

Per diem locality		Maximum lodging amount (includes applicable taxes) (a)	+	M&IE rate (b)	=	Maximum per diem rate <sup>4</sup> (c)
Key city <sup>1</sup>	County and/or other defined location					
NEW MEXICO						
Cloudcroft .....	Otero .....	87		30		117
NEW YORK						
Albany .....	Albany .....	68		38		106
SOUTH DAKOTA						
Sturgis .....	Mead. ....					
(June 15–August 31) .....	.....	86		30		116
(September 1–June 14) ....	.....	50		30		80
TEXAS						
Eagle Pass .....	Maverick .....	57		30		87
El Paso .....	El Paso .....	56		34		90
VIRGINIA						
Harrisonburg .....	.....	54		30		84
WEST VIRGINIA						
Harpers Ferry .....	Jefferson .....	66		30		96

Dated: December 23, 1997.

**Peggy G. Wood,**

*Acting Director, Travel and Transportation Management Policy Division.*

[FR Doc. 97-33971 Filed 12-30-97; 8:45 am]

BILLING CODE 6820-34-P

## LEGAL SERVICES CORPORATION

### 45 CFR Part 1630

#### Cost Standards and Procedures

**AGENCY:** Legal Services Corporation.

**ACTION:** Final rule.

**SUMMARY:** This final rule sets forth cost standards and procedures applicable to Legal Services Corporation ("LSC" or "Corporation") grants and contracts. This rule contains substantial revisions which bring the Corporation's cost standards and procedures into conformance with applicable provisions of the Inspector General Act, the

Corporation's appropriations action, and relevant Office of Management and Budget ("OMB") Circulars.

**DATES:** This rule is effective January 30, 1998.

**FOR FURTHER INFORMATION CONTACT:** Office of the General Counsel, (202) 336-8817.

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 13, 1997, the Corporation's Operations and Regulations Committee ("Committee") held public hearings in Los Angeles, California, on draft revisions to the Corporation's rule on cost standards and procedures and adopted a proposed rule that was published for public notice and comment on August 29, 1997 (62 FR 45778). The Corporation subsequently received five written comments on the proposed revisions.

On November 14, 1997, during public hearings in Washington, DC, the

Committee considered comments on the proposed revisions. After making additional revisions to the rule, the Committee recommended that the Corporation's Board of Directors ("Board") adopt the rule as final, which the Board did on November 15, 1997.

Revisions were necessary to bring the rule into conformance with Sec. 509 of Pub. L. 104-134, 110 Stat. 1321; the Inspector General Act ("IG Act"), 5 U.S.C. App. 3, as amended; the Audit for LSC Recipients and Auditors ("Audit Guide"); OMB Circular A-50, Audit Followup (September 29, 1982); OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations (November 19, 1993); OMB Circular A-122, Cost Principles for Non-Profit Organizations (May 8, 1997); and OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (June 24, 1997).

Because the LSC Act specifies that the Corporation is not a Federal agency, OMB Circulars are generally not binding on the Corporation, unless Congress has specified elsewhere in the law that the Corporation must adhere to a specific Circular, as is the case in Sec. 509(k) of Pub. L. 104-134, which requires the Corporation to develop audit follow-up procedures which meet, at a minimum, the requirements of OMB Circular A-50. As a matter of discretion, however, the Corporation has adopted relevant provisions from OMB Circulars which are applicable to Federally funded non-profit organizations. For example, § I-2 of the Corporation's Audit Guide requires recipients and their auditors to adhere to OMB Circular A-133. This rule draws on that Circular, as well as Circulars A-110 and A-122, which contain cost standards and procedures applicable to non-profit organizations which receive Federal funds.

### Scope and Effective Date

The requirements of this rule apply to all costs charged against Corporation grants or contracts on or after the rule's effective date. The requirements of this rule also apply to certain income derived from Corporation grants and contracts. This rule generally does not apply to funding obtained from sources other than the Corporation, except as provided by § 1630.11. The review and appeal process of § 1630.7 applies to questioned cost proceedings initiated by the Corporation on or after the effective date of this rule.

A section-by-section analysis of the rule follows.

### Section-by-Section Analysis

#### Section 1630.2—Definitions

Paragraph (a) defines an allowed cost as a questioned cost which the Corporation has determined to be eligible for payment with LSC funds. This definition applies only to costs which either the Corporation or an authorized auditor has questioned during the course of an audit or investigation. Costs are generally allowable provided that they meet the nine criteria of § 1630.3(a).

Paragraph (b) defines corrective action as action taken by a recipient that: (1) Corrects identified deficiencies; (2) produces recommended improvements; or (3) demonstrates that audit or other findings are invalid or do not warrant further action. This definition comes from § 105 of OMB Circular A-133, which is applicable to LSC recipients through § I-2 of the LSC Audit Guide.

One comment noted that the third part of the rule's definition was

inconsistent with the customary usage of the term by Corporation recipients, which have not traditionally thought of corrective action as encompassing expression of disagreement with an auditor's finding. The third part of the definition comes from §§ 105 and 315(c) of OMB Circular A-133, which specify that a corrective action plan is the place to express disagreement with an audit finding. Thus, within OMB parlance, the expression of disagreement is "corrective action." To maintain consistency with the OMB definition, the Board decided to retain the third part of the rule's definition of corrective action.

One comment noted a significant difference between the OMB definition and the definition in this rule: while the rule's definition refers to "audit or other" findings, the OMB definition refers only to "audit" findings. The Corporation included "other" findings in its definition of corrective action in order to extend the scope of the definition to non-audit findings, such as findings from complaint investigations by Corporation management. For this reason, the Board has retained the reference to "other" findings in the rule's definition of corrective action.

Paragraph (c) defines derivative income as income resulting from certain Corporation-funded activities. This definition is adapted from the definition of "program income" which appears in § 2(x) of OMB Circular A-110. The term "derivative income" does not include income from publication activities, because these activities are subject to an exception under § 24(h) of OMB Circular A-110, which provides that recipients have no obligation to the Federal Government with respect to income earned from license fees and royalties from copyrighted materials.

One comment suggested that the Corporation should clarify whether funding obtained from other sources as a result of fundraising efforts conducted with LSC funds is LSC derivative income. It is not. The rule's definition of derivative income does not reach grants, contracts, or contributions from non-LSC sources.

Paragraph (d) defines disallowed cost as a questioned cost that the Corporation has determined may not be charged to LSC funds. This definition comes from Sec. 5(f)(3) of the IG Act.

Paragraph (e) defines final action as the completion of all corrective actions which the Corporation, in a management decision, has concluded are necessary to address findings and recommendations in an audit or other report. This definition comes from Sec. 5(f)(6) of the IG Act. The second

sentence of the definition states that, if the Corporation determines that no corrective action is necessary, final action occurs when the Corporation issues its management decision. One comment recommended deletion of this second sentence because the rule did not apply that portion of the definition. In order to maintain consistency with the definition in the IG Act, the Board chose not to revise the rule's definition of final action. Instead, the Board revised § 1630.7(d) to add clarification that, in the event that corrective action is unnecessary, final action occurs with the issuance of a management decision.

Paragraph (f) defines management decision as the evaluation by Corporation management of the findings and recommendations in an audit or other report, and the issuance of a final, written decision by Corporation management, including a description of the corrective action which Corporation management considers necessary to respond to the findings and recommendations. This definition comes from Sec. 5(f)(5) of the IG Act. A similar definition appears in § 105 of OMB Circular A-133.

Two comments sought clarification about the scope of the rule's definitions of final action and management decision. While the IG Act's definitions of management decision and final action refer only to "audit" reports, the definitions in the rule refer to "audit and other" reports. As explained above in the discussion of the definition of corrective action, the Corporation has included "other" findings in the rule's definitions in order to extend the scope of the definitions to non-audit findings, such as those resulting from complaint investigations by Corporation management.

Paragraph (g) defines questioned cost as a cost charged to Corporation funds which the Corporation or an authorized auditor has questioned because of: (1) A violation of applicable law; (2) a lack of adequate supporting documentation; or (3) an appearance that the cost is unnecessary or unreasonable. This definition comes from Sec. 5(f)(1) of the IG Act. A similar definition appears in § 105 of OMB Circular A-133.

The definition of questioned cost recognizes that other persons and entities, in addition to Corporation management, such as the Office of Inspector General ("OIG"), the General Accounting Office ("GAO"), independent public accountants, and other duly authorized auditors and audit organizations have authority to question costs incurred by Corporation recipients. However, this definition does not extend such authority to

persons or entities which are not duly authorized by applicable law to audit or investigate Corporation recipients.

Paragraph (h) defines recipient for the purposes of this part only. This definition reaches grantees receiving Corporation funds pursuant to either Sec. 1006(a)(1) or Sec. 1006(a)(3) of the LSC Act, in contrast to the definition of recipient appearing at 45 CFR § 1600.1, which defines recipients only as those entities receiving Corporation funds pursuant to Sec. 1006(a)(1)(A) of the Act.

*Section 1630.3—Standards Governing Allowability of Costs Under Corporation Grants or Contracts*

**Paragraph (a)—Criteria for Allowability**

Paragraph (a) of this section sets out nine criteria which determine whether costs are allowable under Corporation grants or contracts. These criteria generally conform to section A, paragraph 2, of Attachment A to OMB Circular A-122. Section 1630.5(b) contains a tenth, prior approval criterion which applies to a small number of specific costs. These two sections apply only to Corporation funds and income derived from Corporation-funded activities.

Subparagraph (a)(1) requires that costs be actually incurred in the performance of the grant or contract. This requirement is consistent with the accrual method of accounting, which is required by generally accepted accounting principles. Costs incurred just prior to the onset of a Corporation grant or contract, or just after the cessation of Corporation funding, are allowable with the prior approval of the Corporation as required by § 1630.5(b)(1). This is a change from the prior rule, which did not allow costs incurred prior to, or after the cessation of, Corporation funding.

Subparagraph (a)(2) requires that costs be reasonable and necessary to the performance of a Corporation grant or contract. The concept of reasonableness applies both to the amount of the cost and to the nature of the activity that the cost represents. Paragraph (b) of the rule describes in greater detail four considerations which enter into a determination of whether a cost is reasonable and necessary.

Subparagraph (a)(3) requires that costs be allocable to a Corporation grant or contract. Paragraph (c) describes in detail the considerations which govern the allocability of costs.

Subparagraph (a)(4) requires that costs be in compliance with the LSC Act, applicable appropriations law, Corporation rules, regulations,

guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law. The cost of an activity prohibited or restricted by such law is not allowable under this rule and may result in a questioned or disallowed cost.

Subparagraph (a)(5) requires that recipients account for costs through the consistent application of established accounting policies and procedures. The Accounting Guide for LSC Recipients sets forth applicable principles, guidelines, and criteria for recipients' accounting systems.

Subparagraph (a)(6) requires that recipients account for costs consistently over time. This provision does not prevent recipients from modifying their cost allocation methods. However, recipients doing so should document the reasons for modification, especially if such modification results in the shifting of a particular type of cost from one funding source to another.

Subparagraph (a)(7) requires that recipients allocate costs in accordance with generally accepted accounting principles. The Accounting Guide for LSC Recipients contains guidance on accounting principles applicable to Corporation recipients.

Subparagraph (a)(8) requires that recipients not use Corporation funds to meet the cost matching requirements of other Federal funding sources, unless another Federal funding source has indicated in writing that recipients may do so. In at least one instance, another Federal funding source has done so. In 1980, the Department of Health and Human Services issued a Policy Announcement stating that recipients could use Corporation funds to meet the matching requirement of Title III funding for legal services.

Subparagraph (a)(9) requires that recipients document costs charged to Corporation funds in business records which are available during normal business hours to the Corporation and other persons or entities, such as the GAO, which are duly authorized by applicable law to conduct audits or investigations of Corporation recipients.

**Paragraph (b)—Reasonableness**

Paragraph (b) applies a four-part prudent person test to the determination of whether a cost is reasonable. The language of this provision comes from section A, paragraph 3, of Attachment A to OMB Circular A-122.

One comment noted that, because the language of subparagraph (b)(3) of the proposed rule referred to "persons concerned," the prudent person test could be read to hold recipients liable

for the actions of employees acting outside of their agency, even where recipients may have taken all reasonable steps to prevent the actions from occurring. Because this is not the Corporation's intent, the Board modified subparagraph (b)(3) to refer to "the recipient" instead of "persons concerned."

In general, when applying the prudent person test to determine whether a cost is reasonable, the Corporation will look at both the cost itself and the process by which the recipient decided to incur the cost. Generally, a cost is reasonable in nature and amount if it is comparable to similar costs incurred by other legal services programs in similar circumstances. Indicia of a prudent process include, but are not limited to, the solicitation of quotes from prospective vendors, documentation of the acquisition process, and board approval of unusually large costs.

If, for any reason, uncertainty exists as to the reasonableness of a cost, recipients may seek an advance understanding from the Corporation pursuant to § 1630.5(a). A request for an advance understanding should describe in reasonable detail the nature and amount of the cost. Provided that the actual costs does not vary significantly in nature or amount for the description in the request, an advance understanding ensures that the Corporation will not disallow the cost later on the grounds that it was unreasonable.

**Paragraph (c)—Allocability**

Paragraph (c) sets forth considerations which govern the allocability of costs charged to Corporation grants and contracts. In short, a cost is allocable to a grant or contract to the extent that it "benefits" the grant or contract. The language of this section comes from section A, paragraph 4, of Attachment A to OMB Circular A-122.

Some costs benefit a single grant, such as the salary cost of a Title III attorney who exclusively represents elder clients. Other costs benefit several different grants, such as the rental cost of an office which serves clients under LSC, IOLTA, and Title III grants. In the former instance, a recipient should allocate all of the Title III attorney's salary cost to the Title III grant. In the latter instance, a recipient should allocate a share of the office's rental costs to the LSC, IOLTA, and Title III grants, provided that each of those funding sources permit this type of cost.

This paragraph no longer contains a provision from the prior rule which prohibited the shifting of costs to avoid funding deficiencies or restrictions on

the uses of funds. The Board specifically sought comment on the deletion of this provision in the preamble to the proposed rule. The Corporation received no comments opposing the deletion.

The Board approved deletion of this provision, because § 1630.3(a)(4) already prevents recipients from charging the costs of restricted activities to LSC funds. Although the result of deleting this provision is to permit the shifting of otherwise allowable costs to Corporation funds, the Corporation encourages recipients to budget and allocate costs carefully so as to avoid accumulating deficits in their non-LSC funds which would necessitate year-end transfers of LSC funds to eliminate the deficits.

#### Paragraphs (d) and (e)—Direct and Indirect Costs

The salary of a Title III attorney who exclusively serves elder clients is a typical example of a *direct cost* as described by paragraph (d). Generally, recipients should treat the salaries and wages of attorneys and paralegals as direct costs. The rental cost of office space which is used to serve clients under two or more different grants is a typical example of an *indirect cost* as described by paragraph (e). The language of these two sections comes from sections B and C of Attachment A to OMB Circular A-122.

#### Paragraph (d)—Keeping of Personnel Activity Reports

Several comments observed that a reference to "time records" in paragraph (d) of the proposed rule could be read to require recipients to base their allocations of staff salaries and wages on timekeeping records kept pursuant to 45 CFR part 1635, the Corporation's timekeeping rule. This would require a significant number of recipients to modify their timekeeping systems, because many recipients do not include funding source information in the timekeeping records which they keep pursuant to 45 CFR part 1635.

The Corporation does not intend to impose such a requirement. The preamble to 45 CFR part 1635 clearly states that, while timekeeping records are one possible basis for cost allocations, the Corporation did not intend to require recipients to calculate cost allocations directly from timekeeping records kept pursuant to 45 CFR part 1635. (61 FR 14263, Apr. 1, 1996.) For this reason, the Board revised paragraph (d) to refer to "personnel activity reports" instead of "time records."

Accordingly, paragraph (d) requires that recipients keep personnel activity

reports to support salaries and wages which are allocated as direct costs. Paragraph 6(1)(2) of Attachment B to OMB Circular A-122 provides detailed guidance about the keeping of such reports. These reports should: (1) Be prepared at least monthly; (2) contain a reasonable, after-the-fact estimate of the distribution of activity of each compensated employee whose time is charged directly to a grant; and (3) be signed by either the employee or a supervisor having first-hand knowledge of the employee activity. The keeping of these records also satisfies the "labor-distribution" recordkeeping requirement of § 3-5.5(a) of the Accounting Guide for LSG Recipients.

#### Paragraph (f)—Allocation of Indirect Costs

Pursuant to paragraph (f) of this section, the allocation of indirect costs should be accomplished through an established cost allocation method. Because nearly all current recipients perform the single function of delivering legal services to low-income clients, paragraph (f) sets forth a simplified allocation method for allocating indirect costs among funding sources. The language of this paragraph comes from section D of Attachment A to OMB Circular A-122.

Generally, recipients should use an indirect cost allocation method which distributes costs equitably among all funding sources. Possible bases for allocating indirect costs include, but are not limited to, total direct costs, direct salaries and wages, attorney hours, numbers of cases, and numbers of employees.

#### Paragraph (g)—Exception for Certain Indirect Costs

Two comments noted that some funding sources do not permit the charging of certain indirect costs. Paragraph (g) creates an exception to accommodate this situation. If a recipient cannot allocate an indirect cost to one or more funding sources, the recipient should distribute the cost equitably among the funding sources which do permit the charging of the cost.

In the case of audit costs under Sec. 509(c) of Public Law 104-134, for example, recipients should distribute their audit costs on a pro rata basis among funding sources which do permit the charging of such costs. This allocation method satisfies the requirements of Sec. 509(c).

#### Paragraph (h)—Applicable Credits

Paragraph (h) defines and explains how to allocate applicable credits.

Applicable credits are receipts or reductions of expenditures which operate to offset or reduce expenses.

#### Paragraph (i)—Guidance

Because the LSC Act specifies that the Corporation is not a Federal agency, OMB Circulars are generally not binding on the Corporation or on recipients of its funds. However, the Corporation has relied on three relevant OMB Circulars in the development of these cost standards and procedures.

In particular, OMB Circulars A-110, A-122, and A-133 contain publicly noticed and commented standards which are applied throughout the Federal government to nonprofit organizations which receive Federal funds. In the event that questions arise about the allowability of costs under this part, the Corporation will look to these Circulars for guidance, to the extent that they are not inconsistent with law applicable to the Corporation and its recipients, including the Corporation's rules, regulations, and guidelines.

#### Section 1630.4—Burden of Proof

This section provides that the recipient has the burden of proving that costs charged to Corporation funds meet the requirements of §§ 1630.3 and 1630.5 of this part. When a recipient engages in an activity which is permissible only with non-LSC funds, the recipient also has the burden of showing that such costs are properly charged to non-LSC funds.

To meet this requirement, recipients must maintain accounting systems which are sufficient to demonstrate the allocation of costs to various funding sources, as required by this part and §§ 2-4.1 and 3-5 of the Accounting Guide for LSC Recipients. However, neither this rule nor the Accounting Guide requires recipients to maintain separate bank accounts for the purposes of segregating funds received from different funding sources.

#### Section 1630.5—Costs Requiring Corporation Prior Approval

Paragraph (a) of this section permits recipients to obtain an advance understanding from the Corporation prior to incurring costs that are exceptional in nature or amount. The language of this paragraph comes from section A, paragraph 6, of Attachment A to OMB Circular A-122.

An advance understanding as to the reasonableness or allocability of an exceptional cost guards against the possibility that the cost might come into question during a subsequent audit. The Corporation encourages recipients to

seek advance understandings prior to incurring costs which might be perceived later by an auditor as being other than ordinary and necessary to the operation of a legal services program.

Paragraph (b) of this section lists specific costs which recipients may not charge to Corporation funds without the Corporation's written prior approval. Because this paragraph applies to costs charged to LSC funds only, recipients charging the entire amount of such costs to non-LSC funds do not need to seek the Corporation's prior approval. Where recipients charge part of the cost to LSC funds and part of the cost to non-LSC funds, Corporation prior approval is necessary when the amount charged to LSC funds exceeds one of the threshold amounts in this paragraph. In the case of purchases of real property, Corporation prior approval is necessary when a recipient expends any amount of LSC funds to acquire real property.

Subparagraph (b)(1) requires recipients to obtain prior approval before charging certain pre-award and post-cessation-of-funding costs to Corporation funds. Two comments noted that the wording of this subparagraph, as it appeared in the proposed rule, could be read to apply to expenditures of LSC fund balances carried over by continuing recipients pursuant to 45 CFR part 1628. Because this was not the Corporation's intent, the Board approved a revision to this subparagraph, so that it now refers to "pre-award costs and costs incurred after the cessation of funding."

Pursuant to paragraph 34 of Attachment B to OMB Circular A-122, and with the Corporation's prior approval, pre-award costs may be charged to a Corporation grant if they are: (1) Incurred pursuant to the negotiation of and in anticipation of, the grant; (2) necessary to the performance of the grant; and (3) otherwise allowable during the actual term of the grant. Such costs include, but are not limited to, the hiring of staff and the acquisition of office space and equipment necessary to the performance of the grant.

With the prior approval of the Corporation, recipients may use some or all of their LSC funds remaining at the time of cessation of funding to fulfill their professional responsibilities to clients by closing out cases or by transferring them to other providers. In the rare event that termination of funding occurs during the term of a grant, paragraph 48 of Attachment B to OMB Circular A-122 provides detailed guidance on the allowability of costs incurred during the termination process.

The \$10,000 threshold of subparagraph (b)(2) applies to

individual items of personal property only. Corporation prior approval is no longer necessary for purchases and leases of individual items costing less than this amount, even if a purchase or lease of several related items with individual costs below \$10,000 has a combined cost which exceeds the threshold amount. However, the costs of acquiring such items must still meet the criteria of § 1630.3 of this part, including the requirement that such costs be reasonable and necessary to the performance of the grant or contract.

The use of Corporation funds to purchase real property, whether to pay part or all of an initial down payment or to pay part or all of the principal or interest payments on debt secured to finance the purchase, requires Corporation prior approval. Capital expenditures to improve real property also require Corporation prior approval, if the amount of LSC funds going toward such an expenditure exceeds \$10,000. Leases of real property do not require Corporation prior approval.

Paragraph (b) no longer requires prior approval of consultant contracts. However, recipients should be prepared to justify the costs of such contracts should they come into question during a subsequent audit or investigation. Subparagraph 35(b) of Attachment B to OMB Circular A-122 list several factors which govern the allowability of the costs of retaining consultants. These include: (1) The nature and scope of the service; (2) the necessity of contracting for the service; (3) the recipient's ability to perform the service itself; (4) the qualifications of the consultants; (5) and the adequacy of the contract agreement. In the event that there is likely to be any question about the reasonableness or allocability of a consultant contract, recipients may seek an advance understanding from the Corporation as provided by § 1630.5(a).

The elimination of the prior approval requirement for consultant contracts does not affect or supersede 45 CFR part 1627, which governs subgrants of LSC funds. As provided by part 1627, contracts using LSC funds to perform programmatic activities are subgrants which require Corporation prior approval, except that contracts for private attorney involvement in amounts not greater than \$25,000 do not require prior approval.

#### *Section 1630.6—Timetable and Basis for Granting Prior Approval*

Paragraph (a) requires the Corporation to grant prior approval of a cost when a recipient provides sufficient written information to demonstrate that the cost would be allowable under the

provisions of this part. When denying a request for prior approval, the Corporation must explain in writing why the cost would not be allowable.

Paragraph (b) provides a timetable for obtaining prior approval. If the Corporation fails to act within the timetable in this paragraph, it may not assert the absence of prior approval as a basis for disallowing a cost. However, to be allowable, the cost must nonetheless meet the nine criteria of § 1630.3(a).

#### *Section 1630.7—Review of Questioned Costs and Appeal of Disallowed Costs*

Paragraph (a) recognizes the statutory authority of the Corporation's OIG, the GAO, and authorizes independent auditors to question costs incurred by recipients. Section 509(k) of Public Law 104-134 requires Corporation management to develop procedures for, and to follow up on, significant audit findings reported to the Corporation. This section of the rule addresses that requirement, as it applies to findings of questioned costs.

If, after reviewing a questioned cost, the Corporation determines that there is a reasonable basis for disallowing the cost, paragraph (b) requires the Corporation to provide the recipient with written notice of its intent to disallow the cost. Paragraph (b) also establishes a five-year time limitation on the Corporation's ability to disallow costs.

When approving the proposed rule for public notice and comment, the Board adopted a three-year limitation on the Corporation's ability to disallow costs. One comment supported this shorter time period, on the grounds that it was long enough to permit the Corporation to review costs questioned during routine annual audits of recipients.

Both Corporation management and the OIG recommended that the Board adopt a five-year time period, on the grounds that a three-year time period might be too short to enable the Corporation to fulfill its statutory responsibility to follow up on questioned costs which might arise during the course of a GAO or OIG audit, or during a complaint investigation by Corporation management. Such an audit or investigation might occur at the end of the three-year period, and the time limitation in the proposed rule would prevent the Corporation from following up on a questioned cost finding. The Board agreed and revised paragraph (b) to provide for a five-year time limitation.

Paragraph (c) provides a 30-day time period during which recipients may

provide a written response to the Corporation with evidence and argument as to why the Corporation should not disallow part or all of a questioned cost. This paragraph guarantees that recipients will have at least one full opportunity to respond to a finding of a questioned cost which the Corporation has sought to disallow.

Paragraph (d) requires the Corporation to issue a management decision, as defined by § 1630.2(f), within 60 days of receiving a recipient's response to a notice of intent to disallow a questioned cost. If the Corporation's management decision disallows the cost, the recipient may appeal the disallowance as provided by paragraph (e), provided that the amount of the disallowed cost exceeds \$2,500.

One comment urged the Board to eliminate the \$2,500 appeal threshold, so that recipients could appeal all disallowed costs, no matter what the amount. In contrast, the Corporation's OIG recommended that the Board institute a higher threshold. Among other reasons, the OIG cited as a basis for this recommendation the likelihood that the cost of an appeal, in many instances, would exceed the amount of the disallowed cost itself.

After considering the Corporation's recent experience, which has involved an average of one appeal per year, the Board decided to retain the \$2,500 threshold as an appropriate balancing of the Corporation's and recipients' interests in the equitable and efficient resolution of disagreements about disallowed costs.

#### *Section 1630.8—Recovery of Disallowed Costs and Other Corrective Action*

Paragraphs (a) and (b) require the Corporation to recover disallowed costs and ensure that recipients take necessary corrective action to prevent the recurrence of circumstances giving rise to questioned costs. Final action with respect to a disallowed cost occurs when the Corporation has recovered the disallowed cost and the recipient has concluded all necessary corrective action specified in the Corporation's management decision.

The proposed rule included a provision which allowed the Corporation to recover, in connection with a disallowed cost, income which a recipient may have derived from the activity which resulted in the disallowed cost. One comment urged the deletion of this provision on the grounds that it was unnecessary and without legal basis.

Because the Corporation's experience shows that disallowed costs rarely result in derivative income, and because

relevant OMB Circulars and other applicable law do not provide for its recovery, the Board agreed to delete language providing for the recovery of derivative income from this section. The Board also deleted corresponding references to derivative income from §§ 1630.7(b) and 1630.11(b).

#### *Section 1630.9—Other Remedies; Effect on Other Parts*

Paragraph (a) requires Corporation management to refer instances of serious financial mismanagement, fraud, and defalcation of funds to the Corporation's OIG. In such instances, the Corporation may also initiate proceedings to suspend or terminate a recipient's funding. Paragraph (b) clarifies that the disallowance of a cost does not constitute a permanent reduction in a recipient's funding level.

#### *Section 1630.10—Applicability to Subgrants*

This section provides that recipients and subrecipients shall each be responsible for questioned costs incurred by subrecipients. In the event that a cost incurred by a subrecipient comes into question, both the recipient and the subrecipient will have access to the review and appeal procedures of § 1630.7.

#### *Section 1630.11—Applicability to Non-LSC Funds*

Paragraphs (a) and (b) provide that, in the event that a recipient expends non-LSC funds to pay for an activity for which non-LSC funds may not be expended pursuant to either Sec. 1010(c) of the LSC Act or Sec. 504 of Public Law 104–134, the Corporation may recover from the recipient's LSC funds an amount not to exceed the amount of non-LSC funds which the recipient expended on the prohibited activity. The activities for which recipients may not expend non-LSC funds are defined at 45 CFR §§ 1610.2 (a) and (b).

The provisions of this section do not apply to non-LSC funds spent on activities which are not subject to LSC restrictions on non-LSC funds. Thus, this section does not enable the Corporation to recover the costs of activities which are prohibited by or inconsistent with restrictions imposed by other funding sources. For example, if a recipient uses Title III funds to represent a client who does not meet Title III eligibility requirements, this section does not enable the Corporation to seek to recover the costs of representing that client.

#### *Section 1630.12—Applicability to Derivative Income*

Paragraph (a) requires proportional allocation of income derived from LSC-funded activities. Thus, for example, if a recipient has charged one-half of the cost of purchasing a photocopier to LSC funds and one-half of the cost to non-LSC funds, and the recipient uses the photocopier to provide photocopying services to another non-profit organization for a fee, then one-half of the income from the fee is LSC derivative income which should be allocated to the LSC fund. The remainder of the income is non-LSC derivative income which should be allocated to non-LSC funds. This allocation method is similar to that required by 45 CFR § 1642.5(a), which provides for the allocation of attorney fee awards.

Paragraph (b) specifies that LSC derivative income is subject to the requirements of this part, including the requirement that expenditures of such funds be in compliance with the restrictions of the LSC Act, regulations, and other applicable law. One comment sought a revision to this section clarifying that only that proportion of derivative income which is allocable to the LSC fund is subject to this subparagraph. The Board adopted the suggested revision, and the final rule reflects this clarification.

#### **List of Subjects in 45 CFR Part 1630**

Accounting, Government contracts, Grant programs-law, Hearing and appeal procedures, Legal services, Questioned costs.

For the reasons set forth in the preamble, the Corporation revises 45 CFR part 1630 to read as follows:

#### **PART 1630—COST STANDARDS AND PROCEDURES**

##### **Sec.**

- 1630.1 Purpose.
- 1630.2 Definitions.
- 1630.3 Standards governing allowability of costs under Corporation grants or contracts.
- 1630.4 Burden of proof.
- 1630.5 Costs requiring Corporation prior approval.
- 1630.6 Timetable and basis for granting prior approval.
- 1630.7 Review of questioned costs and appeal of disallowed costs.
- 1630.8 Recovery of disallowed costs and other corrective action.
- 1630.9 Other remedies; effect on other parts.
- 1630.10 Applicability to subgrants.
- 1630.11 Applicability to non-LSC funds.
- 1630.12 Applicability to derivative income.
- 1630.13 Time.

**Authority:** 5 U.S.C. App. 3, 42 U.S.C. 2996e, 2996f, 2996g, 2996h(c)(1), and 2996i(c); Pub. L. 105-11, 111 Stat. 2440; Pub. L. 104-134, 110 Stat. 3009.

**§ 1630.1 Purpose.**

This part is intended to provide uniform standards for allowability of costs and to provide a comprehensive, fair, timely, and flexible process for the resolution of questioned costs.

**§ 1630.2 Definitions.**

(a) *Allowed costs* means a questioned cost that the Corporation, in a management decision, has determined to be eligible for payment from a recipient's Corporation funds.

(b) *Corrective action* means action taken by a recipient that:

- (1) Corrects identified deficiencies;
- (2) Produces recommended improvements; or
- (3) Demonstrates that audit or other findings are either invalid or do not warrant recipient action.

(c) *Derivative income* means income earned by a recipient from Corporation-supported activities during the term of a Corporation grant or contract, and includes, but is not limited to, income from fees for services (including attorney fee awards and reimbursed costs), sales and rentals of real or personal property, and interest earned on Corporation grant or contract advances.

(d) *Disallowed cost* means a questioned cost that the Corporation, in a management decision, has determined should not be charged to a recipient's Corporation funds.

(e) *Final action* means the completion of all actions that Corporation management, in a management decision, has concluded are necessary with respect to the findings and recommendations in a an audit or other report. In the event that Corporation management concludes no corrective action is necessary, final action occurs when a management decision has been made.

(f) *Management decisions* means the evaluation by Corporation management of findings and recommendations in an audit or other report and the recipient's response to the report, and the issuance of a final, written decision by management concerning its response to such findings and recommendations, including any corrective actions which Corporation management has concluded are necessary to address the findings and recommendations.

(g) *Questioned cost* means a cost that a recipient has charged to Corporation funds which Corporation management, the Office of Inspector General, the

General Accounting Office, or an independent auditor or other audit organization authorized to conduct an audit of a recipient has questioned because of an audit or other finding that:

- (1) There may have been a violation of a provision of a law, regulation, contract, grant, or other agreement or document governing the use of Corporation funds;
  - (2) The cost is not supported by adequate documentation; or
  - (3) The cost incurred appears unnecessary or unreasonable and does not reflect the actions a prudent person would take in the circumstances.
- (h) *Recipient* as used in this part means any grantee or contractor receiving funds from the Corporation under sections 1006(a)(1) or 1006(a)(3) of the Act.

**§ 1630.3 Standards governing allowability of costs under Corporation grants or contracts.**

(a) *General criteria.* Expenditures by a recipient are allowable under the recipient's grant or contract only if the recipient can demonstrate that the cost was:

- (1) Actually incurred in the performance of the grant or contract and the recipient was liable for payment;
- (2) Reasonable and necessary for the performance of the grant or contract as approved by the Corporation;
- (3) Allocable to the grant or contract;
- (4) In compliance with the Act, applicable appropriations law, Corporation rules, regulations, guidelines, and instructions, the Accounting Guide for LSC Recipients, the terms and conditions of the grant or contract, and other applicable law;
- (5) Consistent with accounting policies and procedures that apply uniformly to both Corporation-financed and other activities of the recipient;
- (6) Accorded consistent treatment over time;
- (7) Determined in accordance with generally accepted accounting principles;
- (8) Not included as a cost or used to meet cost sharing or matching requirements of any other federally financed program, unless the agency whose funds are being matched determines in writing that Corporation funds may be used for federal matching purposes; and
- (9) Adequately and contemporaneously documented in business records accessible during normal business hours to Corporation management, the Office of Inspector General, the General Accounting Office, and independent auditors or other audit organizations authorized to conduct audits of recipients.

(b) *Reasonable costs.* A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the same or similar circumstances prevailing at the time the decision was made to incur the cost. If a questioned cost is disallowed solely on the ground that it is excessive, only the amount that is larger than reasonable shall be disallowed. In determining the reasonableness of a given cost, consideration shall be given to:

- (1) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the recipient or the performance of the grant or contract;
- (2) The restraints or requirements imposed by such factors as generally accepted sound business practices, arms-length bargaining, Federal and State laws and regulations, and the terms and conditions of the grant or contract;
- (3) Whether the recipient acted with prudence under the circumstances, considering its responsibilities to its clients and employees, the public at large, the Corporation, and the Federal government; and
- (4) Significant deviations from the established practices of the recipient which may unjustifiably increase the grant or contract costs.

(c) *Allocable costs.* A cost is allocable to a particular cost objective, such as a grant, project, service, or other activity, in accordance with the relative benefits received. Costs may be allocated to Corporation funds either as direct or indirect costs according to the provisions of this section. A cost is allocable to a Corporation grant or contract if it is treated consistently with other costs incurred for the same purpose in like circumstance and if it:

- (1) Is incurred specifically for the grant or contract;
- (2) Benefits both the grant or contract and other work and can be distributed in reasonable proportion to the benefits received; or
- (3) Is necessary to the overall operation of the recipient, although a direct relationship to any particular cost objective cannot be shown.

(d) *Direct costs.* Direct costs are those that can be identified specifically with a particular final cost objective, i.e., a particular grant award, project, service, or other direct activity of an organization. Costs identified specifically with grant awards are direct costs of the awards and are to be assigned directly thereto. Direct costs include, but are not limited to, the salaries and wages of recipient staff who are working on cases or matters that are

identified with specific grants or contracts. Salary and wages charged directly to Corporation grants and contracts must be supported by personnel activity reports.

(e) *Indirect costs.* Indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. Any direct cost of a minor amount may be treated as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives. Indirect costs include, but are not limited to, the costs of operating and maintaining facilities, and the costs of general program administration, such as the salaries and wages of program staff whose time is not directly attributable to a particular grant or contract. Such staff may include, but are not limited to, executive officers and personnel, accounting, secretarial and clerical staff.

(f) *Allocation of indirect costs.* Where a recipient has only one major function, i.e., the delivery of legal services to low-income clients, allocation of indirect costs may be by a simplified allocation method, whereby total allowable indirect costs (net of applicable credits) are divided by an equitable distribution base and distributed to individual grant awards accordingly. The distribution base may be total direct costs, direct salaries and wages, attorney hours, numbers of cases, numbers of employees, or another base which results in an equitable distribution of indirect costs among funding sources.

(g) *Exception for certain indirect costs.* Some funding sources may refuse to allow the allocation of certain indirect costs to an award. In such instances, a recipient may allocate a proportional share of another funding source's share of an indirect cost to Corporation funds, provided that the activity associated with the indirect cost is permissible under the LSC Act and regulations.

(h) *Applicable credits.* Applicable credits are those receipts or reductions of expenditures which operate to offset or reduce expense items that are allocable to grant awards as direct or indirect costs. Applicable credits include, but are not limited to, purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds, and adjustments of overpayments or erroneous charges. To the extent that such credits relate to allowable costs, they shall be credited as a cost reduction or cash refund in the same fund to which the related costs are charged.

(i) *Guidance.* The Circulars of the Office of Management and Budget shall provide guidance for all allowable cost questions arising under this part when relevant policies or criteria therein are not inconsistent with the provisions of the Act, applicable appropriations law, this part, the Accounting Guide for LSC Recipients, Corporation rules, regulations, guidelines, instructions, and other applicable law.

#### **§ 1630.4 Burden of proof.**

The recipient shall have the burden of proof under this part.

#### **§ 1630.5 Costs requiring Corporation prior approval.**

(a) *Advance understandings.* Under any given grant award, the reasonableness and allocability of certain cost items may be difficult to determine. In order to avoid subsequent disallowance or dispute based on unreasonableness or nonallocability, recipients may seek a written understanding from the Corporation in advance of incurring special or unusual costs. If a recipient elects not to seek an advance understanding from the Corporation, the absence of an advance understanding on any element of a cost does not affect the reasonableness or allocability of the cost.

(b) *Prior approvals.* Without prior written approval of the Corporation, no cost attributable to any of the following may be charged to Corporation funds:

(1) Pre-award costs and costs incurred after the cessation of funding;

(2) Purchases and leases of equipment, furniture, or other personal, non-expendable property, if the current purchase price of any individual item of property exceeds \$10,000;

(3) Purchases of real property; and

(4) Capital expenditures exceeding \$10,000 to improve real property.

(c) *Duration.* The Corporation's approval or advance understanding shall be valid for one year, or for a greater period of time which the Corporation may specify in its approval or understanding.

#### **§ 1630.6 Timetable and basis for granting prior approval.**

(a) The Corporation shall grant prior approval of a cost if the recipient has provided sufficient written information to demonstrate that the cost would be consistent with the standards and policies of this part. If the Corporation denies a request for approval, it shall provide to the recipient a written explanation of the grounds for denying the request.

(b) Except as provided in paragraphs (c) and (d) of this section, the

Corporation may not assert the absence of prior approval as a basis for disallowing a questioned cost, if the Corporation has not responded to a written request for approval within sixty (60) days of receiving the request.

(c) If additional information is necessary to enable the Corporation to respond to a request for prior approval, the Corporation may make a written request for additional information within forty-five (45) days of receiving the request for approval.

(d) If the Corporation has made a written request for additional information about a cost as provided by paragraph (c) of this section, and if the Corporation has not responded within thirty (30) days of receiving in writing all additional, requested information, the Corporation may not assert the absence of prior approval as a basis for disallowing the cost.

#### **§ 1630.7 Review of questioned costs and appeal of disallowed costs.**

(a) When the Office of Inspector General, the General Accounting Office, or an independent auditor or other audit organization authorized to conduct an audit of a recipient has identified and referred a questioned cost to the Corporation, Corporation management shall review the findings of the Office of Inspector General, General Accounting Office, or independent auditor or other authorized audit organization, as well as the recipient's written response to the findings, in order to determine accurately the amount of the questioned cost, the factual circumstances giving rise to the cost, and the legal basis for disallowing the cost. Corporation management may also identify questioned costs in the course of its oversight of recipients.

(b) If Corporation management determines that there is a basis for disallowing a questioned cost, and if not more than five years have elapsed since the recipient incurred the cost, Corporation management shall provide to the recipient written notice of its intent to disallow the cost. The written notice shall state the amount of the cost and the factual and legal basis for disallowing it.

(c) Within thirty (30) days of receiving written notice of the Corporation's intent to disallow the questioned cost, the recipient may respond with written evidence and argument to show that the cost was allowable, or that the Corporation, for equitable, practical, or other reasons, should not recover all or part of the amount, or that the recovery should be made in installments. If the recipient does not respond to the Corporation's written notice,



Corporation management shall issue a management decision on the basis of information available to it.

(d) Within sixty (60) days of receiving the recipient's written response to the notice of intent to disallow the questioned cost, Corporation management shall issue a management decision stating whether or not the cost has been disallowed, the reasons for the decision, and the method of appeal as provided in this section.

(1) If Corporation management has determined that the questioned cost should be allowed, and that no corrective action by the recipient is necessary, final action with respect to the questioned cost occurs at the time when the Corporation issues the management decision.

(2) If Corporation management has determined that the questioned cost should be disallowed, the management decision shall also describe the expected recipient action to repay the cost, including the method and schedule for collection of the amount of the cost. The management decision may also require the recipient to make financial adjustments or take other corrective action to prevent a recurrence of the circumstances giving rise to the disallowed cost.

(e) If the amount of a disallowed cost exceeds \$2,500, the recipient may appeal in writing to the Corporation President within thirty (30) days of receiving the Corporation's management decision to disallow the cost. The written appeal should state in detail the reasons why the Corporation should not disallow part or all of the questioned cost. If the amount of a disallowed cost does not exceed \$2,500, or if the recipient elects not to appeal the disallowance of a cost in excess of \$2,500, the Corporation's management decision shall be final.

(f) Within thirty (30) days of receipt of the recipient's appeal of a disallowed cost in excess of \$2,500, the President shall either adopt, modify, or reverse the Corporation's management decision to disallow the cost. If the President has had prior involvement in the consideration of the disallowed cost, the President shall designate another senior Corporation employee who has not had prior involvement to review the recipient's appeal. The President shall also have discretion, in circumstances where the President has not had prior involvement in the disallowed cost, to designate another senior Corporation employee to review the recipient's appeal, provided that the senior Corporation employee has not had prior involvement in the disallowed cost.

(g) The decision of the President or designee shall be final and shall be based on the written record, consisting of the Corporation's notice of intent to disallow the questioned cost, the recipient's response, the management decision, the recipient's written appeal, any additional response or analysis provided to the President or designee by Corporation staff, and the relevant findings, if any, of the Office of Inspector General, General Accounting Office, or other authorized auditor or audit organization. Upon request, the Corporation shall provide a copy of the written record to the recipient.

#### **§ 1630.8 Recovery of disallowed costs and other corrective action.**

(a) The Corporation shall recover any disallowed costs from the recipient within the time limits and conditions set forth in the Corporation's management decision. Recovery of the disallowed costs may be in the form of a reduction in the amount of future grant checks or in the form of direct payment from the recipient to the Corporation.

(b) The Corporation shall ensure that a recipient which has incurred a disallowed cost takes any additional, necessary corrective action within the time limits and conditions set forth in the Corporation's management decision. The recipient shall have taken final action when the recipient has repaid all disallowed costs and has taken all corrective action which the Corporation has stated in its management decision is necessary to prevent the recurrence of circumstances giving rise to a questioned cost.

(c) In the event of an appeal of the Corporation's management decision, the decision of the President or designee shall supersede the Corporation's management decision, and the recipient shall repay any disallowed costs and take necessary corrective action according to the terms and conditions of the decision of the President or designee.

#### **§ 1630.9 Other remedies; effect on other parts.**

(a) In cases of serious financial mismanagement, fraud, or defalcation of funds, the Corporation shall refer the matter to the Office of Inspector General, and may take appropriate action pursuant to parts 1606, 1623, 1625, and 1640 of this chapter.

(b) The recovery of a disallowed cost according to the procedures of this part does not constitute a permanent reduction in the annualized funding level of the recipient, nor does it constitute a termination of financial

assistance under part 1606, a suspension of funding under part 1623, or a denial of refunding under part 1625.

#### **§ 1630.10 Applicability to subgrants.**

When disallowed costs arise from expenditures incurred under a subgrant of Corporation funds, the recipient and the subrecipient will be jointly and severally responsible for the actions of the subrecipient, as provided by 45 CFR part 1627, and will be subject to all remedies available under this part. Both the recipient and the subrecipient shall have access to the review and appeal procedures of this part.

#### **§ 1630.11 Applicability to non-LSC funds.**

(a) No costs attributable to a purpose prohibited by the LSC Act, as defined by 45 CFR 1610.2(a), may be charged to private funds, except for tribal funds used for the specific purposes for which they were provided. No cost attributable to an activity prohibited by or inconsistent with section 504, as defined by 45 CFR 1610.2(b), may be charged to non-LSC funds, except for tribal funds used for the specific purposes for which they were provided.

(b) According to the review and appeal procedures of 45 CFR 1630.7, the Corporation may recover from a recipient's Corporation funds an amount not to exceed the amount improperly charged to non-LSC funds.

#### **§ 1630.12 Applicability to derivative income.**

(a) Derivative income resulting from an activity supported in whole or in part with funds provided by the Corporation shall be allocated to the fund in which the recipient's LSC grant is recorded in the same proportion that the amount of Corporation funds expended bears to the total amount expended by the recipient to support the activity.

(b) Derivative income which is allocated to the LSC fund in accordance with paragraph (a) of this section is subject to the requirements of this part, including the requirement of 45 CFR 1630.3(a)(4) that expenditures of such funds be in compliance with the Act, applicable appropriations law, Corporation rules, regulations, guidelines, and instructions, the Accounting Guide for LSC recipients, the terms and conditions of the grant or contract, and other applicable law.

#### **§ 1630.13 Time.**

(a) *Computation.* Time limits specified in this part shall be computed in accordance with Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure.

(b) *Extensions.* The Corporation may, on a recipient's written request for good

cause, grant an extension of time and shall so notify the recipient in writing.

Dated: December 24, 1997.

**Victor M. Fortuno,**

*General Counsel.*

[FR Doc. 97-34120 Filed 12-30-97; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 970829216-7305-02; I.D. 080597F]

RIN 0648-AK14

#### Fisheries of the Exclusive Economic Zone Off Alaska; Allocation of Atka Mackerel to Vessels Using Jig Gear

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

**ACTION:** Final rule.

**SUMMARY:** NMFS implements Amendment 34 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). The implementing regulations of Amendment 34 require an allocation of Atka mackerel to vessels using jig gear. Annually, up to 2 percent of the total allowable catch (TAC) specified for this species in the eastern Aleutian Islands District (AI)/Bering Sea subarea (BS) will be allocated to the jig gear fleet fishing in this area. This action is necessary to provide an opportunity to a localized, small-vessel jig gear fleet to fish for Atka mackerel in summer months. The large-scale trawl fisheries typically harvest the available TAC for this species early in the fishing year, which does not allow jig gear fishermen an opportunity for a summer fishery. This action is intended to further the goals and objectives of the FMP.

**DATES:** Effective January 30, 1998.

**ADDRESSES:** Copies of Amendment 34 and the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action may be obtained from NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori J. Gravel.

**FOR FURTHER INFORMATION CONTACT:** Susan Salveson, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** The domestic groundfish fisheries in the exclusive economic zone of the Bering

Sea and Aleutian Islands management area (BSAI) are managed by NMFS under the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing the groundfish fisheries of the BSAI appear at 50 CFR parts 600 and 679.

At its June 1997 meeting, the Council adopted Amendment 34 to the FMP and recommended that NMFS prepare a rulemaking to implement the amendment. A notice of availability of Amendment 34 was published in the **Federal Register** on August 15, 1997 (62 FR 43689) and invited comments on the amendment through October 14, 1997. A proposed rule to implement Amendment 34 was published on September 22, 1997 (62 FR 49464), with comments invited through November 6, 1997. No comments were received either on Amendment 34 or on the proposed rule.

The rule implementing Amendment 34 requires an allocation of Atka mackerel to vessels using jig gear. Annually, up to 2 percent of the TAC specified for this species in the eastern AI/BS will be allocated to vessels using jig gear in this area. The amount of the allocation will be determined annually based on the anticipated harvest capacity of the jig gear fleet and will be published in the **Federal Register** as part of the annual groundfish specifications process.

NMFS has determined that this action is necessary for the conservation and management of the Atka mackerel fishery of the BSAI and for addressing resource allocation issues between the jig and trawl gear fisheries for this species. NMFS approved Amendment 34 on November 13, 1997, under section 304(a) of the Magnuson-Stevens Act. Additional information on this action may be found in the preamble to the proposed rule and in the EA/RIR/FRFA.

#### Classification

The Administrator, Alaska Region, NMFS, determined that Amendment 34 is necessary for the conservation and management of the groundfish fishery of the BSAI and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of E.O. 12866.

NMFS prepared an FRFA consisting of the EA/RIR, and the preamble to this final rule. The initial regulatory flexibility analysis (IRFA) concluded that this action would have a significant

positive economic impact on small entities to the extent that the jig gear fleet realized potential gains through increased harvests of Atka mackerel. Any loss in gross annual revenues that would be incurred by trawl catcher vessels under Amendment 34 would not be significant (i.e., would not exceed 5 percent of a vessel's total annual revenue) because these vessels are larger (> 60 ft (18.29 m)) in length and participate in other lucrative groundfish fisheries, including the Atka mackerel fishery in the Central and Western Aleutians. Additional explanation of these impacts is presented in the preamble to the proposed rule (62 FR 49464, September 22, 1997). No comments were received on the IRFA. Because the significant economic impacts on small entities are beneficial impacts, no steps have been taken to minimize them. Likewise, other alternatives that were rejected would not have benefited small entities as greatly as the selected alternative. A copy of the RIR/FRFA is available from NMFS (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: December 22, 1997.

**David L. Evans,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

#### PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for 50 CFR part 679 continues to read as follows:

**Authority:** 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

2. In § 679.20, paragraph (a)(8) is redesignated as paragraph (a)(9) and new paragraphs (a)(8) and (c)(6) are added to read as follows:

#### § 679.20 General limitations.

\* \* \* \* \*

(a) \* \* \*

(8) *BSAI Atka mackerel*—(i) *TAC by gear*. Vessels using jig gear will be allocated up to 2 percent of the TAC of Atka mackerel specified for the Eastern Aleutian Islands District and Bering Sea subarea, after subtraction of reserves, based on the criteria specified at paragraph (a)(8)(ii) of this section. The remainder of the TAC, after subtraction of reserves, will be allocated to vessels using other authorized gear types.

(ii) *Annual specification*. The percentage of the Atka mackerel TAC