

run by other incorporated charitable organizations established for the purpose of preventing cruelty to animals.

One commenter stated that our analysis in the proposed rule of the potential economic effects of the rule contained an error. In the analysis, we stated that there are at least 121 known humane societies in 35 States. The commenter stated that there are over 3,000 incorporated, charitable organizations established for the purpose of preventing cruelty to animals and that these organizations exist in all 50 States and can have names such as humane society, society for the prevention of cruelty to animals, animal welfare league, or pet protection league. The commenter added that there are several thousand municipally operated animal shelters that are exempt from licensing requirements under the AWA and that are willing to house confiscated animals in special cases.

The number we provided in our analysis was the number of regional humane societies known to us and listed by State. We are aware that there are a number of organizations other than humane societies. We agree that if we had referred to all incorporated charitable organizations established for the purpose of preventing cruelty to animals, the number of organizations would be significantly larger than 121.

APHIS confiscates animals only once or twice a year. Adoption of this rule will expedite relocation of any confiscated animals. It is likely that the receiving facilities, as noted above, will be small entities. The regulations require that the dealer, exhibitor, intermediate handler, or carrier from whom the animals are confiscated bear all costs associated with performing the placement or euthanasia. If a facility accepts confiscated animals, that facility will be responsible for the future costs incurred for the care of those animals while at the facility. However, as noted, APHIS needs to place confiscated animals only once or twice a year, and the acceptance of confiscated animals is voluntary.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with

State and local officials. (See 7 CFR part 3015, subpart V.)

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

#### Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 9 CFR Part 2

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

Accordingly, we are amending 9 CFR part 2 as follows:

#### PART 2—REGULATIONS

1. The authority citation for part 2 is revised to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

2. In § 2.129, paragraph (c) is revised and a new paragraph (d) is added to read as follows:

#### § 2.129 Confiscation and destruction of animals.

\* \* \* \* \*

(c) Confiscated animals may be:

(1) Placed, by sale or donation, with other licensees or registrants that comply with the standards and regulations and can provide proper care; or

(2) Placed with persons or facilities that can offer a level of care equal to or exceeding the standards and regulations, as determined by APHIS, even if the persons or facilities are not licensed by or registered with APHIS; or

(3) Euthanized.

(d) The dealer, exhibitor, intermediate handler, or carrier from whom the animals were confiscated must bear all costs incurred in performing the placement or euthanasia activities authorized by this section.

Done in Washington, DC, this 26th day of December 2000.

**Craig A. Reed,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 01–57 Filed 1–2–01; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Part 3

[Docket No. 93–076–15]

RIN 0579–AA59

#### Animal Welfare; Marine Mammals

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the Animal Welfare Act regulations concerning the humane handling, care, treatment, and transportation of marine mammals in captivity. These regulations were developed by the Marine Mammal Negotiated Rulemaking Advisory Committee and are necessary to ensure that the minimum standards for the humane handling, care, treatment, and transportation of marine mammals in captivity are based on current general, industry, and scientific knowledge and experience.

**EFFECTIVE DATE:** February 2, 2001.

**FOR FURTHER INFORMATION CONTACT:** Dr. Barbara Kohn, Senior Staff Veterinarian, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 734–7833.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Animal Welfare Act (the Act) (7 U.S.C. 2131 *et seq.*, enacted in 1966 and amended in 1970, 1976, 1985, and 1990) authorizes the Secretary of Agriculture to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers, and intermediate handlers. Regulations established under the Act are contained in 9 CFR parts 1, 2, and 3.

The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture established regulations under the Act in 1979 for the humane handling, care, treatment, and transportation of marine mammals used for research or exhibition purposes. These standards, contained in 9 CFR part 3, subpart E (referred to below as the regulations), were amended in 1984. During the 14 years since the standards were amended, advances have been made, new information has been developed, and new concepts have been implemented with regard to the handling, care, treatment, and

transportation of marine mammals in captivity.

On July 23, 1993, we published in the **Federal Register** (58 FR 39458, Docket No. 93-076-1) an advance notice of proposed rulemaking that solicited comments on appropriate revisions or additions to the standards for the humane handling, care, treatment, and transportation of marine mammals used for research or exhibition. The comments we received supported our intent to revise the regulations and suggested it would be highly desirable to involve all interested parties in developing appropriate regulations. We determined that consensus among interested parties was attainable and that we should proceed with negotiated rulemaking.

On May 22, 1995, we published in the **Federal Register** (60 FR 27049-27051, Docket No. 93-076-3) a notice of intent to establish an advisory committee to advise the Department on how to revise the regulations. The notice included a list of groups tentatively identified by the Department as potential participants on the advisory committee. A committee, called the Marine Mammal Negotiated Rulemaking Advisory Committee (the Committee), was subsequently established in accordance with the Federal Advisory Committee Act (5 U.S.C. App. I). It included all of the groups that were identified in the notice as potential participants, with the exception of the Society for Marine Mammology, which was unable to participate.

The following organizations were included on the Committee as voting members:

American Zoo and Aquarium Association  
Alliance of Marine Mammal Parks and Aquariums  
International Association of Amusement Parks and Attractions  
Marine Mammal Coalition  
United States Navy  
Center for Marine Conservation  
Humane Society of the United States  
Animal Welfare Institute, representing a broad coalition of animal concern groups  
American Association of Zoo Veterinarians  
International Association for Aquatic Animal Medicine  
International Marine Animal Trainers Association  
Animal and Plant Health Inspection Service

The following organizations or individuals were included on the Committee as observers or consultants. These individuals did not vote on the

final consensus reached by the Committee:

Marine Mammal Commission  
National Marine Fisheries Service  
Fish and Wildlife Service  
Dr. Joseph Geraci, independent consultant to the Committee

The Committee conducted three sessions, on September 25 and 26, 1995, in College Park, MD; on April 1, 2, and 3, 1996, in Riverdale, MD; and on July 8, 9, and 10, 1996, in Riverdale, MD. All meetings were open to the public, with specified times during the meetings established for public participation and comment.

Under the rules governing the negotiated rulemaking process, and in accordance with the organizational protocols established by the Committee, APHIS agreed to publish as a proposed rule any consensus language developed during the meetings unless substantive changes were made as a result of authority exercised by another Federal Government entity. Committee members agreed to refrain from commenting negatively on the consensus-based language in the proposed rule.

Consensus language was reached on 13 of the 18 sections that comprise the regulations and on one paragraph in a 14th section: §§ 3.101, 3.104(a), 3.105, 3.107 through 3.110, and 3.112 through 3.118. Sections 3.101 and 3.104(a) contain facility and operating standards. Section 3.101 contains general requirements for facilities housing marine mammals, including construction, water and power supply, drainage, storage, waste disposal, and washroom facilities; § 3.104(a) contains general space requirements for primary enclosures. Sections 3.105 and 3.107 through 3.110 concern animal health and husbandry. Section 3.105 contains feeding requirements; § 3.107 concerns sanitation and pest control; § 3.108 sets standards for employees and attendants; § 3.109 concerns separation of marine mammals; and § 3.110 concerns veterinary care. Sections 3.112 through 3.118 concern transportation of marine mammals. Section 3.112 concerns consignment of marine mammals to carriers and intermediate handlers; § 3.113 contains standards for primary enclosures used to transport marine mammals; § 3.114 contains standards for primary conveyances used to transport marine mammals; § 3.115 contains requirements for provision of food and water during transport; § 3.116 concerns the care of marine mammals by employees or attendants during transport; § 3.117 concerns terminal facilities; and § 3.118 contains

requirements for handling marine mammals during transport.

On February 23, 1999, we published a proposed rule in the **Federal Register** (64 FR 8735-8755, Docket No. 93-076-11) that contained the consensus language developed by the Committee for these sections of the regulations. The proposed rule also contained one provision not agreed on by consensus of the Committee: a provision in current § 3.110(d) concerning maintenance of necropsy records. The proposed rule revised this provision and placed it in § 3.110(g)(2). We included it in the proposed rule in order to complete the section.

We solicited comments concerning our proposal for 60 days ending April 26, 1999. We reopened and extended the deadline for comments until May 26, 1999, in a document published in the **Federal Register** on May 14, 1999 (Docket No. 93-076-14, 64 FR 26330). We received 15 comments by that date. They were from animal welfare organizations, veterinary organizations, and regulated entities that care for marine mammals. Most commenters commended the efforts of the Committee and were supportive of the proposed rule in general. However, all commenters requested changes to specific provisions of the proposal. The comments are discussed below, grouped according to the section of the regulations to which they pertain.

#### *Section 3.101 Facilities, General*

Proposed § 3.101 contains general requirements for indoor and outdoor facilities.

Paragraph (a)(1) of proposed § 3.101 includes the requirement that indoor and outdoor housing facilities be constructed to restrict the entrance of unwanted animals. One commenter said that this provision should apply to seagulls at public feeding exhibits because of the risk of disease transmission from seagulls to marine mammals and because the seagulls consume some of the food offered to the marine mammals, making it difficult to assess the marine mammals' nutritional intake.

We are not making any changes in response to this comment. We recognize that birds can present problems at outdoor facilities. The provision in § 3.101(a)(1) is intended to address this problem. In addition, proposed § 3.107(d) requires that a safe and effective program for the control of pests, including avian pests, be established and maintained. Measures to completely eliminate intrusions by seagulls and other birds at outdoor facilities may not always be in the

marine mammals' best interests. Mesh or wire cages over outdoor pools restrict physical contact between birds and marine mammals but increase exposure to droppings by providing a roosting spot for the birds directly over pool areas. This could increase the risk of disease transmission. We believe the proposed regulations are adequate to prevent significant or widespread problems regarding seagulls and other pests at marine mammal facilities.

Proposed paragraph (a)(1) also includes the following provision: "Lagoon and similar natural seawater facilities must maintain effective barrier fences, or other appropriate measures, on all sides of the enclosure not contained by dry land, extending above the high tide water level, to fulfill the requirements of this section." Two commenters suggested that we move the phrase "extending above the high tide water level" to follow "effective barrier fences." The commenters said this would reinforce the Committee's intent, given our statement in the preamble that the Committee agreed that this requirement is not intended to preclude the temporary lowering or removal of part of the barrier fencing above the water line to accommodate filming or similar actions. We agree, and are revising the sentence to read: "Lagoon and similar natural seawater facilities must maintain effective barrier fences extending above the high tide water level, or other appropriate measures, on all sides of the enclosure not contained by dry land to fulfill the requirements of this section."

Paragraph (a)(2) of proposed § 3.101 requires that marine mammals be provided protection from abuse and harassment by the public by the use of a sufficient number of uniformed or readily identifiable employees or attendants or by physical barriers (e.g., fences, walls, distance). One commenter recommended that we additionally require that the employees or attendants be appropriately trained and in permanent attendance. The commenter said that employees must be trained to educate the public about appropriate behavior and must discipline the public for inappropriate behavior, particularly at public feeding exhibitions.

We are not making any changes in response to this comment. When physical barriers are not present (such as at public feeding exhibitions), we believe it is adequate to require that a sufficient number of uniformed or readily identifiable employees or attendants be present. These employees would be charged with protecting the marine mammals on display from abuse or harassment by the public. It follows

that the employees or attendants would have to be trained adequately to perform this function. In addition, if a member of the public is found to be abusing or harassing a marine mammal, we believe the proposed regulation makes it clear that that person must be prevented from continuing such behavior.

Proposed paragraph (a)(3) of § 3.101 requires that facilities implement a written protocol on cleaning primary enclosure surfaces so that the surfaces do not constitute a health hazard to the animals. One commenter asked if there is a history of problems that justifies requiring a written protocol for this activity.

We are not making any changes based on this comment. There have been a sufficient number of noncompliant citations for sanitation regarding primary enclosure surfaces to cause the Committee to agree that this requirement is necessary and reasonable. Requiring a written protocol for what should be routine maintenance will provide a means for APHIS inspectors to determine if cleaning practices are appropriate for the species and type of enclosure and will enable inspectors to monitor whether the procedures specified are being followed.

Another commenter said we should remove the proposed requirement for a written protocol on cleaning primary enclosure surfaces from § 3.101(a)(3) because the same requirement appears in proposed § 3.107. While proposed § 3.107 does concern sanitation in and around primary enclosures, it contains no provision for a written protocol on cleaning enclosure surfaces. Therefore, we are not making any change based on this comment.

A third commenter asked that we change the wording of the proposed requirement for a written protocol on cleaning primary enclosure surfaces. The last sentence of proposed paragraph (a)(3) reads: "All facilities shall implement a written protocol on cleaning so that surfaces do not constitute a health hazard to animals." The commenter was concerned that this sentence does not make it clear that it addresses only primary enclosure surfaces. We believe that the first sentence of proposed paragraph (a)(3) makes it clear that the paragraph as a whole specifically concerns primary enclosure surfaces. Therefore, we are not making any changes based on this comment.

Paragraph (a)(4) of proposed § 3.101 exempts facilities that house marine mammals in natural water areas (tidal basins, bays, estuaries) from the drainage requirements in § 3.101(c)(1). Paragraph (c) of proposed § 3.101

concerns drainage, and paragraph (c)(1) generally requires that adequate drainage be provided for primary enclosure pools. Two commenters suggested that the exemption in paragraph (a)(4) belongs more appropriately in paragraph (c). We are not making a change based on this comment. Paragraph (a) addresses general construction requirements, and, while paragraph (a)(4) does address the issue of drainage, it is also an exemption from a basic construction requirement. Therefore, we believe it is appropriately placed.

The commenters also asked us to make the natural water area facilities described in § 3.101(a)(4) exempt from the drainage requirements in proposed § 3.101(c)(2). We are making no change based on this comment. Paragraph (c)(2) concerns areas within a primary enclosure other than the pool itself, including areas immediately surrounding the pool. It would not be appropriate to exempt natural water area facilities from this type of drainage. Excess water around a pool area and other parts of an enclosure would be a hazard for marine mammals and caretakers, regardless of whether the pool itself is a natural seawater facility or a man-made facility.

Paragraph (b) of proposed § 3.101 concerns water and power supplies. Currently, paragraph (b) includes the requirement that written contingency plans be submitted to and approved by Veterinary Services regarding emergency sources of water and electric power in the event of failure of the primary sources. We proposed that these plans be submitted to and approved by the Deputy Administrator of Animal Care. One commenter said that contingency plans have always been reviewed by on-site visits from Veterinary Services and wondered why we have assigned review of these plans to the Deputy Administrator of Animal Care.

We are making no changes based on this comment. As we explained in the preamble to the proposed rule, APHIS reorganized after the last amendments to the marine mammal regulations. Veterinary Services no longer enforces the Animal Welfare Act. That authority has been reassigned to the Deputy Administrator of Animal Care. Since the reassignment, written contingency plans have been reviewed by Animal Care at the regional office level. The Deputy Administrator may continue to delegate this authority to the appropriate administrative level.

Paragraph (b) of proposed § 3.101 also requires that contingency plans include animal evacuation plans in the event of

a disaster and, if the contingency plan includes release of marine mammals, provision for recall training and retrieval. One commenter was concerned about including details of recall training and retrieval plans as part of the written contingency plan submitted to the Deputy Administrator. The commenter said that this information would then be available under the Freedom of Information Act (FOIA) and that this would not be in the best interests of the marine mammals. The commenter said it is not clear whether this information needs to be submitted as part of the contingency plan.

We are not making any change based on this comment. We believe that proposed paragraph (b) makes it clear that the entire contingency plan, including plans for recall training and retrieval, must be submitted and approved by the Deputy Administrator. Proposed paragraph (b) does not require a detailed description of recall training and retrieval plans, but requires, if release of the animals is a component of the contingency plan, that the plan provide for recall training and retrieval. The intent of this requirement is that facilities provide enough information so that APHIS inspectors can determine whether the animals have been adequately trained for recall and retrieval. We would not require facilities to include information that could compromise the safety or well-being of the animals, such as details on when and where training occurs or the actual signals used for recall. We believe the requirement is appropriate and in the interests of the safety and well-being of the marine mammals.

Another commenter said that we should remove the requirement for recall training provisions in the contingency plan because recall training is not always in the best interests of the animal, specifically if the facility is working with the purpose of reintroducing marine mammals into the wild.

We are not making any change based on this comment. We are unaware of any facilities currently holding marine mammals in anticipation of releasing them into the wild. Moreover, the contingency plan only requires a provision for recall training and retrieval of animals if animals are to be released in the event of a disaster, not as part of a scientific reintroduction-into-the-wild project. In all other instances, quick and efficient retrieval of the animal is in the animal's best interests. We wish to note that any recall training, including boat following, that involves the release of the animals

from their primary enclosure into the wild (meaning water outside the primary enclosure and facility) must be done under appropriate authorization from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service. This issue was discussed during the negotiated rulemaking sessions, and we reiterate that our requirement regarding contingency plans does not preclude the jurisdiction of these agencies in overseeing the release of captive animals into the wild, even if it is for training purposes.

Paragraph (c) of proposed § 3.101 concerns drainage. Paragraph (c)(1) requires that adequate drainage be provided for all primary enclosure pools and be located so that all the water in the pools may be "effectively eliminated" when necessary. Paragraph (c)(2) requires that drainage be provided for primary enclosures and areas immediately surrounding pools and be located so that excess water may be "rapidly eliminated." One commenter said that one of the phrases ("effectively eliminated" or "rapidly eliminated") should be changed so that they are consistent.

We are making no change based on this comment. As explained in the preamble to the proposed rule, paragraph (c)(1) currently requires that drainage allow water to be "rapidly eliminated" from primary enclosure pools. We proposed to change this to read "effectively eliminated." The Committee believed the change was necessary because rapid emptying of primary enclosure pools is not always necessary and, in some cases, can be unsafe for the marine mammals. In paragraph (c)(2), the Committee chose to retain the requirement for rapid elimination of water, because paragraph (c)(2) concerns areas in the primary enclosure other than the pool, including areas immediately surrounding the pool. For safety purposes, rapid elimination of excess water from these areas is necessary and would not harm the animals.

Paragraph (d) of proposed § 3.101 concerns storage of food, toxic substances, supplements, and medication and includes the following requirement:

No substances which are known to be or may be toxic or harmful to marine mammals may be stored or maintained in the marine mammal food storage or preparation areas, except that cleaning agents may be kept in secured cabinets designed and located to prevent food contamination.

Paragraph (b) of proposed § 3.107 concerns food preparation and includes the following requirement:

Substances such as cleansing and sanitizing agents, pesticides, and other potentially toxic agents must be stored in properly labeled containers away from food storage preparation surfaces.

One commenter found these two requirements confusing, and was unsure whether cleaning agents may be kept in food preparation areas.

We agree that the wording may be somewhat confusing. The Committee's intent was that cleaning agents be stored so that they will not be in danger of contaminating food preparation surfaces or food. While cleaning agents may be stored in the area where food is prepared, they must be stored in secured cabinets away from food preparation surfaces. We are making no changes to the requirement in § 3.101(d), but are revising the requirement in § 3.107(b) to make the Committee's intent clearer. As revised, the sentence cited above from § 3.107(b) will read: "Substances such as cleansing and sanitizing agents, pesticides, and other potentially toxic agents must be stored in properly labeled containers in secured cabinets designed and located to prevent contamination of food storage preparation surfaces."

Another commenter recommended combining these requirements into one paragraph. We are not making a change based on this comment. We believe it is appropriate to have the requirements in both paragraphs because each paragraph addresses a separate issue—one addresses storage and one addresses sanitation.

Paragraph (d) of proposed § 3.101 also requires that refrigerators and freezers be used for storing perishable food but provides that chilled and/or iced coolers may be used for under 12 hours. One commenter said that he uses buckets with ice to transfer food from the preparation area to the feeding docks. The commenter was concerned that the language in proposed paragraph (d) would not allow this practice.

We are not making any changes based on this comment. The Committee discussed this issue and determined that buckets with ice can be used to transfer food from a cooler or refrigerator to a feeding area, as long as the food is fed to the marine mammals immediately after transfer. Food safety issues are a concern when food is stored for longer periods of time in uncovered buckets with melting ice. If food is kept in buckets with ice at the feeding area for use in later feedings, it would be a violation of proposed paragraph (d). We do not believe any change is necessary to the proposed regulation to clarify this because paragraph (d) specifically

concerns food storage and not transfer of food for immediate feeding.

#### *Section 3.104 Space Requirements*

Proposed § 3.104 concerns space requirements for primary enclosures.

Paragraph (a) of proposed § 3.104 states that an enclosure smaller than required by the regulations may be used to house marine mammals temporarily for nonmedical training, breeding, holding, and transfer purposes. However, proposed paragraph (a) requires that, if housing in a smaller than required enclosure is for longer than 2 weeks and is for the purpose of nonmedical breeding, training, or holding (not transfer), an extension must be justified in writing by the attending veterinarian on a weekly basis.

One commenter asked for whom the written justification is intended. The written justification would serve several purposes, including ensuring that the attending veterinarian is aware of the arrangements, concurs with the reason for such arrangements, and monitors the animal's response to such arrangements. Additionally, APHIS would consult the written justification records to assess compliance with the space requirements and as a basis for discussing any concerns about space with the attending veterinarian.

Another commenter said that proposed § 3.104(a) should be changed to require that, if a marine mammal is housed in a smaller than required enclosure for longer than a few hours, it must be justified in writing by the attending veterinarian on a daily basis. We are not making any changes based on this comment. It would be an unnecessary burden to require such frequent justification. Depending on the design of the facility, it can often take a few hours just to transfer a marine mammal from its primary enclosure into the smaller enclosure, making such frequent justification impractical. We are not aware of any evidence showing that it would be harmful to marine mammals to spend up to 2 weeks in an enclosure smaller than required for primary enclosures. Keeping them in such enclosures for longer periods of time must be weighed by the attending veterinarian in terms of harm versus benefits to the animals, and we believe a weekly justification is adequate to accomplish this. We believe the proposed requirements are adequate to ensure that marine mammals are not kept in enclosures smaller than required for longer than is absolutely necessary.

Another requirement in proposed paragraph (a) is that enclosures smaller than required, for example, gated side

pools abutting primary enclosures, may not be used for permanent housing purposes. Proposed paragraph (a) also states that rotating animals between enclosures that do and do not meet the minimum space requirements is not acceptable. One commenter said that, within the marine mammal exhibition industry, it is common to use gated side pools for permanent housing, rotating the animals between them and the main pool regularly, and this requirement would preclude that use. The commenter suggested reevaluating the wording to clarify that the intent is to prohibit the use of medical or holding pools for permanent housing purposes.

The intent of the Committee was to make it clear that enclosures that do not meet the minimum space requirements for primary enclosures may not be used for permanent housing of marine mammals. The Committee further clarified that this holds true even if the marine mammal is being rotated between enclosures that meet the minimum space requirements and enclosures that do not. Such activity would not meet the requirements of the regulations for primary enclosures. The purpose of making this clarification is to prevent facilities from, for example, generally housing marine mammals in smaller than required enclosures supplemented by letting them into a larger enclosure every few days. Proposed paragraph (a) states that marine mammals may be housed temporarily in enclosures smaller than required for nonmedical training, breeding, holding, and transfer purposes, and proposed § 3.110(b) allows marine mammals to be housed temporarily in enclosures smaller than required for medical treatment or training purposes. Marine mammals may not be housed in enclosures smaller than required for any other purpose.

According to the Committee's intent, if gated side pools are large enough to meet the space requirements for primary enclosures, then the activity the commenter describes would be acceptable. If gated side pools do not meet the minimum space requirements for primary enclosures, then the activity the commenter describes would not be acceptable.

Based on the comment, we believe that the proposed language should be revised to make it clearer. Therefore, we are revising the last two sentences of proposed § 3.104(a). The proposed sentences read as follows:

Such enclosures, for example, gated side pools abutting primary enclosures, shall not be used for permanent housing purposes. Rotating animals between enclosures which

do and do not meet minimum space requirements is not acceptable to comply with these regulations.

We are revising these sentences to read as follows:

Any enclosure that does not meet the minimum space requirement for primary enclosures (including, but not limited to, medical pools or enclosures, holding pools or enclosures, and gated side pools smaller than the minimum space requirements) may not be used for permanent housing purposes. Rotating animals between enclosures that meet the minimum space requirements and enclosures that do not is not an acceptable means of complying with the minimum space requirements for primary enclosures.

One commenter said that animals in his facility are routinely placed in gated side pools abutting their primary enclosure for training and show purposes during certain periods of the day and for short periods for medical and other husbandry reasons. The commenter is concerned that the last sentence of proposed § 3.104(a) (revised above) concerning rotating animals between enclosures would preclude this activity.

We are not making any changes based on this comment. We believe that proposed paragraph (a) makes it clear that gated side pools smaller than the minimum space requirements for primary enclosures may be used for the purposes that the commenter describes. If the sentence concerning rotating animals between enclosures is read within the context of the rest of paragraph (a), we do not believe that there is any ambiguity.

Finally, with regard to proposed § 3.104(a), one commenter said that, in order to facilitate appropriate behavioral and medical management of a facility's population as a whole, this paragraph needs to be clarified to maintain a facility's right to have the necessary flexibility with respect to marine mammal housing; that is, a facility must be able to make appropriate use of all pools.

We are not making any changes based on this comment. The commenter does not specify how the paragraph needs to be clarified. However, we believe that the paragraph clearly allows for appropriate use of pools smaller than required for primary enclosures and prohibits inappropriate use of such pools. We believe the allowances and prohibitions give facilities adequate flexibility, while fulfilling the intent of the Act to ensure that marine mammals are housed under conditions favorable to their health and well-being.

### Section 3.105 Feeding

Proposed § 3.105 contains feeding requirements, including provisions to ensure food is nutritious and safely handled.

Paragraph (a) of proposed § 3.105 includes the requirement that marine mammals be offered food at least once per day, except as directed by the attending veterinarian. One commenter said that marine mammals should be offered food more than once per day.

We are making no changes based on this comment. The Act requires that we promulgate minimum standards for the care of marine mammals. We believe that requiring feeding at least once per day is adequate as a minimum standard. Some marine mammals do not require multiple feedings per day; for example, polar bears in maternity dens. Attending veterinarians and animal handlers are free to set up feeding regimens that include multiple feedings per day when they believe it is appropriate for the animal.

Paragraph (b) of proposed § 3.105 includes the requirement that food receptacles be placed so as to minimize contamination of the food. Paragraph (d) of proposed § 3.105 includes the requirement that the maintenance of thawed food be conducted in a manner that will minimize contamination. One commenter said the wording in both these paragraphs should be changed to require that food be handled so as to eliminate contamination.

We are not making any changes based on this comment. This point was debated during the negotiated rulemaking sessions. The Committee reached consensus that, even under ideal circumstances, it may not be possible to completely eliminate contamination of food by microbes, as they are present in the air. Therefore, the term "eliminate" would create a standard impossible to attain. As for contamination by chemicals, proposed § 3.101 contains provisions regarding storage to ensure that food supplies are not contaminated by toxic substances. The Committee agreed that, for these reasons, the term "minimize" would be more appropriate.

Paragraph (c) of proposed § 3.105 includes the requirement that marine mammal feeding records noting the estimated individual daily consumption be maintained at the facility for a period of 1 year and made available to APHIS for inspection. We clarified this requirement in the preamble to the proposed rule as follows: For marine mammals that are individually fed, and not subject to public feeding, the feeding records should reflect an

accurate account of food intake; for animals fed, in part, by the public, and for large, group-fed colonies of marine mammals where individual rations are not practical or feasible to maintain, the daily food consumption should be estimated as precisely as possible. The Committee believed that it would not be necessary to add this clarification to the proposed regulatory language.

However, a few commenters said that the clarification for feeding records should be added to the regulatory language in § 3.105(c). In order to make the section clear for all regulated entities, we are adding the clarification to paragraph (c).

### Section 3.107 Sanitation

Proposed § 3.107 concerns sanitation with regard to primary enclosures, food preparation, housekeeping, and pest control.

Paragraph (c) of proposed § 3.107 requires that buildings and grounds, as well as exhibit areas, be kept clean and in good repair and that fences be maintained in good repair. One commenter said this language is overly broad and should be revised to take into account special situations relating to natural open water facilities.

We are not making any changes based on this comment. The purpose of these requirements is to minimize risk of injury to the marine mammals from contaminants found in unclean surroundings and from hazards due to poor condition of fences, buildings, and grounds. We see no reason why exceptions need to be made for natural open water facilities. For example, it is particularly important that fencing and water barriers in open water facilities be kept in good repair to ensure containment of the animals within the enclosure as well as protection from animals outside the enclosure and sharp projections or edges on broken fencing.

### Section 3.108 Employees or Attendants

Proposed § 3.108 contains standards for employees and attendants that handle marine mammals.

Paragraph (b) of proposed § 3.108 requires that facilities provide and document participation in and successful completion of a facility training course for employees. Paragraph (b) also specifies minimum components of the course, including teaching species appropriate husbandry techniques, handling techniques, and reporting protocols. One commenter said that the requirements in paragraph (b) would place an unnecessary burden on facilities that already have qualified staff and infringe on the rights of

facilities to determine the aptitude of staff and training methodologies.

We are not making any changes based on this comment. In the preamble to the proposed rule, we said that APHIS had received public complaints about the lack of training and applicable experience of employees in licensed facilities. The Committee made several changes and additions to § 3.108 in order to remedy this problem. Adding the requirement for a facility training course was one of the additions. We continue to believe that a facility training course would be an effective means of ensuring that employees and attendants are equipped with the knowledge necessary to care for the marine mammals properly and meet the requirements of the regulations. The facility training course is a one time requirement for each employee, and the minimal content for training courses specified in paragraph (b) would not impose specific training methodologies. Therefore, we do not believe it imposes an undue burden on facilities.

Paragraph (d) of proposed § 3.108 requires that trainers and handlers meet professionally recognized standards for experience and training. Several commenters asked to what professionally recognized standards we are referring. Another commenter said that we should emphasize that paragraph (d) does not require the use of the standards of any particular group or organization.

We are making no changes based on these comments. We stated in the preamble to the proposed rule that, for purposes of enforcing the requirement, APHIS would use available professional organization standards as a point of reference. We may also use the experts within the marine mammal community as resources, as well as our own expertise and any professionally recognized standards.

One commenter said that we should add a sentence to paragraph (d) to require that trainers and handlers have demonstrable experience and appropriate formal training in marine mammal husbandry and care. We are not making any changes based on this comment. Paragraph (a) of proposed § 3.108 requires that employees and attendants (including trainers and handlers) be adequately trained and that supervisors have demonstrable experience in marine mammal husbandry and care.

### Section 3.109 Separation

Proposed § 3.109 concerns social housing and separation of marine mammals.

Proposed § 3.109 requires that marine mammals known to be social in the wild must be housed with at least one compatible animal of the same or biologically related species, except when the attending veterinarian, in consultation with the husbandry/training staff, determines that such housing is not in the best interests of the marine mammal's health or well-being. One commenter said that a situation in one marine park in which an orca is housed with dolphins was discussed during the negotiated rulemaking and was determined to be acceptable under this requirement. The commenter asked that we confirm this.

The commenter is correct that the Committee discussed a marine park that houses an orca with Pacific white-sided dolphins as companions. This arrangement is acceptable under the proposed regulations as long as the animals are compatible and a second compatible orca is not available.

As noted above, proposed § 3.109 includes an exception to the requirement that marine mammals known to be social in the wild must be housed with at least one compatible animal of the same or biologically related species. The exception is if the attending veterinarian in consultation with the husbandry/training staff determines that such housing is not in the best interests of the marine mammal's health or well-being. One commenter said that the attending veterinarian should also consult with facility management before making a decision to house a marine mammal separately.

We are making no changes based on this comment. The Committee discussed whether to require consultation with facility management when making a decision concerning housing a marine mammal separately. The Committee agreed not to add this requirement, in part because of potential conflicts between economic interests and the best interests of the animal. Facility management is typically involved in the activities of husbandry and training staffs and would not be without input into these decisions. Further, the proposed requirement would not prevent attending veterinarians from consulting with facility management if they choose.

Proposed § 3.109 also requires that marine mammals not be housed near other animals that cause them unreasonable stress or discomfort or interfere with their good health. One commenter asked that we remove the word "unreasonable" before "stress and discomfort." The commenter said that

the word "unreasonable" is too open to interpretation.

We are making no changes based on this comment. The Committee debated whether to include a qualifier such as "unreasonable" in this requirement. The Committee reached consensus that a qualifier was necessary because no animal, regardless of the conditions of its housing and even in the wild, is without some degree of stress or discomfort at various times. A requirement that marine mammals be maintained completely without stress or discomfort would be unattainable.

Proposed § 3.109 also requires that marine mammals that are housed separately must have a written plan that includes information on the justification for the length of time the animal will be kept separated or isolated, the type and frequency of enrichment, plans for interaction if appropriate, and provisions for periodic review of the plan by the attending veterinarian. The plan must be approved by the attending veterinarian and developed in consultation with the husbandry/training staff.

One commenter asked why the plan is needed and who the plan is for. We are making no changes based on this comment. Marine mammals are generally social animals. When marine mammals are kept in isolation without the companionship of other marine mammals, it is necessary to enrich their environment in other ways to promote their well-being. We proposed to require the plan to ensure that marine mammals kept in isolation are kept that way for valid reasons and that the animals' special enrichment needs are considered. The plan would be a valuable tool for the facility for making sure personnel caring for the marine mammals understand the special needs of the marine mammals. The plan would also be used by APHIS to determine if the animals' special needs are being considered and if the provisions of the plan are being followed.

#### *Section 3.110 Veterinary Care*

Proposed § 3.110 contains minimum standards of veterinary care for marine mammals.

Paragraph (a) of proposed § 3.110 requires that newly acquired marine mammals be isolated from resident marine mammals. One commenter asked if marine mammals that are seasonally transported between facilities would be considered newly acquired animals for purposes of this requirement. The commenter further said that such animals should not be considered newly acquired.

We are not making any changes based on this comment. If marine mammals are moved to a facility that is not their permanent residence, they would be considered newly acquired to that facility, even if they move there every summer, for example, as a result of regular seasonal movement. However, under proposed § 3.110(a), if the newly acquired marine mammals have a known medical history, they must be isolated only until the attending veterinarian determines the animals are in good health. This may be accomplished on the day of arrival at the facility. We believe the requirement for isolation of newly acquired marine mammals is necessary to protect the health of resident marine mammals.

Paragraph (b) of proposed § 3.110 concerns holding facilities for medical treatment or medical training. Proposed paragraph (b) requires that, if a marine mammal is to be held in an enclosure that does not meet the minimum space requirements for primary enclosures for longer than 2 weeks, it must be justified in writing by the attending veterinarian on a weekly basis. One commenter said that this requirement should be changed so that if a marine mammal is to be held in an enclosure smaller than required for longer than a few hours, it must be justified in writing by the attending veterinarian on a daily basis.

We are not making any changes based on this comment. The same comment was received regarding a similar requirement under proposed § 3.104(a) regarding holding marine mammals in smaller than required enclosures for nonmedical training, breeding, or holding. In response to that comment, we said that it would be an unnecessary burden to require such frequent justification. Depending on the design of the facility, it can often take a few hours just to transfer a marine mammal from its primary enclosure into the smaller enclosure, making such frequent justification impractical. We are not aware of any evidence showing that it would be harmful to marine mammals to spend up to 2 weeks in an enclosure smaller than required for primary enclosures. Keeping them in such enclosures for longer periods of time must be weighed by the attending veterinarian in terms of harm versus benefits to the animals, and we believe a weekly justification is adequate to accomplish this. We believe the proposed requirements are adequate to ensure that marine mammals are not kept in enclosures smaller than required for longer than is necessary.

One commenter expressed concern and asked why, in proposed § 3.110(b), the space requirements for isolation of



marine mammals in natural lagoons and coastal facilities are different than for closed system facilities. We are not making any changes based on this comment. Paragraph (b) begins by stating that all facilities must have holding facilities in place and available to meet the needs for isolation, separation, medical treatment, and medical training of marine mammals. The last sentence of paragraph (b) states that, in natural lagoon or coastal enclosures, separation of newly acquired marine mammals must be accomplished using separate enclosures situated within the facility, located to prevent direct contact with resident animals and to minimize the risk of potential airborne or waterborne contamination between newly acquired and resident animals. This clarification for natural lagoons and coastal facilities is necessary because water circulation cannot be controlled or isolated in such facilities. Paragraph (b) makes no distinction between natural lagoon and coastal facilities and closed system facilities with regard to space requirements.

One commenter suggested we move the last sentence of proposed paragraph (b) of § 3.110 to the end of paragraph (a). We are not making any changes based on this comment. Paragraph (a) addresses the need to isolate newly acquired marine mammals. Paragraph (b) addresses the use of isolation facilities, including the use of such facilities for newly acquired animals. We believe that the last sentence of paragraph (b) is appropriately placed.

Two commenters were concerned that the requirements for isolation in proposed § 3.110 (a) and (b) could be construed to require separate quarantine facilities with tanks, filters, and water treatment systems independent of the rest of the facility. The commenters said that, if this is the intent, it would be inappropriate and cost prohibitive. Both commenters also said that, since it is clear that this is not the intent for natural lagoons and coastal enclosures (paragraph (b) acknowledges that water circulation cannot be controlled or isolated in such systems), the requirement should be the same for other types of enclosures.

We are not making any changes based on these comments. Section 3.110 has always contained a requirement for isolation of newly acquired animals and for holding facilities adequate to accomplish isolation. These requirements, therefore, are not new. In general, our use of the word "isolation" corresponds with the common veterinary meaning of prevention of contact with other animals, directly as

well as through water or air. Bacteria and disease can be transmitted through water and air. However, each facility will present unique concerns over how to effectively isolate an animal. Completely separate tanks, filters, and water filtration systems are ideal. In other cases, a single but efficient water filtration and treatment system may accomplish the same thing. Preventing the exchange of airborne pathogens presents the greatest challenge. Our intent is that facilities keep newly acquired animals and animals that need to be isolated for medical purposes as separate as possible from the known healthy animals in the facility. APHIS will work with each licensed and registered facility to address concerns and to help facilitate compliance with this requirement.

A few commenters were concerned that the Committee generally added too much detail to the veterinary care requirements in proposed § 3.110, giving APHIS inspectors opportunities to question veterinarians' protocols. In particular, one commenter cited the requirement in proposed § 3.110(f) that all cetaceans and sirenians be physically examined by the attending veterinarian at least annually and that the examinations include a hands-on physical examination, hematology and blood chemistry, and other diagnostic tests as determined by the attending veterinarian.

We are not making any changes based on these comments. APHIS has been concerned about the quality of veterinary care provided to marine mammals at certain facilities. These concerns were discussed during the negotiated rulemaking. The Committee agreed that it was necessary to provide more specific standards to clarify what is meant by providing adequate veterinary care to marine mammals. The proposed language is based on currently accepted practices and professional veterinary standards. We do not believe that the language the Committee agreed to is overly burdensome, but rather describes the minimum of what is needed in a preventive health program for marine mammals.

Paragraph (g)(1) of proposed § 3.110 concerns necropsy of marine mammals and includes the requirement that a final necropsy report include a pathological diagnosis. One commenter said that, in the past 15 years, he has received several pathology reports from the laboratory stating the cause of death cannot be determined.

We are not making any changes based on this comment. It is possible for a pathological diagnosis to be inconclusive (that is, cause of death

cannot be determined), and this is an accepted diagnosis. The intent of the requirement is to ensure that histopathology is done as part of a necropsy and evaluated by an expert.

Proposed paragraph (g)(1) also requires that necropsies be conducted by or under the supervision of the attending veterinarian. One commenter asks what to do if the attending veterinarian is unavailable because he or she is out of town. We are not making any changes based on this comment. The intent of the requirement is that the necropsy be performed or supervised by a veterinarian experienced in marine mammal medicine. If an attending veterinarian is out of town for an extended period of time, alternative veterinary medical coverage should be arranged. Usually, the attending veterinarian appoints a back-up veterinarian for emergencies. It would be appropriate for the back-up veterinarian to perform the necropsy. However, if the attending veterinarian will be available within a few days, it may be preferable to cool and store the animal until the necropsy can be performed upon the attending veterinarian's return.

Paragraph (g)(2) of proposed § 3.110 concerns maintenance of necropsy reports. This paragraph was not agreed to by consensus of the Committee and was, therefore, open for all public comment, including comments from Committee members.

We proposed in paragraph (g)(2) that necropsy records must be maintained at the facility for a period of 3 years and be presented to APHIS inspectors when requested. We explained in the preamble to the proposed rule that we intend this to mean that the records must be maintained at the home facility of the marine mammal. This requirement would replace the current requirement that necropsy records be maintained at the facility where the marine mammal died. One commenter said that we should require necropsy reports to be maintained both at the home facility and at the facility where the marine mammal died. The commenter said this would be beneficial because some facilities maintain marine mammals only on a seasonal basis, and requiring them to retain necropsy records on animals that have died at their facility would make it possible to identify and compare problems resulting in deaths in successive years.

We agree with the commenter that it would be beneficial to require necropsy records to be maintained at both the home facility and the facility where the marine mammal died (if these are different facilities). Therefore, we are



making the appropriate change in § 3.110(g)(2).

One commenter said that necropsy reports should be submitted to APHIS upon completion by or approval of the attending veterinarian. The commenter stated that this would allow necropsy reports to be obtained by interested persons for purposes of scientific inquiry into the causes of captive marine mammal mortality.

We are making no changes based on this comment. Although the provisions of proposed paragraph (g)(2) are not based on consensus language, the issue addressed by the commenter was discussed during the negotiated rulemaking. Several members of the Committee had strong reservations about the use and interpretation of necropsy reports by untrained individuals or individuals who do not have complete knowledge of an animal's history. We believe that there would be no enforcement benefits or benefits to the animals from requiring necropsy reports to be submitted to APHIS and that it would unnecessarily increase the reporting burden on facilities. Persons interested in pursuing scientific inquiry into captive marine mammal mortality can request information directly from facilities.

#### *Section 3.112 Consignments to Carriers and Intermediate Handlers*

Proposed § 3.112 contains requirements for carriers and intermediate handlers involved in the transportation of marine mammals.

Paragraph (c) of proposed § 3.112 concerns temperature. It requires that carriers and intermediate handlers whose facilities fail to maintain a temperature within the range prescribed by the regulations may accept a marine mammal for transport only if the marine mammal is accompanied by a certificate executed and signed by the attending veterinarian. The certificate would have to state that the marine mammal is acclimated to an air temperature range specified on the certificate that is either lower or higher than the prescribed range. Under proposed §§ 3.117 and 3.118, the prescribed temperature range is between 7.2 °C and 23.9 °C or 45 °F and 75 °F.

Two commenters were concerned about the maximum temperature in the prescribed range (75 °F) and the requirement to provide an acclimation certificate for transporters whose facilities exceed that temperature. The commenters said that the southern United States experiences temperatures over 75 °F for half of the year and that requiring an acclimation certificate for marine mammals maintained and

transported in that part of the country would be onerous. One commenter said that this temperature range could induce some carriers to refuse to accept marine mammals for transport, even with an acclimation certificate, for fear of liability. The other commenter suggested setting the maximum temperature for the prescribed range at 90 °F.

We are not making any changes based on these comments. A primary problem with transporting marine mammals is heat stress. As cetaceans, pinnipeds, and sirenians are generally not transported in water, or only partially submerged, their thermoregulatory capacity is already being stressed. The Committee included the proposed requirement in paragraph (c) to help minimize heat-related stress during transport. Paragraph (a) of proposed § 3.112 requires that marine mammals consigned to transport be accompanied by a health certificate signed by the attending veterinarian. The additional requirement of obtaining an acclimation certificate from the attending veterinarian would add minimal burden.

Paragraph (d) of proposed § 3.112 requires that, following the arrival of any marine mammal at the animal holding area of the terminal cargo facility, carriers and intermediate handlers must attempt to notify the consignee who is to receive the marine mammal at least once in every 6-hour period. One commenter said that, since proposed § 3.116(a) requires that all marine mammals be accompanied during transport by a licensed veterinarian, employee, and/or attendant of the shipper or receiver, the requirement in proposed § 3.112(d) is unnecessary and should be deleted.

We are not making any changes based on this comment. We recognize that the notification requirement in proposed § 3.112(d) may not be necessary in most cases, since the marine mammal would be accompanied by an attendant at all times. However, there may be unforeseen circumstances that would make notification necessary; for example, a marine mammal shipped on a commercial flight may be inadvertently sent to the wrong location.

#### *Section 3.113 Primary Enclosures Used To Transport Marine Mammals*

Proposed § 3.113 contains standards for primary enclosures used to transport marine mammals.

Paragraph (b) of proposed § 3.113 concerns straps, slings, harnesses, and other devices used to support or restrain marine mammals in their enclosures.

The introductory text of paragraph (b) reads as follows:

Straps, slings, harnesses, or other devices used for body support or restraint, when transporting marine mammals such as cetaceans and sirenians shall \* \* \*

One commenter said that we should add the word "if" to the introductory text, so that it would read as follows:

Straps, slings, harnesses, or other devices, if used for body support or restraint when transporting marine mammals such as cetaceans and sirenians, shall \* \* \*

The commenter suggested that leaving out the word was an inadvertent error, since the current language in § 3.113(b) contains the word "if".

We are making no changes based on this comment. The wording for paragraph (b) was the wording agreed to by the Committee. We do not believe that adding the word "if" changes the meaning of the sentence, since the use of straps, slings, or other such devices is clearly not required.

One commenter said we are inconsistent throughout §§ 3.113, 3.114, 3.117, and 3.118 with the use of the terms "primary enclosure" and "primary transport enclosure." The commenter said that, since all of these sections concern transportation, the term "primary transport enclosure" should be used throughout.

In the preamble to the proposed rule, we explained that throughout these sections, we would use the term "primary transport enclosure" whenever we believed the term was necessary for clarity. In other places, the proposed regulations specify "primary enclosure used to transport marine mammals," and we believed in those places that the intent was clear. Additionally, all of these sections appear in the proposed regulations under the heading "Transportation Standards." However, in reviewing the proposed rule, we realized that in two places we inadvertently failed to use either the term "primary transport enclosure" or "primary enclosure used to transport marine mammals." These places are in § 3.113(c)(2) and in § 3.114(d). For consistency, we are changing "primary enclosure" to "primary transport enclosure" in these two places.

#### *Section 3.116 Care in Transit*

Proposed § 3.116 contains requirements for the care of marine mammals in transit.

Paragraph (a) of proposed § 3.116 includes the requirement that, if the attending veterinarian does not accompany the marine mammal during transit, communication with the

attending veterinarian must be maintained in accordance with 9 CFR part 2, § 2.40(b)(3). Section 2.40 contains requirements for adequate veterinary care of any animal covered under the Act that is maintained by a dealer or exhibitor. Paragraph (b)(3) of § 2.40 requires, among other things, that there be daily observations of all animals to assess their health and well-being and that there be a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being can be conveyed to the attending veterinarian.

One commenter said that we should also reference the requirements of 9 CFR part 2, § 2.33(b)(3), in proposed § 3.116(a). The commenter pointed out that § 2.40(b)(3) concerns only marine mammals maintained by dealers and exhibitors, while § 2.33(b)(3) concerns marine mammals maintained by research facilities.

There are very few transports involving marine mammals used in research. We believe the Committee overlooked the reference to § 2.33(b)(3) for this reason. The commenter's suggestion is, however, appropriate, and we are adding the reference to § 2.33(b)(3) to paragraph (a) of proposed § 3.116.

#### *General Comments*

We also received several comments that did not pertain to a particular section of the proposed regulations. They are as follows:

One commenter commended the work of the Committee but said that just because everybody agreed, it does not mean the agreement needs to be a rule; and that it is now up to APHIS to determine if all the agreements reached need to become rules.

We conducted negotiated rulemaking for this rule under the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561 *et seq.*) and the Federal Advisory Committee Act (5 U.S.C. App. I). Under the rules governing the negotiated rulemaking process, and in accordance with the organizational protocols established by the Committee, we agreed to publish as a proposed rule any consensus language developed during the Committee meetings unless substantive changes were made as a result of authority exercised by another Federal Government entity. APHIS was a voting member of the Committee and, therefore, was in agreement with the consensus language published in the proposed rule. In this final rule, we have exercised our oversight responsibility and have made minor changes based on concerns of

commenters when we believed they were necessary, and other minor changes when deemed appropriate.

One commenter asked that the Committee work toward consensus on the remaining five sections of the marine mammal regulations. These five are §§ 3.102, 3.103, 3.104 (with the exception of paragraph (a)), 3.106, and 3.111. These sections concern, respectively, indoor facilities, including temperature, ventilation, and lighting; outdoor facilities; space requirements; water quality; and swim-with-the-dolphin programs. Two other commenters were particularly concerned that the space requirements in § 3.104 (b) and (c) and the water quality requirements in § 3.106 were not revised.

The charter for the Committee (under the Federal Advisory Committee Act) has expired. In addition, during the negotiated rulemaking meetings, the Committee agreed that consensus on the remaining five sections was most likely not possible. For these reasons, we have decided to draft proposed revisions to these sections without the use of negotiated rulemaking. We plan to publish proposed changes for these sections in the near future, and these changes will be open for public comment.

One commenter asked that we prohibit physical interactions between captive marine mammals and the public, particularly in public petting and feeding displays. The commenter further stated that the proposed regulations would not significantly improve the welfare of captive cetaceans in petting and feeding displays. We are not making any changes based on this comment. On September 4, 1998, APHIS published in the **Federal Register** (63 FR 47128–47151, Docket No. 93–076–10) a final rule establishing standards for swim-with-the-dolphin interactive programs. APHIS is evaluating the issues surrounding these programs, and intends to publish proposed amendments to interactive program regulations in the future.

Another commenter generally opposed capture, breeding, transport, and public display of cetaceans. We are not making any changes based on this comment. It is not within our authority under the Act to prohibit captivity and display of marine mammals. We believe that the regulations finalized in this document will help to ensure the well-being of marine mammals in captivity.

One commenter recommended setting a maximum daily period during which captive marine mammals may be viewed by humans. The commenter said this is necessary to allow marine

mammals time to meet their social and physical needs. The same commenter also asked that we require facilities to provide continual access to refuge areas for marine mammals on public display, where they can withdraw from both visitor attention and other activities.

We are not making any changes based on this comment. We are not aware of any scientific information that would support provisions to limit exhibition time or require designated areas where marine mammals can obtain refuge from being viewed by the public. For displays that allow the public to enter the animal's enclosure (swim-with-the-dolphin programs), the regulations provide for a sanctuary area that allows the cetaceans to avoid direct human interaction with members of the general public if they choose, and limit the amount of time such interaction can take place. In other pools, there is sufficient space to allow animals to distance themselves from the viewing public if they desire.

One commenter said that, in general, the care in the commenter's facility is consistent with the proposed rule, but the proposed rule will increase documentation requirements, imposing additional paperwork and administrative burdens. We are not making any changes based on this comment. We recognize that additional documentation can seem burdensome, especially to those facilities that maintain a high level of care for their marine mammals. However, the Committee believed that the requirements added in the proposed rule are necessary to verify and ensure that all facilities are complying with the regulations. The reporting and recordkeeping requirements in the proposed rule have been approved by the Office of Management and Budget under the Paperwork Reduction Act.

One commenter said that the proposed rule does not account for the special requirements of research institutions. Specifically, the commenter said that the proposed regulations do not address the need for research faculty, graduate students, and post-doctorate students to participate with the attending veterinarian and husbandry personnel in decisions affecting animal training and research protocols, and the proposed regulations do not offer a role for the Institutional Animal Care and Use Committee (IACUC).

We are not making any changes based on this comment. The proposed regulations do not prevent research facilities from allowing research faculty, graduate students, and post-doctorate students to participate in decisions

made by the attending veterinarian and husbandry personnel. We do believe that requiring specific qualified individuals (the attending veterinarian or husbandry personnel) to be ultimately responsible for certain decisions is necessary to ensure proper care of the animals under the Act. All IACUC responsibilities are addressed in 9 CFR part 2 of the regulations. We do not believe any responsibilities given to the attending veterinarian by the proposed regulations are in conflict with IACUC responsibilities.

#### Miscellaneous

We are making minor editorial changes for clarity and consistency. For example, we are replacing the word "which" with the word "that" and the word "shall" with the word "must" where appropriate. None of these changes affects the meaning or intent of the regulations.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

#### Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

This rule amends the Animal Welfare Act regulations concerning the humane handling, care, treatment, and transportation of marine mammals in captivity. These regulations were developed by the Marine Mammal Negotiated Rulemaking Advisory Committee and APHIS and are necessary to ensure the minimum standards for the humane handling, care, treatment, and transportation of marine mammals in captivity are based on current general, industry, and scientific knowledge and experience.

There are 116 establishments that contain marine mammals in the United States: 40 aquariums, 70 zoos, and 6 research facilities. Of the aquariums, 28 are private, 5 belong to small cities, and 7 are owned by States. Of the zoos, 19 are private, 12 are owned by large cities, 23 are owned by small cities, 3 are owned by counties, and 13 belong to States. Of the research facilities, two are privately owned and four are owned by the public (such as State universities). The average annual revenue for an establishment is approximately \$1.46 million. Nearly 95 percent of the establishments have annual revenues of less than \$5 million and, thus, are

considered to be small according to the Small Business Administration size standards.<sup>1</sup> There were 1,429 marine mammals in these establishments during FY 1997. These included 357 Group I cetaceans, 89 Group II cetaceans, 796 Group I pinnipeds, 16 Group II pinnipeds, 39 sirenians, 21 mustelidae and 111 polar bears. (Group designations for cetaceans and pinnipeds are as shown in Table III of § 3.104 of the regulations.) The Atlantic bottlenose dolphin, harbor seal, California sea lion, and polar bear are the predominant varieties of captive marine mammals, accounting for approximately 74 percent of the total number of captive marine mammals. The second largest group includes the West Indian manatee, walrus, common dolphin, Pacific bottlenose dolphin, and Atlantic white-sided dolphin. These represented 13.3 percent of the total number of captive marine mammals in FY 1997.

Arboreta and botanical or zoological gardens comprise an important subgroup of the amusement parks industry, generating more than \$653 million in revenues and attracting close to 50 million visitors annually. There were 448 establishments in this subgroup in 1997, including the 116 that are regulated for marine mammals. About 27 percent of these are operated for-profit; the rest are nonprofit organizations owned publicly by States, counties, or cities, or owned privately. Ten percent of the 116 facilities regulated for marine mammals display regulated captive marine mammals exclusively; the others may exhibit a combination of marine mammals and terrestrial animals. Some facilities licensed to exhibit marine mammals host only a single variety of marine mammal (e.g., only dolphins, only harbor seals, or only polar bears). Marine mammals account for a very small fraction of all animals in captivity, which number in the hundreds of species.

Most facilities exhibiting marine mammals charge admission fees. Overall, visitor admission fees cover less than 30 percent of the annual budget of zoos and aquariums, although the fees vary substantially between facilities. A few facilities, mostly those that are city owned, do not charge visitors for admission. Fees range from \$1 to \$41 for adults, from \$0 to \$33 for children, and from \$0 to \$36 for seniors.

Admission rates to the for-profit facilities are higher than those of nonprofit facilities, which have some of their budget covered through appropriations and donations.<sup>2</sup> If the provisions of this rule significantly increase the operational expenses of a facility, admission fees for that facility could be increased. However, the increases in operational expenses as a result of this rule should not have any significant effect on entrance fees in most facilities.

Other than admission charges, these facilities often generate income by renting space for large group functions such as family reunions, wedding receptions, and corporate parties. City- and State-owned facilities finance their budgets through annual appropriations, membership sales, concessions, grants, and donations. The principal sources of income for privately owned, nonprofit establishments include food service, funding drives, membership dues, gift shops, grants, and donations. Many facilities encourage membership through yearly passes that also provide members of one facility with access to other similar facilities. Some zoos offer guided excursions to other parts of the world. A portion of the generated income is often directed to conservation efforts.

This rule is intended to result in clearer, more easily understood regulatory language and enhanced levels of care for marine mammals. Alternatives to this rule were well discussed and debated during the course of the negotiated rulemaking meetings, and the consensus language reflects the best efforts of all participating parties to ensure the health and well-being of marine mammals in captivity.

Several of the amendments simplify and clarify the language of the existing requirements without requiring any substantial changes. Some of the amendments will result in some additional costs for facilities housing marine mammals if they are not already in compliance with these standards. Since approximately 90 percent of the facilities already meet the standards set by consensus and already practice sound marine mammal husbandry, costs for them should be unaffected. For the remaining facilities, increased costs as a result of this rule will likely be passed on to the public in the form of increased admission fees or will result in changes

<sup>1</sup> Arboreta and botanical or zoological gardens with less than \$5 million in annual revenues are classified as being small according to the Small Business Administration guide for defining industries for size standards. Source: 13 CFR 121.201, SIC 0272, p. 354.

<sup>2</sup> Much of the admission fee information was obtained from Internet home pages of aquariums and botanical and zoological gardens. Data obtained from the home pages were checked with recorded messages of many of the facilities.

in the facility's collection size or diversity.

While it is difficult to quantify all the benefits of this rule, the conditions of captive marine mammals are expected to improve as a result of this action. As stated above, we believe that approximately 90 percent of licensed marine mammal facilities are already meeting or exceeding the requirements of this rule. Therefore, the effect of the requirements will be most apparent within the approximately 10 percent of licensed marine mammal facilities that are not already meeting or exceeding these requirements. The requirements that will likely have the most effect on these facilities are the requirements that clarify veterinary care for marine mammals. Preventive care during annual or semiannual examinations may potentially reduce emergency veterinary costs and result in fewer marine mammal deaths because of improved health of the animals. Healthier animals should also have an increased life expectancy and improved reproductive outcomes. In general, we expect that any improvements in the care and maintenance of marine mammals may be reflected in lower levels of animal distress and suffering and improved quality of life. In addition, improved conditions for captive marine mammals should result in increased satisfaction for members of the public who view these animals in zoos and aquariums.

The following provisions of this rule could generate minor cost increases in facilities that do not already meet these standards.

Section 3.101 currently requires facilities to have a contingency plan addressing relocation during an emergency or natural disaster. This final rule will require that additional and more detailed contingency plans be kept.

In § 3.105, we will require that a daily record of animal feeding be kept by an employee or attendant of the facility, noting daily food consumption of the marine mammals in the facility. Individual feeding records will have to be maintained at the facility for a period of 1 year. Personnel costs to provide for planning, observation, documentation, and record maintenance may increase as a result of these requirements, depending on present staffing.

In § 3.108, we are expanding the training requirements for employees and attendants. Facilities will have to provide and document participation in, and successful completion of, a facility training course by a sufficient number of employees. (This means a number sufficient to maintain the prescribed level of husbandry set forth in the regulations.) Training will need to be done under the direct supervision of experienced trainers who meet professionally recognized standards for their own experience and training. The length of such training sessions is estimated here to be about 4 hours for each trainee. Any increase in costs as a result of this requirement will depend on the current training practice of a facility.

In § 3.109, we are requiring a written plan for any animals kept in isolation. The plan must be approved by the attending veterinarian and developed in consultation with the husbandry/training staff of the facility. The plan must include justification for the length of time an animal will be isolated, the type and frequency of enrichment used to offset the separation or isolation, the interactions planned, and provision for a periodic review by the attending veterinarian. At present, there are not more than 20 animals being housed separately throughout the country. Such record preparation and review by professionals will probably not require more than 30 minutes per animal per week.

In § 3.110, we are adding medical recordkeeping requirements for each animal. This will probably not entail more than 30 minutes for each animal twice per year. We are also adding requirements concerning examinations of marine mammals by the attending veterinarian. All marine mammals in a facility will have to be visually examined at least semiannually and physically examined when deemed necessary, except that cetaceans and sirenians will have to be physically examined at least annually. The physical examinations will have to include a hands-on physical examination, hematology and blood chemistry, and other diagnostic tests as determined by the attending veterinarian. Examinations take an

average of approximately 2 hours per animal. In § 3.110 will also require that both a preliminary and final necropsy report be completed by the attending veterinarian. While most facilities currently provide preliminary and final reports, only one necropsy report is required under current regulations.

In § 3.112, we will require that a health certificate, and possibly an acclimation certificate, signed by the attending veterinarian accompany each animal that is moved to another facility. Issuance of these certificates should not take more than 15 minutes per animal, with an average of two animals moving per facility per year.

In § 3.116, we will require that any transport of a marine mammal for longer than 2 hours duration requires preparation of a transport plan. Preparing such transport plans should take about 1/2 to 2 hours, depending on the circumstances. Most facilities transport marine mammals fewer than two times per year. Facilities that transport marine mammals often have protocols already in place to address this issue. We will require that certain pregnant marine mammals, unweaned young, nursing mothers with young, and marine mammals with certain medical conditions be transported only after approval of the attending veterinarian and with a determination by the attending veterinarian as to whether a veterinarian should accompany the marine mammal during transport. We estimate that not more than five marine mammals that fit one of these categories are transported per year. We will also require that an employee or attendant travel with polar bears being transported to provide care for the animal. Nationally, not more than 10 polar bears are transported per year; an average transport by land takes about 12 hours.

Taken together, these requirements could result in total increase in expenditures of about \$473,000 for all regulated facilities together (see Table A for details). This would yield an average increase in expenditures of \$378 per animal per year or about \$1.04 per animal per day. The table below details the potential additional expenses for marine mammal facilities as a result of the requirements in this rule.

TABLE A.—ADDITIONAL COSTS OF RECORDKEEPING AND TRAINING REQUIREMENTS FOR ALL REGULATED MARINE MAMMAL FACILITIES COMBINED  
[Time in hours]

Section	Nonprofessional staff (\$15/hour) <sup>1</sup>	Professional staff (\$20/hour) <sup>2</sup>	Veterinarian (\$25/hour) <sup>3</sup>	Total value in dollars
3.101 .....	.....	58 .....	.....	\$1,160.00
3.105 .....	21,170 .....	.....	464 .....	329,150.00
3.108 .....	928 .....	928 .....	.....	32,480.00
3.109 .....	.....	.....	10 .....	250.00
3.110 .....	.....	<sup>4</sup> 2,858 .....	1,893 .....	104,485.00
3.112 .....	.....	29 .....	29 .....	1,305.00
3.116 .....	120 .....	.....	<sup>5</sup> 60.5 .....	3,312.50
Total Hours .....	22,218 .....	3,873 .....	2,456.5 .....	.....
Total Cost .....	\$333,270 .....	\$77,460 .....	\$61,412.50 .....	472,142.50

Note: <sup>1</sup>, <sup>2</sup>, <sup>3</sup> Denotes estimated hourly wages of nonprofessional attendant, nonveterinarian professional, and veterinarian professional, respectively.

<sup>4</sup> Represents number of hematology and blood chemistry tests based on two tests per marine mammal per year. Average cost of each test is about \$20. However, the cost of tests varies depending on volume and whether the tests are done in private laboratories or on site. Additionally, most facilities are already doing this testing.

<sup>5</sup> Represents approval of 1 transport plan per year per facility (116 facilities) at 30 minutes each and approval of transport for 5 marine mammals with medical conditions per year at 30 minutes each.

Because this regulatory action was initiated at the request of the major stakeholders and was undertaken using negotiated rulemaking, the resulting rule is broadly supported by affected groups. Additionally, since 90 percent of licensed marine mammal facilities are already meeting or exceeding the requirements, the actual economic effect of this rule is expected to be minimal.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or

recordkeeping requirements included in this rule have been approved by the Office of Management and Budget (OMB) under OMB control number 0579-0115.

#### List of Subjects in 9 CFR Part 3

Animal welfare, Marine mammals, Pets, Reporting and recordkeeping requirements, Research, Transportation.

Accordingly, we are amending 9 CFR part 3 as follows:

#### PART 3—STANDARDS

1. The authority citation for part 3 continues to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

2. Section 3.101 is revised to read as follows:

##### § 3.101 Facilities, general.

(a) *Construction requirements.* (1) Indoor and outdoor housing facilities for marine mammals must be structurally sound and must be maintained in good repair to protect the animals from injury, to contain the animals within the facility, and to restrict the entrance of unwanted animals. Lagoon and similar natural seawater facilities must maintain effective barrier fences extending above the high tide water level, or other appropriate measures, on all sides of the enclosure not contained by dry land to fulfill the requirements of this section.

(2) All marine mammals must be provided with protection from abuse and harassment by the viewing public by the use of a sufficient number of uniformed or readily identifiable

employees or attendants to supervise the viewing public, or by physical barriers, such as fences, walls, glass partitions, or distance, or any combination of these.

(3) All surfaces in a primary enclosure must be constructed of durable, nontoxic materials that facilitate cleaning, and disinfection as appropriate, sufficient to maintain water quality parameters as designated in § 3.106. All surfaces must be maintained in good repair as part of a regular, ongoing maintenance program. All facilities must implement a written protocol on cleaning so that surfaces do not constitute a health hazard to animals.

(4) Facilities that utilize natural water areas, such as tidal basins, bays, or estuaries (subject to natural tidewater action), for housing marine mammals are exempt from the drainage requirements of paragraph (c)(1) of this section.

(b) *Water and power supply.* Reliable and adequate sources of water and electric power must be provided by the facility housing marine mammals. Written contingency plans must be submitted to and approved by the Deputy Administrator regarding emergency sources of water and electric power in the event of failure of the primary sources, when such failure could reasonably be expected to be detrimental to the good health and well-being of the marine mammals housed in the facility. Contingency plans must include, but not be limited to, specific animal evacuation plans in the event of a disaster and should describe back-up systems and/or arrangements for

relocating marine mammals requiring artificially cooled or heated water. If the emergency contingency plan includes release of marine mammals, the plan must include provision for recall training and retrieval of such animals.

(c) *Drainage.* (1) Adequate drainage must be provided for all primary enclosure pools and must be located so that all of the water contained in such pools may be effectively eliminated when necessary for cleaning the pool or for other purposes. Drainage effluent from primary enclosure pools must be disposed of in a manner that complies with all applicable Federal, State, and local pollution control laws.

(2) Drainage must be provided for primary enclosures and areas immediately surrounding pools. All drain covers and strainers must be securely fastened in order to minimize the potential risk of animal entrapment. Drains must be located so as to rapidly eliminate excess water (except in pools). Drainage effluent must be disposed of in a manner that complies with all applicable Federal, State, and local pollution control laws.

(d) *Storage.* Supplies of food must be stored in facilities that adequately protect such supplies from deterioration, spoilage (harmful microbial growth), and vermin or other contamination. Refrigerators and freezers (or chilled and/or iced coolers for under 12 hours) must be used for perishable food. No substances that are known to be or may be toxic or harmful to marine mammals may be stored or maintained in the marine mammal food storage or preparation areas, except that cleaning agents may be kept in secured cabinets designed and located to prevent food contamination. Food, supplements, and medications may not be used beyond commonly accepted shelf life or date listed on the label.

(e) *Waste disposal.* Provision must be made for the removal and disposal of animal and food wastes, dead animals, trash, and debris. Disposal facilities must be provided and operated in a manner that will minimize odors and the risk of vermin infestation and disease hazards. All waste disposal procedures must comply with all applicable Federal, State, and local laws pertaining to pollution control, protection of the environment, and public health.

(f) *Employee washroom facilities.* Washroom facilities containing basins, sinks, and, as appropriate, showers, must be provided and conveniently located to maintain cleanliness among employees, attendants, and volunteers. These facilities must be cleaned and sanitized daily.

(g) *Enclosure or pool environmental enhancements.* Any nonfood objects provided for the entertainment or stimulation of marine mammals must be of sufficient size and strength to not be ingestible, readily breakable, or likely to cause injury to marine mammals, and be able to be cleaned, sanitized, and/or replaced effectively.

3. In § 3.104, paragraph (a) is revised to read as follows:

#### **§ 3.104 Space requirements.**

(a) *General.* Marine mammals must be housed in primary enclosures that comply with the minimum space requirements prescribed by this part. These enclosures must be constructed and maintained so that the animals contained within are provided sufficient space, both horizontally and vertically, to be able to make normal postural and social adjustments with adequate freedom of movement, in or out of the water. (An exception to these requirements is provided in § 3.110(b) for isolation or separation for medical treatment and/or medical training.) Enclosures smaller than required by the standards may be temporarily used for nonmedical training, breeding, holding, and transfer purposes. If maintenance in such enclosures for nonmedical training, breeding, or holding is to last longer than 2 weeks, such extension must be justified in writing by the attending veterinarian on a weekly basis. If maintenance in such enclosures for transfer is to last longer than 1 week, such extension must be justified in writing by the attending veterinarian on a weekly basis. Any enclosure that does not meet the minimum space requirement for primary enclosures (including, but not limited to, medical pools or enclosures, holding pools or enclosures, and gated side pools smaller than the minimum space requirements) may not be used for permanent housing purposes. Rotating animals between enclosures that meet the minimum space requirements and enclosures that do not is not an acceptable means of complying with the minimum space requirements for primary enclosures.

\* \* \* \* \*

4. Section 3.105 is revised to read as follows:

#### **§ 3.105 Feeding.**

(a) The food for marine mammals must be wholesome, palatable, and free from contamination and must be of sufficient quantity and nutritive value to maintain marine mammals in a state of good health. The diet must be prepared with consideration for factors such as age, species, condition, and size of the

marine mammal being fed. Marine mammals must be offered food at least once a day, except as directed by the attending veterinarian.

(b) Food receptacles, if used, must be located so as to be accessible to all marine mammals in the same primary enclosure and must be placed so as to minimize contamination of the food they contain. Such food receptacles must be cleaned and sanitized after each use.

(c) Food, when given to each marine mammal individually, must be given by an employee or attendant responsible to management who has the necessary knowledge to assure that each marine mammal receives an adequate quantity of food to maintain it in good health. Such employee or attendant is required to have the ability to recognize deviations from a normal state of good health in each marine mammal so that the food intake can be adjusted accordingly. Inappetence exceeding 24 hours must be reported immediately to the attending veterinarian. Public feeding may be permitted only in the presence and under the supervision of a sufficient number of knowledgeable, uniformed employees or attendants. Such employees or attendants must assure that the marine mammals are receiving the proper amount and type of food. Only food supplied by the facility where the marine mammals are kept may be fed to the marine mammals by the public. Marine mammal feeding records noting the estimated individual daily consumption must be maintained at the facility for a period of 1 year and must be made available for APHIS inspection. For marine mammals that are individually fed and not subject to public feeding, the feeding records should reflect an accurate account of food intake; for animals fed, in part, by the public, and for large, group-fed colonies of marine mammals where individual rations are not practical or feasible to maintain, the daily food consumption should be estimated as precisely as possible.

(d) Food preparation and handling must be conducted so as to assure the wholesomeness and nutritive value of the food. Frozen fish or other frozen food must be stored in freezers that are maintained at a maximum temperature of  $-18^{\circ}\text{C}$  ( $0^{\circ}\text{F}$ ). The length of time food is stored and the method of storage, the thawing of frozen food, and the maintenance of thawed food must be conducted in a manner that will minimize contamination and that will assure that the food retains nutritive value and wholesome quality until the time of feeding. When food is thawed in standing or running water, cold water

must be used. All foods must be fed to the marine mammals within 24 hours following the removal of such foods from the freezers for thawing, or if the food has been thawed under refrigeration, it must be fed to the marine mammals within 24 hours of thawing.

5. Section 3.107 is revised to read as follows:

**§ 3.107 Sanitation.**

(a) *Primary enclosures.* (1) Animal and food waste in areas other than the pool of water must be removed from the primary enclosures at least daily, and more often when necessary, in order to provide a clean environment and minimize health and disease hazards.

(2) Particulate animal and food waste, trash, or debris that enters the primary enclosure pools of water must be removed at least daily, or as often as necessary, to maintain the required water quality and to minimize health and disease hazards to the marine mammals.

(3) The wall and bottom surfaces of the primary enclosure pools of water must be cleaned as often as necessary to maintain proper water quality. Natural organisms (such as algae, coelenterates, or molluscs, for example) that do not degrade water quality as defined in § 3.106, prevent proper maintenance, or pose a health or disease hazard to the animals are not considered contaminants.

(b) *Food preparation.* Equipment and utensils used in food preparation must be cleaned and sanitized after each use. Kitchens and other food handling areas where animal food is prepared must be cleaned at least once daily and sanitized at least once every week. Sanitizing must be accomplished by washing with hot water (8 °C, 180 °F, or higher) and soap or detergent in a mechanical dishwasher, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with live steam. Substances such as cleansing and sanitizing agents, pesticides, and other potentially toxic agents must be stored in properly labeled containers in secured cabinets designed and located to prevent contamination of food storage preparation surfaces.

(c) *Housekeeping.* Buildings and grounds, as well as exhibit areas, must be kept clean and in good repair. Fences must be maintained in good repair. Primary enclosures housing marine mammals must not have any loose objects or sharp projections and/or edges which may cause injury or trauma

to the marine mammals contained therein.

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests must be established and maintained. Insecticides or other such chemical agents must not be applied in primary enclosures housing marine mammals except when deemed essential by an attending veterinarian.

6. Section 3.108 is revised to read as follows:

**§ 3.108 Employees or attendants.**

(a) A sufficient number of adequately trained employees or attendants, responsible to management and working in concert with the attending veterinarian, must be utilized to maintain the prescribed level of husbandry practices set forth in this subpart. Such practices must be conducted under the supervision of a marine mammal caretaker who has demonstrable experience in marine mammal husbandry and care.

(b) The facility will provide and document participation in and successful completion of a facility training course for such employees. This training course will include, but is not limited to, species appropriate husbandry techniques, animal handling techniques, and information on proper reporting protocols, such as recordkeeping and notification of veterinary staff for medical concerns.

(c) Any training of marine mammals must be done by or under the direct supervision of experienced trainers.

(d) Trainers and handlers must meet professionally recognized standards for experience and training.

7. Section 3.109 is revised to read as follows:

**§ 3.109 Separation.**

Marine mammals, whenever known to be primarily social in the wild, must be housed in their primary enclosure with at least one compatible animal of the same or biologically related species, except when the attending veterinarian, in consultation with the husbandry/training staff, determines that such housing is not in the best interest of the marine mammal's health or well-being. However, marine mammals that are not compatible must not be housed in the same enclosure. Marine mammals must not be housed near other animals that cause them unreasonable stress or discomfort or interfere with their good health. Animals housed separately must have a written plan, approved by the attending veterinarian, developed in consultation with the husbandry/training staff, that includes the

justification for the length of time the animal will be kept separated or isolated, information on the type and frequency of enrichment and interaction, if appropriate, and provisions for periodic review of the plan by the attending veterinarian. Marine mammals that are separated for nonmedical purposes must be held in facilities that meet minimum space requirements as outlined in § 3.104.

8. Section 3.110 is revised to read as follows:

**§ 3.110 Veterinary care.**

(a) Newly acquired marine mammals must be isolated from resident marine mammals. Animals with a known medical history must be isolated unless or until the newly acquired animals can be reasonably determined to be in good health by the attending veterinarian. Animals without a known medical history must be isolated until it is determined that the newly acquired animals are determined to be in good health by the attending veterinarian. Any communicable disease condition in a newly acquired marine mammal must be remedied before it is placed with resident marine mammals, unless, in the judgment of the attending veterinarian, the potential benefits of a resident animal as a companion to the newly acquired animal outweigh the risks to the resident animal.

(b) Holding facilities must be in place and available to meet the needs for isolation, separation, medical treatment, and medical training of marine mammals. Marine mammals that are isolated or separated for nonmedical purposes must be held in facilities that meet minimum space requirements as outlined in § 3.104. Holding facilities used only for medical treatment and medical training need not meet the minimum space requirements as outlined in § 3.104. Holding of a marine mammal in a medical treatment or medical training enclosure that does not meet minimum space requirements for periods longer than 2 weeks must be noted in the animal's medical record and the attending veterinarian must provide a justification in the animal's medical record. If holding in such enclosures for medical treatment and/or medical training is to last longer than 2 weeks, such extension must be justified in writing by the attending veterinarian on a weekly basis. In natural lagoon or coastal enclosures where isolation cannot be accomplished, since water circulation cannot be controlled or isolated, separation of newly acquired marine mammals must be accomplished using separate enclosures situated within the facility to prevent direct



contact and to minimize the risk of potential airborne and water cross-contamination between newly acquired and resident animals.

(c) Any holding facility used for medical purposes that has contained a marine mammal with an infectious or contagious disease must be cleaned and/or sanitized in a manner prescribed by the attending veterinarian. No healthy animals may be introduced into this holding facility prior to such cleaning and/or sanitizing procedures. Any marine mammal exposed to a contagious animal must be evaluated by the attending veterinarian and monitored and/or isolated for an appropriate period of time as determined by the attending veterinarian.

(d) Individual animal medical records must be kept and made available for APHIS inspection. These medical records must include at least the following information:

(1) Animal identification/name, a physical description, including any identifying markings, scars, etc., age, and sex; and

(2) Physical examination information, including but not limited to length, weight, physical examination results by body system, identification of all medical and physical problems with proposed plan of action, all diagnostic test results, and documentation of treatment.

(e) A copy of the individual animal medical record must accompany any marine mammal upon its transfer to another facility, including contract or satellite facilities.

(f) All marine mammals must be visually examined by the attending veterinarian at least semiannually and must be physically examined under the supervision of and when determined to be necessary by the attending veterinarian. All cetaceans and sirenians must be physically examined by the attending veterinarian at least annually, unless APHIS grants an exception from this requirement based on considerations related to the health and safety of the cetacean or sirenian. These examinations must include, but are not limited to, a hands-on physical examination, hematology and blood chemistry, and other diagnostic tests as determined by the attending veterinarian.

(g)(1) A complete necropsy, including histopathology samples, microbiological cultures, and other testing as appropriate, must be conducted by or under the supervision of the attending veterinarian on all marine mammals that die in captivity. A preliminary necropsy report must be prepared by the

veterinarian listing all pathologic lesions observed. The final necropsy report must include all gross and histopathological findings, the results of all laboratory tests performed, and a pathological diagnosis.

(2) Necropsy records will be maintained at the marine mammal's home facility and at the facility at which it died, if different, for a period of 3 years and must be presented to APHIS inspectors when requested.

9. Section 3.112 is revised to read as follows:

**§ 3.112 Consignments to carriers and intermediate handlers.**

(a) Carriers and intermediate handlers shall not accept any marine mammal that is presented by any dealer, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or any State or local government for shipment, in commerce, more than 4 hours prior to the scheduled departure of the primary conveyance on which it is to be transported, and that is not accompanied by a health certificate signed by the attending veterinarian stating that the animal was examined within the prior 10 days and found to be in acceptable health for transport: *Provided, however,* That the carrier or intermediate handler and any dealer, research facility, exhibitor, operator of an auction sale, or other person, or any department, agency, or instrumentality of the United States or any State or local government may mutually agree to extend the time of acceptance to not more than 6 hours if specific prior scheduling of the animal shipment to destination has been made.

(b) Any carrier or intermediate handler shall only accept for transportation or transport, in commerce, any marine mammal in a primary transport enclosure that conforms to the requirements in § 3.113 of this subpart: *Provided, however,* That any carrier or intermediate handler may accept for transportation or transport, in commerce, any marine mammal consigned by any department, agency, or instrumentality of the United States having laboratory animal facilities or exhibiting animals or any licensed or registered dealer, research facility, exhibitor, or operator of an auction sale if the consignor furnishes to the carrier or intermediate handler a certificate, signed by the consignor, stating that the primary transport enclosure complies with § 3.113 of this subpart, unless such primary transport enclosure is obviously defective or damaged and it is apparent that it cannot reasonably be expected to contain the marine mammal without

causing suffering or injury to the marine mammal. A copy of any such certificate must accompany the shipment to destination. The certificate must include at least the following information:

(1) Name and address of the consignor;

(2) The number, age, and sex of animals in the primary transport enclosure(s);

(3) A certifying statement (e.g., "I hereby certify that the—(number) primary transport enclosure(s) that are used to transport the animal(s) in this shipment complies (comply) with USDA standards for primary transport enclosures (9 CFR part 3)."); and

(4) The signature of the consignor, and date.

(c) Carriers or intermediate handlers whose facilities fail to maintain a temperature within the range of 7.2 °C (45 °F) to 23.9 °C (75 °F) allowed by § 3.117 of this subpart may accept for transportation or transport, in commerce, any marine mammal consigned by any department, agency, or instrumentality of the United States or of any State or local government, or by any person (including any licensee or registrant under the Act, as well as any private individual) if the consignor furnishes to the carrier or intermediate handler a certificate executed by the attending veterinarian on a specified date that is not more than 10 days prior to delivery of the animal for transportation in commerce, stating that the marine mammal is acclimated to a specific air temperature range lower or higher than those prescribed in §§ 3.117 and 3.118. A copy of the certificate must accompany the shipment to destination. The certificate must include at least the following information:

(1) Name and address of the consignor;

(2) The number, age, and sex of animals in the shipment;

(3) A certifying statement (e.g., "I hereby certify that the animal(s) in this shipment is (are), to the best of my knowledge, acclimated to an air temperature range of ———"); and

(4) The signature of the attending veterinarian and the date.

(d) Carriers and intermediate handlers must attempt to notify the consignee (receiving party) at least once in every 6-hour period following the arrival of any marine mammals at the animal holding area of the terminal cargo facility. The time, date, and method of each attempted notification and the final notification to the consignee and the name of the person notifying the consignee must be recorded on the copy of the shipping document retained by the carrier or intermediate handler and

on a copy of the shipping document accompanying the animal shipment.

10. Section 3.113 is revised to read as follows:

**§ 3.113 Primary enclosures used to transport marine mammals.**

No dealer, research facility, exhibitor, or operator of an auction sale shall offer for transportation or transport, in commerce, any marine mammal in a primary enclosure that does not conform to the following requirements:

(a) Primary enclosures that are used to transport marine mammals other than cetaceans and sirenians must:

(1) Be constructed from materials of sufficient structural strength to contain the marine mammals;

(2) Be constructed from material that is durable, nontoxic, and cannot be chewed and/or swallowed;

(3) Be able to withstand the normal rigors of transportation;

(4) Have interiors that are free from any protrusions or hazardous openings that could be injurious to the marine mammals contained within;

(5) Be constructed so that no parts of the contained marine mammals are exposed to the outside of the enclosures in any way that may cause injury to the animals or to persons who are nearby or who handle the enclosures;

(6) Have openings that provide access into the enclosures and are secured with locking devices of a type that cannot be accidentally opened;

(7) Have such openings located in a manner that makes them easily accessible at all times for emergency removal and potential treatment of any live marine mammal contained within;

(8) Have air inlets at heights that will provide cross ventilation at all levels (particularly when the marine mammals are in a prone position), are located on all four sides of the enclosures, and cover not less than 20 percent of the total surface area of each side of the enclosures;

(9) Have projecting rims or other devices placed on any ends and sides of the enclosures that have ventilation openings so that there is a minimum air circulation space of 7.6 centimeters (3.0 inches) between the enclosures and any adjacent cargo or conveyance wall;

(10) Be constructed so as to provide sufficient air circulation space to maintain the temperature limits set forth in this subpart; and

(11) Be equipped with adequate handholds or other devices on the exterior of the enclosures to enable them to be lifted without unnecessary tilting and to ensure that the persons handling the enclosures will not come in contact

with any marine mammal contained inside.

(b) Straps, slings, harnesses, or other devices used for body support or restraint, when transporting marine mammals such as cetaceans and sirenians must:

(1) Be designed so as not to prevent access to the marine mammals by attendants for the purpose of administering in-transit care;

(2) Be equipped with special padding to prevent trauma or injury at critical weight pressure points on the body of the marine mammals; and

(3) Be capable of keeping the animals from thrashing about and causing injury to themselves or their attendants, and yet be adequately designed so as not to cause injury to the animals.

(c) Primary enclosures used to transport marine mammals must be large enough to assure that:

(1) In the case of pinnipeds, polar bears, and sea otters, each animal has sufficient space to turn about freely in a stance whereby all four feet or flippers are on the floor and the animal can sit in an upright position and lie in a natural position;

(2) In the case of cetaceans and sirenians, each animal has sufficient space for support of its body in slings, harnesses, or other supporting devices, if used (as prescribed in paragraph (b) of this section), without causing injury to such cetaceans or sirenians due to contact with the primary transport enclosure: *Provided, however*, That animals may be restricted in their movements according to professionally accepted standards when such freedom of movement would constitute a danger to the animals, their handlers, or other persons.

(d) Marine mammals transported in the same primary enclosure must be of the same species and maintained in compatible groups. Marine mammals that have not reached puberty may not be transported in the same primary enclosure with adult marine mammals other than their dams. Socially dependent animals (e.g., sibling, dam, and other members of a family group) must be allowed visual and olfactory contact whenever reasonable. Female marine mammals may not be transported in the same primary enclosure with any mature male marine mammals.

(e) Primary enclosures used to transport marine mammals as provided in this section must have solid bottoms to prevent leakage in shipment and must be cleaned and sanitized in a manner prescribed in § 3.107 of this subpart, if previously used. Within the primary enclosures used to transport

marine mammals, the animals will be maintained on sturdy, rigid, solid floors with adequate drainage.

(f) Primary enclosures used to transport marine mammals, except where such primary enclosures are permanently affixed in the animal cargo space of the primary conveyance, must be clearly marked on top (when present) and on at least one side, or on all sides whenever possible, with the words "Live Animal" or "Wild Animal" in letters not less than 2.5 centimeters (1 inch) in height, and with arrows or other markings to indicate the correct upright position of the container.

(g) Documents accompanying the shipment must be attached in an easily accessible manner to the outside of a primary enclosure that is part of such shipment or be in the possession of the shipping attendant.

(h) When a primary transport enclosure is permanently affixed within the animal cargo space of the primary conveyance so that the front opening is the only source of ventilation for such primary enclosure, the front opening must open directly to the outside or to an unobstructed aisle or passageway within the primary conveyance. Such front ventilation opening must be at least 90 percent of the total surface area of the front wall of the primary enclosure and covered with bars, wire mesh, or smooth expanded metal.

11. Section 3.114 is revised to read as follows:

**§ 3.114 Primary conveyances (motor vehicle, rail, air and marine).**

(a) The animal cargo space of primary conveyances used in transporting live marine mammals must be constructed in a manner that will protect the health and assure the safety and comfort of the marine mammals contained within at all times. All primary conveyances used must be sufficiently temperature-controlled to provide an appropriate environmental temperature for the species involved and to provide for the safety and comfort of the marine mammal, or other appropriate safeguards (such as, but not limited to, cooling the animal with cold water, adding ice to water-filled enclosures, and use of fans) must be employed to maintain the animal at an appropriate temperature.

(b) The animal cargo space must be constructed and maintained in a manner that will prevent the ingress of engine exhaust fumes and gases in excess of that ordinarily contained in the passenger compartments.

(c) Marine mammals must only be placed in animal cargo spaces that have a supply of air sufficient for each live

animal contained within. Primary transport enclosures must be positioned in the animal cargo spaces of primary conveyances in such a manner that each marine mammal contained within will have access to sufficient air.

(d) Primary transport enclosures must be positioned in primary conveyances in such a manner that, in an emergency, the live marine mammals can be removed from the conveyances as soon as possible.

(e) The interiors of animal cargo spaces in primary conveyances must be kept clean.

(f) Live marine mammals must not knowingly be transported with any material, substance, or device that may be injurious to the health and well-being of the marine mammals unless proper precaution is taken to prevent such injury.

(g) Adequate lighting must be available for marine mammal attendants to properly inspect the animals at any time. If such lighting is not provided by the carrier, provisions must be made by the shipper to supply such lighting.

12. Section 3.115 is revised to read as follows:

**§ 3.115 Food and drinking water requirements.**

(a) Those marine mammals that require drinking water must be offered potable water within 4 hours of being placed in the primary transport enclosure for transport in commerce. Marine mammals must be provided water as often as necessary and appropriate for the species involved to prevent dehydration, which would jeopardize the good health and well-being of the animals.

(b) Marine mammals being transported in commerce must be offered food as often as necessary and appropriate for the species involved or as determined by the attending veterinarian.

13. Section 3.116 is revised to read as follows:

**§ 3.116 Care in transit.**

(a) A licensed veterinarian, employee, and/or attendant of the shipper or receiver of any marine mammal being transported, in commerce, knowledgeable and experienced in the area of marine mammal care and transport, must accompany all marine mammals during periods of transportation to provide for their good health and well-being, to observe such marine mammals to determine whether they need veterinary care, and to obtain any needed veterinary care as soon as possible. Any transport of greater than 2 hours duration requires a transport

plan approved by the attending veterinarian that will include the specification of the necessity of the presence of a veterinarian during the transport. If the attending veterinarian does not accompany the animal, communication with the veterinarian must be maintained in accordance with § 2.33(b)(3) and 2.40(b)(3) of this chapter.

(b) The following marine mammals may be transported in commerce only when the transport of such marine mammals has been determined to be appropriate by the attending veterinarian:

(1) A pregnant animal in the last half of pregnancy;

(2) A dependent unweaned young animal;

(3) A nursing mother with young; or

(4) An animal with a medical condition requiring veterinary care, that would be compromised by transport. The attending veterinarian must note on the accompanying health certificate the existence of any of the above conditions. The attending veterinarian must also determine whether a veterinarian should accompany such marine mammals during transport.

(c) Carriers must inform the crew as to the presence of the marine mammals on board the craft, inform the individual accompanying the marine mammals of any unexpected delays as soon as they become known, and accommodate, except as precluded by safety considerations, requests by the shipper or his agent to provide access to the animals or take other necessary actions for the welfare of the animals if a delay occurs.

(d) A sufficient number of employees or attendants of the shipper or receiver of cetaceans or sirenians being transported, in commerce, must provide for such cetaceans and sirenians during periods of transport by:

(1) Keeping the skin moist or preventing the drying of the skin by such methods as intermittent spraying of water or application of a nontoxic emollient;

(2) Assuring that the pectoral flippers are allowed freedom of movement at all times;

(3) Making adjustments in the position of the marine mammals when necessary to prevent necrosis of the skin at weight pressure points;

(4) Keeping the animal cooled and/or warmed sufficiently to prevent overheating, hypothermia, or temperature related stress; and

(5) Calming the marine mammals to avoid struggling, thrashing, and other unnecessary activity that may cause overheating or physical trauma.

(e) A sufficient number of employees or attendants of the shipper or receiver of pinnipeds or polar bears being transported, in commerce, must provide for such pinnipeds and polar bears during periods of transport by:

(1) Keeping the animal cooled and/or warmed sufficiently to prevent overheating, hypothermia, or temperature related stress; and

(2) Calming the marine mammals to avoid struggling, thrashing, and other unnecessary activity that may cause overheating or physical trauma.

(f) Sea otters must be transported in primary enclosures that contain false floors through which water and waste freely pass to keep the interior of the transport unit free from waste materials. Moisture must be provided by water sprayers or ice during transport.

(g) Marine mammals may be removed from their primary transport enclosures only by the attendants or other persons capable of handling such mammals safely.

14. Section 3.117 is revised to read as follows:

**§ 3.117 Terminal facilities.**

Carriers and intermediate handlers must not commingle marine mammal shipments with inanimate cargo. All animal holding areas of a terminal facility of any carrier or intermediate handler where marine mammal shipments are maintained must be cleaned and sanitized in a manner prescribed in § 3.107 of this subpart to minimize health and disease hazards. An effective program for the control of insects, ectoparasites, and avian and mammalian pests must be established and maintained for all animal holding areas. Any animal holding area containing marine mammals must be ventilated with fresh air or air circulated by means of fans, blowers, or an air conditioning system so as to minimize drafts, odors, and moisture condensation. Auxiliary ventilation, such as exhaust fans and vents or fans or blowers or air conditioning must be used for any animal holding area containing marine mammals when the air temperature within such animal holding area is 23.9 °C (75 °F) or higher. The air temperature around any marine mammal in any animal holding area must not be allowed to fall below 7.2 °C (45 °F). The air temperature around any polar bear must not be allowed to exceed 29.5 °C (85 °F) at any time and no polar bear may be subjected to surrounding air temperatures that exceed 23.9 °C (75 °F) for more than 4 hours at any time. The ambient temperature must be measured in the animal holding area upon arrival of the

shipment by the attendant, carrier, or intermediate handler. The ambient temperature must be measured halfway up the outside of the primary transport enclosure at a distance from the external wall of the primary transport enclosure not to exceed 0.91 meters (3 feet).

15. Section 3.118 is revised to read as follows:

**§ 3.118 Handling.**

(a) Carriers and intermediate handlers moving marine mammals from the animal holding area of the terminal facility to the primary conveyance or from the primary conveyance to the animal holding area of the terminal facility must provide the following:

(1) *Movement of animals as expeditiously as possible.*

(2) *Shelter from overheating and direct sunlight.* When sunlight is likely to cause overheating, sunburn, or discomfort, sufficient shade must be provided to protect the marine mammals. Marine mammals must not be subjected to surrounding air temperatures that exceed 23.9 °C (75 °F) unless accompanied by an acclimation certificate in accordance with § 3.112 of this subpart. The temperature must be measured and read within or immediately adjacent to the primary transport enclosure.

(3) *Shelter from cold weather.* Marine mammals must be provided with species appropriate protection against cold weather, and such marine mammals must not be subjected to surrounding air temperatures that fall below 7.2 °C (45 °F) unless accompanied by an acclimation certificate in accordance with § 3.112 of this subpart. The temperature must be measured and read within or immediately adjacent to the primary transport enclosure.

(b) Care must be exercised to avoid handling of the primary transport enclosure in a manner that may cause physical harm or distress to the marine mammal contained within.

(c) Enclosures used to transport any marine mammal must not be tossed, dropped, or needlessly tilted and must not be stacked unless properly secured.

Done in Washington, DC, this 26th day of December 2000.

**Craig A. Reed,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 01-135 Filed 1-2-01; 8:45 am]

**BILLING CODE 3410-34-P**

**FEDERAL RESERVE SYSTEM**

**12 CFR Part 225**

[Regulation Y; Docket No. R-1094]

**Bank Holding Companies and Change in Bank Control**

**DEPARTMENT OF THE TREASURY**

**Office of the Under Secretary for Domestic Finance**

**12 CFR Part 1501**

**RIN 1505-AA85**

**Financial Subsidiaries**

**AGENCY:** Board of Governors of the Federal Reserve System and Department of the Treasury.

**ACTION:** Joint interim rule with request for public comments.

**SUMMARY:** The Board of Governors of the Federal Reserve System and the Secretary of the Treasury (the Agencies) are soliciting comment on interim rules that would implement section 4(k)(5) of the Bank Holding Company Act and section 5136A(b)(3) of the Revised Statutes, as enacted by the Gramm-Leach-Bliley Act. The interim rules find three general types of activities to be financial in nature, and create a mechanism by which financial holding companies, financial subsidiaries of national banks, or others may request that the Board or the Secretary, respectively, define particular activities within one of the three categories.

The Board and the Secretary solicit comments on all aspects of the interim rule and will modify the final rule as appropriate in response to the comments received.

**DATES:** The interim rule is effective on January 2, 2001. Comments must be received by February 2, 2001.

**ADDRESSES:** Comments should refer to Docket No. R-1094, and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551 or mailed electronically to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov) and to Three Financial Activities Regulation, Office of Financial Institution Policy, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Room SC 37, Washington, DC 20220 (or mailed electronically to [financial.institutions@do.treas.gov](mailto:financial.institutions@do.treas.gov)).

Comments addressed to Ms. Johnson also may be delivered to Room B-2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. weekdays or delivered to

the guard station in the Eccles Building Courtyard on 20th Street, NW. (between Constitution Avenue and C Street, NW.) at any time. All comments received at the above address will be available for inspection and copying by any member of the public in the Freedom of Information Office, Room MP-500 of the Martin Building, between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in § 261.14 of the Board's Rules Regarding the Availability of Information (12 CFR 261.14). Comments addressed to the Treasury Department may also be delivered to the Treasury Department mail room between the hours of 8:45 a.m. and 5:15 p.m. at the 15th Street entrance to the Treasury Building.

**FOR FURTHER INFORMATION CONTACT:**

*Board:* Scott G. Alvarez, Associate General Counsel (202/452-3583), or Andrew S. Baer, Senior Attorney (202/452-2246), Legal Division. Users of Telecommunication Device for Deaf (TTD) only, contact Janice Simms at (202) 872-4984.

*Department of the Treasury:* Gerry Hughes, Senior Financial Analyst (202/622-2740); Roberta K. McInerney, Assistant General Counsel (Banking and Finance) (202/622-0480); or Gary W. Sutton, Senior Banking Counsel (202/622-0480).

**SUPPLEMENTARY INFORMATION:**

**Background**

These interim rules implement section 4(k)(5) of the Bank Holding Company Act ("BHC Act") (12 U.S.C. 1843(k)(5)), which was added to the BHC Act by section 103 of the Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1338 (1999)) (the "GLB Act"), and section 5136A(b)(3) of the Revised Statutes (12 U.S.C. 24a(b)(3)) ("section 5136A"), as enacted by section 121(a) of the GLB Act. The GLB Act amended the BHC Act to allow bank holding companies and foreign banks that qualify as financial holding companies to engage in a broad range of activities that are defined by the GLB Act to be financial in nature or incidental to a financial activity, or that the Board, in consultation with the Secretary of the Treasury, determines to be financial in nature or incidental to a financial activity.<sup>1</sup> Bank holding companies that do not qualify as financial holding companies are limited to engaging in

<sup>1</sup> The GLB Act also allows financial holding companies to seek Board approval to engage in any activity that the Board determines both to be complementary to a financial activity and not to pose a substantial risk to the safety and soundness of depository institutions or the financial system generally. 12 U.S.C. 1843(k)(1)(B).