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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

15 CFR Part 270

[Docket No. 030421094-4155-02]

RIN 0693-AB53

Procedures for Implementation of the National Construction Safety Team Act

AGENCY: National Institute of Standards and Technology, United States Department of Commerce.

ACTION: Final rule.

SUMMARY: The Director of the National Institute of Standards and Technology ("NIST"), Technology Administration, United States Department of Commerce ("Director"), issues a final rule that amends regulations found at 15 CFR part 270, that implements the National Construction Safety Team Act ("Act"). An interim final rule with a request for public comments clarifying NIST's role in recommending improvements to building codes, standards, and practices, and clarifying the relationship between investigations conducted under the Act and criminal investigations of the same building failure, and establishing procedures regarding the establishment and deployment of National Construction Safety Teams and for the conduct of investigations under the Act was published in the **Federal Register** on November 28, 2003. This final rule responds to comments received in response to the November 28, 2003 document.

DATES: This rule is effective on July 16, 2004.

FOR FURTHER INFORMATION CONTACT: Dr. James E. Hill, Acting Director, Building and Fire Research Laboratory, National Institute of Standards and Technology, Mail Stop 8600, Gaithersburg, MD 20899-8600, telephone number (301) 975-6850.

SUPPLEMENTARY INFORMATION:

Background

The National Construction Safety Team Act, Public Law 107-231, was enacted to provide for the establishment of investigative teams ("Teams") to assess building performance and

emergency response and evacuation procedures in the wake of any building failure that has resulted in substantial loss of life or that posed significant potential of substantial loss of life. The purpose of investigations by Teams is to improve the safety and structural integrity of buildings in the United States. A Team will (1) establish the likely technical cause or causes of the building failure; (2) evaluate the technical aspects of evacuation and emergency response procedures; (3) recommend, as necessary, specific improvements to building standards, codes, and practices based on the findings made pursuant to (1) and (2); and recommend any research and other appropriate actions needed to improve the structural safety of buildings, and improve evacuation and emergency response procedures, based on the findings of the investigation. Section 2(c)(1) of the Act requires that the Director develop procedures for certain activities to be carried out under the Act as follows: Regarding conflicts of interest related to service on a Team; defining the circumstances under which the Director will establish and deploy a Team; prescribing the appropriate size of Teams; guiding the disclosure of information under section 7 of the Act; guiding the conduct of investigations under the Act; identifying and prescribing appropriate conditions for provision by the Director of additional resources and services Teams may need; ensuring that investigations under the Act do not impede and are coordinated with any search and rescue efforts being undertaken at the site of the building failure; providing for regular briefings of the public on the status of the investigative proceedings and findings; guiding the Teams in moving and preserving evidence; providing for coordination with Federal, State, and local entities that may sponsor research or investigations of building failures; and regarding other issues.

NIST published an interim final rule with a request for public comments in the **Federal Register** on January 30, 2003 (68 FR 4693), seeking public comment on general provisions regarding implementation of the Act and on provisions establishing procedures for the collection and preservation of evidence obtained and the protection of information created as part of investigations conducted pursuant to the Act, including guiding the disclosure of information under section 7 of the Act (§§ 270.350, 270.351, and 270.352) and guiding the Teams in moving and preserving evidence (§ 270.330). These general

provisions and procedures, comprising Subparts A and D of the rule, are necessary to the conduct of the investigation of the World Trade Center disaster, already underway, and became effective immediately upon publication. The comment period closed on March 3, 2003. On May 7, 2003, NIST published a final rule in the **Federal Register** (68 FR 24343), addressing the comments received.

NIST published an interim final rule with a request for public comments in the **Federal Register** on November 28, 2003 (68 FR 66073), seeking public comment on amendments to § 270.1, Description of rule; purpose, applicability, of the final rule to clarify NIST's role in recommending improvements to building codes, standards, and practices and to clarify the relationship between investigations conducted under the Act and criminal investigations of the same building failure; an amendment to the definition of *Credentials*, contained in § 270.2, to clarify that credentials are issued by the Director and to better define the term; and an amendment to § 270.313, Requests for Evidence, to clarify that collections of evidence under that section are investigatory in nature and are not research. NIST also sought public comment on procedures set forth in the interim final rule regarding conflicts of interest related to service on a Team (§ 270.106); defining the circumstances under which the Director will establish and deploy a Team (§ 270.102); prescribing the appropriate size of Teams (§ 270.104); guiding the conduct of investigations under the Act (§ 270.200); identifying and prescribing appropriate conditions for provision by the Director of additional resources and services Teams may need (§ 270.204); ensuring that investigations under the Act do not impede and are coordinated with any search and rescue efforts being undertaken at the site of the building failure (§ 270.202); providing for regular briefings of the public on the status of the investigative proceedings and findings (§ 270.206); providing for coordination with Federal, State, and local entities that may sponsor research or investigations of building failures (§ 270.203); and regarding other issues.

The comment period closed on December 29, 2003.

Summary of Public Comments Received by NIST in Response to the November 28, 2003, Interim Final Rule, and NIST's Response to Those Comments

NIST received ten responses to the request for comments. One response was from a private, not-for-profit organization that develops model

building codes. Two responses were from industry associations. One response was from an association of local building officials, and one response was from an association of state building officials. One response was from a local government agency. One response was from the NCST Federal Advisory Committee, and three responses were from individual members of that committee. A detailed analysis of the comments follows.

General Comments

Comment: One commenter expressed the view that it is important to the future of the public's health, welfare and life safety that the Act be adequately funded by Congress at the earliest time possible.

Response: This comment is outside the scope of this rulemaking.

Comment: One commenter recommended that the regulations provide for the establishment of a directory of pre-approved and credentialed individuals that are available to act as Team members.

Response: NIST intends to establish such a list under its internal procedures.

Comment: One commenter recommended deleting the word "technical" from the causes of building failure and from the aspects of evacuation and emergency response procedures in § 270.100(b) because it limits the work of Teams.

Response: The Act requires NIST to assess the technical causes of building failures. Specifically, section 2(b)(2)(A) and (B) of the Act state that a Team shall establish the likely technical cause or causes of the building failure and that a Team shall evaluate the technical aspects of evacuation and emergency response procedures.

Comment: One commenter recommended that NIST revise the first sentence of § 270.1(b)(1) by expanding the stated purpose of investigations by Teams to include improving "the safety of building occupants and emergency egress and response measures."

Response: NIST has revised § 270.1(b)(1) by adding language contained in the preamble to the Act. The preamble states that the purpose of the Act is "to provide for the establishment of investigative teams to assess building performance and emergency response and evacuation procedures in the wake of any building failure that has resulted in substantial loss of life or that posed significant potential of substantial loss of life."

Comments Regarding Criteria for the Establishment and Deployment of Teams

Comment: One commenter recommended that NIST develop and include language that specifically describes situations that will result in investigation by a Team and that the language should be similar, in detail and description, to that currently used by the National Transportation Safety Board ("NTSB").

Response: The Act authorizes the Director to establish a Team for deployment "after events causing the failure of a building or buildings that has resulted in substantial loss of life or that posed significant potential for substantial loss of life." The variety of "events" that could cause building failures yielding such results is extremely broad. In addition, the same type of "event" might in some circumstances cause a building failure yielding such results and in other circumstances might not cause a building failure or might cause a building failure that does not result in substantial loss of life or pose significant potential for substantial loss of life. The broad nature of this authority requires broad discretion for the Director in determining whether a particular event results in a situation that is within the scope of the Act. In addition, NIST has reviewed the NTSB criteria and finds that the criteria set forth in § 270.102 are similar in detail and description to that currently used by the NTSB.

Comment: One commenter recommended that NIST work cooperatively with the construction industry and with the building and fire regulatory communities to define the terms in the Act "substantial loss of life or a potential for substantial loss of life."

Response: The Director's decision to establish a Team after an event that caused the failure of a building or buildings that resulted in substantial loss of life or posed significant potential for substantial loss of life will require consideration of the entire context of the building failure, the event that caused it, the likelihood that an investigation will likely result in significant and new knowledge or recommendations for building code revision, and the factors identified in § 270.102(b). Not defining "substantial loss of life or a potential for substantial loss of life" leaves the Director with the broad discretion needed to make this determination.

Comment: Two commenters recommended changing the wording of § 270.100(a) to indicate that historically,

in the United States, building failures from fires, earthquakes, hurricanes, tornadoes, and other disasters that have resulted in a substantial loss of life or that posed significant potential for substantial loss of life have occurred several times per year, rather than less than once per year.

Response: NIST has revised § 270.100(a) to state that NIST expects that the Director will establish and deploy a Team to conduct an investigation at a frequency of approximately once per year or less based on prior NIST experience.

Comment: One commenter stated that § 270.100(b) requires an editorial correction as follows: "Teams established under the Act and this part will investigate these", change "these" to "the".

Response: NIST disagrees. In § 270.100(b), "these" refers back to the building systems described in the previous sentence, the failure of which could be a technical cause of a building failure.

Comment: One commenter recommended that the wording in § 270.102(a)(1)(ii) be changed to read: "a fire that resulted in a building failure of the building of origin and/or spreads beyond the building of origin."

Response: NIST has revised the referenced section to read "a fire that resulted in a building failure of the building of origin and/or spread beyond the building of origin."

Comment: One commenter stated that the Federal Response Plan cited in § 270.102(a)(1)(iv) had been revised and renamed the National Response Plan. The commenter recommended that NIST revise that section to reflect this change.

Response: NIST has changed the reference in § 270.102(a)(1)(iv) to read "National Response Plan."

Comment: One commenter recommended deleting paragraph 270.102(b)(4) because it is highly unlikely that an NCST investigation would substantially duplicate local or state capabilities, and replacing it with "Whether an investigation is likely to result in relevant knowledge for mitigation of the building failure."

Response: NIST disagrees. NIST will retain the original language of paragraph 270.102(b)(4) to make clear that no matter how infrequently the situation occurs, in deciding whether to establish and deploy a Team, the Director will consider whether an NCST investigation would substantially duplicate a local or state investigation. NIST has revised § 270.102(a)(2) to address the importance of gaining relevant

knowledge for mitigation of building failures.

Comments Regarding the Size and Composition of a Team

Comment: Two commenters suggested adding structural and electrical engineering to the disciplines that may be represented on a Team as listed in § 270.104(b)(5).

Response: NIST agrees and has added these disciplines.

Comment: One commenter recommended adding Code administration and enforcement to the disciplines that may be represented on a Team as listed in § 270.104(b)(5).

Response: NIST disagrees. Code administration and enforcement are not disciplines that would participate in investigating the technical causes of a building failure. Rather, they are disciplines involved in the implementation of recommendations resulting from an investigation. If the expertise provided by these disciplines is needed in the course of an investigation, NIST may engage appropriate representatives as contractors or consultants to the Team, but it is unlikely that they would be Team members.

Comment: One commenter suggested that Teams involve the local building official in the investigation and draw on the resources of the local building department during investigations.

Response: Section 6(3) of the Act states that in order to support Teams in carrying out the Act, the Director may “confer with employees and request the services, records, and facilities of State and local governmental authorities.” When appropriate, local building officials may be requested to serve on or support Teams in their investigations. If a local building department possesses evidence necessary to an NCST investigation, it may voluntarily submit such information to NIST pursuant to 15 CFR 270.312.

Comments Regarding the Duties of a Team

Comment: One commenter recommended that § 270.105(b)(3) be revised to include that in addition to recommending, as necessary, specific improvements to building standards, codes and practices based on its findings, a Team be required to provide the supporting rationale for each recommendation.

Response: Supporting rationale for a Team’s recommendations will be included in its report as required by section 8 of the Act and § 270.205(a) of the regulations.

Comment: One commenter requested that NIST change the word “Cooperate” in § 270.105(c)(6) to “Not impede” to describe a Team’s interaction with State and local authorities carrying out any activities related to a Team’s investigation.

Response: Section 4(c)(4) of the Act requires a Team to cooperate with State and local authorities carrying out any activities related to a Team’s investigation.

Comment: One commenter requested that NIST remove from § 270.105(d)(4) the authority to move, or to further articulate the nature of the “records” to be moved as a result of the investigation. The commenter questioned whether this authority includes the official records of the jurisdiction.

Response: No change has been made in response to this comment. The authority to move such records is granted by section 4(a)(4) of the Act. The Act limits this authority by stating that it is to be carried out “as provided by the procedures developed under section 2(c)(1).” The procedures for collection and preservation of evidence are set forth in subpart D of the regulations.

Comments Regarding the Conduct of Investigations

Comment: One commenter asked that NIST add an additional task to the list of tasks that may be completed during an investigation. The commenter requested that NIST add a new paragraph 270.200(c)(2)(xii): “Review best practices in codes adoption and administration to determine the extent to which the circumstances that led to this building failure have statewide, regional or national implications.”

Response: NIST agrees that this is a task that might be completed during an investigation that proceeds beyond preliminary reconnaissance. Rather than adding a new task, NIST has incorporated this task into the task described in § 270.200(c)(2)(ix) by revising that section to read: “Analyze the relevant building practices, including code adoption and enforcement practices, to determine the extent to which the circumstances that led to this building failure have regional or national implications.”

Comment: One commenter recommended that NIST revise § 270.200(c)(2)(iv) to require that the Team make a determination whether the building was constructed in accordance with the adopted code, determine what code was in force when the building was approved for construction and identify any renovations, repairs,

additions, etc. that were made during the life of the building and how those were addressed with respect to the adopted code at the time they were made.

Response: A Team may determine what code or codes were in force when the building was designed and approved for construction, and identify any renovations, repairs, additions, etc. that were made during the life of the building and the relevant code provisions that were in force when such work was done. However, determining whether a building was built in accordance or complied with code requirements is a code enforcement authority and is not part of the statutory authority granted to NIST under the Act. As a result of its investigation, a Team will recommend any changes to current building standards, codes, and practices that would improve the safety and structural integrity of buildings in the United States.

Comment: One commenter recommended that NIST provide additional guidance in § 270.200(c)(2)(v) on how a Team should identify the most probable technical cause when no computer model is available to address a particular issue.

Response: The tasks listed in § 270.200(c)(2) are examples of tasks that Teams might need to perform in conducting an investigation. None of the tasks is required in any investigation, and it is not possible to provide a complete list of every task that a Team might need to perform to complete its investigation. If no computer model is available, a Team will do what is necessary to reconstruct the event and identify the most probable technical cause of the building failure without a computer model.

Comment: One commenter recommended that § 270(c)(2)(x) be revised from “Identify specific areas in building and fire codes, standards, and building practices that may warrant revisions based on investigation findings.” To “identification of specific criteria in building and fire codes and standards and practices—with an understanding that building and fire are broad and include mechanical, electrical, e.g., all codes that warrant revisions, proposed changes to those documents and development of supporting rationale.”

Response: The specific criteria differ from code to code. A Team cannot address every change to every code in the United States that may result from a Team’s general recommendation for an improvement to building codes. Each jurisdiction or industry will be responsible for adopting changes to the

specific criteria contained in its codes, standards, and practices that warrant change based on a Team's recommendation.

Comments Regarding the Priority of Investigations and the Coordination of Investigations With Search and Rescue Efforts and With Federal, State, and Local Entities

Comment: One commenter asked that NIST clarify that a Team would have priority over civil litigants.

Response: No change has been made in response to this comment. The Act does not provide NIST with authority for Teams to take priority over civil litigants.

Comment: One commenter stated that, contrary to the wording of § 270.202, FEMA does not have local offices. The commenter suggested that NIST revise the reference in § 270.202 to read: "including FEMA urban search and rescue teams, local emergency management agencies, and local emergency response groups."

Response: NIST has made this change.

Comment: One commenter hoped that the NIST teams will realize that search and rescue efforts and recovery efforts will be the top priorities of local officials and that the NIST team should perform their investigation in such a manner that they will not impede the efforts of local officials.

Response: NIST recognizes that search and rescue efforts and recovery efforts are the top priorities following a building disaster. Section 4(c)(1) of the Act and § 270.202 state that NIST will coordinate its investigation with such efforts.

Comment: One commenter stated that notification of the establishment and deployment of a Team by publication in the **Federal Register** is too slow a process. The commenter recommended that NIST should notify the jurisdiction's chief building code enforcement and fire official, as well as neighboring local jurisdictions, of such actions directly by phone or e-mail to establish a positive working relationship and to expedite a cooperative working environment.

Response: NIST agrees. As required by section 2(a) of the Act and implemented by § 270.103 of the regulations, the Director will promptly publish in the **Federal Register** notice of the establishment of each Team. In addition, NIST will promptly notify appropriate authorities having jurisdiction over a building failure site. NIST also is in the process of contacting and establishing relationships with state and local authorities with whom Teams conducting an investigation may have to

coordinate. With the help of other Federal agencies, NIST is developing a list of the appropriate contacts in each jurisdiction for the purpose of immediate notification of the establishment and deployment of a Team.

Comment: One commenter recommended that NIST develop details and a formal protocol document to spell out and facilitate cooperation with state and local authorities in carrying out activities related to a Team's investigation.

Response: NIST agrees. Section 270.203 sets forth NIST's intent to enter into Memoranda of Understanding with Federal, State, and local entities, as appropriate, to ensure the coordination of investigations.

Comments Regarding Reports

Comment: One commenter recommended that language be added to § 270.205 to clarify the intended recipients of Team reports. The commenter recommended that the primary recipients be organizations which are private sector voluntary consensus standards writing organizations operating under approved guidelines of the American National Standards Institute (ANSI).

Response: All final Team reports will be made publicly available and will be posted on the NIST Web site. NIST encourages standards organizations to access the reports. NIST cannot take on the burden of identifying all appropriate recipients of each Team's final report.

Comment: One commenter urged NIST to take care in framing and briefing the press on recommendations from investigations so as to take into consideration the potential impact on the construction industry, government, leasing of buildings, and the public.

Response: NIST agrees and will do so, taking into account public safety and welfare.

Comment: One commenter recommended that the reporting of "any recommended specific improvements to building standards, codes, and practices," required by § 270.205(a)(3) include specific code changes with supporting rationale.

Response: Section 2(b)(2)(C) of the Act and § 270.105(b)(3) of the regulations state that a Team will recommend, as necessary, specific improvements to building standards, codes, and practices based on its findings. It is the responsibility of appropriate standards and codes organizations and authorities to consider adoption of a Team's recommendations and to develop specific code change proposals and

language. Section 9(2) of the Act authorizes NIST to promote (consistent with existing procedures for the establishment of building standards, codes, and practices) the appropriate adoption of its recommendations by the Federal Government and encourage the appropriate adoption of those recommendations by other agencies and organizations. Reports will include the supporting rationale for any recommendations made.

Additional Information

Executive Order 12866

This rule has been determined not to be significant under section 3(f) of Executive Order 12866.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Administrative Procedure Act

Prior notice and an opportunity for public comment are not required for this rule of agency organization, procedure, or practice. 5 U.S.C. 553(b)(A).

Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. As such, a regulatory flexibility analysis is not required, and none has been prepared.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to, nor shall any person be subject to penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

There are no collections of information involved in this rulemaking.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

List of Subjects in 15 CFR Part 270

Administrative practice and procedure; buildings and facilities; disaster assistance; evidence; investigations; National Institute of

Standards and Technology; science and technology; subpoena.

Dated: June 8, 2004.

Hratch G. Semerjian,
Acting Director.

■ For the reasons set forth in the preamble, title 15 of the Code of Federal Regulations is amended as follows:

PART 270—NATIONAL CONSTRUCTION SAFETY TEAMS

■ 1. The authority citation for part 270 continues to read as follows:

Authority: Pub. L. 107–231, 116 Stat. 1471 (15 U.S.C. 7301 *et seq.*).

■ 2. Section 270.1 is amended by revising the first sentence of paragraph (b)(1) to read as follows:

§ 270.1 Description of rule; purpose; applicability.

(b)(1) The purpose of the Act is to provide for the establishment of investigative teams to assess building performance and emergency response and evacuation procedures in the wake of any building failure that has resulted in substantial loss of life or that posed significant potential of substantial loss of life. * * *

■ 3. Section 270.100 is amended by revising paragraph (a) to read as follows:

§ 270.100 General.

(a) Based on prior NIST experience, NIST expects that the Director will establish and deploy a Team to conduct an investigation at a frequency of approximately once per year or less.

■ 4. Section 270.102 is amended by revising paragraphs (a)(1)(ii), (a)(1)(iv), and (a)(2) to read as follows:

§ 270.102 Conditions for establishment and deployment of a Team.

- (a) * * *
 - (1) * * *
 - (ii) A fire that resulted in a building failure of the building of origin and/or spread beyond the building of origin.
 - (iv) An act of terrorism or other event resulting in a Presidential declaration of disaster and activation of the National Response Plan; and
 - (2) A fact-finding investigation of the building performance and emergency response and evacuation procedures will likely result in significant and new knowledge or building code revision recommendations needed to reduce or mitigate public risk and economic losses from future building failures.

■ 5. Section 270.104 is amended by revising paragraph (b)(5) to read as follows:

§ 270.104 Size and composition of a Team.

(b) * * *
(5) Teams may include members who are experts in one or more of the following disciplines: civil, structural, mechanical, electrical, fire, forensic, safety, architectural, and materials engineering, and specialists in emergency response, human behavior, and evacuation.

■ 6. Section 270.200 is amended by revising paragraph (c)(2)(ix) to read as follows:

§ 270.200 Technical conduct of investigation.

(c) * * *
(2) * * *
(ix) Analyze the relevant building practices, including code adoption and enforcement practices, to determine the extent to which the circumstances that led to this building failure have regional or national implications.

■ 7. Section 270.202 is amended by revising the first sentence to read as follows:

§ 270.202 Coordination with search and rescue efforts.

NIST will coordinate its investigation with any search and rescue or search and recovery efforts being undertaken at the site of the building failure, including FEMA urban search and rescue teams, local emergency management agencies, and local emergency response groups. * * *

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9131]

RIN 1545–BB47

Administrative Simplification of Section 481(a) Adjustment Periods in Various Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains amendments to regulations under

sections 263A and 448 of the Internal Revenue Code. The amendments apply to taxpayers changing a method of accounting under the regulations and are necessary to conform the rules governing those changes to the rules provided in general guidance issued by the IRS for changing a method of accounting. Specifically, the amendments will allow taxpayers changing their method of accounting under the regulations to take any adjustment under section 481(a) resulting from the change into account over the same number of taxable years that is provided in the general guidance.

DATES: *Effective Date:* These regulations are effective on or after June 16, 2004.

FOR FURTHER INFORMATION CONTACT: Christian Wood, 202–622–4930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 12, 2003, the IRS and Treasury published in the **Federal Register** (68 FR 25310) proposed amendments to the regulations (REG–142605–02) under sections 263A and 448 of the Internal Revenue Code (Code). These amendments pertain to the period for taking into account the adjustment required under section 481 to prevent duplications or omissions of amounts resulting from a change in method of accounting under section 263A or 448. Neither public comments in response to the proposed regulations nor any request to speak at a public hearing were received. The proposed regulations under sections 263A and 448 are adopted as revised by this Treasury decision.

The proposed regulations provided that they are applicable to taxable years ending on or after the date those regulations are published as final regulations. However, the proposed regulations allowed taxpayers to rely on them for taxable years ending on or after May 12, 2003, by filing a Form 3115, “Application for Change in Accounting Method,” in the time and manner provided in the regulations (in the case of a change in method of accounting under section 448) or applicable administrative procedure (in the case of a change in method of accounting under section 263A) for such a taxable year that reflects a section 481 adjustment period that is consistent with the proposed regulations. Taxpayers may continue to rely on the proposed regulations for taxable years ending on or after May 12, 2003, but ending before June 16, 2004.