

**Fiduciary Status Revisited & Revised:
Proposed Fiduciary Definition Regulations -- What's Changed Since 1975**

Presented to
Employee Benefits Committee, Oakland county Bar Association
March 14, 2011
- Larry Schiller -

- I. Definition of Fiduciary
 - A. Statutory definition reasonably broad—"investment advice" was only one part
 - B. Regs issued in 1975 – only as to "investment advice"
 - 1. Not investment advice when valuing employer securities for purchase by an ESOP (AO 76-65A)
 - C. Regs more suited to plans where advice was to a fiduciary
 - D. 5-part test:
 - 1. Render advice re: value of, investing in or purchasing/selling securities/property
 - 2. On a regular basis
 - 3. Pursuant to agreement or understanding with plan or fiduciary
 - 4. Advice will serve as primary basis of decisions
 - 5. Advice is individualized based on plan needs
 - E. DOL took position that advice to participant covered by reg: IB 96-1 (investment education)
 - 1. But, not a fiduciary as a result of recommending plan distribution, even if advice also related to investment of that distribution (AO 2005-23A)
 - 2. Proposed regs' preamble asked for comments about this issue
- II. Proposed reg (10/22/10 – comment period expired 1/20/2011) – to further eliminate conflicts
 - A. Description of Advice
 - 1. Includes appraisals (thus superseding AO 76-65A), e.g. including real estate
 - 2. Management of securities – includes advice re: exercising rights (e.g., proxies)
 - 3. Specifically addresses advice to participants
 - 4. Covers those who acknowledge they are fiduciaries
 - B. Conditions
 - 1. Does not cover sellers of investments, if the recipient of the advice knows or should know that the advice is given by a seller with an adverse interest who is not intending to give impartial advice (unless there is acknowledgement of fiduciary status)
 - 2. Does not cover investment education (under IB 96-1)
 - 3. Making available platform selections, if there is acknowledgement that the advice is not intended to be impartial
 - 4. Preparing reports or statements that reflect value of investment provided to comply with reporting/disclosure requirements, unless there is no recognized market and the report will serve as a basis of valuing participant distributions

- (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.
- (9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.
- (10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Northern Mariana Islands, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

- (11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.
- (12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

- (13) The term "Secretary" means the Secretary of Labor.
- (14) The term "party in interest" means, as to an employee benefit plan—
 - (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;
 - (B) a person providing services to such plan;
 - (C) an employer any of whose employees are covered by such plan;
 - (D) an employee organization any of whose members are covered by such plan;
 - (E) an owner, direct or indirect, of 50 percent or more of—
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,
 - (ii) the capital interest or the profits interest of a partnership, or
 - (iii) the beneficial interest of a trust or unincorporated enterprise,
 which is an employer or an employee organization described in subparagraph (C) or (D);
 - (F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);
 - (G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—
 - (i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,
 - (ii) the capital interest or profits interest of such partnership, or
 - (iii) the beneficial interest of such trust or estate,
 is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);
 - (H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or
 - (I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the owners (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 is permitted to make payments under section 402(a)(4) shall be treated as a party in interest with respect to such trust.

- (15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.
- (16) (A) The term "administrator" means—
 - (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
 - (ii) if an administrator is not so designated, the plan sponsor; or
 - (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.
- (B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employer or one or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 6 of the Securities Exchange Act of 1933 or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203(a)(3).

(20) The term "security" has the same meaning as such term has under section 2(1) of the Securities Act of 1933 (15 U.S.C. 77b(1)).

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

& Regulations

(1) whether the individual is entitled to benefits under the plan, or

(2) the amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2)(i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual—

(A) is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if—

(A) the entire benefit rights of the individual—

(1) are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(2) a contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) the individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3)(i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term "year of service" shall have the same meaning as in section 203(b)(2)(A) of the Act and any regulations issued under the Act and the term "one-year break in service" shall have the same meaning as in section 203(b)(3)(A) of the Act and any regulations issued under the Act.

[¶ 14,138]

§ 2510.3-21 Definition of "Fiduciary". (a) [Reserved]

(b) [Reserved]

(c) *Investment advice.* (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—

(A) has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or

(B) renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

(2) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect

to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act, with respect to an employee benefit plan solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify (A) the security to be purchased or sold, (B) a price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1, et seq.), a price which is determined in accordance with Rule 22c-1 under the Investment Company Act of 1940 (17 CFR 270.22c-1), (C) a time span during which such security may be purchased or sold (not to exceed five business days), and (D) the minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment

Regulations

Reg. § 2510.3-37 was adopted by FR Doc. 75-30032 under "Title 29—Labor; C) Labor; Part 2510—Definitions of Terms used in Subchapters C, D, E, F and G of this November 7, 1975, filed November 6, 1975, and effective November 6, 1975 (40 FR 5 13, 1987, and amended by 51 FR 47226, December 31, 1986. Reg. § 2510.3-102 was amended August 7, 1996, effective February 3, 1997. Reg. § 2510.3-102 was further amended 24, 1997, published in the *Federal Register* on November 25, 1997, and effective on April 9, 2003 (68 FR 17471). Reg. § 2510.3-38 was added on August 24, 2004 (69 FR 5:

[¶ 14,139]

§ 2510.3-37 **Multiemployer plan.** (a) *General.* Section 3(37) of the Act contains in subparagraph (a)(i)-(iv) a number of criteria which an employee benefit plan must meet in order to be a multiemployer plan under the Act. Section 3(37) also provides that the Secretary may prescribe by regulation other requirements in addition to those contained in subparagraph (a)(i)-(iv). The purpose of this regulation is to establish such requirements.

(b) *Plans in existence before the effective date.* (1) A plan in existence before September 2, 1974, will be considered a multiemployer plan if it satisfies the requirements of section 3(37)(A)(i)-(iv) of the Act.

(2) For purposes of this section, a plan is considered to be in existence if:

(i)(A) The plan was reduced to writing and adopted by the participating employers and the employee organization (including, in the case of a corporate employer, formal approval by an employer's board of directors or shareholders, if required), even though no amounts had been contributed under the plan, and

(B) The plan has not been terminated; or

No. 4 of 1978, 43 FR 47713, 3 CFR, 1978 Comp., p. 332 and E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275, and 29 U.S.C. 1135 note. Section 2510.3-38 also issued under Sec. 1, Pub. L. 105-72, 111 Stat. 1457.

2. In § 2510.3-21, revise paragraph (c) to read as follows:

§ 2510.3-21 Definition of "Fiduciary."

* * * * *

(c) *Investment advice for a fee.* (1) *General.* Except as provided in paragraph (c)(2) of this section, a person renders "investment advice" for a fee or other compensation, direct or indirect, to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, if:

(i) Such person—

(A)(1) Provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property,

(2) Makes recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property, or

(3) Provides advice or makes recommendations as to the management of securities or other property,

(B) To a plan, a plan fiduciary or a plan participant or beneficiary;

(ii) Such person either directly or indirectly (e.g., through or together with any affiliate)—

(A) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to providing advice or making recommendations described in paragraph (c)(1)(i) of this section;

(B) Is a fiduciary with respect to the plan within the meaning of section 3(21)(A)(i) or (iii) of the Act;

(C) Is an investment adviser within the meaning of section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(11)); or

(D) Provides advice or makes recommendations described in paragraph (c)(1)(i) of this section pursuant to an agreement, arrangement or understanding, written or otherwise, between such person and the plan, a plan fiduciary, or a plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets, and will be individualized to the needs of the plan, a plan fiduciary, or a participant or beneficiary.

(2) *Limitations.* (i) For purposes of this paragraph (c), a person shall not be considered to be a person described in paragraph (c)(1) of this section with respect to the provision of advice or recommendations if, with respect to a

person other than a person described in paragraph (c)(1)(ii)(A), such person can demonstrate that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.

(ii) For purposes of this paragraph (c), the following acts in connection with an individual account plan (as defined in section 3(34) of the Act) shall not, in and of themselves, be treated as the rendering of investment advice for purposes of section 3(21)(A)(ii):

(A) Provision of investment education information and materials within the meaning of 29 CFR 2509.96-1(d);

(B) Marketing or making available (e.g., through a platform or similar mechanism), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property from which a plan fiduciary may designate investment alternatives into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person making available such investments discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice;

(C) In connection with the activities described in paragraph (c)(2)(ii)(B), the provision of general financial information and data to assist a plan fiduciary's selection or monitoring of such securities or other property as plan investment alternatives, if the person providing such information or data discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice.

(iii) For purposes of paragraph (c)(1)(i) of this section, the term "advice, or appraisal or fairness opinion" shall not include the preparation of a general report or statement that merely reflects the value of an investment of a plan or a participant or beneficiary, provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder, unless such report involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries.

(3) *Fee or other compensation.* For purposes of this paragraph (c) and section 3(21)(A)(ii) of the Act, a fee or other compensation, direct or indirect, received by a person for rendering investment advice means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or compensation includes, for example, brokerage, mutual fund sales, and insurance sales commissions. It includes fees and commissions based on multiple transactions involving different parties.

(4) *Internal Revenue Code.* Section 4975(e)(3)(B) of the Internal Revenue Code of 1986 (Code) contains provisions parallel to section 3(21)(A)(ii) of the Act which define the term "fiduciary" for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 214 (2000 ed.) transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 3(21)(A)(ii) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3)(B) of the Code. Furthermore, the provisions of this paragraph (c) shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

(5) A person who is a fiduciary with respect to a plan by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term "party in interest" (as set forth in section 3(14)(B) of the Act) with respect to any assets of the plan.

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Signed at Washington, DC, this 13th day of October 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Part 334

Pamlico Sound and Adjacent Waters, NC; Danger Zones for Marine Corps Operations

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to amend its regulations to establish one new danger zone in Pamlico Sound near Marine Corps Air Station Cherry Point, North Carolina. Establishment of this danger zone will enable the Marine Corps to control access and movement of persons, vessels, and objects within the danger zone during live fire training exercises.

DATES: Written comments must be received by November 22, 2010.

ADDRESSES: You may submit comments, identified by docket number COE-2010-0037, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: david.b.olson@usace.army.mil. Include the docket number COE-2010-0037 in the subject line of the message.

Mail: U.S. Army Corps of Engineers, Attn: CECW-CO (David B. Olson), 441 G Street, NW., Washington, DC 20314-1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2010-0037. All comments received will be included in the public docket without change and

may be made available on-line at <http://regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202-761-4922 or Richard K. Spencer, U.S. Army Corps of Engineers, Wilmington District, at 910-251-4172.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in Section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and Chapter XIX of the Army Appropriations Act of 1919 (40 Stat. 892; 33 U.S.C. 3), the Corps proposes to amend the regulations in 33 CFR part 334 by adding § 334.420 (b)(1)(v) to establish an Intermittent Danger Zone abutting the existing 1.8 mile Danger Zone [as described in § 334.420(b)(1)(i)] in the Pamlico Sound

and adjacent waters in Carteret County, North Carolina. The public is currently restricted from accessing the existing 1.8 mile radius circular area and has limited access to three additional 0.5 mile radius circular danger zones described at §§ 334.420(b)(1)(ii), (iii), and (iv), but has unrestricted access to the surrounding waters. To better protect the public from potentially hazardous conditions during scheduled live fire training, Marine Corps Air Station Cherry Point has requested that the Corps establish the Intermittent Danger Zone that will enable the Marine Corps to ensure security and safety for the public.

The current military training mission requires enhanced public safety and protection of vessels that operate in the vicinity of the Bombing Target-11 range. This proposed amendment to the current danger zone regulation at 33 CFR 334.420 includes the addition of a danger zone in Pamlico Sound that abuts the existing 1.8 mile radius danger zone and extends out to 2.5 miles from the common center point. Establishment of this additional danger zone will allow the Marine Corps to minimize the public safety hazard resulting from the increased use of .50 caliber weapons firing from rotary-wing aircraft and small boats during training exercises at Bombing Target-11 Range. The new danger zone will optimize public safety and military training, and protect any vessels that operate in the vicinity of Bombing Target-11 Range.

Procedural Requirements

a. *Review Under Executive Order 12866.* This proposed rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

b. *Review Under the Regulatory Flexibility Act.* This proposed rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96-354) which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (i.e., small businesses and small governments). The Corps has determined that revising this proposed rule would have practically no economic impact on the public, or result in no anticipated navigational hazard or interference with existing waterway traffic. This proposed rule will have no significant economic impact on small entities.

c. *Review Under the National Environmental Policy Act.* The Corps expects that the proposed rule will not have a significant impact to the quality of the human environment and,