

Authority: 7 U.S.C. 1622; 19 U.S.C. 1306; 21 U.S.C. 102-105, 111, 114a, 134a, 134b, 134c, 134d, 134f, 135, 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.17, 2.51, and 371.2(d).

§ 92.308 [Amended]

2. In § 92.308, paragraph (a)(2) is amended by removing "Portugal,".

Done in Washington, DC, this 18th day of February 1994.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94-4325 Filed 2-24-94; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 93-ASO-22]

Establishment of Class E Airspace; Puerto Rico, PR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at San Juan, Puerto Rico. This action reestablishes a portion of airspace that was lost as a result of the terminal airspace reconfiguration. Controlled airspace extending from 1200 feet and 2700 feet is needed to contain IFR operations in the area and to provide necessary air traffic services.

EFFECTIVE DATE: 0901 UTC, April 28, 1994.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Patterson, Airspace Section, System Management Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305-5585.

SUPPLEMENTARY INFORMATION:

History

On November 19, 1993, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish Class E airspace at San Juan, Puerto Rico. The terminal airspace configuration final rule dated August 27, 1992, amended the size of the 1200 ft. transition area from a 100-mile radius of San Juan, Puerto Rico to an area extending approximately 15 miles north of San Juan. This reduced area is not adequate to provide necessary air traffic services. This action will establish 1200 ft. and 2700 ft. Class E airspace and replace a portion of the airspace that was lost (58 FR 65949).

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The coordinates for this airspace docket are based on North American Datum 83. This amendment is the same as that proposed in the notice with the exception of removing Warning Areas from the description that are outside this Class E airspace and the additional of a set of coordinates to more clearly describe the actual area. Designations for Class E airspace extending upward from 700 feet or more above the surface are published in paragraph 6005 of FAA Order 7400.9A dated June 17, 1993, and effective September 16, 1993. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations establishes Class E airspace at San Juan, Puerto Rico to provide controlled airspace for aircraft arriving and departing San Juan.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a significant regulatory action under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. app. 1348(a), 1354(a), 1510; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 49 U.S.C. 106(g); 14 CFR 11.69.

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9A, Airspace Designations and Reporting Points, dated June 17, 1993, and effective September 16, 1993, is amended as follows:

Paragraph 6005, Class E airspace areas extending upward from 700 feet above the surface of the earth.

* * * * *

ASO PR E5 Puerto Rico, PR—San Juan-Fernando Luis Ribas Dominicci Airport, PR

(Lat. 18°27'25" N, long. 66°05'53" W)

That airspace extending upward from 1,200 feet above the surface beginning at lat. 18°50' N, long. 68°00' W; to lat. 18°45'22.62" N, long. 66°54'58.15" W; to lat. 18°33' N, long. 64°22' W; to lat. 17°20' N, long. 64°22' W; to lat. 17°29' N, long. 64°54' W; to lat. 17°50' N, long. 65°34' W; to lat. 17°42' N, long. 68°00' W; to the point of beginning; excluding that airspace within Warning Areas W-370A, W-371, W-373A; and that airspace extending upward from 2,700 feet above the surface beginning at lat. 18°33' N, long. 64°22' W; to lat. 18°25' N, long. 62°52' W; to lat. 17°47' N, long. 62°23' W; to lat. 17°22' N, long. 62°59' W; to lat. 16°58' N, long. 63°00' W; to lat. 17°20' N, long. 64°22' W; to the point of beginning; and that airspace extending upward from 2,700 feet above the surface beginning at lat. 18°45'22.62" N, long. 66°54'58.15" W; to lat. 19°00' N, long. 66°10' W; to lat. 19°00' N, long. 65°45' W; to lat. 18°45' N, long. 64°22' W; to lat. 18°33' N, long. 64°22' W; to the point of beginning.

* * * * *

Issued in College Park, Georgia, on February 7, 1994.

Michael J. Powderly,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 94-4366 Filed 2-24-94; 8:45 am]

BILLING CODE 4910-13-M

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1500

Requirements for Clacker Balls; Amendments

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Commission amends its existing regulation, under the Federal Hazardous Substances Act, that bans clacker balls that do not meet specified requirements. The amendments include revising the definition of clacker ball to exclude those devices where the balls are suspended by plastic rods that are integrally molded to the balls and are mounted on a pivot so that movement

of the balls is essentially limited to a single plane. The amendments also exempt from the ban those clacker balls that meet specified maximum ball-weight and cord-length specifications and a minimum safety factor specification. The amendments clarify the regulation and benefit consumers, manufacturers, importers, distributors, and retailers by allowing the marketing of currently-banned products that do not present the unreasonable risk of injury the ban was intended to prevent.

DATES: The amendments are effective March 25, 1994.

FOR FURTHER INFORMATION CONTACT: Frank Krivda, Division of Regulatory Management, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504-0400.

SUPPLEMENTARY INFORMATION:

A. Background

The Commission's regulations, issued under the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. 1261-1277, ban clacker balls (defined in 16 CFR 1500.18(a)(7)), unless the clacker balls meet the requirements in 16 CFR 1500.86(a)(5). The regulations define clacker balls as consisting of two balls of plastic or another material connected by a length of line or cord or similar connector * * * intended to be operated in a rhythmic manner by an upward and downward motion of the hand so that the two balls will meet forcefully at the top and bottom of two semicircles thus causing a "clacking" sound, which toys present a mechanical hazard because their design or manufacture presents an unreasonable risk of personal injury from fracture, fragmentations, or disassembly of the toy and from propulsion of the toy or its part(s). (But see § 1500.86(a)(5))

These requirements were issued in 1971 by the Food and Drug Administration, which administered the FHSA at that time.

The criteria in § 1500.86(a)(5) were designed to ensure the safety of the type of clacker ball that was on the market before the regulation was issued in 1971. This type of clacker ball used balls that were relatively large and heavy, and the balls were mounted on flexible cords. The criteria include an impact test for the balls and strength tests for the cords and attachment points.

In August of 1989, Mr. William Hones of Fascinations Toys and Gifts, Inc., petitioned the Commission to amend its requirements for clacker balls to exclude products that (1) mechanically restrict the motion of the balls to a plane perpendicular to a supporting shaft and

(2) withstand impact and centrifugal stresses at least 10 times those produced in normal use. [1, Tab A]¹ The petitioner marketed a product similar to a clacker ball but that operated in the manner that would be excluded by the requested amendment.

The device marketed by the petitioner mounted the balls by integrally molding them onto the apex of a V-shaped plastic member mounted so that the arms of the V pivot on a shaft. This mounting limits the movement of the balls to a single plane that is perpendicular to the axis of the shaft. Compared to the pre-1972 type of clacker balls, the petitioner's product had lighter balls and shorter mounting arms. Because of this, the petitioner's product did not generate the impact or centrifugal forces that the earlier clacker balls did. The Commission's staff agreed that the criteria of § 1500.18(a)(5) vastly exceeded the stresses generated by petitioner's device and by various other brands and types of clacker balls that were on the market.

After considering the petition, the Commission decided that the term "clacker ball" did not encompass the product marketed by the petitioner and similar products. The Commission (3-0) also directed the staff to prepare, for the Commission's consideration, a draft **Federal Register** notice that would propose to amend the definition of clacker ball to explicitly exclude petitioner's and similar products and to amend § 1500.86(a)(5) to exempt clacker balls meeting maximum ball-weight and cord-length specifications and a minimum safety factor specification. On June 25, 1993, the Commission published proposed amendments in the **Federal Register**, 58 FR 34385. The period for public comment on the proposal ended on September 8, 1993; no comments were received.

B. Procedure

A regulation such as the Commission's clacker ball regulation is issued under section 3(e) of the FHSA, 15 U.S.C. 1262(e), which applies to determinations that a toy or other article intended for use by children presents a mechanical, electrical, or thermal hazard and is thus a hazardous substance pursuant to section 2(f)(1)(D), 15 U.S.C. 1261(f)(1)(D). The original issuance of such a regulation would be governed by the procedure in section 3(f) of the FHSA, 15 U.S.C. 1262(f), which specifies a three-stage rulemaking procedure that is initiated by the

publication of an advance notice of proposed rulemaking ("ANPR"). The amendments issued below, however, eliminate from the scope of the rule those products that do not present the mechanical risk that the regulation originally intended to cover.

Accordingly, since new obligations are not being imposed, sections 3 (e) and (f) do not apply. In addition, the provisions of section 3(f) governing the required content of the ANPR show that the ANPR is intended to apply only to cases where new requirements are being imposed and not to the case where previously covered products are being exempted or otherwise released from coverage. Therefore the two-stage rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553, apply.

C. The Amendments

Amended § 1500.18(a)(7). As explained above, the device marketed by the petitioner was mounted on plastic rods so that the balls move only in a single plane. This prevents off-center hits of the balls, and the limitation to "plastic" material should limit any likelihood of loose particles caused by flaking or fragmentation of the balls. The Commission determined that the definition of clacker ball did not cover the petitioner's device, or similar devices with these features. Therefore, the amendments add language specifically stating that the definition of clacker ball "does not include products that are constructed such that the connecting members consist of plastic rods integrally molded to the balls and are mounted on a pivot so that movement of the balls is essentially limited to a single plane."

Amended § 1500.86(a)(5). As discussed above, the Commission concluded that the criteria in the current exemption in § 1500.86(a)(5) are too stringent for the lighter and smaller clacker balls that are currently on the market, which have balls with masses of less than 12 grams each and pivot lengths of less than 180 mm (7.1 inches). Accordingly, the staff examined how the exemption criteria might be changed so that they would be more appropriate for these lighter and smaller clacker balls. The criteria that must be changed in order to do this are (1) The cord-strength requirement of § 1500.86(a)(5)(i)(B), (2) the ball-impact test in § 1500.86(a)(5)(ii)(B), (3) the cord-strength test of § 1500.86(a)(5)(ii)(D), and (4) the holding-device strength test of § 1500.86(a)(5)(ii)(E). These criteria are discussed separately below. How the formulae for adjusting these factors were derived is explained in detail in the

¹ Numbers in brackets represent the number of a relevant document in Appendix 1 (List of Relevant Documents) at the end of this notice.

report "Engineering Analysis Supporting Proposed Amendments to the Clacker Ball Regulation at 16 CFR Sections 1500.18(a)(7) and 1500.86(a)(5)," Scott R. Heh, CPSC Directorate for Engineering Sciences, December 1992 [6, Tab B]. For clacker balls with masses of 12 grams or more, or with pivot lengths of 180 mm or more, the current provisions of the regulation will continue to apply.

Cord-strength test. The staff calculated the safety factor that the current regulation applied to the large and heavy clacker balls that the regulation was intended to address and determined that it provides a cord-strength safety factor, for those clacker balls, of approximately 35. Therefore, this safety factor was also applied to the reduced forces proposed to be allowed when testing the cord strength of smaller and lighter clacker balls.

The tensile forces applied to the cord of a clacker ball during use are mainly due to the centrifugal forces generated by the motion of the balls. The centrifugal force of an object is equal to the mass of the object times its acceleration, which in turn is a function of the velocity of the object and the radius of the curve being traveled by the object. The velocity of the ball is established by specifying a maximum "clack" rate of 20 clacks per second. (As specified in the definition of clacker ball at § 1500.18(a)(7), a clack is produced when the two balls collide at the top and bottom of their semicircular paths. The highest clack rate that the Commission's staff was able to achieve in testing was 17 clacks per second.)

Applying the safety factor of 35, the adjusted cord strength value in Newtons can be calculated by $0.1382(m_b)(R_p)$, where m_b is the mass of a single ball in grams and R_p is the radius of the arc described by the ball (pivot length) in mm. Accordingly, the Commission is amending the regulation as set forth below so that this adjusted cord strength value will be one of the criteria for exempting the smaller and lighter clacker balls described above.

Ball-impact test. The current regulation provides that a clacker ball shall be tested by 10 drops of a 5-lb steel weight from a height of 48 inches. The Commission's staff determined that this provides a safety factor of about 20 for the large and heavy clacker balls for which the test was designed.

The clacker ball experiences an impact related to the magnitude of the kinetic energy it achieves in use, which is a function of the mass of the clacker ball times its velocity. The velocity can be calculated from the "clack rate," which, as described above, is assumed

to be 20 clacks per second. Accordingly, the height from which a 5-lb weight must be dropped in order to achieve an impact equal to what the clacker ball can generate, times the safety factor of 20, can be calculated as $179 \times 10^{-5}(m_b)(R_p)^2$, where m_b is the mass of a single ball in grams and R_p is the radius of the arc described by the ball (pivot length) in mm. Accordingly, the Commission amends its regulations to allow this adjusted drop height value to be one of the criteria for exempting the smaller and lighter clacker balls described above.

Holding device test force. Present § 1500.86(a)(5)(ii)(E) provides that the device for holding the cords together shall be tested by applying a force of 50 lb to each cord separately, while the holding device is clamped in position. Since this is half the force provided by the current regulation for the cord-strength test, the Commission amends its regulations to allow an adjusted holding device test force of half the adjusted cord-strength test force, to exempt the smaller and lighter clacker balls described above.

D. Metric Units

Current Federal policy encourages the use of metric units in regulations. Exec. Order No. 12770, 3 CFR, 1991 Comp., p. 343. Accordingly, wherever current § 1500.86(a)(5) uses inch/pound units that can be specified instead in metric units, the amendments proposed below give the corresponding metric units as the primary criteria, with the inch/pound equivalent in parentheses.

E. Correction

The exemptions at § 1500.86(a)(5) have a typographical error in the table in § 1500.86(a)(5)(vi). The word "rental" in the heading of the first column should be "retail." Accordingly, the amendments issued below correct this discrepancy.

F. Effective Date

This amendment grants an exemption. A delayed effective date of 30 days from the date a final rule is issued will be sufficient for parties to test their products to determine whether the products comply with the amended regulation. Accordingly, these amendments will become effective March 28, 1994.

G. Regulatory Flexibility Act Certification

When an agency undertakes a rulemaking proceeding, the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 et seq.) generally requires the agency to prepare initial and final

regulatory flexibility analyses describing the impact of the rule on small businesses and other small entities. The purpose of the Regulatory Flexibility Act, as stated in section 2(b) (5 U.S.C. 602 note), is to require agencies, consistent with their objectives, to fit the requirements of regulations to the scale of the businesses, organizations, and governmental jurisdictions subject to the regulations. Section 605 of the Act provides that an agency is not required to prepare a regulatory flexibility analysis if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The Commission's Directorate for Economics prepared Initial and Final Regulatory Flexibility Act Analyses to examine the effect of the rule on small entities. [6, Tab D; 8, Tab D] The findings of the Final Regulatory Flexibility Analysis are repeated below.

The potential cost of the rule includes the possibility of future injury or death associated with these products, if that were due to less safe clacker balls being on the market because the exemption criteria of the regulation were made less stringent. The Commission has no information that would support a conclusion that this will occur.

The Commission is aware of 13 incidents from January 1, 1973, through 1992 that were associated with clacker balls. [6, Tab C] Three of these incidents involved fatalities. In one of these fatal incidents, a child strangled when she got the cord of a clacker ball around her neck. In the two others, infants were asphyxiated when clacker balls obstructed their airways. Such strangulation and asphyxiation hazards are not addressed by the current requirements for clacker balls.

The remaining 10 incidents involved injuries incurred when users were hit with clacker balls (4), fell on clacker balls (2), or ingested a piece of broken clacker ball (1), or involved a burn (1) or poisonings (2) associated with clacker balls that made a cracking sound and emitted smoke when the balls struck each other. None of these incidents is known to be due to any deficiency in the clacker balls' impact resistance, cord strength, or holding-device strength.

Based on the available epidemiological and engineering information, no potential injuries or deaths are expected to be associated with the amended definition and exemption. Accordingly, no significant costs are expected to be associated with these changes.

The amended definition and exemption will provide benefits to marketers of the product by allowing the

continued marketing of these products as toys and novelties. Marketers would also benefit through an elimination of any uncertainty about enforcement of the existing regulations, and the regulation's effects on future product development would be clarified. The marketers would also benefit by avoiding any cost increases that would be caused by having to come into compliance with the present regulation.

Consumers obtain utility from the use of these products. Sales in 1990 of products similar to the petitioner's are estimated at 10–12 million units, which were valued at \$25–30 million. Sales in 1991 declined to about one million units, and 1992 sales were around two million units. Sales of lightweight, short-cord clacker balls are thought to be insignificant compared to the number of products like the petitioner's that are marketed. However, the available information is not sufficient to enable an accurate estimate. To the extent that consumers enjoy the use of these products, their continued availability is a benefit, and the loss of this product on the market would be a loss to consumers.

All the firms known to be currently marketing these products are small firms. The rule is expected to have a positive impact on these firms.

For the reasons given above, the Commission concludes that the amendments to the Commission's regulations for clacker balls, issued below, will not have any significant adverse economic effect on a substantial number of small entities.

H. Environmental Considerations

Pursuant to the National Environmental Policy Act, and in accordance with the Council on Environmental Quality regulations and CPSC procedures for environmental review, the Commission preliminarily assessed the possible environmental effects associated with the proposed amendments to the clacker ball regulations. [6, Tab D] Because that assessment found that there were no significant environmental effects from the rule, no final assessment is required.

List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, Toys.

I. Conclusion

For the reasons given above, the Commission amends 16 CFR part 1500 as follows:

PART 1500—[AMENDED]

1. The authority citation for part 1500 is revised to read as follows:

Authority: 15 U.S.C. 1261–1277.

2. Section 1500.18(a)(7) is amended by replacing the second sentence with two new sentences to read as follows:

§ 1500.18 Banned toys and other banned articles intended for use by children.

(a) * * *

(7) * * * (But see § 1500.86(a)(5).) This does not include products that are constructed so that the connecting members consist of plastic rods integrally molded to the balls and are mounted on a pivot so that movement of the balls is essentially limited to a single plane.

§ 1500.86 [AMENDED]

3. Section 1500.86(a)(5)(i)(B) is amended by:

- Replacing "100 pounds" with "445 Newtons (100 pounds)" and
- Adding a new sentence at the end of the paragraph, to read as follows:

§ 1500.86 Exemptions from classification as a banned toy or other banned article for use by children.

(a) * * *

(5) * * *

(i) * * *

(B) * * * Clacker balls where the mass of each ball is less than 12 grams (0.42 oz.) and the distance between the center of the pivot and the center of the ball cannot exceed 180 mm (7.1 inches) may have a minimum cord breaking strength of less than 445 Newtons (100 pounds), as computed by the following formula:

Adjusted Cord Breaking Strength in Newtons = $0.1382(m_b)(R_p)$, where m_b = mass of a single ball in grams and R_p = pivot length in mm.

4. Section 1500.86(a)(5)(ii)(B) is amended by:

- Replacing "5-pound" with "2.25 kg (5-pound)"
- Replacing "2¼-inch" with "57-mm (2¼-inch)"
- Replacing "48 inches" with "1220 mm (48 inches)"
- Replacing "2⅜-inch" with "60-mm (2⅜-inch)" and
- Adding a sentence after the first sentence and before the last sentence, to read as follows:

§ 1500.86 Exemptions from classification as a banned toy or other banned article for use by children.

(a) * * *

(5) * * *

(ii) * * *

(B) * * * Clacker balls where the mass of each ball is less than 12 grams (0.42 oz.) and the distance between the center of the pivot and the center of the ball cannot exceed 180 mm (7.1 inches) may be tested by dropping the impact weight from a height of less than 1220 mm (48 in.), where the height is computed as follows:

Adjusted drop height in mm = $179 \times 10^{-5}(m_b)(R_p^2)$, where m_b = mass of a single ball in grams and R_p = pivot length in mm. * * *

5. Section 1500.86(a)(5)(ii)(D) is amended by:

- Replacing "100-pound" with "445 Newton (100-pound)" and
- Adding two sentences before the last sentence, to read as follows:

§ 1500.86 Exemptions from classification as a banned toy or other banned article for use by children.

(a) * * *

(5) * * *

(ii) * * *

(D) * * * Clacker balls where the mass of each ball is less than 12 grams (0.42 oz.) and the distance between the center of the pivot and the center of the ball cannot exceed 180 mm (7.1 inches) may be tested with a force of under 445 Newtons (100 pounds). The test force for these clacker balls shall be the same as the cord breaking strength calculated in § 1500.86(a)(5)(i)(B). * * *

6. Section 1500.86(a)(5)(ii)(E) is amended by:

- Replacing "50-pound" with "222-Newton (50-pound)" and
- Adding two sentences after the first sentence and before the last sentence, to read as follows:

§ 1500.86 Exemptions from classification as a banned toy or other banned article for use by children.

(a) * * *

(5) * * *

(ii) * * *

(E) * * * Clacker balls where the mass of each ball is less than 12 grams (0.42 oz.) and the distance between the center of the pivot and the center of the ball cannot exceed 180 mm (7.1 inches) may have their holding device tested with a force of less than 222 Newtons (50 pounds). The holding device test force for these clacker balls shall be half of the cord breaking strength calculated in § 1500.86(a)(5)(i)(B). * * *

§ 1500.86 [Amended]

7. Section 1500.86(a)(5)(iv)(C) is amended by:

- a. Replacing "one-quarter inch" with "6 mm (¼ inch)" and
- b. Replacing "one-eighth inch" with "3 mm (⅛ inch)".

8. Section 1500.86(a)(5)(vi) is amended by replacing "rental" in the heading of the first column of the table with "retail".

Dated: February 18, 1994.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

Appendix 1—List of Relevant Documents

(This Appendix will not be printed in the Code of Federal Regulations.)

1. Briefing Package—Petition HP 90-2—Clacker Balls: Executive Summary and briefing memorandum "Petition HP 90-2: Clacker Balls," John D. Preston, Project Manager, CPSC Directorate for Engineering Sciences, dated Jan. 27, 1992, with Tabs A, C, and F-J.

TAB A—Petition.

TAB C—Photograph of petitioner's clacker ball.

TAB F—Memorandum from Debbie Tinsworth, CPSC/EPHA, to John Preston, CPSC/ESME, "Clacker Ball Incident Data," April 18, 1991.

TAB G—Memorandum from Terrance R. Karels, CPSC/ECPA to John Preston, Project Manager, "Clacker Ball Petition, HP 90-2," July 23, 1991.

TAB H—Memorandum from John Preston, CPSC/ESME, "Petition HP 90-2, Clacker Balls," October 4, 1991.

TAB I—Memorandum from Bob Poth, CPSC/CEM, to John Preston, Project Manager, CPSC/ESME, "Background of CE Action on 'Newton's Yo-Yo'," Sept. 18, 1991.

TAB J—Proposed Enforcement Policy.

2. Tape recording of Commission briefing on March 25, 1992.

3. Memorandum from John Preston, Project Manager, to the Commission, "Response to Commission Request for Options and Resource Estimates to Respond to the Clacker Ball Petition," June 5, 1992, with revised vote sheet.

4. Commissioners' ballot vote sheets, signed June 29-30, 1992.

5. Letter from the Commission's Secretary to Mr. William G. Hones, President of Fascinations Toys and Gifts, Inc., dated Sept. 23, 1992.

6. Briefing package "Proposed Amendments to the Clacker Ball Regulation at 16 CFR Sections 1500.18(a)(7) and 1500.86(a)(5)," consisting of Executive Summary, briefing memorandum, and Tabs A-E.

Briefing Memorandum, "Proposed Rule Amending the Clacker Ball Regulation at 16 CFR § 1500.18(a)(7) and § 1500.86(a)(5)," April 13, 1993.

TAB A—Photographs of products.

TAB B—Engineering report from Scott Heh, ESME, "Engineering Analysis Supporting Proposed Amendments to the Clacker Ball Regulation at 16 CFR Sections 1500.18(a)(7) and 1500.86(a)(5)," December 17, 1992.

TAB C—Memorandum from Suzanne P. Cassidy, EPHA, "Injuries and Deaths Associated with Clacker Balls," Feb. 1, 1993.

TAB D—Memorandum from A. Homan, ECPA, to Scott R. Heh, ESME, "Regulatory Flexibility and Regulatory Analyses, Economic and Environmental Assessments: Proposed Amendments to the Clacker Ball Regulations," December 10, 1992.

TAB E—Draft Federal Register notice 7. 58 FR 34385 (June 25, 1993).

8. Briefing memorandum from Scott Heh, Project Manager, to the Commission, "Final Rule Amending the Clacker Ball Regulation at 16 C.F.R. Sections 1500.18(a)(7) and 1500.86(a)(5), with Tabs A-E, dated January 19, 1994:

TAB A—Photographs of Products.

TAB B—Memorandum from Suzanne Cassidy EPHA, to Scott Heh, Project Manager, "Injuries and Deaths Associated with Clacker Balls," dated February 1, 1993.

TAB C—Memorandum from Suzanne Cassidy, EPHA, to Scott Heh, Project Manager, "Data Update on Injuries and Deaths Associated with Clacker Balls," dated November 4, 1993.

TAB D—Memorandum from A. Homan, ECPA, "Regulatory Flexibility and Regulatory Analyses, and Economic Assessments: Final Regulatory Amendments to the Clacker Ball Regulation," dated December 1, 1993.

TAB E—Draft Federal Register notice.

[FR Doc. 94-4359 Filed 2-24-94; 8:45 am]

BILLING CODE 6355-01-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing-Federal Housing Commissioner

24 CFR Parts 201 and 202

[Docket No. R-94-1636; FR-3021-F-02]

RIN 2502-AF29

Tiered Pricing

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule implements section 203(t) of the National Housing Act. That section prohibits tiered pricing involving a variation in mortgage charge rates that exceeds two percentage points for FHA insured mortgages made by a mortgagee in an area. The purpose of the rule is to eliminate a mortgagee's discriminatory pricing of FHA insured mortgages in a particular area that would either discourage home purchases or place an unfair burden of costs on the borrower. The rule also implements section 539(a)(2) of the National Housing Act by providing a procedure for requests for determination

of a mortgagee's compliance with tiered pricing restrictions or compliance by a mortgagee or Title I lender with related prohibitions on establishing minimum loan amounts.

EFFECTIVE DATE: March 28, 1994.

FOR FURTHER INFORMATION CONTACT:

William Heyman, Director, Office of Lender Activities and Land Sales Registration, Department of Housing and Urban Development, room 9156, 451 Seventh Street SW., Washington, DC 20410, Telephone Number (202) 708-1824; TDD telephone number (202) 708-4594. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Introduction

The information collection requirements contained in this rule have been approved by the Office of Management and Budget, under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control numbers 2502-0265 and 2502-0059.

Section 330(a) of the Cranston-Gonzalez National Affordable Housing Act, entitled "Limitation on Tiered Pricing Practices," amended Section 203 of the National Housing Act to add subsection (t). The new provision restricts "tiered pricing" of single family FHA-insured mortgages. "Tiered pricing" occurs when a mortgagee varies its charges for the same type of mortgage in the same area, usually based on the principal amount of the loan.

Under section 203(t), no mortgagee may make or hold FHA insured mortgages if the customary lending practices of the mortgagee, as determined by HUD, provide for variations of more than two percentage points in the mortgage charge rate based on interest rate, level of discount points, loan origination fees, or any other amount charged to a mortgagor by the mortgagee with respect to a mortgage made within a designated area. The section is concerned with lending practices that may unfairly impose costs and charges that are higher for smaller loans than for larger loans.

HUD published a proposed rule on July 14, 1993, 58 FR 37885, with a request for public comments. HUD received 37 public comments. More than half were from State Bankers Associations; comments also were received from the American Bankers Association, the Mortgage Bankers Association, and mortgagees. The following section summarizes the principal points of the public comments, explains how HUD has responded to the public comments, and

explains additional changes that HUD has made in the final rule.

II. Public Comments and Provisions of Final Rule

General

Most of the commenters agreed that tiered pricing in the form of excessive variation in mortgage charge rates should be discouraged, but most commenters also argued that the proposed rule would drive mortgagees away from the FHA programs. The principal reasons cited were the failure of the proposed rule to recognize legitimate differences in pricing based on the fact that lower balance loans cost more to originate, and excessive recordkeeping requirements in the proposed rule. HUD believes that the commenters have overstated the burdensome effect of the proposed rule (as distinguished from the statutory command). HUD has concluded, however, that the lending community will benefit from additional information concerning the manner in which HUD intends to apply the final rule. The following discussion should provide additional information on HUD's intentions that may alleviate some of the commenters' concerns.

Many commenters observed that the two percentage point limit on variation in mortgage charge rates may force mortgagees to either suffer losses on the smallest loans (which must still be offered due to an earlier statutory provision) or overprice the largest loans. Either effect could lead mortgagees to withdraw from FHA single family programs. In this rule, HUD has attempted to interpret the statute in a way that preserves the ability of mortgagees to participate profitably in FHA single family programs while honoring the letter and spirit of the statute.

Calculation and Comparison of Mortgage Charge Rate

A. General

Many commenters expressed confusion over how mortgage charge rates would be calculated and how HUD would determine which variations in charges were acceptable. Mortgagees will be compared to determine excess variations in mortgage charge rates only if: (1) They are of the same mortgage type, (2) from the same area and (3) the amounts charged by the mortgagee were determined on the same day or during some other reasonably limited period. Items 1 and 2 will be discussed in more detail later under separate headings. The purpose of the comparison is to determine whether a mortgagee's

customary lending practices include either variations in mortgage charge rates (determined primarily by the discount point spread for each interest rate offered) that exceed two percentage points, or lesser variations that are unrelated to variations in the mortgagee's actual costs in making loans.

B. Two Percentage Point Variation

As explained in the preamble to the proposed rule, HUD's determination of whether the permissible two percentage point variation is exceeded will primarily be based on a review of discount points charged by the mortgagee. The rule prevents a mortgagee from offering an interest rate only for certain size loans. For any given interest rate offered in an area for a mortgage type during the time period under review, mortgages should be available to all applicants without a difference in discount points of greater than two percentage points. Charges collected by the mortgagee for third party services would not be considered for tiered pricing purposes. HUD's experience is that all mortgagees typically will collect the maximum 1% origination fee so that the fee will be disregarded in reviewing variations in charges.

HUD expects a mortgagee to charge a mortgagor only the origination fee, discount points and interest to cover its costs (excluding payments for third party services). HUD regulations do not permit mortgagees to charge other fees such as document preparation fees or closing fees for services provided by their own employees. (Some mortgagees are permitted to use appraisers and/or inspectors on their staffs. For purposes of this rule, the amounts collected by a mortgagee for the services of its staff appraisers and/or inspectors are considered analogous to third party services and are not included in mortgagee charges.)

Thus, for purposes of the two percentage point variation there will ordinarily be no need to consider other fees or charges. Mortgagees that establish other fees or charges should be certain that they are acceptable to the local HUD Office as reasonable and customary. Mortgagees are also on notice that HUD will consider them in determining compliance with the two percentage point limitation on variations even if the spread in discount points among mortgages is less than two percent.

Several commenters noted that any flat fee will necessarily have a greater impact on the mortgage charge rate for a small loan than for a larger loan,

making it more difficult to comply with the two percent variation. It is probable that Congress did not expect significant flat fees for services to be charged by the mortgagee because such services are ordinarily to be compensated through the 1% origination fee. However, the statutory definition of mortgage charge rate refers to "any other amount charged to a mortgagor with respect to an insured mortgage." The Department interprets this language as excluding flat fees for mortgagee services distinct from the actual making of the loan (justifying the treatment of staff appraisers and staff inspectors described above) but the Department finds no blanket authority to disregard any flat fees charged by the mortgagee for any part of its role in the actual underwriting and closing process.

Two commenters addressed the proposed § 202.20(d) which would require that any interest rate offered for a mortgage type be available for mortgages of any principal amount. HUD has responded to one comment by clarifying in the final rule that this requirement applies only within an area as defined by the rule. Another commenter argued that the proposed rule conflicted with the tiered pricing statute because the proposed rule would require a mortgagee to recover a variance in costs in making different loans through variances in points rather than interest rates, whereas the statute left to the mortgagee the discretion to recover differences through either means or a combination of them. The commenter is correct that the statute refers to variations between mortgage charge rates instead of variations in discount points. If HUD permitted certain interest rates to be reserved for certain size loans, HUD would have needed to propose a rule that in all cases required a mathematical calculation of a specific mortgage charge rate, taking into account at least interest rates, discount points and origination fees. Under such an approach a mortgagee could have reserved certain interest rates for certain loans.

Such an approach may have been closer than the proposed rule to the literal language of the statute. HUD determined that the statute permitted a different and less complex approach. The compliance burden on mortgagees as well as the monitoring burden on HUD is greatly reduced if the primary comparison between mortgages is limited to discount points only so that no calculation is required. A single commenter objected to this approach, while nearly all commenters urged a reduction in regulatory burden. HUD will use its simplified approach of focussing on one component of the

mortgage charge rate (discount points) in lieu of a more complex and burdensome approach.

C. Variation in Costs

For a mortgagee which is in compliance with the two percentage point limitation on variation in mortgage charge rates, the statute also requires that HUD ensure that any variations in mortgage charge rates "are based only on actual variations in fees or costs to the mortgagee to make the loan." This requirement was contained in the proposed rule in § 202.20(a). Many commenters expressed concern over how HUD would determine the costs to make a loan. In effect, commenters wanted to know whether HUD would look solely at a mortgagee's direct expenditures and overhead in determining the cost of making a loan or whether the origination fees and value of servicing rights generated in making the loan would also be considered to arrive at a net cost. Loans of different sizes might appear to have similar costs until origination fees and servicing value are considered.

Origination fees necessarily vary because they are set at 1% of the loan amount. Commenters also explained that servicing value might be nonexistent for the smallest loans but could be a significant factor that partially or completely offsets costs for a larger loan. If these items were considered so that net costs were compared and points were allowed to make up the difference in net costs between small and large loans, mortgagees would have less difficulty in complying with the rule.

HUD did not address this issue specifically in the proposed rule. HUD agrees with commenters that the statute was not intended to prevent consideration of the variations in origination fee income and servicing values as factors offsetting other variations in costs. HUD has added language to § 202.20(a) of the final rule to clarify that net costs will be considered. Section 202.20(a) has also been revised to improve organization.

One commenter proposed that variation in mortgage charge rates up to two percentage points be permitted whenever the mortgagee can demonstrate that it is not recovering for any mortgage more than its average cost to originate all mortgages. "The lender should be prohibited from creating classes of mortgages and allocating differing costs to those classes," wrote the commenter. The Department agrees that the mortgagee may allocate the same average basic cost for all mortgages within a mortgage type, or for all

mortgages, provided that this approach is documented in the mortgagee's records. Information submitted by commenters suggested that mortgagees do have information on the average basic cost of originating an FHA-insured mortgage (without considering the value of servicing) produced by allocating general overhead among the mortgages originated. One commenter used an estimate of \$1,000 "unit cost" plus a commission that varied with loan size, resulting in a cost range of \$1,175–\$1,700 for loans of \$25,000–\$100,000. Another reported typical loan costs of \$1500–\$1800. Another stated that all FHA-insured single family mortgages, regardless of size, cost approximately the same to originate. An industry study by the Mortgage Bankers Association of America based on 1991 data from 185 mortgagees (not limited to FHA-insured mortgages) indicated somewhat higher expenses for producing a loan—an average of \$2,332 for all companies studied, \$2,183 for companies that purchase less than 10% of their loan production, and \$1,884 for the ten companies in the study with the highest profit. HUD will not question a mortgagee that documents its costs by using an average basic production cost in these ranges for all sizes of FHA-insured mortgages and any additional documented costs varying directly due to loan size, such as for commission. A mortgagee that wants to justify its costs variations by using differing basic costs for particular mortgages within a mortgage type will need to document any actual difference in costs but will not be prohibited from attempting to do so.

D. Other Comments on Mortgage Charge Rates

A few commenters disagreed completely with HUD's approach to determining mortgage charge rates. They argued that HUD should use the annual percentage rate (APR) determined under the Truth in Lending Act as the mortgage charge rate. HUD considered this approach when developing the proposed rule but did not pursue the idea. The APR could be useful in determining compliance with the two percentage point limit on variation, but the simplicity of comparing two APRs does not seem to be any great advantage over the simplicity of comparing discount points under the proposed rule. Use of the APR could not help to determine whether variations in fees and charges within the two percentage point limitation were justified. In addition, the APR includes charges not under the control of the mortgagee, such as charges for the appraisal, credit

report and other third party closing services, that would distort the application of the two percent tolerance that Congress intended to be applied only to mortgagee charges. It might be possible to develop some other tolerance applied to APR variations that approximated the effect of the two percent variation for mortgage charge rates, but HUD has no clear authority to abandon the specific terms of the statute. If Congress had intended that HUD attack the tiered pricing problem through comparison of APRs, it could easily have said so instead of developing the distinct concept of mortgage charge rates.

Two commenters questioned the statement in the preamble to the proposed rule that HUD would review any practices that pass closing costs and charges to the seller, in addition to items paid by the mortgagor. The commenters stated that HUD lacked statutory authority to review fees charged to the seller. One stated that at a minimum the rule should clarify that fees paid by the seller should be reviewed to determine whether they were charged to circumvent the tiered pricing rule and that there would be no other scrutiny.

The commenters' remarks regarding statutory authority presumably refer to the statutory definition of "mortgage charge rate" as including various items "charged to a mortgagor with respect to an insured mortgage." This could exclude some items that a mortgagee would not charge to a mortgagor, such as a seller's share of a settlement fee in a jurisdiction in which sellers share responsibility for the mortgagee's cost of conducting a settlement. HUD does not agree that the law precludes review of one or more items of closing costs merely because actual payment may have been made by the seller in the particular transaction. The law applies to the mortgagee's customary lending practices, not to the terms negotiated between particular sellers and buyers.

For example, assume that the parties to the sale are able to negotiate the manner in which they will share the responsibility for paying discount points to the mortgagee. If the mortgagee charges three extra points for a small mortgage as compared to a large one at the same interest rate, the mortgagee is not in compliance with the tiered pricing restriction merely because the seller in the smaller transaction has agreed to pay one or two points on behalf of the mortgagor. That aspect of the seller-mortgagor negotiation does not modify the mortgagee's customary lending practices, which are to charge a

mortgagor an impermissible amount of extra points for the smaller loan.

Recordkeeping

Most commenters viewed as excessively burdensome the requirement in § 202.20(h) of the proposed rule that mortgagees retain for three years records on pricing information "satisfactory to the Secretary". The following comment represents a typical reaction: "The creation of a separate and distinct recordkeeping system for this particular proposed rule is excessive." Another complained of "the sheer volume and extent of the loan documentation requirement." Another asserted that the proposal "requires banks to make extensive calculation of variables." Commenters did not offer any suggestions as to how HUD could monitor compliance with the statute if it had no access to historical records on a mortgagee's pricing policies.

HUD deliberately proposed a rule that minimized a mortgagee's recordkeeping burden and that did not require a separate and distinct recordkeeping system. HUD might have pursued approaches that would have placed substantial new recordkeeping and reporting burdens on a mortgagee, such as requiring all pricing sheets to be submitted to a local HUD office when they are adopted, or requiring a mortgagee to calculate a mortgage charge rate for each FHA insured single family mortgage or requiring a mortgagee to develop its own comparisons of its mortgage charge rates. HUD chose instead not to specify new records that a mortgagee must develop and maintain. Under current FHA policies and under the regulations implementing the Equal Credit Opportunity Act, 12 CFR part 202, mortgagees must retain loan files for both rejected and closed loan applications for two years. The rule does not add significantly to this burden.

Files for closed loans will ordinarily contain information showing the date and terms when the mortgage charges were locked in. Loan files for rejected loans should also contain sufficient information on the pricing of the loan if processing progressed far enough for specific loans terms to be considered. However, the rule does not require that pricing information be retained on an individual loan basis. The focus of the rule is on the "customary lending practices" of a mortgagee. A mortgagee could choose to retain its pricing sheets for two years as evidence of its general pricing policies and as a simple way to demonstrate compliance with the

regulation. The final rule does not dictate whether a mortgagee keeps information on mortgage charges on an individual loan basis, as a general record on its pricing policies, or both. Similarly, a mortgagee that wishes to ensure consideration of factors offsetting direct costs may include evidence of variations in origination fees and the value of servicing rights either in the individual loan files or in some other form that is available to HUD monitors.

The comments suggest that the necessary information is routinely available to a mortgagee with respect to each loan that is underwritten since the information is a basis for pricing the particular loan. It is a simple matter and not a substantial new burden to include the information in the loan file, or otherwise maintain it elsewhere if the mortgagee so chooses.

In short, all that the final rule requires is that a mortgagee be able to provide records to HUD during routine HUD mortgagee monitoring (or otherwise pursuant to a general inquiry as discussed below in Section III), in a form determined by the mortgagee and consistent with existing legal requirements for recordkeeping, that will enable HUD to obtain answers to a few basic questions: What charges has a mortgagee imposed on mortgagors for its mortgages, of a particular mortgage type in a particular area, during a specified time period? If the charges vary between mortgages of the same interest rate, mortgage type and area, what is the specific reason for the amount of variance? If the mortgagee has information available to answer these questions (and HUD expects that mortgagees already have such information without the requirements of this rule), then the mortgagee has records "satisfactory to the Secretary." HUD will inform mortgagees if the records ordinarily retained by mortgagees are found to be insufficient in the course of applying the rule and more specific requirements are needed.

A few commenters questioned the reference in § 202.20(h) of the proposed rule to data required under regulations implementing the Home Mortgage Disclosure Act (HMDA). The rule does not affect existing HMDA requirements, either by adding to information that must be reported for HMDA purposes or by relieving mortgagees of any reporting requirements. The final rule has been corrected to acknowledge that not all FHA-approved mortgagees are required to report under HMDA. Mortgagees that are not covered by HMDA are subject to similar requirements with respect to applications and closed loans involving FHA-insured mortgages pursuant to

HUD's responsibilities under the Fair Housing Act, Mortgagee Letter 90-25 and other mortgagee letters, and Handbook 4155.1 REV-4, paragraph 3-14G.1.

Responsibility of Sponsors/Wholesalers/Investors

Ten commenters disagreed with the Department's position in the preamble to the proposed rule regarding responsibility of sponsors/wholesalers/investors. The Department proposed to hold responsible for an originator's tiered pricing violations the sponsor mortgagee (if the originator was approved by HUD as a loan correspondent) or any wholesaler/investor mortgagee that had arranged prior to closing to fund and purchase the mortgage (i.e., through table funding). This would involve interpreting the statutory phrase "customary loan practices" as applicable to the wholesale purchases of mortgages from the originator and including the purchased loans.

Commenters stated that the mortgagees/investors at the wholesale level lacked the ability to dictate the amounts charged to a mortgagor by the originating mortgagee and therefore should not be held responsible. Some commenters also stated that a sponsor has no knowledge of the various prices charged by its loan correspondents and no way to monitor them. Many commenters also pointed out that an originating loan correspondent could have many sponsors, and that HUD should not hold a single sponsor responsible for the loan practices of the loan correspondent including loans originated for other sponsors.

The Department stated in the proposed rule preamble that its intent was to "most effectively regulate those directly responsible for tiered pricing." Responsibility can be the result of action or inaction by the sponsor or wholesale purchaser. The Department's experience in examining possible tiered pricing violations has been that loan originators attribute any violations to the requirements of mortgagees at the wholesale level. The Department agrees that this is not always the case. The Department does not view as dispositive, however, the fact that the tiered pricing practices at the retail level may not have been expressly dictated by the wholesale mortgagee. The Department believes that there are other ways in which the wholesaler's requirements and practices may lead to tiered pricing that is not in compliance with the statute.

The commenters generally appeared to accept the Department's position that

the practices of wholesale lenders in setting terms for the mortgages that they fund or purchase can come within the scope of the statutory term "customary lending practices" if they have the effect of leading to discriminatory pricing by the originating mortgagees in violation of the tiered pricing restrictions. The disagreement is over whether, in fact, that effect follows from typical arrangements.

Current regulations, at 24 CFR 202.15(c)(6), provide that each sponsor of a loan correspondent shall be responsible to the Secretary for the actions of its loan correspondent in originating mortgages, unless applicable law or regulation requires specific knowledge on the part of the party to be held responsible. This principle applies to the tiered pricing area. It is limited to those mortgages with which the particular sponsor mortgagee is involved, not mortgages originated for sale to other mortgagees. The sponsor is required to underwrite the FHA insured loans that it will purchase from the loan correspondent, 24 CFR 202.15(c)(1). The sponsor is not ignorant of the lending practices of its correspondent with respect to such loans. The Department will provide a sponsor the opportunity to explain why it should not be regarded as responsible for a particular tiered pricing violation of its loan correspondent with respect to loans that it underwrites, but the Department does not agree that sponsors generally cannot be regarded as responsible for the pricing of loans by loan correspondents.

In the proposed rule HUD stated its intention to treat wholesale purchasers providing table funding for a mortgagee in the same manner as HUD-approved sponsors. At least one commenter specifically objected to any application of the rule to a table funding situation. The commenter cited a 1992 ruling of the Emerging Issues Task Force of the Financial Accounting Standards Board (FASB), the governing body of the accounting profession, that a table funding arrangement should be accounted for as a purchase if the loan is legally structured as an origination by the correspondent and if the correspondent is independent of the mortgage banking enterprise. HUD does not agree that this accounting ruling should govern the distinct issue of responsibility for tiered pricing practices. Even if the mortgagee/investor providing table funding is not an approved sponsor purchasing from a loan correspondent, HUD will regard the mortgagee/investor as responsible for tiered pricing violations if the requirements of the funding mortgagee have the effect of leading to a tiered

pricing violation by the loan originator. HUD has revised § 202.20(a) to state this principle in the final rule. HUD continues to distinguish approved sponsors from other mortgagees providing table funding because other mortgagees do not have the general responsibility for the correspondent/originator stated in § 202.15(c)(6).

Application of Rule to All Single Family Programs

Numerous commenters objected to applying the rule to all FHA single family programs rather than limiting the rule to the section 203 programs mentioned in the legislation. The commenters viewed this as a major extension of the scope of tiered pricing restrictions, and beyond HUD's legal authority. One commenter supported HUD's approach.

Section 203(t) can be read as only requiring HUD to consider section 203 mortgages when determining whether the customary lending practices of a mortgagee violate the tiered pricing restrictions. Most Section 203 mortgages are insured under the basic Section 203(b) program; insurance is also available in specific circumstances under Sections 203 (h), (i), (n) or (k). HUD does not agree that it lacks authority to consider practices under other FHA single family programs and concludes that there is good reason to look beyond section 203 to other single family programs as well.

For FY 1993, approximately 84.5 percent of single family mortgage loans receiving FHA insurance were insured under section 203 programs so that single family mortgagees will not be subject to significant extra burdens by including other programs in this rule. The principal non-section 203 mortgage insurance program is the section 234(c) program for insurance of condominium unit mortgages with approximately 7.7 percent of insured mortgages in FY 1993. There is no policy reason why the practice of tiered pricing should be viewed differently for section 234(c) mortgages as for section 203(b) mortgages. It should be restricted in both programs. In addition, the Department anticipates that additional significant single family programs may be added to the National Housing Act outside of section 203 with the same potential for discriminatory treatment through tiered pricing. The law should not be interpreted to require specific amendment of section 203(t) as a prerequisite to addressing tiered pricing concerns in new programs; the better reading is that the law permits HUD to attack any tiered pricing concerns for

each new program without the need for express new authority.

The general rulemaking authority in section 211 of the National Housing Act permits HUD to adopt rules and regulations that it regards as necessary to carry out Title II of the National Housing Act; that authority permits HUD to adopt and apply its mortgagee approval requirements generally to all programs and the tiered pricing restrictions are being adopted in the regulations as an additional section of the mortgagee approval requirements. In section 539 of the National Housing Act, which will be discussed in a later section, Congress acknowledged the relationship of the tiered pricing restrictions of section 203(t) with the prohibition of a minimum loan amount in section 535 of the National Housing Act. Congress required the Secretary to assess the compliance of a mortgagee with both requirements in connection with any HUD examination of a mortgagee, and required a single procedure for a private individual to require determination of a mortgagee's compliance with both requirements. Section 535 has already been implemented by regulation for all single family programs and it is reasonable to keep the same broad approach for the related provision. The Department is sympathetic to the commenters' concern that extension of the tiered pricing restrictions to many minor programs could be burdensome. The Department will respond to this concern by focusing its review of tiered pricing compliance on a limited number of mortgage types involving major programs as discussed below.

Mortgage Type

The proposed rule provides for comparison only of mortgages of the same mortgage type. Instead of describing each mortgage type, the proposed rule provided that a mortgage type would include those groups of mortgages that are closely parallel in important risk characteristics. The proposed rule would have authorized the Secretary to develop standards and definitions regarding risk characteristics. The preamble to the proposed rule suggested that mortgage types could be based both on approaches to interest rate (fixed rate, ARM, GPM) and insurance program (sections 203(b) and 234(c) separated from section 203(k)). The Department indicated particular interest in receiving industry comment.

The commenters provided many suggestions for developing mortgage types. There was no consensus regarding appropriate typing. The

following were cited by one or more commenters as characteristics that should place mortgages in separate categories: purchase vs. refinance, attached/condominium vs. detached (203(b)), high vs. low loan-to-value ratio, adjustable rate vs. fixed rate level payment vs. fixed rate graduated payment, new vs. existing construction, no- or low-closing cost loans (refinances or others) with premium interest rate vs. market rate, and different FHA mortgage insurance funds.

One commenter stated that mortgage types should be based on cost of origination instead of risk. The proposed rule reference to risk was taken from the pertinent discussion in the Conference Committee report on the statute¹, but that report also mentioned expenses. The report states:

This section is intended to apply to Sec. 203 of the National Housing Act by loan type. For example, mortgages insured under the section 203(k) program may be priced differently from mortgages insured under the 203(b) program. The Committee recognizes that different types of mortgages involve differing levels of risk, processing expenses or other factors that differentiate them and necessitate pricing variation.

The basic objective is to avoid comparing mortgages where one would ordinarily expect to find interest rate and/or discount point differences due to the nature of the mortgage even given identical borrowers, property and loan amount. HUD agrees that the proposed rule's reference only to "risk characteristics" may be too limiting and additional language has been added to § 202.20(g) that paraphrases the Conference Committee report.

The Department does not consider it advisable to place a fixed delineation of mortgage types in the rule because of lack of experience and potential new mortgage programs and pricing practices. Instead the Department has retained general language providing for the Secretary to provide standards and definitions. Based on this authority, HUD's monitoring for tiered pricing compliance will initially be based on a mortgage type definition that will divide mortgages only into two types based on program: section 203(b)/section 234(c) mortgages as one type, with section 203(k) rehabilitation loans as a separate type. The rule extends to all single family programs as discussed above, but at this time HUD intends to restrict routine monitoring to these major programs.

HUD considered whether each mortgage type based on program should be further subdivided based on other

characteristics of the mortgage such as those cited by the commenters. HUD has concluded that it does not have sufficient information and experience to determine additional appropriate subtypes at this time, given the lack of any consensus among the commenters who addressed this question. An excessive number of overly specific mortgage types would result if each of the suggested methods of grouping mortgages were adopted by HUD. The final rule permits HUD to further define mortgage types if its monitoring experience demonstrates that this is necessary to avoid inappropriate comparisons of mortgages when determining compliance with the rule.

Definition of "Area"

The statute applies the two percentage point limitation on mortgage charge rate variation to mortgages on dwellings in an "area". The statute states that "area" shall have the meaning given the term under section 203(b)(2) of the National Housing Act. The pertinent sentence in section 203(b)(2) states that "area" means a county or a metropolitan statistical area (MSA) as established by the Office of Management and Budget, whichever results in the higher dollar amount. This definition is ordinarily used when implementing HUD's authority to designate "high-cost" areas where—due to high median area house prices—the FHA maximum mortgage limit can exceed the \$67,500 amount that would otherwise apply for a 1-family residence. There is some ambiguity in applying this definition of "area" to the tiered pricing context.

The proposed rule regarded the statutory reference to the section 203(b)(2) definition as an indication that the areas for tiered pricing purposes should be the high-cost areas already designated by HUD to determine maximum mortgage amounts. These areas currently cover most of the population of the country and include most MSAs as well as some counties that are not part of any MSA. Under the reading of the statute adopted in the proposed rule, there is no specific statutory guidance regarding how other parts of the country should be divided into areas for purposes of tiered pricing comparisons. The proposed rule would have divided the rest of the country (*i.e.*, excluding the designated high-cost areas) by using the jurisdictional lines of HUD Field Offices.

HUD received 5 comments—all negative—on its proposed approach to defining areas. Several commenters indicated that the proposed rule was difficult to understand. Three commenters made specific suggestions

for different approaches. One asserted that the statutory reference to the section 203(b)(2) definition of area simply means that loans made in metropolitan statistical areas are compared with other loans made in the same metropolitan statistical area, and loans made outside of metropolitan statistical areas are compared on a county by county basis. This commenter also recommended use of counties because HMDA data is compiled by counties. HMDA data is not compiled for loans outside MSAs, however, so that HMDA precedent is not pertinent regarding defining rural land into "areas" for tiered pricing purposes. Another commenter accepted HUD's use of designated high-cost areas as areas for purposes of the rule, but also suggested that the remainder of the country be compared on a county-by-county basis instead of using HUD Field Office jurisdictions. A third commenter also objected to use of HUD Field Office jurisdictions and suggested the use of areas served by the lender's own offices as they might change from time to time. Another commenter noted that different counties or states may require different pricing levels even though they are both in the same HUD Office jurisdiction, without offering any alternative approach. None of the commenters submitted any information regarding how lenders typically vary pricing levels geographically. No evidence was submitted indicating that pricing typically varies on a county-by-county basis.

After reviewing the comments, HUD continues to conclude that the most likely intent of the statutory reference to the section 203(b)(2) definition of area was to require use of the same high-cost areas that are used for designating mortgage limits under section 203(b)(2). It is unlikely that the statute demands use of county-by-county comparisons outside of MSAs, as one commenter suggested, because of the lack of evidence that mortgages are priced on a county basis and because of the very large number of separate rural areas that would result—with very few mortgages made by any one mortgagee in most of the areas. County comparisons are unlikely to reveal any excessive tiered pricing that may be occurring over broader areas outside of MSAs.

It is possible that the statute does not mandate any tiered pricing comparisons outside of high-cost areas. If so, HUD still would possess authority to extend the rule's coverage through its general rulemaking authority and HUD believes that it is not appropriate to exclude parts of the country from coverage of the final rule. There is no reason to

¹ H.R. Rep. 101-922, p. 393.

conclude that excessive tiered pricing, to the extent that it exists, is limited to high-cost areas.

Any dividing of the rural and non-high-cost MSAs will be somewhat arbitrary and will not match exactly any mortgagee's perception of different mortgage markets. Use of political jurisdictional lines could result in too many areas (counties) or too few and too large areas (states). HUD has concluded that use of HUD Office jurisdictional lines is an appropriate compromise. In large sparsely populated states which are unlikely to be divided into well-defined separate mortgage pricing areas, there is typically a single HUD Office. In the more populous state there are likely to be several HUD offices, as well as high-cost areas, so that the state will be divided into a number of different areas for tiered pricing comparisons. HUD has previously decided to use HUD Office jurisdictions as a means of dividing up mortgage markets for monitoring purposes. For example, 24 CFR 202.11(d)(i) defines the "normal rate" of claims and defaults in an area on the basis of HUD Office jurisdictions.

Therefore, HUD has not made any substantive changes in the definition of area in the final rule. A technical change has been made in the reference to the regulation on high-cost areas to reflect revisions made by a final rule that implemented a revision of section 203(b)(2) in the Housing and Community Development Act of 1992 (58 FR 40996, July 30, 1993.)

Variations From Customary Lending Practices

The commenters raised a number of questions involving cases where the actual charges for the mortgage might differ in special cases from the prevailing policy of the mortgagee. Commenters asked about reduced rates for certain loans as a promotion or to gain market share in an area or on a "random basis," about par-plus pricing, about negotiated interest rates or points needed to attract a particular mortgagor from a competitor lender, and about loan officer overages. Rather than discuss each of these situations in detail, the Department will point out that the statute is directed at a mortgagee's "customary lending practices". It is permissible for a mortgagee to have a lending policy that permits occasional deviations from the standard terms it is generally offering to customers in its lending area, even if beyond a two percent variation, provided that those deviations are not applied in a discriminatory fashion and are available to purchasers on lower as well as higher priced homes on an

individual case basis. The loan file should document why special pricing was applied. The two percent variation limitation is permitted by law not to recognize the occasional exceptions to a pricing policy, but to permit the mortgagee's pricing policy itself to contain some variations among loans, principally to ensure that a mortgagee can afford to make loans of all sizes.

One commenter objected to the lack of a good faith exception process for what it characterized as "good faith noncompliance based on circumstances which do not violate the spirit of a regulation * * * There should be the ability to show that in good faith, tiered pricing was not based on loan amounts or other discriminatory factors." HUD does not interpret the statute as authorizing a formal good faith exception although, as stated above, the statute is concerned with customary practices instead of the actual terms of each individual mortgage. Monitoring and enforcement in this area, as in other areas, can take into account actual circumstances when determining appropriate responses to a mortgagee's noncompliance. The mere lack of intent to engage in forbidden discrimination is not a defense. The statute prohibits customary lending practices with variation in mortgage charge rates on greater than two percentage points regardless of any legitimate business motive for the excess variation. The statute requires HUD to determine that lesser variations in mortgage charge rates are based on actual variations in fees or costs to the mortgagee. The mere lack of an illegitimate discriminatory motive for variations is not enough.

III. Implementation of Section 539(a) of the National Housing Act

Section 330(b) of the Cranston-Gonzalez National Affordable Housing Act added a new section 539(a) to the National Housing Act (NHA). The new section requires, among other things, that the Secretary establish a procedure whereby any person may file a request for a determination on whether a mortgagee is in compliance with: (1) The new section 203(t) on tiered pricing, and (2) certain other provisions of the National Housing Act that prohibit minimum loan amounts for insured mortgages and Title I loans. The Secretary must also establish a procedure to inform each requestor of the disposition of its request for determination and to publish in the *Federal Register* the disposition of any case referred to the Mortgagee Review Board for action.

HUD published a notice setting forth the procedure for filing a request for

determination of compliance with section 203(t) and the minimum loan amount prohibitions (56 FR 33455, July 22, 1991.) Section 330(b) requires that this notice be followed by a final rule. The substance of the notice is included in this rule as a new subsection (i) to § 202.20. The Department has also amended § 201.10(g) to refer to new § 202.20(i) because the procedure also applies to Title I Lenders.

Many commenters, primarily State Banking Associations, objected to this provision as a "private right of action" that would cause HUD to conduct "fishing expeditions" at great expense to mortgagees. HUD believes that the commenters misunderstood the intent of the provision. HUD has done no more than follow the requirements of section 539(a)(2) of the National Housing Act. Those requirements must be read together with section 539(a)(1), which directs the Secretary to assess the performance of a mortgagee in meeting the tiered pricing and minimum loan amount prohibitions "[i]n connection with any examination of a mortgagee by the Secretary pursuant to this [National Housing] Act." In other words, a tiered pricing review generally would be conducted as part of the regular mortgagee monitoring conducted by HUD.

Section 539(b)(2) ensures that HUD can receive evidence of violations outside of its regular mortgagee monitoring so that special investigations can be made if appropriate. The law and the rule do not compel HUD to conduct an investigation at the demand of any person. A person may "request" a HUD determination of compliance, and HUD must inform the person of the disposition of the request, which could be a decision that no investigation was warranted. One commenter suggested that requests be published. They will be available to the public upon request under the Freedom of Information Act (except to the extent that withholding is determined to be necessary under the "investigatory records" exception to disclosure) but HUD does not plan a formal publication system.

An investigation might not be warranted if the requestor provides no reason to suspect a tiered pricing violation by the mortgagee or if the request appears to have been solely for harassment purposes. HUD has limited investigative and monitoring resources and will not waste those resources in pursuing all requests no matter how unsupported or frivolous. HUD will respond vigorously when it receives reason to suspect a tiered pricing violation even though a violation may

not have been identified through the regular mortgagee monitoring process.

IV. Procedural Requirements

Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers are: 14.108, 14.110, 14.117, 14.119, 14.120, 14.121, 14.122, 14.123, 14.133, 14.142 and 14.162.

Regulatory Flexibility Act

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule carries out a statutory mandate designed to ensure that FHA mortgagees will not discriminate against FHA mortgagors with low principal loans. The Department believes that the rule does this in a manner which interferes to the minimum extent feasible with ordinary business operations of small entities.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule do not have "federalism implications" within the meaning of the Order. The rule does not alter existing relationships between the Department, state and local governments and the private sector.

Executive Order 12606, the Family

The General Counsel, as the Designated Official for Executive Order 12606, the Family, has determined that the provisions of this rule do not have the potential significant impact on family formation, maintenance, and general well-being within the meaning of the Order. The tiered pricing rule serves primarily as a tool for prohibiting discrimination against mortgagors who apply for low-principal loans.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969. (42 U.S.C. 4332) The Finding of No Significant Impact is available for public inspection and copying through Friday, 7:30 a.m. until 6:00 p.m. in the Office of the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

Regulatory Agenda

This rule was listed as sequence number 1528 in the Department's Semiannual Agenda of Regulations published on October 25, 1993 (58 FR 56402, 56428) pursuant to Executive Order 12866 and the Regulatory Flexibility Act.

List of Subjects

24 CFR Part 201

Health facilities, Historic preservation, Home improvement, Loan programs—housing and community development, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 202

Administrative practice and procedure, Home improvement, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

Accordingly, 24 CFR parts 201 and 202 are amended to read as follows:

PART 201—TITLE I PROPERTY IMPROVEMENT AND MANUFACTURED HOME LOANS

1. The authority citation for 24 CFR part 201 is revised to read as follows:

Authority: 12 U.S.C. 1703; 42 U.S.C. 3535(d).

2. In § 201.10, paragraph (g) is amended by adding to the end of the paragraph a new sentence to read as follows:

§ 201.10 Loan amounts.

* * * * *

(g) * * * A person may request the Secretary to determine compliance of a lender with this section as provided in § 202.20(i) of this chapter.

PART 202—APPROVAL OF LENDING INSTITUTIONS AND MORTGAGEES

3. The authority citation for 24 CFR part 202 continues to read as follows:

Authority: 12 U.S.C. 1703, 1709, and 1715(b); 42 U.S.C. 3535(d).

Subpart B—Approval of Mortgages

4. Part 202, subpart B, is amended by adding a new § 202.20 to read as follows:

§ 202.20 Tiered Pricing.

(a) *Customary lending practices.* (1) The customary lending practices of a mortgagee for its FHA insured single family mortgages shall not provide for a variation in mortgage charge rates that exceeds two percentage points. A

variation is determined as provided in paragraph (f) of this section.

(2) The customary lending practices of a mortgagee include all FHA insured single family mortgages originated by the mortgagee. They also include FHA insured single family mortgages funded by the mortgagee or purchased from the originator if requirements of the mortgagee have the effect of leading to violation of this section by the originator. The responsibility of sponsors of loan correspondents is also governed by § 202.15(c)(6).

(3) Any variations in the mortgage charge rate up to two percentage points under the mortgagee's customary lending practices must be based on actual variations in fees or cost to the mortgagee to make the loan, which shall be determined after accounting for the value of servicing rights generated by making the loan and other income to the mortgagee related to the loan. Fees or costs must be fully documented for each specific loan.

(b) *Area.* For purposes of this section, an area is:

(1) An area used by HUD for purposes of § 203.18(a) of this chapter to determine the median 1-family house price for an area; or

(2) The area served by a HUD field office but excluding any area included in paragraph (b)(1) of this section.

(c) *Mortgage charges.* Mortgage charges include any charges under the control of the mortgagee and not collected for the benefit of third parties, including, but not limited to interest discount points and loan origination fees.

(d) *Interest rate.* Whenever a mortgagee offers a particular interest rate for a mortgage type in an area, it may not restrict the availability of the rate in the area on the basis of the principal amount of the mortgage. A mortgagee may not direct mortgage applicants to any specific interest rate category on the basis of loan size.

(e) *Mortgage charge rate.* The mortgage charge rate is defined as the amount of mortgage charges for an FHA insured mortgage expressed as a percentage of the initial principal amount of the mortgage.

(f) *Determining excess variations.* Variation in mortgage charge rates for a mortgage type is determined by comparing all mortgage charge rates offered by the mortgagee within an area for the mortgage type for a designated day or other time period, including mortgage charge rates for all actual mortgage applications.

(g) *Mortgage type.* A mortgage type for purposes of paragraph (f) of this section will include those mortgages that are

closely parallel in important characteristics affecting pricing and charges, such as level of risk or processing expenses. The Secretary may develop standards and definitions regarding mortgage types.

(h) *Recordkeeping.* Mortgagees are required to maintain records on pricing information, satisfactory to the Secretary, that would allow for reasonable inspection by HUD for a period of at least two years. Additionally, many mortgagees are required to maintain racial, ethnic, and gender data under the regulations implementing the Home Mortgage Disclosure Act (12 U.S.C. 2801-2810).

(i) *Request for determination of compliance.* Pursuant to section 539(a) of the Cranston-Gonzalez National Affordable Housing Act, any person may file a request that the Secretary determine whether a mortgagee or Title I lender is in compliance with this section or with sections implementing sections 223(a)(7) and 535 of the National Housing Act such as §§ 201.10(g), 203.18d and 203.43(c)(5) of this chapter.² The request for determination shall be made to the following address: Department of Housing and Urban Development, Office of Lender Activities and Land Sales Registration, 451 Seventh Street SW., Room 9146, Washington, DC 20410. Each request shall include the requestor's name and address and the name and address of the mortgagee or Title I lender involved. A complete explanation of the circumstances and the mortgagee's or Title I lender's practices, to the extent known, must be delineated. Any documented evidence that the requestor may have, including copies of advertisements, HUD-1 Settlement Statements, sales contracts, or other relevant documents would greatly expedite the Department's review and the resultant determination. The Secretary shall inform the requestor of the disposition of the request. The Secretary shall publish in the **Federal Register** the disposition of any case referred by the Secretary to the Mortgagee Review Board.

(Approved by the Office of Management and Budget under control numbers 2502-0265 and 2502-0059)

Dated: February 15, 1994.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 94-4331 Filed 2-24-94; 8:45 am]

BILLING CODE 4210-27-P

² Only section 535 applies to Title I lenders.

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

Montana Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is announcing approval of a proposed amendment to the Montana permanent regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment would revise the State's definition of "prospecting" to more closely conform to the Federal definition of "coal exploration."

EFFECTIVE DATE: February 25, 1994.

FOR FURTHER INFORMATION CONTACT: Guy V. Padgett, Telephone: (307) 261-5776.

SUPPLEMENTARY INFORMATION:

I. Background on the Montana Program

On April 1, 1980, the Secretary of the Interior conditionally approved the Montana program as administered by the Department of State Lands. General background information on the Montana program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Montana program can be found in the April 1, 1980 **Federal Register** (45 FR 21560). Subsequent actions concerning Montana's program and program amendments can be found at 30 CFR 926.15 and 926.16.

II. Submission of Amendment

By letter dated October 19, 1992, (Administrative Record No. MT-9-1) Montana submitted a proposed amendment to its permanent program pursuant to SMCRA. Montana submitted the proposed amendment in response to a March 29, 1990, letter that OSM sent to Montana in accordance with 30 CFR 732.17(c) (Administrative Record No. MT-8-01). The provision of the Montana program that Montana proposes to amend is Montana Code Annotated (MCA) Section 82-4-203(26) (statutory definition of "prospecting").

OSM published a notice in the December 14, 1992, **Federal Register** (57 FR 59020) announcing receipt of the amendment and inviting public comment on its adequacy (Administrative Record No. MT-9-8).

The public comment period ended January 13, 1993.

During its review of the amendment, OSM identified concerns relating to the proposed revision of MCA 82-4-203(26). OSM notified Montana of the concerns by letter dated February 3, 1993 (Administrative Record No. MT-9-11). Montana responded in a letter dated July 28, 1993, by submitting a revised proposed definition at MCA 82-4-203(26) (Administrative Record No. MT-9-13). OSM published a notice in the **Federal Register** announcing receipt of the revision and invited public comment on its adequacy (Administrative Record No. MT-9-18). The public comment period ended September 27, 1993.

In a letter dated November 24, 1993, (Administrative Record No. MT-9-26) OSM notified the State of concerns related to the proposed definition submitted by cover letter dated July 28, 1993. Thereafter, by letter dated January 12, 1994, (Administrative Record No. MT-9-27) Montana agreed that OSM's concerns with the proposed definition were justified.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment submitted by Montana on October 19, 1992, and revised July 28, 1993.

Montana submitted a revised definition of "prospecting" at MCA 82-4-203(26) on October 19, 1992, and subsequently, as a result of OSM's February 3, 1993 letter, submitted a revision to the initially proposed definition on July 28, 1993. The State is proposing the following definition of "prospecting":

Prospecting means the removal of overburden, core drilling, construction of roads, or any other disturbance of the surface for the purpose of determining the location, quantity, or quality of a natural mineral deposit: the gathering of surface or subsurface geologic, physical, or chemical data by mapping, trenching, geophysical or other techniques necessary to determine the quality and quantity of overburden in an area; or the gathering of environmental data to establish the conditions of an area before beginning strip-or underground-coal-mining and reclamation operations under this part.

The State proposal is similar to the Federal definition of the term "coal exploration" at 30 CFR 701.5 insofar as it includes: " * * * the gathering of environmental data to establish the conditions of an area before beginning strip-or underground-coal-mining and reclamation operations * * *."