

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9D, Airspace Designations and Reporting Points, dated September 4, 1996, and effective September 16, 1996, is amended as follows:

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

* * * * *

ASO GA E5 Thomson, GA [New]

Thomson-McDuffie Airport, GA
(Lat. 33°31'47" N. long. 82°31'00" W)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Thomson-McDuffie Airport.

* * * * *

ASO GA E5 Augusta, GA [Revised]

Augusta, Bush Field, GA
(Lat. 33°22'12" N. long. 81°57'52" W)

Bushe NDB
(Lat. 33°17'13" N. long. 81°56'49" W)

Daniel Field
(Lat. 33°27'59" N. long. 82°02'21" W)

Burke County Airport
(Lat. 33°02'28" N. long. 82°00'14" W)

Burke County NDB
(Lat. 33°02'33" N. long. 82°00'17" W)

That airspace extending upward from 700 feet above the surface within an 8.2-mile radius of Bush Field and within 8 miles west and 4 miles east of Augusta ILS localizer south course extending from the 8.2-mile radius to 16 miles south of the Bushe NDB, and within a 6.3-mile radius of Daniel Field, and within a 6.2-mile radius of Burke County Airport and within 3.5 miles each side of the 243° bearing from the Burke County NDB extending from the 6.2-mile radius to 7 miles southwest of the NDB.

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Issued in College Park, Georgia, on March 24, 1997.

Wade T. Carpenter,

*Acting Manager, Air Traffic Division,
Southern Region.*

[FR Doc. 97-8614 Filed 4-3-97; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 96-AWP-30]

**Amendment of Class E Airspace;
Victorville, CA**

AGENCY: Federal Aviation
Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects an error in the geographic coordinates of a final rule that was published in the **Federal Register** on February 25, 1997 (62 FR 8369), Airspace Docket No. 96-AWP-30.

EFFECTIVE DATE: 0901 UTC March 27, 1997.

FOR FURTHER INFORMATION CONTACT: William Buck, Airspace Specialist, Operations Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California, 90261, telephone (310) 725-6556.

SUPPLEMENTARY INFORMATION:**History**

Federal Register Document 97-4577, Airspace Docket No. 96-AWP-30, published on February 25, 1997 (62 FR 8369), revised the description of the Class E airspace area at Victorville, CA. An error was discovered in the geographic coordinates for the Victorville, CA, Class E airspace area. This action corrects that error.

**Correction to Notice of Proposed
Rulemaking**

Accordingly, pursuant to the authority delegated to me, the geographic coordinates for the Class E airspace are at Victorville, CA, as published in the **Federal Register** on February 25, 1997, **Federal Register** Document 97-4577; page 8370, column 2), is corrected as follows:

§ 71.1 [Corrected]

* * * * *

AWP CA E5 Victorville, CA

By removing "(lat. 34°35'67" N., long. 117°22'93" W.)" and substituting "(lat. 34°35'40" N., long. 117°22'56" W.)".

* * * * *

Issued in Los Angeles, California, on March 5, 1997.

George D. Williams,

*Manager, Air Traffic Division, Western-Pacific
Region.*

[FR Doc. 97-8500 Filed 4-3-97; 8:45 am]

BILLING CODE 4910-13-M

**SECURITIES AND EXCHANGE
COMMISSION****17 CFR Part 202**

[Release Nos. 33-7408, 34-38447, 35-26696,
39-2350, IC-22588, and IA-1625; File No.
S7-14-97]

**Penalty-Reduction Policy for Small
Entities**

AGENCY: Securities and Exchange
Commission.

ACTION: Policy statement; request for
comments.

SUMMARY: The Securities and Exchange
Commission is issuing a statement of its

penalty-reduction policy for small entities as required by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). The Commission also requests comments on the policy. After the comment period has closed and the Commission has gained experience in applying the policy, the Commission intends to re-evaluate the policy in light of its experience and the comments of interested persons.

DATES: Effective *March 29, 1997*.

Interested persons may submit comments on the policy on or before *December 31, 1997*.

ADDRESSES: Interested persons should submit three copies of their written data, views, and opinions to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth St. N.W., Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-14-97; this file number should be included on the subject line if E-mail is used. All comment letters will be made available for public inspection and copying at the Commission's Public Reference Room, Room 1024, 450 Fifth St., N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (<http://www.sec.gov>).

FOR FURTHER INFORMATION CONTACT: Joan McKown (202-942-4530) or Susan Mathews (202-942-4737), Office of the Chief Counsel, Division of Enforcement, or Amy Kroll (202-942-0927) or Anne Sullivan (202-942-0954), Office of the General Counsel.

SUPPLEMENTARY INFORMATION: The Small Business Regulatory Fairness Act ("SBREFA" or "the Act") was enacted on March 29, 1996.¹ SBREFA seeks to improve the regulatory climate for small entities² by, among other things:

- Expanding the extent to which the rule making process must include evaluation of the impact of proposed rules (and rule changes) on small entities;³

¹ Pub. L. No. 104-121, 110 Stat. 857 (codified in scattered sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. § 601) (1996).

² The definition of "small entity" under SBREFA is the same as the definition of "small entity" under the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* ("Reg. Flex. Act"). SBREFA § 221(1). The Reg. Flex. Act defines "small entity" to include "small business." Pursuant to the Reg. Flex. Act, 5 U.S.C. § 601(3), the Commission has adopted appropriate definitions of "small business" for purposes of the Reg. Flex. Act. See *infra* n.10.

³ 5 U.S.C. §§ 603(a), 604, and 605(b), codifying SBREFA §§ 241 and 243.

- Expanding the rights of action for small businesses to seek judicial review of rules impacting small entities;⁴
- Requiring agencies to establish small entity penalty reduction or waiver policies;⁵ and
- Directing agencies to expand their efforts to provide formal and informal guidance to small entities.⁶

In this release, the Commission announces a small entity penalty-reduction policy ("Penalty-Reduction Policy" or "Policy") as mandated by SBREFA and solicits comment on the Policy.

SBREFA provides a general standard for penalty-reduction policies:

Each agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section to provide for the reduction, and, under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.⁷

A statement entered into the Congressional Record after enactment of SBREFA explains that agencies have "flexibility to tailor their specific programs to their missions and charters" and instructs agencies "to develop the boundaries of their program and the specific circumstances for providing for a waiver or reduction of penalties."⁸ To that end, SBREFA specifies that a penalty-reduction policy adopted by an agency may be subject to the requirements or limitations of other applicable statutes. SBREFA also lists six possible exclusions or conditions that an agency may incorporate in its policy.⁹

The Commission has reviewed the current requirements of the federal securities laws, its current practice in

assessing penalties on small entities, and the appropriate conditions and exclusions for a penalty-reduction policy for small entities that violate the federal securities laws. On the basis of that review, the Commission announces its Penalty-Reduction Policy for small entities. Although the Commission's informal practice has been to consider some or all of the factors contained in the policy in its penalty analysis for all entities, in accord with the mandates of SBREFA, the Commission sets forth in this release a formal policy specifically for small entities that embodies these factors. The Commission also invites comments on this Policy.

I. Penalty-Reduction Policy

A. Text of Policy

The text of the policy follows:

The Commission's policy with respect to whether to reduce or assess civil money penalties against a small entity is:

(a) The Commission will consider on a case-by-case basis whether to reduce or not assess civil money penalties against a small entity. In determining whether to reduce or not assess penalties against a specific small entity, the following considerations will apply:

(1) Except as provided in paragraph (a)(3) below, penalty reduction will not be available for any small entity if:

(i) The small entity was subject previously to an enforcement action;

(ii) Any of the small entity's violations involved willful or criminal conduct; or

(iii) The small entity did not make a good faith effort to comply with the law.

(2) In considering whether the Commission will reduce or refrain from assessing a civil money penalty, the Commission may consider:

(i) The egregiousness of the violations;

(ii) The isolated or repeated nature of the violations;

(iii) The violator's state of mind when committing the violations;

(iv) The violator's history (if any) of legal or regulatory violations;

(v) The extent to which the violator cooperated during the investigation;

(vi) Whether the violator has engaged in subsequent remedial efforts to mitigate the effects of the violation and to prevent future violations;

(vii) The degree to which a penalty will deter the violator or others from committing future violations; and

(viii) Any other relevant fact.

(3) The Commission also may consider whether to reduce or not assess a civil money penalty against a small entity, including a small entity otherwise excluded from this policy under paragraphs (a)(1)(i)-(iii) above, if the small entity can demonstrate to the Commission's satisfaction that it is financially unable to pay the penalty, immediately or over a reasonable period of time, in whole or in part.

(4) For purposes of this policy, an entity qualifies as "small" if it is a small business

or small organization as defined by Commission rules adopted for the purpose of compliance with the Regulatory Flexibility Act.¹⁰ An entity not included in these definitions will be considered "small" for purposes of this policy if it meets the total asset amount that applies to issuers as set forth in Rule 157(a) of the Securities Act of 1933.¹¹

(b) The foregoing policy does not create a right or remedy for any person. This policy shall not apply to any remedy that may be sought by the Commission other than civil money penalties, whether or not such other remedy may be characterized as penal or remedial.

B. Penalties Eligible for Reduction

The Policy will apply only to civil money penalties. It will not apply to any remedy that the Commission may seek other than civil money penalties, whether or not such other remedy may be characterized as penal or remedial.¹² SBREFA provides that an agency may consider an entity's "ability to pay," and requires agencies to report to Congress on the "total amount of penalty reductions." The Commission interprets these statements to refer to civil money penalties. Committee statements that were included in the Congressional Record after enactment of SBREFA also support limiting penalty reduction policies to civil money penalties.¹³ Moreover, an Environmental Protection Agency ("EPA") policy cited

¹⁰ Pursuant to the Reg. Flex. Act, 5 U.S.C.

§ 601(3), the Commission has adopted appropriate definitions of "small business" for purposes of the Reg. Flex. Act. Based on an analysis of the language and legislative history of the Reg. Flex. Act, Congress does not appear to have intended that Act to apply to natural persons (as opposed to individual proprietorships) or to foreign entities. The Commission understands that staff at the Small Business Administration (SBA) have taken the same position. Telephone conversation with Gregory J. Dean, Jr., Assistant Chief Counsel for Finance and Programs, SBA Office of Advocacy (Mar. 13, 1997). See 17 CFR 270.0-10, 275.0-7, 240.0-10, 230.157, 250.110, and 260.0-7. The Commission recently proposed amendments to certain of these definitions. *Definitions of "Small Business" or "Small Organization" Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933*, Securities Act Rel. No. 7383, 62 FR 4106 (Jan. 28, 1997). The Commission extended the comment period for the proposed amendments to April 30, 1997, 62 FR 13356 (Mar. 20, 1997).

¹¹ At present, this threshold is \$5 million. Thus, non-regulated entities, such as general partnerships, privately held corporations or professional service organizations, with assets of \$5 million or less may qualify for penalty-reduction.

¹² See *Johnson v. SEC*, 87 F.3d 484 (D.C. Cir. 1996) (six-month suspension from supervisory positions at broker-dealers constitutes a penalty for the purposes of 28 U.S.C. § 2462).

¹³ "Small Business Regulatory Enforcement Fairness Act: Views of the House Committees of Jurisdiction on the Congressional Intent Regarding the 'Small Business Regulatory Enforcement Fairness Act of 1996,'" 142 Cong. Rec. E572 (daily ed. Apr. 19, 1996); 142 Cong. Rec. at S3244.

⁴ 5 U.S.C. § 611, codifying SBREFA § 242.

⁵ SBREFA § 223.

⁶ SBREFA §§ 212, 213, 214 (codified at 15 U.S.C. § 648(c)(3)), and 215. In a companion release, the Commission is adopting an informal guidance program as required by SBREFA. *Informal Guidance Program for Small Entities*, Securities Act Rel. No. 33-7407 (Mar. 27, 1997). The Commission previously, on January 28, 1997, adopted small entity compliance guides as required by SBREFA. Securities Act Rel. No. 7342, 62 FR 4104 (Jan. 28, 1997) (codified at 17 CFR 202.8).

⁷ SBREFA § 223(a). SBREFA also establishes that "[i]n any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against such small entity." *Id.* § 213(a).

⁸ "Small Business Regulatory Enforcement Fairness Act—Joint Managers Statement of Legislative History and Congressional Intent," 142 Cong. Rec. S3244 (daily ed. Mar. 29, 1996).

⁹ SBREFA § 223(b).

in the statements as an example of an appropriate policy is limited to civil money penalties.¹⁴

C. Other Relevant Statutes

The Policy is consistent with the statutory provisions in the Securities Enforcement Remedies and Penny Stock Act of 1990,¹⁵ the Insider Trading Sanctions Act of 1984,¹⁶ and other statutes¹⁷ that grant the Commission the authority to impose civil money penalties for a broad range of violations of the federal securities laws.¹⁸ These Acts give the Commission flexibility to tailor sanctions and recommend factors that guide the Commission's discretion in imposing money penalties. Although each decision is based on fact-specific circumstances, with respect to each violator the Commission presently may consider: (1) the violator's financial ability to pay a penalty; (2) whether the violator is a repeat offender; (3) cooperation provided during the investigation; (4) subsequent remedial efforts; (5) whether the violation was willful; (6) the degree to which a penalty will deter future violations; and (7) any other relevant fact.¹⁹

D. Exclusions From and Conditions to the Penalty-Reduction Policy

Section 223(b) of SBREFA lists six possible exclusions or conditions that agencies may incorporate in their penalty-reduction policies, some of which are similar to those factors the Commission may consider when fashioning a penalty under the statutes described above. For the reasons discussed below, the Commission incorporates in the Policy three of the suggested exclusions, which are

contained in paragraph (a)(1) of the Policy, but does not incorporate the other three.

1. Multiple Enforcement Actions

SBREFA permits an agency to exclude from its policy small entities that have been subject to multiple enforcement actions. The Commission historically has made a similar determination under Section 21B(c) of the Exchange Act when considering whether a penalty is in the public interest.²⁰ The Commission believes it is appropriate to deny access to the Penalty-Reduction Policy to small entities against which the Commission previously has filed an action. Therefore, the Policy contains this exclusion.

2. Willful or Criminal Conduct

SBREFA permits an agency to exclude from its policy a small entity whose violation involves willful or criminal conduct. Thomas J. Bliley, Jr., Chairman of the House Commerce Committee, explained in a statement entered into the Congressional Record after enactment of SBREFA that:

We will not tolerate, and this bill does not create, any free pass for financial fraud. Specifically, Section 323(b)(4) of the bill expressly excludes "violations involving willful or criminal conduct" from the small business enforcement variance. In the context of the federal securities laws, I understand "willful" to have the longstanding judicial construction as expressed in, for example, *Tager v. Securities and Exchange Commission*, 344 F.2d 5, 7 (2d. Cir. 1965).²¹

Consistent with Chairman Bliley's statement, the Policy is not available to small entities if their violations involve willful or criminal conduct.

3. Good Faith Compliance

SBREFA permits an agency to require that a small entity has made a good faith effort to comply with the law in order for the small entity to avail itself of the penalty reduction policy. The Policy contains this exclusion. Under the Policy, a small entity may qualify for penalty reduction only if the Commission has not alleged that its actions were undertaken in bad faith and if the entity proffers evidence satisfactory to the Commission that it made a "good faith" effort to comply with the securities laws.

4. Reasonable Correction Period

SBREFA permits an agency to condition the availability of penalty

reduction on a small entity's correction of a violation within a reasonable time period. If a small entity violates the securities laws, the violation cannot be "undone." Rather, the Commission's enforcement program focuses on stopping current violative conduct or preventing future conduct through the use of injunctions and temporary restraining orders, and by recovering ill-gotten gains in the form of disgorgement or by requiring undertakings to improve compliance procedures at firms. The Office of Compliance Inspections and Examinations ("OCIE") issues deficiency letters to regulated entities found to have weaknesses in their compliance systems and or to have violated applicable rules and regulations. Depending on the nature of violations found, however, even if an entity corrects the violations, OCIE may make an enforcement referral in an effort to deter future violations by the entity. Because enforcement action is initiated when a violation is particularly egregious, or when an entity has failed to correct adequately its violations, penalty reduction for correcting a violation that is the basis of an enforcement action would send the wrong message to regulated entities. Consequently, the Commission is not including this condition in the Policy.

5. Compliance Assistance Program

SBREFA also permits an agency to apply penalty reduction to violations discovered through an entity's participation in a compliance assistance or audit program operated or supported by the agency or a state.²² Specifically, some agencies, for example the Occupational Safety and Health Administration and EPA, have offices that will audit, and pass judgment on, a regulated entity's compliance program. SBREFA suggests that agencies could consider applying their penalty reduction policies to small entity violations found in the course of such a compliance audit. Although various divisions within the Commission provide regulatory guidance, the Commission does not operate a formal "compliance assistance or audit program."²³ Rather than specify how every regulated entity should structure its compliance program, the Commission sets standards and then relies on the ability of each regulated entity, and when applicable its self-regulatory organization, to determine how best to implement its compliance

¹⁴ See EPA, *Policy on Compliance Incentives for Small Business*, 61 FR 27984 (June 3, 1996).

¹⁵ Pub. L. 101-429, 104 Stat. 931 (1990) (codified in scattered sections of 15 U.S.C.) ("Remedies Act").

¹⁶ Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified in scattered sections of 15 U.S.C.) ("Insider Trading Act").

¹⁷ See, e.g., Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified in scattered sections of 15 U.S.C.).

¹⁸ See section 20(d)(2) of the Securities Act of 1933 (civil actions) (15 U.S.C. 77t(d)(2)); sections 21(d)(3) (civil actions), 21A (insider trading actions), and 21B (administrative proceedings) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. §§ 78u(d)(3), 78u-1, and 78u-2); sections 203(i)(2) (administrative proceedings) and 209(e) (civil actions) of the Investment Advisers Act of 1940 (15 U.S.C. §§ 80b-3(i)(2) and 80b-9(e)); and sections 9(d) (administrative proceedings) and 42(e) (civil actions) of the Investment Company Act of 1940 (15 U.S.C. §§ 80a-9(d) and 80a-41(e)).

¹⁹ See, e.g., section 21B(c)(1)-(6) of the Exchange Act (15 U.S.C. § 78u-2(c)(1)-(6)); see also *SEC v. Brumfield et al.*, SEC Lit. Rel. No. 14,956 (June 20, 1996) (penalty not imposed in light of respondent's cooperation).

²⁰ Under this section, the Commission will consider whether the entity previously violated the federal or state securities laws or rules.

²¹ "Contract with America Advancement Act of 1996," Speech of Hon. Thomas J. Bliley, Jr., 142 Cong. Rec. E591-92 (daily ed. Apr. 19, 1996).

²² SBREFA § 223(b)(2).

²³ Inspections and examinations by OCIE do not constitute formal compliance assistance or audit programs.

program, based on the nature of its business. Because the Commission does not have a compliance program of the type described in SBREFA, this condition is not in the Policy. Notably, however, as a general matter, the Commission does take into consideration compliance efforts and gives appropriate weight to the existence of effective compliance procedures both in making prosecutorial decisions regarding bringing charges and in determining sanctions or penalties.

6. Health, Safety or Environmental Threats

Finally, SBREFA mentions excluding from a penalty reduction policy those violations "that pose serious health, safety or environmental threats." The Commission does not regulate health, safety or environmental entities. Therefore, this exclusion is not in the Policy.

E. Elements the Commission May Consider When Assessing Whether to Reduce or Not Assess Penalties

Consistent with the Commission's practice and the statutes which enable the Commission to assess money penalties, paragraph (a)(2) of the Policy identifies eight elements the Commission may consider when determining whether to reduce or not assess a civil money penalty against a small entity. Although derived from considerations the Commission already applies when determining whether, and the level at which, to apply penalties,²⁴ the Policy gives the Commission discretion to consider any or all of these in any case where the Policy may apply.

F. Ability to Pay

SBREFA permits an agency to consider ability to pay in determining penalty assessments on small entities.²⁵ Since passage of the Remedies Act in 1990, the Commission has complied with the spirit of SBREFA, considering an entity's ability to pay before setting a penalty amount. Generally, the Commission seeks money penalties in an amount that, after careful examination of financial information provided by the violator, the Commission determines the violator is able to pay. When analyzing appropriate sanctions in a particular case, the Commission typically will direct its staff to examine an entity's ability to pay disgorgement first; if the entity has the ability to pay a penalty after paying disgorgement, the Commission will

demand an appropriate penalty amount based on the entity's ability to pay.²⁶

Consistent with this practice, paragraph (a)(3) of the Policy makes penalty-reduction available to small entities that may otherwise be excluded under paragraph (a)(1). A small entity must demonstrate to the Commission's satisfaction that it is unable financially to pay a penalty before the Commission will consider whether penalty-reduction is warranted. The Policy establishes that the Commission, in its sole discretion, may consider the eight factors in paragraph (a)(2) of the Policy as well as reviewing evidence presented by the small entity requesting penalty-reduction, such as sworn financial statements, to determine whether reduction is warranted in a particular case. The small entity must demonstrate to the Commission's satisfaction that it presently is unable financially to pay the penalty, in whole or in part, and that it will be unable to pay the penalty, in whole or in part, over a reasonable period of time.

II. Regulatory Requirements

The Commission is announcing a Penalty Reduction Policy as required by SBREFA. As a general statement of policy, the Administrative Procedure Act ("APA") does not require that the Commission publish the Policy for notice and comment.²⁷ The Commission wishes, however, to provide interested parties, particularly small entities, an opportunity to comment on the Policy. The Commission intends to revisit the Policy when a reasonable period has passed after the end of the comment period. In its re-evaluation, the Commission will consider its experience administering the Policy and comments the Commission receives.

List of Subjects in 17 CFR Part 202

Administrative practice and procedure.

Text of Amendment

In accordance with the foregoing, 17 CFR, Chapter II, is amended as follows:

PART 202—INFORMAL AND OTHER PROCEDURES

1. The authority citation for Part 202 is amended by adding the following citation to read as follows:

²⁶ In accordance with section 21B(d) of the Exchange Act, for example, the staff considers an entity's "ability to continue in business and the collectability of a penalty, taking into account any other claims of the United States or third parties upon such person's assets and the amount of such person's assets."

²⁷ 5 U.S.C. § 553(a)(3)(A).

Authority: 15 U.S.C. 77s, 77t, 78d-1, 78u, 78w, 78ll(d), 79r, 79t, 77sss, 77uuu, 80a-37, 80a-41, 80b-9, and 80b-11, unless otherwise noted.

* * * * *

Section 202.9 is also issued under section 223, 110 Stat. 859 (Mar. 29, 1996).

2. Section 202.9 is added to read as follows:

§ 202.9 Small entity enforcement penalty reduction policy.

The Commission's policy with respect to whether to reduce or assess civil money penalties against a small entity is:

(a) The Commission will consider on a case-by-case basis whether to reduce or not assess civil money penalties against a small entity. In determining whether to reduce or not assess penalties against a specific small entity, the following considerations will apply:

(1) Except as provided in paragraph (a)(3) of this section, penalty reduction will not be available for any small entity if:

- (i) The small entity was subject previously to an enforcement action;
 - (ii) Any of the small entity's violations involved willful or criminal conduct; or
 - (iii) The small entity did not make a good faith effort to comply with the law.
- (2) In considering whether the Commission will reduce or refrain from assessing a civil money penalty, the Commission may consider:
- (i) The egregiousness of the violations;
 - (ii) The isolated or repeated nature of the violations;
 - (iii) The violator's state of mind when committing the violations;
 - (iv) The violator's history (if any) of legal or regulatory violations;
 - (v) The extent to which the violator cooperated during the investigation;
 - (vi) Whether the violator has engaged in subsequent remedial efforts to mitigate the effects of the violation and to prevent future violations;
 - (vii) The degree to which a penalty will deter the violator or others from committing future violations; and
 - (viii) Any other relevant fact.

(3) The Commission also may consider whether to reduce or not assess a civil money penalty against a small entity, including a small entity otherwise excluded from this policy under paragraphs (a)(1) (i)-(iii) of this section, if the small entity can demonstrate to the Commission's satisfaction that it is financially unable to pay the penalty, immediately or over a reasonable period of time, in whole or in part.

(4) For purposes of this policy, an entity qualifies as "small" if it is a small

²⁴ See *supra* n.19 and accompanying text.

²⁵ See SBREFA § 223(a).

business or small organization as defined by Commission rules adopted for the purpose of compliance with the Regulatory Flexibility Act.¹ An entity not included in these definitions will be considered "small" for purposes of this policy if it meets the total asset amount that applies to issuers as set forth in § 230.157a of this chapter.²

(b) This policy does not create a right or remedy for any person. This policy shall not apply to any remedy that may be sought by the Commission other than civil money penalties, whether or not such other remedy may be characterized as penal or remedial.

Dated: March 27, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-8360 Filed 4-3-97; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Mobile, AL 97-005]

RIN 2115-AA97

Safety Zone Regulations: Pelican Passage Dauphin Island, AL

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule.

SUMMARY: The Coast Guard is establishing a safety zone for Pelican Passage extending ½ mile south and ¾ mile east and west of Dauphin Island Pier, Dauphin Island, Alabama.

¹ Pursuant to the Reg. Flex. Act, 5 U.S.C. § 601(3), the Commission has adopted appropriate definitions of "small business" for purposes of the Reg. Flex. Act. See 17 CFR 270.0-10, 275.0-7, 240.0-10, 230.157, 250.110, and 260.0-7. The Commission recently proposed amendments to certain of these definitions. *Definitions of "Small Business" or "Small Organization" Under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Exchange Act of 1934, and the Securities Act of 1933*, Securities Act Rel. No. 7383, 62 FR 4106 (Jan. 28, 1997). The Commission extended the comment period for the proposed amendments to April 30, 1997, 62 FR 13356 (Mar. 20, 1997). Based on an analysis of the language and legislative history of the Reg. Flex. Act, Congress does not appear to have intended that Act to apply to natural persons (as opposed to individual proprietorships) or to foreign entities. The Commission understands that staff at the Small Business Administration have taken the same position.

² At present, this threshold is \$5 million. Thus, non-regulated entities, such as general partnerships, privately held corporations or professional service organizations, with assets of \$5 million or less may qualify for penalty-reduction.

The zone is needed to protect personnel and property associated with the Dauphin Island Spring Festival Acrobatic airshow, Dauphin Island, Alabama. Entry into this zone is prohibited unless authorized by the Captain of the Port.

DATES: This regulation is effective from 3 p.m. to 4 p.m. on April 5, 1997.

FOR FURTHER INFORMATION CONTACT:

LTJG H. Elena McCullough, (334) 441-5286, 150 North Royal Street, Mobile, AL 36652-2924.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rule making was not published for this regulation and good cause exists for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to prevent damage to the vessels involved.

Background and Purpose

The event requiring this regulation will begin at 3 p.m. on April 5, 1997. The Town of Dauphin Island will be sponsoring an airshow, with low level acrobatics, in the Pelican Passage extending ½ mile south and ¾ mile east and west of Dauphin Island Pier, Dauphin Island, Alabama, bounded by the previously listed coordinates. The airshow will terminate at 4 p.m. on April 5, 1997. This regulation is issued pursuant to 33 U.S.C. 1231 as set out in the authority citation for all of Part 165. The safety zone is bounded by 30-15N, 088-08.2W; 30-14N, 088-08.2W; 30-13.5N, 088-06.5N; and 30-14.5N, 088-06.5W.

Regulatory Evaluation

This temporary rule is not a significant regulatory evaluation under Executive Order 12866 and is not significant under the "Department of Transportation Regulatory Policies and Procedures" (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full regulatory evaluation is unnecessary. This regulation will only be in effect for a short period of time, and the impacts on routine navigation are expected to be minimal.

Collection of Information

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

Federalism

The Coast Guard has analyzed this rule under the principles and criteria

contained in Executive Order 12612 and has determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this proposal and concluded that under section 2.B.2. of Commandant Instruction M16475.1 (series), this proposal is categorically excluded from further environmental documentation. A Categorical Exclusion Determination is available by contacting Commander (mps), Eight Coast Guard District, 501 Magazine Street, New Orleans, LA 70130-3396.

List of Subjects in 33 CFR Part 165

Marine safety, Waterways.

Regulation

For the reasons set out in the preamble, 33 CFR 165 is amended as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. Section 165.T08-009 is added to read as follows:

§ 165.T08.009 Safety Zone: Pelican Passage, Dauphin Island, AL.

(a) Location. The following area is a safety zone: Pelican Passage extending ½ mile south and ¾ mile east and west of Dauphin Island Pier, Dauphin Island, Alabama. The zone is needed to protect personnel and property associated with the Town of Dauphin Island will be sponsoring an airshow, with low level acrobatics.

(b) Effective date: This section is effective from 3 p.m. to 4 p.m. on April 5, 1997, unless terminated sooner by the Captain of the Port.

(c) Regulations: In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port.

Dated: March 14, 1997.

S.E. Hartley,

Commander, U.S. Coast Guard, Captain of the Port, Acting.

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