

approved directions for use. A veterinarian may issue a VFD only if a valid veterinarian-client-patient relationship exists, as defined in § 530.3(i) of this chapter.

(8) A "medicated feed" means a Type B medicated feed as defined in paragraph (b)(3) of this section or a Type C medicated feed as defined in paragraph (b)(4) of this section.

(9) For the purposes of this part, a "distributor" means any person who distributes a medicated feed containing a VFD drug to another distributor or to the client-recipient of the VFD.

(10) An "animal production facility" is a location where animals are raised for any purpose, but does not include the specific location where medicated feed is made.

(11) An "acknowledgment letter" is a written communication provided to a distributor by a consignee who is not the ultimate user of medicated feed containing a VFD drug. An acknowledgment letter affirms that the consignee will not ship such medicated animal feed to an animal production facility that does not have a VFD, and the consignee will not ship such feed to another distributor without receiving a similar written acknowledgment letter.

7. Section 558.6 is added to subpart A to read as follows:

§ 558.6 Veterinary feed directive drugs.

(a) What conditions must be met if I am a veterinarian issuing a veterinary feed directive?

(1) You must be appropriately licensed;

(2) You must issue a VFD only within the confines of a valid veterinarian-client-patient relationship (as defined in § 530.3(i) of this chapter) in accordance with the format described in paragraphs (a)(3), (a)(4), and (a)(5) of this section;

(3) You must complete the VFD in writing and sign it;

(4) You must produce the VFD in triplicate;

(5) You must include the following information in the VFD:

(i) Your name, address, and phone number and that of the client;

(ii) Identification and number of animals to be treated/fed the medicated feed, including identification of the species of animals, and the location of the animals;

(iii) Date of treatment and, if different, date of prescribing the VFD drug;

(iv) Approved indications for use;

(v) Name of the animal drug;

(vi) Level of animal drug in the feed, and the amount of feed required to treat the animals in paragraph (a)(5)(ii) of this section;

(vii) Feeding instructions with the withdrawal time;

(viii) Any special instructions and cautionary statements necessary for use of the drug in conformance with the approval;

(ix) Expiration date of the VFD;

(x) Number of refills (reorders) if necessary and permitted by the approval;

(xi) Your license number and the name of the State issuing the license; and,

(xii) The statement: "Extra-label use, (i.e., Use of this VFD feed in a manner other than as provided for in the VFD drug approval) is strictly prohibited."

(xiii) Any other information required by the VFD drug approval regulation.

(6) You must issue a VFD only for the approved conditions and indications for use of the VFD drug.

(b) What must I do with the VFD if I am a veterinarian?

(1) You must give the original VFD to the feed distributor (directly or through client);

(2) You must keep one copy of the VFD;

(3) You must give the client the second copy of the VFD;

(4) You may fax a VFD to the client or distributor, if you wish, provided you immediately forward the signed written original to the distributor and a copy to the client.

(c) What are the VFD recordkeeping requirements?

(1) The VFD must be kept by all involved parties (i.e., veterinarian, client, and VFD feed distributor) for a period of 2 years from date of issuance.

(2) The VFD must be made available by all involved parties for inspection and copying by FDA.

(3) VFD's transmitted by facsimile must be kept by all involved parties along with copies distributed by the veterinarian.

(d) What are the notification requirements if I am a distributor of animal feed containing a VFD drug?

(1) You must notify FDA only once, by letter, that you intend to distribute animal feed containing a VFD drug.

(i) The notification letter must include the complete name and address of each business site from which distribution will occur.

(ii) A responsible person from your firm must sign and date the notification letter.

(iii) You must submit the notification letter, prior to beginning your first distribution, to the Center for Veterinary Medicine, Division of Animal Feeds (HFV-220), 7500 Standish Pl., Rockville, MD 20855; and

(iv) You must notify the Center for Veterinary Medicine at the address provided in paragraph (d)(1)(iii) of this

section within 30 days of any change in name or business address.

(2) If you are a distributor who ships an animal feed containing a VFD drug to another consignee-distributor in the absence of a valid VFD, you must obtain:

(i) An "acknowledgment letter," as defined in § 558.3(b)(11) of this chapter, from the consignee-distributor; and

(ii) A statement affirming that the consignee-distributor has complied with "Distributor Notification" requirements of paragraph (d)(1) of this section.

(e) What are the recordkeeping requirements if I am a distributor?

(1) You must keep information specified in paragraph (c)(1) or paragraph (d)(2)(i) of this section;

(2) You must keep records of receipt and distribution of all medicated animal feed containing a VFD drug;

(3) You must keep these records for 2 years from date of receipt and distribution; and

(4) You must make records available for inspection and copying by FDA.

(f) What cautionary statements are required for VFD drugs and animal feeds containing VFD drugs? All labeling and advertising must prominently and conspicuously display the following cautionary statement:

"Caution: Federal law limits this VFD drug product to use under the professional supervision of a licensed veterinarian. Medicated feed bearing or containing a VFD drug may be fed to animals only when there exists a lawful veterinary feed directive issued by a licensed veterinarian in the course of the veterinarian's professional practice."

Dated: June 25, 1999.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy Coordination.

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BILLING CODE 4160-01-F

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1908

[Docket No. CO-5]

Consultation Agreements: Proposed Changes to Consultation Procedures

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: OSHA proposes to revise its regulations for federally-funded on-site

safety and health consultation visits to provide for greater employee involvement in site visits; to require that employees be informed of the results of these visits; to provide for the confidential treatment of information concerning workplace consultation visits; and to update its procedures for conducting consultation visits.

DATES: Written comments must be submitted on or before September 30, 1999.

ADDRESSES: Send two copies of your comments to: Docket Office, Docket No. C-05, Room N2625, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Comments limited to 10 pages or fewer may also be transmitted by FAX to: 202-693-1648, provided that the original and one copy of the comment are sent to the Docket Office immediately thereafter.

Comments may also be submitted electronically through OSHA's Internet site at URL, <http://www.osha-slc.gov/e-comments/e-comments-consult.html>. Information such as studies and journal articles cannot be attached to electronic submissions and must be submitted in duplicate to the above address. Such attachments must clearly identify the respondent's electronic submission by name, date, and subject, so that they can be attached to the correct submission. The entire record for the Proposed Changes to the Consultation Procedures is available for inspection and copying in the Docket Office, Docket C-05, telephone 202-693-2350.

FOR FURTHER INFORMATION CONTACT: Bonnie Friedman, Director, Office of Information and Consumer Affairs-OSHA, Rm. N-3647, 200 Constitution Avenue NW, Washington DC 20210. Telephone: (202) 693-1999.

SUPPLEMENTARY INFORMATION:

I. Background

The OSHA On-Site Consultation Program

The Occupational Safety and Health Administration (OSHA), under cooperative agreements with agencies in 44 states, the District of Columbia, and several U.S. territories, administers and provides federal funding for an on-site consultation program which makes trained health and safety personnel available, at an employer's request and at no cost to the employer, to conduct worksite visits to identify occupational hazards and provide advice on compliance with OSHA regulations and standards. (In the remaining 6 states and 2 territories on-site consultation services

are provided to small employers in the private sector as part of an OSHA-approved state plan funded by federal grants under section 23(g) of the Occupational Safety and Health (OSH) Act, rather than under cooperative agreements). Priority in providing on-site consultation visits is accorded to smaller employers in more hazardous industries. (Various OSHA directives currently specify that priority for consultation services be given to employers having not more than 250 workers at the site receiving the consultation, and no more than 500 workers nationwide). The consultation program was first authorized by Congressional appropriations action in 1974. On July 16, 1998, President Clinton signed into law the Occupational Safety and Health Administration Compliance Assistance Authorization Act (CAAA), Pub. L. 105-197, which codifies this important OSHA program as a new subsection 21(d) of the Occupational Safety and Health Act.

The OSHA on-site consultation program is administered in accordance with regulations at 29 CFR Part 1908. These regulations provide, among other things, rules and procedures for State consultants performing worksite visits. In the present **Federal Register** notice, OSHA proposes several revisions to these rules, and requests interested members of the public to submit any data, views, or arguments relevant to these proposed changes, during a 90-day public comment period.

II. Proposed Changes to 29 CFR 1908

Employee Walkaround Rights

Current consultation program regulations provide that employees, representatives of employees, and members of joint workplace safety and health committees may be allowed to accompany the consultant and the employer's representative during the on-site consultative visit "to the extent desired by the employer" [29 CFR 1908.6(c)(2)]. Although these regulations encourage, but do not require, the employer to accord "walkaround" rights to employee representatives, OSHA's procedures have for some time required that union representatives should be accorded walkaround rights during consultation visits to unionized workplaces. [*Consultation Policies and Procedures Manual*, TED 3.5B Chap. VI, p. VI-9 (1996)]. One of the goals established for OSHA by the National Performance Review in a 1995 report was to revise agency procedures to assure that employees are included in the

consultation walkaround. [National Performance Review, *The New OSHA: Reinventing Worker Safety and Health* (May, 1995.)] Finally, the newly-enacted Compliance Assistance Authorization Act directs OSHA to require that states carrying out consultation visits "ensure that on-site consultations

* * * include provision for the participation by employees."

OSHA strongly believes that active employee participation is essential to the success of any systematic effort to address health and safety issues in the workplace. Although the role of employees in consultation visits differs from their role in OSHA enforcement inspections, where employee representatives have statutory rights to participate both in the investigation and in subsequent enforcement litigation, there are many potential advantages to active employee involvement during a consultant's worksite visit. Employees often have firsthand knowledge of hazards in the workplace. Sometimes, employees are in a position to make valuable suggestions which can be of assistance in formulating the consultant's recommendations. OSHA also believes employee involvement during a consultation visit can be a stimulus to further employee involvement in an employer's ongoing health and safety effort.

In order to assure fuller participation by employees in the consultation process, OSHA is proposing to amend 29 CFR Part 1908 to expressly provide authorized employee representatives a right to accompany the consultant during the physical inspection of the workplace. Where there is no authorized employee representative, or if the representative cannot be determined, the consultant shall speak with a reasonable number of employees concerning matters of safety and health in the workplace. These general provisions are derived from the current employee walkaround provisions in 29 CFR Part 1903, OSHA's regulations on the conduct of enforcement visits. OSHA is further proposing that authorized employee representatives should be afforded the opportunity to participate in opening and closing conferences with the consultant (either separately or jointly with the employer).

Employee Notification of Hazards

The legislative history of the Compliance Assistance Authorization Act reflects a congressional expectation that in carrying out the mandate to provide for employee participation, information on hazards identified by the consultant and corrective actions proposed will be made available to

affected employees. [House Report 105-444 105th Cong., 2d Sess., 6-7]. The National Performance Review had earlier recommended that employees be furnished copies of the consultant's written report at the conclusion of each consultation visit. However, as is explained elsewhere in the present **Federal Register** notice, disclosure of the complete written report has traditionally been extremely limited. Present regulations protect the employer's right to keep the consultant's report confidential from OSHA enforcement officials [29 CFR 1908.7(a)(3); 1908.7(c)(3)]. It has also been the longstanding practice of state consultation agencies not to disclose these reports to anyone but the subject employer.

OSHA believes it is essential to an effective safety and health management system that employees be made aware of any significant hazards identified during the course of a consultation visit. At the same time, a consultation visit is a voluntary service provided to small employers who typically would be unable to afford the services of paid safety or health consultants. The visit is not an enforcement inspection which leads to the issuance of citations; involves the creation of inspection records, many of which will ultimately be subject to public disclosure; or has provisions that allow the employer to contest alleged violations. Consultation visits and subsequent reports reflect the best professional judgement of consultants, but the consultant's report of hazards does not have to meet all the legal standards required for the issuance of a citation for violation of OSHA regulations and/or the OSH Act. Further, the report often contains many details about business practices, processes and personnel not ordinarily made public by the employer. Moreover, the success of OSHA's consultation program depends to a great extent on the voluntary cooperation of employers who request its services; the confidentiality of the consultant's report has long been viewed by OSHA and state consultants as essential to continued participation by employers in this important program.

OSHA proposes to amend Part 1908 to require that a list of serious hazards and hazards addressed by OSHA rules that are identified by the consultant, the corrective action proposed, and the dates for completion of corrective action be forwarded to the employer at the same time the consultant's written report is furnished. OSHA also proposes that each employer be required to post this list in a prominent place that is readily observable by all affected

employees, for 3 working days or until hazards are corrected, whichever is later. If an authorized employee representative has participated in the consultation visit, a copy of the posted list will be furnished directly to the authorized representative. At the same time, as discussed below, language would be added to 29 CFR part 1908 making clear that the full text of the consultant's written report to the employer remains confidential, and, except in certain unusual circumstances, can be disclosed to others only with the employer's consent.

Existing 29 CFR 1908.7(c), which deals with the effect of a prior consultation visit in the event of a subsequent OSHA enforcement inspection, is being updated. The current provision specifies at 1908.7(c)(3) that an employer is not required to furnish a copy of the consultant's written report to the compliance officer, except to the extent that disclosure of information in the report is required by 29 CFR 1910.20. The referenced regulation, OSHA's rule requiring that certain employee medical and exposure records be made available to employees and to OSHA, has been recodified at 29 CFR 1910.1020. Moreover, there are now a number of other provisions included in OSHA standards or regulations which require the sharing of safety- or health-related information which may in some instances be included in consultant's reports, [see, e.g. 29 CFR 1910.110(c)(3) (employee access to chemical process hazard analyses)]. Paragraph 1908.7(c) is therefore being updated to assure that information whose disclosure is specifically required by an OSHA standard or regulation must continue to be made available by the employer when such information has been included in a consultant's report.

Disclosure of Consultation-Related Information

1. Consultation Program Data

During the course of a consultation visit, the consultant gathers information and data about work processes, business practices, safety procedures, and accident or injury experience at an employer's workplace, all of which are needed in formulating advice for the employer on ways of complying with OSH Act requirements. Such information, gathered from employers during the course of a workplace consultation visit, is normally retained by the state consultation agency. OSHA regulations have always maintained the strict confidentiality of employer-

specific consultation information from OSHA enforcement personnel, in order to assure employers who avail themselves of this service that their use of the consultation service will not be the basis for scheduling an OSHA enforcement inspection or for other enforcement-related purposes [29 CFR 1908.7(a)(3)].

Occasionally, non-enforcement federal OSHA personnel obtain access to confidential material during the course of evaluating state consultation programs or rendering program assistance. OSHA has had access to such information more frequently in recent years as the agency has begun to incorporate consultation program information in federal databases such as the Integrated Management Information System (IMIS.) Federally-collected management data includes, among other information, worksite-specific injury and illness rates for employers visited by consultants. In addition, some limited sharing of information with enforcement personnel is necessary to carry out the Safety and Health Achievement Recognition Program (SHARP), under which employers who successfully complete a consultation visit and satisfy certain other requirements may request an exemption from OSHA inspections [29 CFR 1908.7(b)(4)]. Lists of employers who have qualified for such an exemption must, of course, be made available to OSHA enforcement staff.

Consultation-related information retained by federal OSHA is generally subject to the federal Freedom of Information Act (FOIA), 5 U.S.C. 552. The FOIA provides that documents maintained by federal agencies must be disclosed upon request unless one of the nine exemptions listed in the Act applies. Exemption 4 of the FOIA exempts from disclosure "commercial or financial information obtained from a person [that is] privileged or confidential." Information that relates to an employer's business decision to engage a consultant, and workplace information reviewed by that consultant during the visit, certainly qualifies as "commercial" information as that term has been broadly construed by the courts. Information collected by consultants under 29 CFR 1908 is clearly "obtained from a person" within the meaning of FOIA.

OSHA believes such information also qualifies as "confidential", the remaining criterion for non-disclosure under Exemption 4. Federal court decisions establish that commercial information voluntarily submitted by a person to the government is "confidential" if it is the kind of

information not customarily made public by the person from whom it was obtained. [*Critical Mass Energy Project v. NRC*, 975 F.2d 871 (“*Critical Mass III*”)(D.C. Cir.1992)]. Even if submission of the information was mandatory, the information qualifies as confidential under Exemption 4 if disclosure would impair the effectiveness of the government program under which the information was submitted. [*Critical Mass Energy Project v. NRC*, 931 F.2d 939, 944-45 (“*Critical Mass II*”)(D.C. Cir. 1990)].

As discussed above, 29 CFR Part 1908 provides that information about consultation visits must be kept confidential from OSHA enforcement personnel. The present regulation does not specifically address the broader issue of whether information concerning consultation visits to particular employers should be subject to public disclosure. However, as the federal grant agency and overall federal coordinator of the on-site consultation program, OSHA is well aware that state consultation providers have historically treated information about on-site consultation visits as a confidential business service to the employers who request it. OSHA believes that an employer’s purely voluntary decision to invite a federally-funded consultant to evaluate conditions in his workplace, like the decisions made by other employers to retain paid, private sector health and safety consultants, is a decision an employer may, but should not be required to, disclose to the general public. OSHA’s experience is that data and observations gathered by the consultant during the visit are also held in confidence by state agencies, in the same way a private consultant’s recommendations would not ordinarily be made public by an employer.

Furthermore, a long-standing concern of consultation program administrators is that unwarranted publication of employer lists and other employer-specific program data will discourage many employers from availing themselves of this service. OSHA has long recognized the importance of preserving the confidentiality of employer-specific consultation program information, e.g., 42 FR 41386 at 41388 (August 16, 1977) (noting OSHA’s policy that “the identity of employers receiving on-site consultation is not revealed”).

Therefore, OSHA proposes to add a provision to existing Part 1908 specifying that consultation program information which identifies specific employers who have requested the services of a consultant under 29 CFR Part 1908 shall be kept confidential.

This confidentiality requirement would not apply to the furnishing of certain types of employer specific data, such as the hazards identified and abatement suggested by the consultant, which must be provided to an employer’s own workers and their representatives under the new consultation procedures in today’s proposed rule. Because OSHA has an ongoing need for accurate and comprehensive consultation data to administer the consultation program and to evaluate its own performance and that of the states, OSHA retains a right of access to this data.

2. Consultant’s Written Report

Every consultative visit under Part 1908 results in the preparation of a written report to the employer, documenting in detail the conditions observed by the consultant inside the workplace. Such reports can include descriptions not only of processes, methods and materials used in the employer’s business but personnel and administrative information. Moreover, because of OSHA’s emphasis on evaluating the quality of the employer’s accident prevention programs, [see 1908.6(g) and 1908.7(b)(4)], many reports will also include critiques of employee and manager performance that relate to the effectiveness of the safety and health program. OSHA does not normally obtain a copy of the consultant’s written report, and the employer is not required to furnish one should OSHA request to see it during a subsequent inspection [1908.7(c)(3)]. These reports have long been treated as confidential by state consultation agencies and by participating employers. As explained earlier in connection with consultation program data, state consultation agencies have advised OSHA that routine disclosure of these reports would adversely affect employer participation in the consultation program.

The proposed rule specifically recognizes the confidential nature of the consultant’s written report and forbids the disclosure of the report except to the employer, and to OSHA upon request. OSHA retains the right to use a consultant’s report in appropriate enforcement proceedings. Situations in which a consultation report might become relevant would include, among others, an enforcement action triggered by an employer’s refusal to correct serious hazards identified by a consultant, or an investigation of false statements, or deliberately concealed hazards. Inquiries to OSHA’s compliance staff during the preparation of the present proposed rule indicate that consultants’ written reports have

been used in extremely rare circumstances, probably no more than a half-a-dozen times in the last ten years, typically in cases involving serious accidents where there were allegations of employer bad faith. OSHA fully expects, based on past agency experience, that the enforcement cases in which it will be necessary to obtain and use consultant’s reports developed under Part 1908 will continue to be extremely rare. OSHA intends to provide guidance concerning circumstances under which the Assistant Secretary may request a Consultant’s written report, after discussion with the State. Finally, the access rights of employees and others to certain specific types of information identified by particular OSHA regulations and standards such as 1910.1020 will continue to apply to information incorporated in consultation reports. Under the proposed new regulation, as under existing Part 1908, the employer would of course be free to voluntarily disclose all or parts of the consultant’s report.

The proposed changes to OSHA consultation regulations would be applicable only to information related to or generated by consultation visits scheduled or carried out under 29 CFR Part 1908. The OSHA consultation program is a unique federally-funded, state-administered consultation service. OSHA believes that the consultation program is carefully balanced to serve the objective of providing effective worker protection while at the same time affording a limited employer confidentiality as an incentive to employer participation. Because the OSHA consultation mechanism is a unique business service with numerous built-in compliance safeguards, the qualified confidentiality accorded to the consultant’s written report and other employer-identifying information by the proposed regulation provides no basis for inferring a broader evidentiary privilege for employer audits or other self-evaluation materials.

Revisions Delineating the Relationship With OSHA Enforcement

Since its inception, OSHA has conducted the on-site consultation program independently from OSHA enforcement. Congress has endorsed OSHA’s practice of independent management of the consultation program in the Compliance Assistance Authorization Act (CAAA), which specifies that “(a)ctivities under this section shall be conducted independently of any enforcement activity.” Nevertheless, the need to assure that workers are fully protected,

as well as the practical demands of program administration, require some limited coordination between these two OSHA activities. Thus, for example, OSHA regulations have long provided that employers failing to correct serious hazards identified by consultants be referred to enforcement, 29 CFR 1908.7(f)(4), and also provide for a one-year exemption from general schedule programmed inspections for employers who complete a consultation visit and meet the requirements set forth in paragraph 1908.7(b)(4). Congress itself has implicitly recognized the importance of limited coordination between OSHA's consultation and enforcement activities by incorporating comparable requirements in the CAAA.

Because an effective balance between consultation and enforcement is extremely important to OSHA as well as being an issue of interest to most affected parties, OSHA's proposed revisions to Part 1908 address this relationship in detail. OSHA's strategic plan includes the consultation projects as full partners. It is therefore important for the agency to eliminate administrative procedures that would result in duplication of effort between compliance and cooperative programs.

One area of potential duplication of effort is in the conduct of general schedule inspections at sites that receive consultation service, and are working within established time frames to correct hazards identified by the consultant. Current OSHA procedures provide that general schedule compliance inspections shall not be conducted at worksites where a consultation visit is "in progress," a time period which presently is defined as "from the beginning of the opening conference through the end of the closing conference". [29 CFR 1908.7(b)(1)]. The agency believes that, for the working conditions, hazards or situations covered during the visit, the term "visit in progress" used in paragraph 1908.7(b) should extend from the date of the opening conference to the end of the correction due date agreed upon between the consultant and the employer, a redefinition reflected in the rule proposed today. This would avoid the duplication (and the burden to the small employer) of conducting an OSHA general schedule inspection on the heels of a consultation visit, while the employer is working to correct hazards. Proposed new language in part 1908 for employee notification about hazards and correction due dates, and OSHA's continuing obligation to perform certain types of inspections/investigations such as imminent danger, fatality or catastrophe, and complaint

inspections, will ensure that adequate safeguards are in place for employee protection.

OSHA is also proposing to change paragraph 1908.7(b)(4), the Inspection Exemption Through Consultation (IETC), to reflect OSHA's current policy under the Safety and Health Achievement Recognition Program (SHARP). The SHARP policy, which has been in effect since 1995, also achieves one of the objectives of the Compliance Assistance Authorization Act. OSHA experience has shown that combining a national recognition program with an exemption program fosters a partnership that works for employees, employers, and for OSHA. SHARP achieves the unique objective of according national recognition and inspection exemption to small employers operating exemplary safety and health management systems at their worksites. The revised paragraph 1908.7(b)(4) incorporates the basic requirements of the SHARP and is consistent with the exemption program requirements outlined in the CAAA, now codified as section 21(d)(4) of the OSH Act. As an editorial matter, the generic term "recognition and exemption program" is used in the proposed regulation in lieu of terms like SHARP or IETC.

Consultation Programs and State Plans

The importance of recognition and exemption programs is also reflected in a proposed revision to paragraph 1908.1(c). That provision presently specifies that in states which administer OSHA-approved state plans, the provisions of Part 1908 which affect federal enforcement do not apply directly to state-administered enforcement programs, but the states must adopt enforcement provisions which are "at least as effective" as those of federal OSHA. The agency proposes to add specific requirements for recognition and exemption programs comparable to that outlined in the revised Part 1908 and mandated by section 21(d)(4) of the Act.

The recognition and exemption program involves coordination between two aspects of OSHA's program: the OSHA consultation service, which must conduct the consultation visit and employer evaluation specified in 21(d)(4); and OSHA's enforcement program, which honors the exemption from inspections granted to employers who successfully complete the relevant requirements. One potentially complicating factor in implementing the CAAA inspection exemption scheme is the division of work between federal OSHA and states which have assumed responsibility for various occupational

safety and health issues under federally-approved state plans as provided by section 18 of the Act.

States may assume responsibility for occupational safety and health enforcement within their state by obtaining federal approval of a state plan under section 18 of the Act. Twenty-three states and two territories currently exercise enforcement responsibility under approved state plans. (A comprehensive listing of state plan states is set forth in 29 CFR Part 1952.) Enforcement programs under approved plans are not required to be identical to that of federal OSHA, but must be "at least as effective."

States that wish to carry out federally-funded on-site consultation services may do so by entering into cooperative agreements with OSHA under 29 CFR Part 1908 and section 21 of the Act. Many states which have entered into consultation agreements also separately administer a state enforcement program under a federally-approved state plan. Other states, however, have elected not to assume enforcement responsibility under a state plan, but only to conduct on-site consultation services within their state by entering into cooperative agreements under section 21 of the Act and Part 1908. Enforcement in these states is provided by federal OSHA. Finally, a few states and territories (currently Arizona; Indiana; Kentucky; Nevada; New Mexico; Washington; Puerto Rico; and the U.S. Virgin Islands) administer both enforcement and consultation service programs as part of their state plan.

As already discussed, exemption and recognition programs under section 21(d) of the Act serve the important purposes of conserving enforcement resources by diverting them away from sites which already are undergoing a comprehensive on-site safety and health review, and of worker protection by giving an incentive to small employers to undertake a program of hazard review and correction with participation by employees. Accordingly, the new paragraph 1908.1 would specify that every state providing a program of consultation services under a cooperative agreement pursuant to section 21(d) of the Act shall provide a recognition and exemption program which meets the criteria and procedures in paragraph 1908.7(b)(4). This basic program element must be provided in all states which provide consultation services under section 21(d) of the OSH Act and 29 CFR Part 1908, whether enforcement responsibility is carried out under a state plan or by federal OSHA.

States which elect to carry out both enforcement and consultation services

under a state plan pursuant to section 18 of the Act, in lieu of a cooperative agreement under section 21(d), would not be directly bound by requirements in section 21(d) and 29 CFR Part 1908. However, some form of inspection exemption and recognition program is, in OSHA's judgment, an essential element in any state program which seeks to meet the "at least as effective as" criterion of section 18(c) of the Act. For this reason, the proposed 29 CFR 1908.1 specifies that the six states and two territories which provide on-site consultation services under the auspices of the OSHA-approved state plan, rather than a cooperative agreement, must provide these services in a manner "at least as effective as" the program established under Part 1908. In view of Congress' explicit reference in the CAAA to employee participation during consultation visits, OSHA will expect state plan-based consultation programs to offer comparable notice and participatory opportunities to those afforded under the proposed new Part 1908. Additionally, the proposed revisions to section 1908.1 specify that states providing on-site consultation under their state plan must either adopt the exemption and recognition program outlined in paragraph 1908.7(b)(4) or offer an "at least as effective" alternative.

Miscellaneous Editorial Changes

The definition of "employer" in 1908.2 is being modified to reflect recent congressional action amending OSH Act coverage to include the U.S. Postal Service. Definitions of various terms used in connection with the proposed program revisions discussed above, such as "recognition and exemption program," "full service consultation visit," and "list of hazards" are also proposed, as well as revised definitions of "serious" and "other than serious" hazards, which are reworded to remove references to OSHA's superseded Field Operations Manual. In section 1908.3, editorial changes have been made to more clearly set forth the existing rule that a state which administers a private-sector consultation program as part of an approved state plan under section 18 of the Act may not additionally administer a consultation program under Part 1908.

III. Preliminary Economic Analysis

The modifications to 29 CFR Part 1908 proposed today will not have any significant measurable economic impact either on employers or state consultation agencies. The OSHA on-site consultation program is entirely voluntary both for employers who seek

this free service and for states which provide it. The proposal that consultation visits include an opportunity for employee participation would add slightly to the time spent by state consultants in conducting a visit. OSHA believes, however, that any additional demand on resources would be justified by the benefits of employee participation. A review of our data indicates that in fiscal year 1998, there was some form of employee participation in all consultation visits. Employers allowed participation which included opening and closing conferences, walkaround, and employee interviews, voluntarily. The data also indicates that 100 percent of all visits included employee participation in the walkaround. This new requirement is a codification of what already exists in practice, and will ensure that employees are afforded an opportunity to participate in all aspects of the consultation visit. The cost to employers in continuing to allow such participation is minimal. Employee participation will produce heightened awareness by the workforce and will result in a positive contribution to ensure a safer and healthier workplace. Further, employers receive these consultative services free of charge. Similarly, OSHA believes that the proposed amendment to require employers to post the list of serious hazards and hazards addressed by OSHA rules that are identified by the consultant, the corrective action proposed, and the dates for completion of corrective action will slightly increase the responsibilities of participating employers, but is offset by the value of greater employee participation in the consultation process and enhanced employee awareness. Finally, OSHA's proposal to specifically articulate in Part 1908 the agency's longstanding policy concerning public disclosure of employer-specific consultation information does not appear to impose any economic impact.

In terms of economic impact, the rule proposed today does not constitute a significant regulatory action, within the meaning of Executive Order 12866, because it does not have an annual effect on the economy of \$100 million or more; materially affect any sector of the economy; interfere with the programs of other agencies; materially affect the budgetary impact of grant or entitlement programs; nor result in other adverse effects of the kind specified in the Executive Order. However, the rule raises novel legal and policy issues, and has been submitted to

OMB for review under Executive Order 12866.

IV. Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (RFA) [(5 U.S.C. 601 *et seq.*)], the Assistant Secretary hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. The state agencies which have elected to furnish on-site consultation services under cooperative agreements with OSHA are not covered entities under the RFA. Since the consultation program is historically targeted to small, high-hazard workplaces, employers affected by the proposed regulation would tend to include a substantial number of small entities, but, as indicated in the foregoing discussion of regulatory impacts, the proposed rule should have virtually no measurable economic impact on employers.

V. Paperwork Reduction Act

This proposed regulation contains collection of information requirements. These collection of information requirements are identical to the collection of information requirements in the existing consultation agreement regulations, except that OSHA is proposing to add a new requirement for participating employers to post a list of serious hazards identified during the visit, the corrective action proposed by the consultant, and the correction due dates. Under the Paperwork Reduction Act of 1995, all collection of information requirements must be submitted to OMB for approval. The existing collection of information requirements had been approved by OMB under control number 1218-0110. However, these approvals were inadvertently allowed to lapse. Therefore, as a first step in its review of these regulations, OSHA on December 8, 1998 published in the **Federal Register** a request for public comment prior to requesting OMB reinstatement of these approvals [63 FR 67702]. The **Federal Register** notice on information collection for this rule closed without comment. It is currently undergoing review by OMB.

VI. Federalism

The proposed revisions to 29 CFR Part 1908 have been reviewed under Executive Order 12612, Federalism (52 FR 41685; October 30, 1987), which sets forth fundamental federalism principles, federalism policymaking criteria, and provides for consultation by federal agencies with state or local governments

when policies are being formulated which potentially affect them.

Federal OSHA meets regularly with representatives of state-operated on-site consultation programs, both individually and at meetings of OSHCON (the National Association of Occupational Safety and Health Consultation Programs). OSHA additionally has established a Consultation Steering Committee on which both OSHA and the states are represented. OSHA also maintains extensive and frequent communications with its state plan partner agencies, both individual states and through the Occupational Safety and Health State Plan Association (OSHSPA), the association of state plan states. The proposed revisions to Part 1908 have been discussed with all affected states via OSHCON, the Consultation Steering Committee and the OSHSPA, and many state comments are already reflected in the proposal being issued today. The states will, of course, also have an opportunity to submit comments during the 90-day public comment period which opens today.

The revisions to 29 CFR Part 1908 proposed today are generally consistent with the requirements and procedures under which OSHA and the states have administered the consultation program for many years. Two of the procedural requirements which are being strengthened, employee participation rights and mandatory recognition and exemption programs, have been specifically identified by Congress as essential program elements in the recently-enacted Compliance Assistance Authorization Act. The remaining significant revision, which involves the confidentiality of reports and data generated by the consultation program, generally reflects the views historically held by states that this information should be kept confidential. However, the revisions also provide for certain limited use by OSHA of this information, a proposed provision which seeks to balance the states' need to minimize unwarranted disclosure of business information with OSHA's need for the data under certain circumstances. These issues have been extensively discussed with the states. OSHA has reviewed the proposed revisions and finds them to be consistent with the policymaking criteria outlined in Executive Order 12612. It should be noted that cooperative agreements pursuant to section 21 of the OSH Act, and state plans submitted and approved under section 18 of the Act, are entirely voluntary federal programs which do not involve imposition of an

intergovernmental mandate [2 U.S.C. 1502, 658(5)].

VII. Public Participation

Interested persons including state consultation agencies, employers and employees who have experience with or an interest in the consultation program are invited to submit written data, views and arguments with respect to the proposed amendments to Part 1908 during a 90-day public comment period. OSHA is interested, among other things, in the experiences of State consultation agencies and other affected parties regarding the following matters:

- How would the requirements for employee participation and notification of hazards affect the willingness of employers to participate in the consultation program?
- What proportion of site visits by federally-funded consultants currently involve some form of employee participation? How many involve complete walkaround participation? What proportion of sites are union and nonunion?
- What types of trade secret or other confidential information are typically included in a consultant's report?
- Are the names of employers who request consultation usually publicly disclosed in your State? How is employer-specific information such as the consultant's report treated under State disclosure laws?

Would employers be less likely to request federally-funded consultation services if participation in this program is not confidential?

Comments must be received on or before _____ [date], and must be submitted in quadruplicate to Docket No. _____, Docket Office, Room N-2625, U.S. Department of Labor-OSHA, 200 Constitution Ave., N.W., Washington, DC 20210. Comments under 10 pages long may be sent via telefax to (202) 219-5546 but must be followed by a mailed submission in quadruplicate. Written submissions must clearly identify the issue addressed and the position taken with regard to each issue. All comments submitted to the docket during this proceeding will be open for public inspection and copying at the location specified above. No hearing will be held on this proposal.

VIII. Authority

This document was prepared under the direction of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health. It is issued under sections 7(c), 8, and 21(d)

of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656, 657, 670) and Secretary of Labor's Order No. 6-96 (62 FR 111, January 2, 1997).

List of Subjects in 29 CFR Part 1908

Confidential business information, Occupational safety and health, Small business.

Signed this 24th day of June, 1999 in Washington, DC.

Charles N. Jeffress,
Assistant Secretary of Labor.

It is proposed to amend 29 CFR part 1908 as set forth below:

PART 1908—CONSULTATION AGREEMENTS

The authority citation for 29 CFR part 1908 would be revised to read as follows:

Authority: Secs. 7(c), 8, 21(d), Occupational Safety and Health Act of 1970 (29 U.S.C. 656, 657, 670) and Secretary of Labor's Order No. 6-96 (62 FR 111 January 2, 1997).

2. Section 1908.1 would be amended by revising paragraphs (a) and (c) to read as follows:

§ 1908.1 Purpose and scope.

(a) This part contains requirements for Cooperative Agreements between States and the Federal Occupational Safety and Health Administration (OSHA) under sections 21(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) and section 21(d), the Occupational Safety and Health Administration Compliance Assistance Authorization Act of 1998 (which amends the Occupational Safety and Health Act), under which OSHA will utilize State personnel to provide consultative services to employers. Priority in scheduling such consultation visits shall be assigned to small businesses which are in higher hazard industries or have the most hazardous conditions at issue in the request. Consultation programs operated under the authority of a State plan approved under Section 18 of the Act (and funded under Section 23(g), rather than under a Cooperative Agreement) which provide consultative services to private sector employers, must be "at least as effective as" the section 21(d) Cooperative Agreement programs established by this Part. The service will be made available at no cost to employers to assist them in establishing effective occupational safety and health programs for providing employment and places of employment which are safe and healthful. The overall goal is to prevent the occurrence of injuries and illnesses which may result from

exposure to hazardous workplace conditions and from hazardous work practices. The principal assistance will be provided at the employer's worksite, but off-site assistance may also be provided by telephone and correspondence, and at locations other than the employer's worksite, such as the consultation project offices. At the worksite, the consultant will, within the scope of the employer's request, evaluate the employer's program for providing employment and a place of employment which is safe and healthful, as well as identify specific hazards in the workplace, and will provide appropriate advice and assistance in establishing or improving the employer's safety and health program and in correcting any hazardous conditions identified.

* * * * *

(c) States operating approved Plans under section 18 of the Act shall, in accord with section 18(b), establish enforcement policies applicable to the safety and health issues covered by the State Plan which are at least as effective as the enforcement policies established by this part, including a recognition and exemption program.

3. Section 1908.2 would be amended by revising the definitions of "Employee", "Employer", "Other-than-serious hazards", and "Serious hazard", and by adding the definitions of "List of Hazards", "Programmed inspection", "Programmed inspection schedule", and "Recognition and exemption program" to read as follows:

§ 1908.2 Definitions.

* * * * *

"Employee" means an employee of an employer who is employed in the business of that employer which affects interstate commerce.

"Employer" means a person engaged in a business who has employees, but does not include the United States (not including the United States Postal Service), or any State or political subdivision of a State.

* * * * *

"List of Hazards" means a list of serious hazards and hazards addressed by OSHA rules that are identified by the consultant, the corrective actions proposed by the consultant, and the correction due dates agreed upon by the employer and the consultant. Hazards addressed by OSHA rules shall be included in the list without regard to classification as "serious" or "other-than-serious." The List of Hazards will accompany the consultant's written

report but is separate from the written report to the employer.

* * * * *

"Other-than-serious hazard" means any condition or practice which would be classified as an other-than-serious violation of applicable Federal or State statutes, regulations or standards, based on criteria contained in the current OSHA field instructions or approved State Plan counterpart.

"Programmed inspection" means OSHA worksite inspections which are scheduled based upon objective or neutral criteria. These inspections do not include imminent danger, fatality/catastrophe, and formal complaints.

"Programmed inspection schedule" means OSHA inspections scheduled in accordance with criteria contained in the current OSHA field instructions or approved State Plan counterpart.

* * * * *

"Recognition and exemption program" means an achievement recognition program of the OSHA consultation services, which recognizes small employers who operate, at a particular work site, an exemplary program that results in the immediate and long term prevention of job related injuries and illnesses.

"Serious hazard" means any condition or practice which would be classified as a serious violation of applicable Federal or State statutes, regulations or standards, based on criteria contained in the current OSHA field instructions or approved State Plan counterpart, except that the element of employer knowledge shall not be considered.

* * * * *

4. Section 1908.3 would be amended by revising paragraph (a) to read as follows:

§ 1908.3 Eligibility and funding.

(a) *State eligibility.* Any State may enter into an Agreement with the Assistant Secretary to perform consultation for private sector employers; except that a State having a Plan approved under section 18 of the Act is eligible to participate in the program only if that Plan does not include provisions for federally funded consultation to private sector employers as a part of its plan.

* * * * *

5. Section 1908.5 would be amended by revising paragraphs (a)(3) and (b)(1) to read as follows:

§ 1908.5 Requests and scheduling for onsite consultation.

(a) * * *

(3) *Scope of service.* In its publicity for the program, in response to any

inquiry, and before an employer's request for a consultative visit may be accepted, the State shall clearly explain that the service is provided at no cost to an employer with Federal and State funds for the purpose of assisting the employer in establishing and maintaining effective programs for providing safe and healthful places of employment for employees, in accord with the requirements of the applicable State or Federal laws and regulations. The State shall explain that while utilizing this service, an employer remains under a statutory obligation to provide safe and healthful work and working conditions for employees. In addition, while the identification of hazards by a consultant will not mandate the issuance of citations or penalties, the employer is required to take necessary action to eliminate employee exposure to a hazard which in the judgment of the consultant represents an imminent danger to employees and to take action to correct, within a reasonable time, any serious hazards that are identified. The State shall emphasize, however, that the discovery of such a hazard will not initiate any enforcement activity, and that referral will not take place, unless the employer fails to eliminate the identified hazard within the established time frame. The State shall also explain the requirements for participation in the recognition and exemption program as set forth in § 1908.7(b)(4).

(b) *Employer requests.* (1) An on-site consultative visit will be provided only at the request of the employer, and shall not result from the enforcement of any right of entry under State law. When taking a request for assistance, the Project shall explain the employer's obligation to post the List of Hazards accompanying the consultant's written report.

* * * * *

6. Section 1908.6 would be amended by revising paragraphs (b), (c)(2), (d), (e)(7), (e)(8), and (f)(2); by redesignating (g) as (g)(1) and (h) as (h)(1); and by adding new paragraphs (g)(2), and (h)(2) as follows:

§ 1908.6 Conduct of a visit.

(a) * * *

(b) *Structured format.* An initial on-site consultative visit will consist of an opening conference, an examination of those aspects of the employer's safety and health program which relate to the scope of the visit, a walk through of the workplace, and a closing conference. An initial visit may include training and education for employers and employees, if the need for such training and education is revealed by the walk

through of the workplace and the examination of the employer's safety and health program and if the employer so requests. The visit shall be followed by a written report to the employer. Additional visits may be conducted at the employer's request to provide needed education and training, assistance with the employer's safety and health program, or technical assistance in the correction of hazards, or as necessary to verify the correction of serious hazards identified during previous visits. A compliance inspection may, in some cases, be the basis for a visit limited to education and training, assistance with the employer's safety and health program, or technical assistance in the correction of hazards.

(c) * * *

(2)(i) A representative authorized by affected employees shall be afforded an opportunity to accompany the consultant and the employer's representative during the physical inspection of the workplace. Additional employees (such as representatives of a joint safety and health committee, if one exists at the worksite) may be permitted to accompany the consultant during the physical inspection, where the consultant determines that such additional representatives will further aid the visit.

(ii) If there is no authorized representative of employees, or if the consultant is unable with reasonable certainty to determine who is such a representative, the consultant shall confer with a reasonable number of employees concerning matters of occupational safety and health.

(iii) The consultant is authorized to deny the right to accompany under this section to any person whose conduct interferes with the orderly conduct of the visit.

(d) *Opening and closing conferences.* (1) The consultant shall attempt to inform all affected employees of the purpose of the consultation visit, and shall encourage a joint opening conference with employer and employee representatives. If there is an objection to a joint conference, the consultant shall conduct separate conferences with employer and employee representatives.

(2) In addition to the requirements of § 1908.6(c), the consultant shall, in the opening conference, explain to the employer the relationship between on-site consultation and OSHA enforcement activity and shall explain the obligation to protect employees in the event that certain hazardous conditions are identified.

(3) During the opening conference, the consultant shall emphasize the

employer's obligation to post the List of Hazards accompanying the consultant's written report as described below in § 1908.6(e)(8).

(4) At the conclusion of the consultation visit, the consultant will conduct a closing conference with employer and employee representatives, jointly or separately. The consultant shall describe hazards identified during the visit, and other pertinent issues related to employee safety and health.

(e) * * *

(7) At the time the consultant determines that a serious hazard exists, the consultant shall assist the employer to develop a specific plan to correct the hazard, affording the employer a reasonable period of time to complete the necessary action. The State shall provide, upon request from the employer within 15 working days of receipt of the consultant's report, an opportunity for an expeditious informal discussion with the consultation manager regarding the period of time established for the correction of a hazard or any other substantive finding of the consultant.

(8) Upon receipt, the employer shall post the List of Hazards accompanying the consultant's written report, and notify affected employees when hazards are corrected. The List of Hazards shall be posted, unedited, in a prominent place where it is readily observable by all affected employees for 3 working days, or until the hazards are corrected, whichever is later. The consultation project shall make available a copy of the List of Hazards to the authorized representative of affected employees.

(f) * * *

(2) An employer must also take the necessary action in accordance with the plan developed under § 1908.6(e)(7) to eliminate or control employee exposure to any identified serious hazard, and meet the posting requirements of § 1908.6(e)(8). In order to demonstrate that the necessary action is being taken, an employer may be required to submit periodic reports, permit a followup visit, or take similar action.

* * * * *

(g) * * *

(2) Because the consultant's written report contains information considered confidential, and because disclosure of such reports would adversely affect the operation of the OSHA consultation program, the consultant's written report shall not be disclosed except to the employer for whom it was prepared and, upon request, to OSHA. OSHA may use information contained in the report in enforcement proceedings which result from an employer's failure to

correct hazards identified during a consultation visit under this Part, or which involve misconduct relating to an employer's participation in the consultation program, or other enforcement proceedings to which the information is relevant.

(h) * * *

(2) Disclosure of consultation program information which identifies employers who have requested the services of a consultant would adversely affect the operation of the OSHA consultation program as well as breach the confidentiality of commercial information not customarily disclosed by the employer. Accordingly, such information shall be kept confidential. The State shall provide consultation program information requested by OSHA, including information which identifies employers who have requested consultation services. OSHA may use such information to administer the consultation program and to evaluate state and federal performance under that program, but information which identifies specific employers shall not otherwise be disclosed.

7. Section 1908.7 would be amended by revising paragraphs (a)(3), (b)(1), (b)(4), (b)(5), and (c)(3) to read as follows:

§ 1908.7 Relationship to enforcement.

(a) * * *

(3) The identity of employers requesting on-site consultation, as well as the file of the consultant's visit, shall not be forwarded or provided to OSHA for use in any compliance activity, except as provided for in § 1908.6(f)(1) (failure to eliminate imminent danger), § 1908.6(f)(4) (failure to eliminate serious hazards), § 1908.6(g)(2) (confidentiality of consultant's written report), § 1908.6(h)(2) (confidentiality of employer specific data), and § 1908.7(b)(4) (recognition and exemption program).

(b) *Effect upon scheduling.* (1) An on-site consultative visit already in progress will have priority over OSHA compliance inspections except as provided in § 1908.7(b)(2). The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. An on-site consultative visit shall be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. OSHA may, in exercising its authority to schedule compliance

inspections, assign a lower priority to worksites where consultation visits are pending.

* * * * *

(4) The recognition and exemption program of the Occupational Safety and Health Administration (OSHA) consultation services provides incentives and support to smaller, high-hazard employers to work with their employees to develop, implement, and continuously improve the effectiveness of their workplace safety and health management system.

(i) *Programmed Inspection Schedule.* (A) When an employer requests participation in a recognition and exemption program, and undergoes a consultative visit covering all conditions and operations in the place of employment related to occupational safety and health; corrects all hazards that were identified during the course of the consultative visit within established time frames; has begun to implement all the elements of an effective safety and health program; and agrees to request a consultative visit if major changes in working conditions or work processes occur which may introduce new hazards, OSHA's Programmed Inspections at that particular site may be deferred while the employer is working to achieve recognition and exemption status.

(B) Employers who meet all the requirements for recognition and exemption will have the names of their establishments removed from OSHA's Programmed Inspection Schedule for a period of not less than one year. The exemption period will extend from the date of issuance by the Regional Office of the certificate of recognition.

(ii) *Inspections.* OSHA will continue to make inspections in the following categories at sites that achieved recognition status and have been granted exemption from OSHA's Programmed Inspection Schedule; and at sites granted inspection deferrals as provided for under § 1908.7(b)(4)(i)(A):

- (A) Imminent danger.
- (B) Fatality/Catastrophe.
- (C) Formal Complaints.

(5) When an employer requests consideration for participation in the recognition and exemption program under § 1908.7(b)(4), the provisions of § 1908.6(e)(7), (e)(8), (f)(3), and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) * * *

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the state

consultant's written report to the compliance officer, except to the extent that disclosure of information contained in the report is required by 29 CFR 1910.1020 or other applicable OSHA standard or regulation.

* * * * *

[FR Doc. 99-16592 Filed 7-1-99; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 990625173-9173-01; I.D. 033199C]

RIN 0648-AL57

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 16B

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule, request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 16B to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP). This proposed rule would establish size limits for banded rudderfish, lesser amberjack, cubera snapper, dog snapper, mahogany snapper, mutton snapper, schoolmaster, scamp, gray triggerfish, and hogfish; exclude banded rudderfish, lesser amberjack, and hogfish from the 20-fish aggregate (combined) reef fish bag limit; establish new bag limits for hogfish, speckled hind, warsaw grouper, and for banded rudderfish and lesser amberjack combined; and remove queen triggerfish from the listing of Gulf reef fish and from the applicable regulations. The intended effect of this rule is to conserve and manage the reef fish resources of the Gulf of Mexico.

DATES: Written comments must be received on or before August 16, 1999.

ADDRESSES: Comments on the proposed rule must be sent to Dr. Roy E. Crabtree, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

Requests for copies of Amendment 16B, which includes an environmental assessment, and a regulatory impact review (RIR) should be sent to the Gulf of Mexico Fishery Management Council, Suite 1000, 3018 U.S. Highway 301

North, Tampa, FL 33619; Phone: 813-228-2815; Fax: 813-225-7015; E-mail: gulf.council@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Dr. Roy E. Crabtree at 727-570-5305; Fax: 727-570-5583.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Amendment 16B establishes more conservative bag and size limits for several reef fish species and improves consistency with Florida's regulations, thereby improving enforcement.

Measures for Minor Amberjack Species

The word "minor" used by the Council in the FMP is not intended to reflect on the significance of these measures but instead to refer to the species banded rudderfish and lesser amberjack. A 1996 NMFS stock assessment suggests that the number of young greater amberjack has decreased steadily since 1991. In addition, anecdotal information from anglers along Florida's Gulf coast suggests that greater amberjack have decreased in size and abundance in recent years. In response to this information, the Council developed Amendment 12 to the FMP that established a 1-fish bag limit for greater amberjack and Amendment 15 to the FMP that established a seasonal closure of the commercial fishery. Under the FMP, greater amberjack are also subject to minimum size limits of 28 inches (71.1 cm) fork length for the recreational fishery and 36 inches (91.4 cm) for the commercial fishery.

Juvenile greater amberjack, lesser amberjack, and banded rudderfish are difficult for the public to distinguish; consequently, misidentified juvenile greater amberjack may be landed as lesser amberjack or banded rudderfish, species that are currently unregulated. Therefore, the Council believes that additional protection for juvenile greater amberjack is warranted. The intent of this rule is to reduce the harvest of misidentified juvenile greater amberjack by limiting the harvest of these minor amberjack species.

The Council proposed in FMP Amendment 12 to apply an aggregate bag limit and a minimum size limit of 28 inches (71.1 cm) to greater amberjack, lesser amberjack, and banded rudderfish. These proposed