.401 Grant of sick leave.

(a) Subject to paragraphs (b) through (e) of this section, an agency shall grant sick leave to an employee when the employee—

(1) Receives medical, dental, or optical examination or treatment;

(2) Is incapacitated for the performance of duties by physical or mental illness, injury, pregnancy, or childbirth;

(3) Provides care for a family member as a result of physical or mental illness; injury; pregnancy; childbirth; or medical, dental, or optical examination or treatment;

(4) Makes arrangements necessitated by the death of a family member or attends the funeral of a family member; or

(5) Would, as determined by the health authorities having jurisdiction or by a health care provider, jeopardize the health of others by his or her presence on the job because of exposure to a communicable disease.

(b) The amount of sick leave granted to an employee during any leave year for the purposes described in paragraphs (a)(3) and (4) of this section many not exceed a total of 104 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the number of hours of sick leave normally accrued by that employee during a leave year).

(c) To be granted any sick leave for the purposes described in paragraphs (a)(3) or (4) of this section during any leave year in an amount exceeding a total of 40 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, the average number of hours of work in the employee's scheduled tour of duty each week), the employee concerned shall retain in his or her sick leave account a balance of at least 80 hours (or, in the case of a part-time employee or an employee with an uncommon tour of duty, an amount equal to twice the average number of hours of work in the employee's scheduled tour of duty each week).

(d) When sick leave is granted to an employee under the condition specified in paragraph (c) of this section, the amount of sick leave retained in the employee's sick leave account shall, in each instance, be at least equal to the minimum prescribed by paragraph (b) of this section after deducting the amount to be used for the purposes described in paragraphs (a)(3) and (4) of this section.

(e) If the number of hours in the employee's tour of duty is changed during the leave year, the employee's entitlement to use sick leave for the purposes described in paragraphs (a)(3) and (4) of this section shall be recalculated based on the employee's new tour of duty.

4. Section 630.402 is revised to read as follows:

§ 630.402 Application for sick leave.

An employee shall file a written application for sick leave within such time limits as the agency may require. An employee shall request advance approval for sick leave for the purpose of receiving medical, dental, or optical examination or treatment and to the extent possible, for the purposes described in § 630.401(a)(3) and (4).

630.403 Supporting evidence.

An agency may grant sick leave only when supported by evidence administratively acceptable. Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his or her absence as evidence administratively acceptable. However, for an absence in excess of 3 workdays, of for a lesser period when determined necessary by an agency, the agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a).

6. Section 630.405 is revised to read as follows:

§ 630.405 Use of sick leave during annual leave or to become eligible for donated leave.

(a) Subject to § 630.401(b) through (e), an agency may grant sick leave during a period of annual leave for any of the purposes described in § 630.401(a).

(b) An employee's entitlement to use sick leave to care for a family member under § 630.401 shall be considered as available paid leave for the purpose of determining an employee's eligibility to become a leave recipient under the voluntary leave transfer and leave bank program established under subchapters III and IV of title 5, United States Code, if the medical emergency involves a family member of the employee. This determination shall be made for any application to be a leave recipient approved on or after December 2, 1994.

(c) In the case of an employee already in a shared leave status on December 2, 1994, under the voluntary leave transfer or leave bank programs established under subschapters III and IV of title 5, United States Code, any sick leave available to care for a family member under § 630.401 shall be used, if the medical emergency involves a family member of the employee, before continuing to use transferred annual leave or annual leave withdrawn from a leave bank.

7. Section 630.408 is added to read as follows:

§ 630.408 Records and reports.

(a) Beginning with leave year 1995, each agency shall maintain records concerning the use of sick leave to care for a family member or to make arrangements for or attend the funeral of a family member under § 630.401(a) (3) and (4) and shall report such information as may be required by the Office of Personnel Management (OPM) for the purpose of evaluating the use of sick leave.

(b) Beginning with leave year 1995, each agency shall maintain the following information by leave year for each employee using sick leave for the purpose described in § 630.401(a) (3) or (4):

(1) The grade or pay level and gender of each employee;

(2) The total number of hours of sick leave used by each employee—

(i) For the purposes described in § 630.401(a) (3) or (4); and

(ii) For all other purposes described in § 630.401(a); and

(3) Any additional information OPM may require.

8. The heading for subpart E of part 630 is revised to read as follows:

Subpart E—Recredit of Leave

9. In subpart E, § 630.502 is revised to read as follows:

§ 630.502 Sick leave recredit.

(a) When an employee transfers between positions under subchapter I of chapter 63 of title 5, United States Code, the agency from which the employee transfers shall certify his or her sick leave account to the employing agency for credit or charge.

(b) Except as provided in § 630.407 and in paragraph (c) of this section, an employee who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns

to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

(c) Except as provided in § 630.407, an employee of the government of the District of Columbia who was first employed by the government of the District of Columbia before October 1, 1987, who has had a break in service is entitled to a recredit of sick leave (without regard to the date of his or her separation), if he or she returns to Federal employment on or after December 2, 1994, unless the sick leave was forfeited upon reemployment in the Federal Government before December 2, 1994.

(d) When sick leave is transferred between different leave systems under section 6308 of title 5, United States Code, 7 calendar days of sick leave are deemed equal to 5 workdays of sick leave.

(e) An employee who transfers to a position under a different leave system to which he or she can transfer only a part of his or her sick leave is entitled to a recredit of the untransferred sick leave (without regard to the date of the original transfer) if the employee returns to the leave system under which it was earned on or after December 2, 1994.

(f) An employee who transfers to a position to which he or she cannot transfer his or her sick leave is entitled to a recredit of the untransferred sick leave (without regard to the date of the original transfer) if the employee returns to the leave system under which it was earned on or after December 2, 1994.

(g) The recredit of sick leave under this section shall be supported by written documentation available to the employing agency in its official personnel records concerning the employee, the official records of the employee's former employing agency, copies of contemporaneous earnings and leave statement(s) provided by the employee, or copies of other contemporaneous written documentation acceptable to the agency.

(h) The sick leave to be recredited under this section must have been accrued under 5 U.S.C. 6307 or transferred to the employee's credit under 5 U.S.C. 6308 (or the corresponding provisions of prior statutes).

10. Section 630.504 is revised to read as follows:

§ 630.504 Reestablishment of leave account after military service.

(a) When an employee leaves his or her civilian position to enter the military service, the employing agency shall certify his or her leave account for credit or charge.

(b) If the employee returns to a civilian position following military service, the agency to which the employee returns shall reestablish the certified leave account as a credit or charge (without regard to the date he or she left the civilian position) when the employee is—

(1) Restored in accordance with a right of restoration after separation from active military duty or hospitalization continuing thereafter as provided by law or in accordance with the mandatory provisions of a statute, Executive order, or regulation; or

(2) Reemployed in a position under subchapter I of chapter 63 of title 5, United States Code, on or after December 2, 1994.

(c) For the purpose of documenting a returning employee's entitlement to a recredit of sick leave under this section, the documentation criteria established in § 630.502(g) shall apply.

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5 CFR Part 630

RIN 3206–AG 43

Absence and Leave; Sick Leave for Adoption

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to permit employees to use sick leave for purposes related to the adoption of a child.

DATES: The interim rules are effective on December 2, 1994. Comments must be submitted on or before January 31, 1995.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Acting Assistant Director for Compensation Policy, Personnel Systems and Oversight Group, U.S. Office of Personnel Management, Room 6H31, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: Jo Ann Perrini or Sharon Herzberg, (202) 606–2858.

SUPPLEMENTARY INFORMATION: Section 629 of Public Law 103–329, The Treasury, Postal Service and General Government Appropriations Act for fiscal year 1995, September 30, 1994, made two significant changes in leave entitlements for Federal employees. Section 629(a) added section 6327 to title 5, United States Code, to provide employees with an entitlement to 7 days of paid leave each calendar year (in addition to annual and sick leave) to serve as a bone-marrow or organ donor. The law provides that an employee is entitled to use this leave without loss of or reduction in pay, leave to which otherwise entitled, credit for time or service, or performance or efficiency rating. The Office of Personnel Management (OPM) does not believe regulations are needed to administer section 6327. Agencies are responsible for notifying employees of this new entitlement to paid leave.

The length of absence for such purposes will vary depending upon the medical circumstances of each case. For medical procedures and recuperation requiring absences longer than 7 days, agencies are encouraged to continue to accommodate employees by granting additional time off in the form of excused absence, accrued sick leave and/or annual leave, as appropriate; leave without pay; and advanced sick and/or annual leave.

Section 629(b) amended 5 U.S.C. 6307 to permit an employee to use sick leave for purposes related to the adoption of a child. (Conforming technical changes were also made in 5 U.S.C. 6129.) This change was recommended in the Report of the National Performance Review on September 7, 1993. Section 629(b) also directs OPM to prescribe regulations to allow an employee to substitute sick leave retroactively for all or any portion of any annual leave used by an employee for adoption-related purposes between September 30, 1991, and September 30, 1994. (September 30, 1991, was the ending date of the former 1-year experimental program created by Public Law 101–509 to test the feasibility of granting sick leave for adoption-related purposes.) If an employee elects to make this substitution, the employing agency must adjust the employee's leave accounts to reflect the amount of annual leave and sick leave, respectively, that would remain had sick leave been used instead of all or any portion of the annual leave actually used, as designated by the employee.

Sick Leave for Adoption

OPM's sick leave regulations at 5 CFR 630.401 have been amended to permit employees to use accrued or accumulated sick leave for purposes relating to the adoption of a child. In addition, § 630.402 has been revised to require employees to request, to the extent possible, advance approval to use sick leave for adoption-related purposes. This is consistent with current