securities of the U.S. registrant or its subsidiary. In such instances the Commission stated that the other accounting firm would be held to be not independent only if the securities of the U.S. registrant or its subsidiary are owned by partners of the other accounting firm who are located in the office which makes the examination of the division or subsidiary or who are otherwise engaged in such examination. The interpretation in ASR No. 112 related exclusively to the ownership of securities and did not extend to any other relationship proscribed by Rule 2–01 of Regulation S–X; however, as discussed below, the Commission now believes it is appropriate to expand its interpretations with respect to foreign entities and accountants to include bookkeeping services.

After considering the arguments noted above and in view of the Commission's efforts to recognize increasing complexities in the area multinational operations, the Commission has determined not to raise questions of independence solely because a foreign office of or a foreign firm associated with a domestic accounting firm performs limited, routine or ministerial bookkeeping services for a foreign division, subsidiary or investee of a domestic registrant which is a client of that firm. The Commission, however, believes that such services should be performed only in certain circumstances and that a limit must be established for such services.

The independent accountant should not be engaged to perform such services unless it is impractical to make other arrangements. The Commission believes that such bookkeeping services should be performed only in situations where the foreign entity is not material to the consolidated financial statements and where the entity does not have employees capable or competent to perform the services.

The Commission believes that a comparison of the fees for the bookkeeping services and the audit should provide a fair test for determining the significance of the work to the registrant and the accountant and, indirectly, the possible effect on the firm's independence. Therefore, the limitation to be placed on such service can be based on the relationship of the fee charged for the service to the total audit fee charged to the registrant. Total fees for bookkeeping services for all foreign entities should not exceed one percent of the total audit fee for the registrant. A $1,000 cut-off for de minimis amounts is also appropriate, thus allowing small amounts of bookkeeping work to be performed for all of a registrant's foreign operations combined even when the total audit fee is not particularly large.

It should be pointed out that in areas where these services are rendered they must be consistent with the local professional ethics rules. Therefore, an informed observer in the foreign location would have no cause to question the fact or appearance of independence of the auditor.

The Commission indicated in ASR No. 81 that the accountant should contact the staff in any case where doubt exists. A letter outlining all the pertinent facts of the situation should be directed to the Office of the Chief Accountant. In general, this has proved a satisfactory method for administering the Commission's responsibility in the area of accountants' independence.

IV. Staff Accounting Bulletin No. 39

Subpart B—Staff Accounting Bulletins

Staff Accounting Bulletin No. 39 is no longer pertinent.

By the Commission.

Shirley E. Hollis,

Assistant Secretary.

April 10, 1981.

[FR Doc. 81–11742 Filed 4–17–81; 8:45 am]

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17 CFR Part 241

[Release No. 34–17719]

Interpretative Release Relating to Going Private Transactions Under Rule 13e–3

AGENCY: Securities and Exchange Commission.

ACTION: Publication of staff interpretations.

SUMMARY: The Securities and Exchange Commission today authorized the issuance of this release reflecting the views of the Division of Corporation Finance on various questions regarding the rule and related schedule governing going private transactions by public companies or their affiliates. The purpose of this release is to provide guidance to the public and thereby assist issuers and their affiliates in complying with Rule 13e–3.

FOR FURTHER INFORMATION CONTACT: Joseph G. Connolly, Jr. (202) 272–3097 or David B. Myatt (202) 272–2707, Office of Tender Offers, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549 with respect to specific questions concerning the subject matter of this release or the operation of Rule 13e–3 in general.

SUPPLEMENTARY INFORMATION: On August 2, 1979, the Commission issued Release No. 34–16075 (44 FR 46736) which announced the adoption of new Rule 13e–3 [17 CFR 240.13e–3] and related Schedule 13E–3 [17 CFR 240.13e–100] under the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78a et seq. (1976 and Supp. III 1979)] applicable to certain transactions by issuers or their affiliates which would result in one or more classes of equity securities of the issuer no longer having the attributes of public ownership (so-called "going private" transactions). The Rule prohibits fraudulent, deceptive or manipulative acts or practices and, with the Schedule, prescribes filing, disclosure and dissemination requirements in connection with going private transactions

In light of the continued occurrence of going private transactions,[1] the nature of those transactions and the need for investor protection with respect to those transactions, the Commission believes that the views expressed in the releases which proposed and adopted Rule 13e–3 are sound and therefore specifically affirms those views.[2] The nature of and methods utilized in effecting going private transactions present an opportunity for overreaching of unaffiliated security holders by an issuer or its affiliates. This is due, in part, to the lack of arm's-length bargaining and the inability of unaffiliated security holders to influence corporate decisions to enter into such transactions. Additionally, such transactions have a coercive effect in that security holders confronted by a going private transaction are faced with the prospects of an illiquid market, termination of the protections under the federal securities laws and further efforts by the proponent to eliminate their equity interest. Because of the potential for harm to security holders, particularly small investors, and the need for full and timely disclosure, the Commission continues to believe that Rule 13e–3 is necessary and appropriate for the public interest and the protection of investors.

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[1] From September 7, 1979, the effective date of the rule, through April 3, 1981, there have been 215 filings with the Commission on Schedule 13E–3, the Rule 13e–3 transaction statement. The term "Rule 13e–3 transaction" is defined in paragraph (a)(4) of the Rule, discussed in Part II of this Release. Absent an applicable exception (*see* Part IV of this release), a transaction which falls within that defintion is subject to the requirements of the Rule.

[2] Release Nos. 34–14185 (November 17, 1977) (42 FR 60090) and 34–16075.

Since 1979, the Commission's Division of Corporation Finance (the "Division") has responded both formally and informally to numerous requests for interpretive advice regarding various provisions of the Rule and the Schedule. Although the Commission's experience in administering the Rule and Schedule has generally been favorable, the staff has encountered certain issues regarding the scope of application of the Rule and the operation of the filing, disclosure and dissemination requirements thereunder. The Commission has authorized the publication of this release to provide to the general public more comprehensive guidance with respect to such issues.

Part I of this release provides a brief discussion of the background of Rule 13e–3, the reasons for its adoption and its basic structure. Parts II through V set forth, in question and answer format, certain staff positions relating to the Rule and Schedule. The positions set forth herein relate principally to the kinds of transactions which are subject to the Rule; the persons subject to the filing, discloure and dissemination requirements of the Rule; the scope of the Rule 13e–3 exceptions; and the nature and timing of the Schedule 13E–3 disclosure requirements. Where appropriate, the Rule provision or Schedule item being interpreted is briefly quoted or summarized prior to the question or series of questions relating thereto.[3]

Also, the Commission is today publishing for comment proposed amendments to Rule 13e–3 which would clarify certain provisions of the Rule and codify staff positions with respect to certain of the exceptions from the Rule.[4] These proposed amendments are referred to in the responses to Questions 1, 8, 10, 11 and 14, *infra*.

I. Background and Basic Structure of Rule 13e–3

The adoption of Rule 13e–3 and related Schedule 13E–3 was the culmination of a rulemaking proceeding that began in 1974.[5] The Commission believed that it was necessary and appropriate in the public interest and for the protection of investors to adopt Rule 13e–3 and Schedule 13E–3 because of the continued occurrence of going private transactions, the variety of methods employed in such transactions and the deleterious effects that such transactions pose to investors absent full and adequate disclosure.

The Commission believed that the involvement of an individual investor in a going private transaction may not only result in a loss of confidence in the particular issuer concerned in the transaction but a loss of confidence in the securities markets as well. Because a going private transaction is undertaken either solely by the issuer or by the issuer and one or more of its affiliates[6] standing on both sides of the transaction,[7] the terms of the transaction, including the consideration received and other effects upon unaffiliated security holders, may be designed to accommodate the interests of the affiliated parties rather than determined as a result of arm's-length negotiations. Further, the timing of the transaction is within the control of the issuer or its affiliate, who may choose a period of depressed market prices to propose the transaction, resulting in a loss to the unaffiliated security holders.

Additionally, such transactions may have a coercive effect. Although several types of going private transactions may require a vote of security holders, this requirement frequently proves to be a mere formality since the affiliates of the issuer may already hold the requisite percentage of securities for approval. In other types of transactions there may be no requirement (other than that imposed by the Rule) that information concerning the transaction be disseminated to security holders prior to the consummation of the transaction. In an involuntary transaction, a security holder may be forced out of his equity interest or be faced with the prospect of an illiquid market for his securities, reduction or termination of the protection available under the federal securities laws, and further efforts by the issuer or affiliate to eliminate his equity interest. Because of the potential for overreaching by issuers and their affiliates in going private transactions, the consequent harm to security holders, particularly small investors, and for adverse effects upon the confidence of investors in the securities markets, the Commission believed that rulemaking action was necessary and appropriate with respect to such transactions by public companies or their affiliates.[8]

The application of Rule 13e–3 depends on three factors:

(1) whether the transaction involved is a Rule 13e–3 transaction;

(2) if so, whether an exception from the application of the Rule is available; and

(3) if no exception is available, whether the equity securities which are the subject of the Rule 13e–3 transaction are of a class which is registered pursuant to Section 12 of the Exchange Act or are of a class as to which an issuer is required to file periodic reports pursuant to Section 15(d) of that Act.

The first two of these factors have been the subject of a substantial majority of the interpretive issues which have arisen in connection with the operation of the Rule. These factors are discussed in detail in Parts II and IV of this release.

The third factor, the status under the Exchange Act of the issuer or the class of equity securities of the issuer, relates to the determination of which of the requirements of the Rule are applicable to the issuer or affiliate engaging in the Rule 13e–3 transaction. The definition of a Rule 13e–3 transaction encompasses both transactions involving securities registered under Section 12 of the Exchange Act and transactions involving securities as to which the

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[3] *See* Release No. 34–16075, 44 FR at 46737–40, for an overview of the application of the Rule, the filing, disclosure and dissemination provisions thereof, and the Schedule 13E–3 disclosure requirements. Additionally, Rule 13e–3(a) provides that all terms which are not defined therein but which are used in the Rule or the Schedule shall, unless indicated otherwise or the context otherwise requires, have the same meaning as in the Exchange Act or elsewhere in the General Rules and Regulations thereunder. The interpretations in this Release should be considered in conjunction with Release No. 34–16075.

[4] *See* Release No. 34–17720 [April 13, 1981] [46 FR 22602].

[5] One of the specific inquiries in the Commission's Public Fact-Finding Investigation in the Matter of Beneficial Ownership, Takeovers and Acquisitions by Foreign and Domestic Persons was "whether the Commission should adopt a schedule of disclosure items pursuant to subsection 13(e) of the Exchange Act for issuers making tender offers for their own securities, including when issuers attempt to go private and cease reporting under the Exchange Act." *See* Release No. 34–11003 (September 9, 1974) (39 FR 33835, 33837). Based in part on the response to that inquiry, the Commission announced a Public Fact-Finding Investigation and Rulemaking Proceedings in the Matter of "Going Private" Transactions by Public Companies or Their Affiliates and published two proposed rules for regulating going private transactions. *See* Release No. 34–11231 (February 6, 1975) (40 FR 7947). In lieu of the public fact-finding investigation, the Commission published proposed Rule 13e–3 and proposed Schedule 13E–3. *See* Release No. 34–14185. For a more complete description of the rulemaking proceedings that led to the adoption of Rule 13e–3 and Schedule 13E–3, see Release No. 34–14185, 42 FR at 60092.

[6] Rule 13e–3(a)(1) defines an "affiliate" of an issuer as a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, such issuer. For the purposes of the Rule only, a person who is not an affiliate of an issuer at the commencement of such person's tender offer for a class of equity securites of such issuer will not be deemed an affiliate of such issuer prior to the stated termination of such tender offer and any extensions thereof. In determining the existence of an affiliation between the issuer (or its subsidiaries) and one or more of the other parties to the transaction, consideration must be given to the terms of the transaction, itself. *See* Release No. 34–16075, 44 FR at 46738.

[7] *See* Question 1, *infra*.

[8] For a more complete discussion of the reasons for Commission rulemaking in this area, *see* Release No. 34–14185, 42 FR at 60090–2.

issuer is required to report under Section 15(d) of that Act. However, the provisions of the Rule applicable to the two types of securities differ.

If the class of equity securities which is the subject of the Rule 13e–3 transaction is registered pursuant to Section 12 of the Act, Rule 13e–3(b) applies.[9] An issuer of securities so registered, or an affiliate of such an issuer, proposing to engage in a Rule 13e–3 transaction is required to comply with the antifraud provisions in addition to compliance with the filing, disclosure and dissemination requirements of paragraphs (d), (e) and (f) of Rule 13e–3, respectively. If the class of securities which is subject to the Rule 13e–3 transaction is one as to which the issuer is required to file periodic reports pursuant to Section 15(d) of the Exchange Act, Rule 13e–3(c) applies. Under paragraph (c), an issuer subject to Section 15(d), or an affiliate of such an issuer, proposing to engage in a Rule 13e–3 transaction is required to comply with the filing, disclosure and dissemination requirements of paragraphs (d), (e) and (f) of Rule 13e–3, respectively, but would not be subject to the antifraud provisions of Rule 13e–3(b).

Because Rule 13e–3 transactions may occur in a variety of forms, and may be subject to disclosure requirements pursuant to other applicable provisions of the federal securities laws, the Rule and Schedule do not prescribe a general disclosure format. For example, the disclosure document relating to a Rule 13e–3 transaction involving the registration of securities under the Securities Act of 1933 (the "Securities Act") may be prepared in accordance with the requirements of any of the forms for registration under that Act. However, General Instruction E to Schedule 13E–3 provides that the requirements of the Schedule are in addition to the requirements of any other form or schedule which may be filed with the Commission in connection with the Rule 13e–3 transaction and further provides that, to the extent that the disclosure requirements of the Rule and Schedule are inconsistent with the disclosure requirements of any such form or schedule, the requirements of Schedule 13E–3 are controlling.

Thus, as long as all requirements of the Rule and Schedule are met, any available format, including proxy statements prepared in accordance with rules under the Exchange Act and registration statements on forms such as Form S–7 [17 CFR 239.26] and Form S–15 [17 CFR 239.29] under the Securities Act, may be used. However, the Rule and Schedule do not substitute for, or give relief from, more stringent requirements of any other applicable provisions. For example, while Item 14 of Schedule 13E–3 requires audited financial statements of the issuer for its two most recent fiscal years, Item 15 of Schedule 14A [17 CFR 240.14a–101] under the Exchange Act requires such statements for the issuer's three most recent fiscal years. Accordingly, if a proxy solicitation subject to the disclosure requirements of Schedule 14A is also a Rule 13e–3 transaction, the three fiscal year requirement of Item 15 of Schedule 14A, rather than the two fiscal year requirement of Rule 13e–3, would apply.[10]

II. The Definition of a Rule 13e–3 Transaction

Critical to the application of the Rule is the meaning of a "Rule 13e–3 transaction." This term is defined in Rule 13e–3(a)(4). The definition consists of three elements: (1) an issuer or an affiliate of such issuer; (2) engaging in one or more of certain specified transactions [11]; (3) having a purpose or reasonable likelihood of resulting in one or more specified effects.[12] Since these elements are in the conjunctive, all must be present for the Rule to be applicable. Questions 1 through 4 pertain to this definition.

1. *Question:* Rule 13e–3(a)(4)(i)(C) relates to transactions involving the solicitation of proxies or the distribution of information statements in connection with, among other things, "a merger, consolidation * * * reorganization * * * or similar corporate transaction of an issuer or between an issuer (or its subsidiaries) and its affiliate * * *." Is the merger of an issuer with a non-affiliate encompassed by this provision?

Response: No. The Rule is intended to apply to a merger, consolidation or similar multi-party reorganization transaction of an issuer [13] only if an affiliate of the issuer is also a party to the transaction. Transactions between the issuer and a non-affiliate are ordinarily the product of arm's-length negotiations and therefore do not involve the potential for abuse and overreaching associated with the types of transactions intended to be covered by the Rule. In order to clarify the meaning of the Rule in this regard and to resolve any potential confusion regarding the language of Rule 13e–3(a)(4)(i)(C), the Commission is today proposing an amendment to the Rule which would make clear that such transactions are subject to the Rule only if the issuer (or one or more of its subsidiaries) and one or more affiliates of the issuer are parties to the transaction.[14]

2. *Question:* Is a short-form merger [15] subject to the Rule?

Response: Yes. The short-form merger provisions under state law ordinarily relate to a merger between an issuer and the holder of a specified, large percentage of the issuer's outstanding securities. The security holder into which the issuer is merged in such a transaction has a controlling interest in, and is therefore an affiliate of, the

[9] Rule 13e–3(b) is divided into two subparagraphs, the first of which defines fraudulent, deceptive or manipulative acts or practices in connection with a Rule 13e–3 transaction and the second of which prescribes means reasonably designed to prevent such acts and practices.

[10] *See* Question 16, *infra*.

[11] The specified transactions set forth in Rule 13e–3(a)(4)(i) are: (a) a purchase (as defined in Rule 13e–3(a)(3)) of any equity security by the issuer of such security or by an affiliate of such issuer; (b) a tender offer for or request or invitation for tenders of any equity security made by the issuer of such class of securities or by an affiliate of such issuer; or (c) a solicitation subject to Regulation 14A [17 CFR 240.14a–1 to 240.14a–103] of any proxy, consent or authorization of, or a distribution subject to Regulation 14C [17 CFR 240.14c–1 to 14c–101] of information statements to, any equity security holder by the issuer of the class of securities or by an affiliate of such issuer, in connection with: a merger, consolidation, reclassification, recapitalization, reorganization or similar corporate transaction of an issuer or between an issuer (or its subsidiaries) and its affiliate; a sale of substantially all the assets of an issuer to its affiliate or group of affiliates; or a reverse stock split of any class of equity securities of the issuer involving the purchase of fractional interests.

[12] The specified effects, set forth in Rule 13e–3(a)(4)(ii) are: (a) causing any class of equity securities which is subject to Section 12 or Section 15(d) of the Exchange Act to be held of record by less than 300 persons; or (b) causing any class of equity securities of the issuer which is either listed on a national securities exchange or authorized to be quoted in the inter-dealer quotation system of a registered national securities association to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association.

[13] Certain transactions involving only the issuer, such as reclassifications and recapitalizations, may be considered, for certain purposes, to be reorganizations. *See, e.g.*, Int. Rev. Code of 1954, §§ 368(a)(1)(E)–(F) (reorganization defined to include recapitalization or change in identity, form or place of organization). These types of single-party corporate reorganization transactions are specifically included within the scope of Rule 13e–3(a)(4)(i)(C). However, the Division does not believe that the inclusion of single-party corporate reorganizations within subparagraph (a)(4)(i)(C) will result in the application of the Rule to transactions which are not within its intended scope. For example, a simple change in place of incorporation may be a reorganization for tax purposes but would not constitute a Rule 13e–3 transaction because (1) it would not have either of the effects specified in paragraph (a)(4)(ii) of the Rule (*see* footnote 12, *supra*), or (2) the subparagraph (g)(2) exception (*see* Questions 9 through 11, *infra*) would be applicable.

[14] *See* Release No. 34–17720.

[15] *See* Release No. 34–16075, 44 FR 46739 and n.8.

issuer. Accordingly, this form of transaction presents the potential conflicts of interest and related problems to which the Rule is directed. Because a short-form merger may not require a vote of the issuer's unaffiliated security holders, a solicitation subject to Regulation 14A or a distribution subject to Regulation 14C would not be involved. Nevertheless, subparagraph (a)(4)(i)(A) of the Rule provides that the transactions covered by the Rule include a "purchase of any equity security by the issuer of such security or by an affiliate of such issuer," and the term "purchase," as defined in Rule 13e-3(a)(3), includes any acquisition pursuant to a merger. Thus, a short-form merger of an issuer into its affiliate, involving a class of securities of the issuer which is subject to Section 12 or Section 15(d) of the Exchange Act, is a Rule 13e-3 transaction and, absent an available exception,[16] is subject to the provisions of Rule 13e-3.

3. *Question:* Rule 13e-3(a)(4)(ii)(A) relates to transactions having a reasonable likelihood or a purpose of causing any class of equity securities which is subject to Section 12 or Section 15(d) of the Exchange Act to be held of record by fewer than 300 persons. Does this mean that a transaction having such effect may be a Rule 13e-3 transaction even though the issuer will continue to have one or more other classes of securities which are subject to Section 12 or Section 15(d) and held of record by at least 300 persons?

Response: Yes. The Exchange Act contemplates registration of classes of securities (and reporting of information in consequence thereof),[17] and Rule 13e-3 is designed to provide to holders of each class so registered information with respect to transactions that may have the effects described in the Rule. Although the issuer may continue to be subject to reporting and other obligations arising in respect of other classes of its securities, the Rule provides for holders of each class to receive the required information concerning a Rule 13e-3 transaction with respect to their class prior to the implementation of the Rule 13e-3 transaction.

4. *Question:* Rule 13e-3(a)(4) defines a "Rule 13e-3 transaction" to include "any transaction *or series of transactions* involving one or more of the transactions described in [Rule 13e-3(a)(4)(i)]" (emphasis added). When will a transaction of the type described in paragraph (a)(4)(i) which would not, if considered by itself, be a Rule 13e-3 transaction be deemed to be part of a series of transactions which, taken together, constitute a Rule 13e-3 transaction?

Response: The determination of when a transaction by an issuer or an affiliate will be deemed to be part of a series of transactions involving a Rule 13e-3 transaction must, of course, be based upon the particular facts and circumstances of each situtation. Generally speaking, however, a specific paragraph (a)(4)(i) transaction will be regarded as one step in a series of transactions which together constitute a Rule 13e-3 transaction if the specific transaction is effected by an issuer or an affiliate as a part, or in furtherance, of a series of actions which, taken together, have either a reasonable likelihood or a purpose of producing, directly or indirectly, any of the paragraph (a)(4)(ii) effects. Thus, a transaction effected with a view to increasing the probability of success or reducing the aggregate expense of, or otherwise facilitating, the result sought to be achieved would be a part of a series of transactions constituting a Rule 13e-3 transaction.[18]

In the absence of a purpose of producing or facilitating the production of any of the specified effects, the determination of whether a transaction or series of transactions is likely to produce any of such effects must take into account past, current and planned transactions by the issuer, its affiliates and others, as well as other factors which may contribute to the production of such effects. On this basis, a Rule 13e-3 transaction would be deemed to commence with the first transaction which occurs at or after the time when it becomes reasonably likely that any of the specified effects will occur and which directly or indirectly contributes to the production of such effects.

Illustration: X Corp. agrees to merge with its affiliate Y Corp. in a transaction in which Y Corp. common stockholders will receive cash in exchange for their common stock. After entering into this agreement but prior to the solicitation of proxies with respect to the merger, X Corp. purchases Y Corp. common stock in the open market for the purpose of reducing the cost of the acquisition and/or ensuring that a legally sufficient number of shares will be voted for the merger. The open market purchases would be a step in the Rule 13e-3 transaction since the purchases are in furtherance of the going private transaction.

III. Persons Subject to the Rule

Issuers and affiliates engaging in a Rule 13e-3 transaction for which no exception is available are subject to the filing, disclosure and dissemination requirements of paragraphs (d), (e) and (f) of the Rule and, if the class of securities involved is registered pursuant to Section 12 of the Exchange Act, are also subject to the antifraud provisions of paragraph (b) of the Rule. Interpretative questions 5 and 6, below, address issues which have arisen with respect to the determination of which persons are subject to the requirements of the Rule.

5. *Question:* To whom do the requirements of the Rule apply in the case of a Rule 13e-3 transaction in which both the issuer and its affiliate are engaged?

Response: The filing, disclosure and dissemination requirements of the Rule would apply to both the issuer and its affiliate when both are engaging in the Rule 13e-3 transaction. Generally speaking, Rule 13e-3 is designed to ensure that the holders of the class of securities which is the subject of the Rule 13e-3 transaction receive information from and regarding the issuer and each of its affiliates engaged in the transaction. Accordingly, it is important that the required disclosure and other provisions of the Rule be satisfied by each of such persons.

To avoid unnecessarily duplicative filings and disclosure, the Division will not object if, whenever two or more persons are subject to the requirements of Rule 13e-3 with respect to the same transaction or series of transactions, a joint Rule 13e-3 transaction statement is filed which includes in response to Item 17(d) of Schedule 13E-3 joint disclosure materials containing all of the information and exhibits required from each person subject to the Rule. Of course, each person on whose behalf the statement is filed is responsible for the timely filing of such statement and any amendments thereto. In addition, such statement should identify, and indicate that it is filed on behalf of, all such persons and be signed by each of them or include as an exhibit their signed, written agreement that such a statement is filed on behalf of each of them.

Illustration 1: X Corp. and its affiliate Y Corp. propose to engage in a long-form merger transaction in which the holders

[16] In certain situations, the subparagraph (g)(1) exception may be available for mergers to complete an acquisition by a person which was not an affiliate of the issuer prior to the first step in the acquisition. *See* Part IV of this release.

[17] In contrast, registration of companies would be required under the American Law Institute's proposed Federal Securities Code. *See* A.L.I. Fed. Sec. Code §§ 402 et seq. (Official Draft, May 19, 1978).

[18] *See* Question 15, *infra*, with respect to the Schedule 13E-3 filing and dissemination requirements applicable to multi-step transactions.

of X Corp. common stock (a class of securities registered pursuant to Section 12 of the Exchange Act), other than Y Corp., are to receive cash in exchange for their shares. In this situation, both X Corp. and Y Corp. will engage in a Rule 13e–3 transaction and both will therefore be subject to all the requirements of the Rule. X Corp. will engage in a solicitation subject to Regulation 14A, or a distribution subject to Regulation 14C, in connection with a merger with its affiliate Y Corp. (subparagraph (a)(4)(i)(C) of the Rule); Y Corp. will engage in a purchase of the equity securities of its affiliate X Corp. (subparagraphs (a)(4)(i)(A) and (a)(3)(ii) of the Rule).

Illustration 2: X Corp. is the subject of a cash tender offer for any or all outstanding shares of its common stock, a class of securities registered pursuant to Section 12 of the Exchange Act. The tender offer is made by Y Corp., the parent of X Corp. and the holder of sixty percent of the outstanding shares of X Corp. common stock. Unless an exception is applicable, Y Corp. must comply with the requirements of the Rule because it is engaging in a purchase of the registered equity securities of its affiliate (*see* Illustration 1, above) and such purchase may have a Rule 13e–3(a)(4)(ii) effect. X Corp., however, is not engaging in any transaction described in Rule 13e–3(a)(4)(i) and is therefore not subject to the Rule.

6. *Question:* Paragraphs (b) and (c) of Rule 13e–3 detail the application of the Rule to issuers, or affiliates thereof, which have a class of securities registered pursuant to Section 12 of the Exchange Act, or are closed-end investment companies registered under the Investment Company Act of 1940, and to issuers which are subject to Section 15(d) of the Exchange Act. Does the Rule apply to issuers which have been completely exempted from the provisions of Sections 12(g) or Section 15(d) pursuant to an order under Section 12(h) of the Exchange Act? [19]

Response: No. Rule 13e–3 would not apply to an issuer which has been completely exempted from Sections 12(g) or 15(d) pursuant to an order under Section 12(h) of the Act.[20] However, issuers should be aware that, in determining whether to exercise its delegated authority to grant applications under Section 12(h), the Division will consider any plans or proposals of the issuer or its affiliates regarding activities or transactions which would have either a reasonable likelihood or a purpose of causing, directly or indirectly, any class of equity securities of the issuer to be held of record by fewer than 300 persons. Accordingly, issuers making application under Section 12(h) for exemption from the provisions of Section 12(g) or 15(d) should include in their application a brief description of any such plans or proposals or a statement that there are no such plans or proposals.

IV. The Rule 13e–3 Exceptions

Although an issuer or affiliate may engage in a transaction or series of transactions which constitutes a Rule 13e–3 transaction, the filing, disclosure and dissemination requirements and the antifraud provisions of the Rule will not be applicable if the transaction or series of transactions is within the scope of one of the paragraph (g) exceptions.[21] Exceptions are provided for: (1) second-step, clean-up transactions within one year of a tender offer by a non-affiliate; (2) transactions in which security holders are offered or receive only an equity security meeting certain criteria; (3) transactions by a holding company registered under the Public Utility Holding Company Act of 1935; (4) redemptions, calls and similar purchases by an issuer pursuant to the instruments creating or governing the class of equity securities involved; and (5) certain solicitations by an issuer with respect to a plan of reorganization in bankruptcy proceedings.

Subparagraph (g)(1) of Rule 13e–3 excepts transactions by or on behalf of a person which occur within one year of the termination [22] of a tender offer in which such person was the bidder [23] and as a result of which such person became an affiliate [24] of the issuer. This exception is conditioned upon compliance with the equal consideration, disclosure and other requirements of Rule 13e–3(g)(1). The basis for the exception is that a tender offer and second-step, clean-up transaction which are structured to satisfy the conditions of the exception may be viewed as a single, integrated transaction by a non-affiliate to acquire the entire class of equity securities of the issuer on the same per share basis. The second step in such a transaction, if the specified conditions are met, does not present the potential for overreaching by an affiliate which Rule 13e–3 was designed to address, even though that second step may take the form of a transaction involving an affiliate which would otherwise be within the Rule. The disclosure requirements applicable to the tender offer which is the initial step in the transaction qualifying for the exception are set forth in subparagraphs (g)(1)(i)(A) and (g)(1)(ii)(A) of the Rule. These requirements differ with respect to tender offers made for any or all securities of a class as opposed to tender offers for less than all securities of a class. If the tender offer is for less than all securities of the class, the offer must fully disclose a plan of merger, a plan of liquidation or similar binding agreement [25] with respect to the subsequent transaction.[26] However, if the tender offer is for any or all securities of the class, the tender offer need not disclose a binding agreement but must fully disclose the bidder's intention to engage in the subsequent transaction and, to the extent known, the proposed terms thereof.[27]

Question 7: Does a statement, in connection with an any or all tender offer, that the bidder "may determine to engage" in a described follow-up transaction satisfy the Rule 13e–3(g)(1)(ii)(A) disclosure requirement?

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[19] Section 12(h) provides that, among other things, the Commission may exempt any issuer or class of issuers from the provisions of Sections 12(g) or 15(d) if the Commission finds that such action is not inconsistent with the public interest or the protection of investors.

[20] An exemption from some but not all of the requirements of Section 12(g) or Section 15(d) would not exempt an issuer from Rule 13e–3, unless the exemptive order also specifically exempts the issuer from Rule 13e–3.

[21] However, a transaction or series of transactions which is excepted from Rule 13e–3 is nevertheless subject to other applicable provisions of the federal securities laws.

[22] For purposes of the Rule 13e–3(g)(1) exception [17 CFR 240.13e–3(g)(1)], the Division deems a tender offer to terminate on the last date upon which securities may be tendered pursuant to the terms of the tender offer.

[23] The term "bidder" is defined, for purposes of Section 14(d) and 14(e) of the Exchange Act and Regulations 14D and 14E thereunder, in Rule 14d–1(b)(1) [17 CFR 240.14d–1(b)(1)] to mean any person, other than the issuer, who makes a tender offer or on whose behalf a tender offer is made.

[24] In the view of the Division, the subparagraph (g)(1) exception will not be lost solely because the bidder in the first step contemporaneously with the tender offer purchases securities of the issuer from officers, directors or affiliates at a price equal to that paid in the tender offer and the second-step transaction. In such situations, the purchases and contemporaneous tender offer may be deemed to be a unitary transaction. *See* Question 8, *infra*.

[25] As used in Rule 13e–3(g)(1), the term "binding agreement" refers to an agreement which is legally enforceable against the bidder in accordance with its terms. This usage therefore excludes agreements in which the bidder's obligation to engage in the subsequent transaction is indefinite or illusory. However, an agreement which is subject to substantial conditions not within the bidder's control may nevertheless be a binding agreement for the purposes of the subparagraph (g)(1) exception.

[26] Rule 13e–3(g)(1)(ii)(A) [17 CFR 240.13e–3(g)(1)(ii)(A)].

[27] Rule 13e–3(g)(1)(i)(A) [17 CFR 240.13e–3(g)(1)(i)(A)].

Response: No. The availability of this exception is conditioned upon the disclosure of a binding agreement or a firm intent to engage in a specifically described second-step transaction. The requirement that such an agreement or commitment exist and be disclosed at the commencement of the first-step transaction assures that the second-step transaction is indeed based upon arm's-length negotiations or upon unilateral decisions by a non-affiliate, and not upon the use of any control position resulting from the pendency or completion of the first-step transaction. The disclosure requirement gives notice to security holders that the tender offer may result in the acquisition of all the outstanding shares, reduces the uncertainty concerning the bidder's future plans, and relieves, to some extent, the pressure upon unaffiliated security holders to tender their securities in the first-step transaction rather than risk being forced to accept a lower price or other potentially unfavorable terms in a second-step transaction, if any, if the tender offer succeeds. These purposes would not be served by equivocal disclosure. Thus, for example, a statement that the bidder "may" engage in the second-step transaction, or that the transaction is one of a number of possible alternatives being considered, would not satisfy the disclosure requirement of the exception. In the view of the Division, disclosure of the bidder's intent pursuant to subparagraph (g)(1)(i)(A), or of a binding agreement of the bidder pursuant to subparagraph (g)(1)(ii)(A), regarding possible alternative forms of second-step transactions would satisfy the requirements of the subparagraph (g)(1) exception only if the form and effect of each of the alternatives identified is fully disclosed in the disclosure materials. Further, the Division believes that the bidder's disclosed binding agreement or firm intent to engage in the second-step transaction will satisfy the subparagraph (g)(1) requirements even though it may be conditioned upon the acquisition by the bidder of a specified number or percentage of shares or other securities in the tender offer.

8. *Question:* X Corp. agrees to acquire Y Corp., a non-affiliate, in a cash merger transaction. Pursuant to the merger agreement, and shortly before the merger, X Corp. purchases from affiliates of Y Corp. a controlling amount [28] of the outstanding exchange-listed equity securities of Y Corp. Is the merger subject to the requirements of the Rule?

Response: The Division has taken a "no-action" position [29] with respect to the applicability of the requirements of Rule 13e–3 to transactions involving the purchase of a controlling interest in a class of equity securities of an issuer and the subsequent acquisition of the balance of the outstanding securities of such class, provided certain conditions are met.

This position has been predicated on the fact that:

(i) Prior to the initial acquisition of securities, there was no affiliation between the issuer and the acquiring entity;

(ii) The initial acquisition and the second-step transaction are made pursuant to an agreement or agreements for the acquisition of the entire class of securities at the same unit price;

(iii) The intention to engage in the second-step transaction was publicly announced at the time of the initial acquisition, and the second-step transaction is effected within a relatively short period of time thereafter; and

(iv) The acquiring entity will not change the management or the board of directors, or otherwise exercise control, of the issuer prior to the completion of the second-step transaction.

This position is derived from subparagraph (g)(1), the exception for transactions within one year of a tender offer by a non-affiliate.[30] Both the specific subparagraph (g)(1) exception and the "no-action" position are based upon the fact that the initial purchase and subsequent acquisition of the balance of the outstanding securities of the class at the same unit price pursuant to an agreement disclosed at the time of the initial purchase may properly be regarded as a unitary transaction by a non-affiliate; and such transactions do not present the potential for abuse at which Rule 13e–3 was directed.[31]

As a result of its experience with such transactions, and as a part of its re-examination of the Rule and staff interpretations thereof in connection with the rulemaking proceeding announced today, the Commission is publishing for comment a proposed amendment to Rule 13e–3(g)(1).[32] If a modification of the Division's "no-action" position described above, would except from Rule 13e–3 any form of multi-step transaction meeting certain specified criteria. Pending action on the proposed amendment, the Division will not object if transactions meeting the criteria of the prior "no-action" position are effected without compliance with Rule 13e–3.

9. *Question:* Rule 13e–3(g)(2) [17 CFR 240.13e–3(g)(2)] provides an exception from the operation of the Rule for transactions in which the security holders are offered or receive only an equity security, provided that, among other things, such equity security has substantially the same rights as the equity security which is the subject of the Rule 13e–3 transaction. Is this exception available where the public security holders are offered or receive only an equivalent equity security, but the person engaging in the transaction or its affiliate receives cash or other non-qualifying consideration (*i.e.*, not an equivalent equity security) in exchange for its equity security holdings?

Response: No. The basis of the subparagraph (g)(2) exception is that where "security holders are offered only an equity security which is either common stock or has essentially the same attributes as the security which is the subject of the Rule 13e–3 transaction * * * *all holders of [the affected] class of security are on an equal footing* and are permitted to maintain an equivalent or enhanced equity interest" (emphasis added). [33] Transactions which are structured to meet the conditions of the subparagraph (g)(2) exception provide security holders with equal treatment through the requirement that (i) all security holders are offered or receive the same form and amount of consideration and (ii) the consideration must be an equity security which is substantially equivalent to the equity security which is the subject of the Rule 13e–3 transaction. Thus, security holders are afforded equal treatment both among themselves and through receipt of an equivalent equity interest in another publicly held issuer. Transactions in which affiliates may receive forms or amounts of consideration differing from that offered to the unaffiliated security holders do not provide the unaffiliated security holders with the equal treatment contemplated by the exception. Accordingly, the Rule 13e–3(g)(2) exception is available only as to transactions in which *all* of the holders of the class of securities that is the

[28] The existence of a control relationship with Y Corp. does not turn solely upon the ownership of any specific percentage of securities. Rather, the question is whether there is the ability, directly or indirectly, to direct or cause the direction of the management and policies of Y Corp., whether through the ownership of voting securities, by contract or otherwise.

[29] *See, e.g.*, letters re *Federal-Mogul Corporation* (August 27, 1980) and *HM Acquisition Corp.* (January 29, 1981).

[30] *See* Question 7, *supra*.

[31] For a discussion of the concerns of the Commission in adopting Rule 13e–3, see Part I of this Release. For a discussion of the rationale of the subparagraph (g)(1) exception, see text preceding Question 7, *supra*.

[32] Reference should be made to Release No. 34–17720 for the complete text of the proposed amendment.

[33] Release No. 34–16075, 44 FR at 46738.

subject of the transaction are offered or receive only a qualifying equity security.[34]

Illustration: X Corp., the issuer of a class of common stock registered pursuant to Section 12 of the Exchange Act, is merged with and into its affiliate Y Corp. Z, a controlling person of X Corp., receives cash in exchange for his common stock of X Corp. but the other holders of X Corp. common stock are offered only common stock issued by Y Corp. Because not all of the holders of X Corp. common stock, the class which is the subject of the transaction, are offered or receive only an equity security, the subparagraph (g)(2) exception is not available.

Question: Is the Rule 13e–3(g)(2) exception available for transactions in which the security holders are offered or receive equity securities issued by a person not a party to the transaction?

Response: No. The subparagraph (g)(2) exception was designed to except from the operation of the Rule recapitalizations, "transactions structured to create a holding company or reincorporate the entity in a new jurisdiction; and . . . mergers with and exchange offers by affiliates in which unaffiliated security holders would receive common stock of the surviving entity."[35] Because transactions involving the equity securities of unrelated issuers do not provide the safeguards intended by Rule 13e–3(g)(2), this provision is applicable only as to transactions in which the security holders are offered or receive equity securities of (i) the issuer (or a successor issuer pursuant to Rule 12g–3 [17 CFR 240.12g–3] or Rule 15d–5 [17 CFR 240.15d–5] under the Exchange Act), (ii) the surviving entity in a merger, (iii) the bidder in an exchange offer, or (iv) the holder, directly or through its wholly owned subsidiary or subsidiaries, of all of the voting equity securities (including non-voting securities which represent rights to acquire or are convertible into voting securities) of such issuer, successor issuer, surviving entity or bidder. In the Division's view, the critical factor in each of these situations is that the unaffiliated security holders are permitted to retain an equity interest in the entity which is to subsume the issuer. The Commission is today publishing for comment a proposed amendment to Rule 13e–3(g)(2) to clarify the Rule in this regard.[36]

Illustration 1: X Corp., a wholly owned subsidiary of Y Corp., offers to exchange Y Corp. common stock for any or all of the outstanding shares of common stock of its affiliate Z Corp. Both of such classes of securities are listed on a national securities exchange and registered pursuant to Section 12(b) of the Exchange Act. Since the securities offered to Z Corp. stockholders are those of the holder of all of the voting equity securities of the bidder (and the requirements of subparagraphs (i)–(iii) of rule 13e–3(g)(2) are otherwise satisfied), this exchange offer is excepted from the operation of the Rule.

Illustration 2: X Corp., subject to Section 15(d) of the Exchange Act in respect of its common stock, proposes to engage in an issuer exchange offer pursuant to which its common stockholders are offered equity secutities held by X Corp. but issued by Y Corp., a non-affiliate. Because the securities to be received by the X Corp. stockholders are not issued by any of the parties to the transaction or by the holder, directly or indirectly, of all the voting equity securities of one of the parties, the subparagraph (g)(2) exception is not available for this transaction.

11. *Question:* Is a transaction in which security holders may elect to receive either an equity security meeting the requirements of subparagraphs (g)(2)(i)–(iii) or cash within the scope of the rule 13e–3(g)(2) exception?

Response: The Division has taken the position that the exception provided in subparagraph (g)(2) would not be lost if security holders are offered the option of receiving cash in lieu of an equity security meeting the requirements of the exception. In the Division's view, the equal treatment intended to be afforded to all security holders by the subparagraph (g)(2) exception will not be impaired with respect to a transaction otherwise meeting the requirements thereof solely because the security holders are offered the alternative of receiving cash, provided that as a result of the cash election feature there is not a reasonable likelihood or purpose of producing, directly or indirectly, any of the effects described in paragraph (a)(4)(ii) of the Rule with respect to the class of securities being offered in exchange for the issuer's securities. Thus, the exception would generally be available in the case of a cash-option merger[37] or an exchange offer in which tendering security holders may elect to receive cash. The exception might not be available, however, if a cash option were offered in lieu of equity securities of a class issued by the surviving corporation when the anticipated number of security holders of record of such class after the cash option is exercised can reasonably be expected to be less than 300. Of course, the exception's objective of ensuring that the security holders are afforded a meaningful opportunity to maintain their equity interest is defeated if the cash option is clearly more desirable than the alternative qualifying equity security. Accordingly, the view expressed by the staff is applicable only if, at the time the security holders are first able to make their election, each alternative offered is of substantially equal value. The Commission is today publishing for comment a proposed amendment to Rule 13e–3(g)(2) to incorporate this position in a slightly modified and more specific provision.[38] Pending action on the proposed amendment, the Division will not object if transactions meeting the criteria of the prior staff position are effected without compliance with Rule 13e–3.

12. *Question:* Subparagraph (g)(4) of the Rule provides an exception for "[r]edemptions, calls or similar purchases of an equity security by an issuer pursuant to specific provisions set forth in the instrument(s) creating or governing that class of equity securities." Is this exception applicable to open-market purchases by the issuer to satisfy sinking-fund requirements?

Response: Yes. Under certain sinking fund provisions set forth in the instruments creating or governing certain classes of equity securities, the issuer may be permitted to satisfy its sinking fund obligation by retiring securities that have been purchased in the open market. If satisfaction of sinking fund obligations in this manner is permitted, purchases made by the issuer primarily for the purpose of meeting its sinking fund obligation are within the subparagraph (g)(4) exception.

13. *Question:* The limited partnership agreements of certain types of publicly held limited partnerships provide for periodic repurchases of limited partnership interests by the managing general partner of the partnership.

[34] While the Division has taken the position that the subparagraph (g)(2) exception is available for certain transactions involving a cash election (*see* Question 11, *infra*), in order for a transaction to qualify for the exception all security holders would have to be given the same alternative rights as to the consideration to be received in the transaction. Thus, a cash election would be permissible only if all security holders were offered both an equivalent equity security and a cash election.

[35] Release No. 34–16075, 44 FR at 46737.

[36] Release No. 34–17720.

[37] The characteristics of a typical cash-option merger transaction are described in Release No. 33–5927 (April 24, 1978) [42 FR 18163].

[38] Release No. 34–17720.

Typically, the terms and conditions of repurchase, including timing, are fixed in the limited partnership agreement or are determinable in accordance with the provisions of such agreement, and may not be amended except upon the affirmative vote of the holders of limited partnership interests representing at least a majority of the limited partners' capital contribution to the partnership. The repurchase price may, for example, be determined pursuant to a formula set forth in the limited partnership agreement which is applied to a recent valuation of the limited partnership's assets made by a qualified independent appraiser. The limited partnership agreement may also restrict the aggregate amount which may be paid to repurchase the limited partnership interests and provide that, if the amount to be paid for interests to be repurchased would exceed such limitation, the interests to be purchased will be selected by lot. Is the subparagraph (g)(4) exception applicable to such repurchases?

Response: Yes. In the view of the Division, such repurchases by the managing general partner in accordance with the specific terms of the limited partnership agreement constitute "redemptions, calls or similar purchases . . . by an issuer" within the meaning of Rule 13e–3(g)(4).

14. *Question:* Rule 13e–3(g)(5) excepts solicitations by an issuer with respect to a plan of reorganization under Chapter X of the Bankruptcy Act, as amended, if made after the entry of an order approving such plan pursuant to Section 174 of that Act and after, or concurrently with, the transmittal of information concerning such plan as required by Section 175 of that Act. Does this exception cover solicitations with respect to a plan of reorganization under the new Bankruptcy Code? [39]

Response: Yes. The Division has taken the position that subparagraph (g)(5) of the Rule implicitly provides an exception for a solicitation by an issuer with respect to a plan of reorganization under Chapter 11 of the Bankruptcy Code, provided an order is entered approving a disclosure statement with respect to such plan pursuant to Section 1125(b) of the Code [40] and such disclosure statement is transmitted to all interested parties as required by such Section. The Commission is today proposing an amendment to Rule 13e–3(g)(5) clarifying the applicability of the exception provided thereby to transactions under the Bankruptcy Code. [41]

V. Schedule 13E–3

The information required to be disclosed in a Rule 13e–3 transaction is set forth in Schedule 13E–3. Pursuant to paragraph (d) of Rule 13e–3, the Schedule must be filed with the Commission at the time and in the form indicated in the General Instructions to the Schedule, and must be amended promptly to report any material change in the information set forth and to report the results of the Rule 13e–3 transaction promptly but no later than 10 days after termination of the transaction. [42] Rule 13e–3(e) governs the inclusion of information in the disclosure document furnished to holders of the class of equity securities which is the subject of the transaction. This provision consists of two elements: the information required by Items 1 through 6 and 10 through 16 of the Schedule 13E–3, or a fair and adequate summary thereof, and Items 7, 8 and 9 of the Schedule; and other information required to be disclosed pursuant to any other applicable rule or regulation under the Federal securities laws. The disclosure required by Items 7, 8 and 9 of the Schedule, relating to the purpose for and fairness of the transaction and certain reports, opinions, appraisals and negotiations, is considered by the Commission to be particularly important to investors and is therefore required to be prominently set forth in a special factors section to be included in the forepart of the disclosure document furnished to security holders. Paragraphs (e) and (f) of the Rule require that the information contained in the Schedule 13E–3 [43] must be disseminated to security holders prior to the Rule 13e–3 transaction or, if the Rule 13e–3 transaction is a tender offer, in accordance with Regulation 14D [17 CFR 240.14d–1 to 240.14d–101] or Rule 13e–4.

15. *Question:* Release No. 34–16075 contains a discussion of the applicability of Rule 13e–3 to certain multi-step sale of assets transactions. [44] What are the Schedule 13E–3 filing and amendment requirements with respect to each step in a series of transactions?

Response: The Schedule 13E–3 must be filed concurrently with the filing of the preliminary proxy or information statement relating to the sale of assets constituting the first step in the Rule 13e–3 transaction. [45] Thereafter, the statement must be amended (in addition to the amendments required pursuant to subparagraphs (d)(2) and (d)(3) of Rule 13e–3) with respect to each subsequent tender offer, [46] purchase of securities or other transaction which is a component of the multi-step transaction. [47] Accordingly, the information required by Rule 13e–3 must be disclosed and disseminated with respect to each transaction by the issuer or its affiliate which is a step in the Rule 13e–3 transaction.

16. *Question:* General Instruction F to Schedule 13E–3 requires that the information contained in any proxy or information statement, registration statement, Schedule 14D–1 or Schedule 13E–4 [17 CFR 240.13e–101] filed in connection with the Rule 13e–3 transaction be incorporated by reference in answer to the items of the Schedule or amendments thereto. Must the filing from which such information is incorporated by reference pursuant to

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[39] Title I of the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2549 (1978) (effective October 1, 1979), codified as Title 11 of the United States Code.

[40] 11 U.S.C. § 1125(b) (Supp. III 1979).

[41] Release No. 34–17720.

[42] If the Rule 13e–3 transaction is a tender offer governed by Rule 13e–4 [17 CFR 240.13e–4], the final amendment must be filed no later than ten business days after the termination of such tender offer. *See also* General Instructions D and F to Schedule over 14D–1.

[43] *See* General Instruction E to Schedule 13E–3.

[44] Two forms of multi-step sale of assets transactions subject to the Rule are considered in Release No. 34–16075. In the first, the assets of the issuer are sold to a non-affiliate, following which the issuer makes a tender offer for, or other purchases of, its securities. The second form involves the sale of the issuer's assets to its affiliate or group of affiliates (including persons who become affiliated, by means of equity ownership or otherwise, as a part of the overall sales transaction), followed by a tender offer or other securities purchases by the issuer or the distribution of the proceeds of the asset sale in dissolution of the issuer. Multi-step transactions subject to the Rule may, however, take many forms (*see* Question 4, *supra*) and the views expressed in this Question 15 apply to all. Not all forms of multi-step sale of asset transactions, however, are Rule 13e–3 transactions. Certain disclosure requirements with respect to such multi-step transactions, including transactions which are not subject to Rule 13e–3, are discussed in Release No. 34–15572 (February 15, 1979) (44 FR 11537).

[45] The timing provision does not apply to issuers which are only required to file periodic reports pursuant to Section 15(d) of the Exchange Act because such issuers are not subject to the proxy and information statement requirements of Section 14 of the Exchange Act. Such a Section 15(d) issuer which is engaging in a multi-step sale of assets transaction subject to the Rule must, pursuant to General Instruction A(4) of Schedule 13E–3, file the Schedule at least 30 days prior to any purchase of any securities of the class of securities subject to the Rule 13e–3 transaction. The term "purchase" is defined in Rule 13e–3(a)(3) to include any acquisition pursuant to the dissolution of an issuer subsequent to the sale or other disposition of substantially all the assets of such issuer to its affiliate.

[46] Although the tender offer may be subject to both Rule 13e–3 and either Rule 13e–4 or Regulation 14D, the disclosure and dissemination requirements of the applicable rules may be satisfied by the dissemination of a single set of disclosure materials containing the information specified in both rules.

[47] *See* Rule 13e–3(a)(4) [17 CFR 240.13e–3(a)(4)] and General Instruction (A)(4) to Schedule 13E–3.

this instruction be filed as an exhibit to the Schedule?

Response: No. General Instruction F requires the incorporation by reference [48] from such filings of only the information contained therein which is responsive to the items of Schedule 13E–3. Thus, there need be furnished as an exhibit to the Schedule only the portions of such filings which contain such information. In addition, subparagraph (d) of Item 17, the exhibit item of the Schedule, requires that any disclosure materials furnished to security holders in connection with the Rule 13e–3 transaction must be filed as an exhibit. Accordingly, while the entire filing (*i.e.*, the registration statement, proxy or information statement, Schedule 14D–1 or Schedule 13E–4) which contains the incorporated information need not be furnished as an exhibit to the Schedule, any disclosure materials which are contained in such filing and are provided to security holders in connection with the Rule 13e–3 transaction must be furnished as an exhibit to the Schedule. Further, a copy of any material incorporated by reference pursuant to General Instruction D of the Schedule (which does not apply to materials contained in the filings governed by General Instruction F) must be filed as an exhibit to the Schedule. A Schedule 13E–3 prepared in accordance with this procedure is a "wrap-around" filing, consisting of a cover page, cross-reference sheet, required exhibits and a signature page.[49]

17. *Question:* General Instruction G to the Schedule provides that Schedule 13E–3 filings incorporating a preliminary proxy or information statement shall be deemed to constitute "Preliminary Copies" within the meaning of Rule 14a–6(e) [17 CFR 240.14a–6(e)] and Rule 14c–5 [17 CFR 240.14c–5] under the Exchange Act and shall not be available for public inspection before an amendment to the Schedule containing definitive material has been filed with the Commission. When must such a Schedule 13E–3 amendment be filed?

Response: The procedure set forth in General Instruction G is designed solely to maintain the non-public status of the preliminary proxy or information statement which has been incorporated by reference. In order to ensure that the Schedule 13E–3 is made public at the earliest appropriate time, an amended Schedule 13E–3 incorporating the definitive proxy or information statement (and including such materials as an exhibit pursuant to Item 17(d) of Schedule 13E–3) should be filed concurrently with the filing of the definitive materials.

18. *Question:* Item 2 of the Schedule 13E–3 requires disclosure of certain information regarding the person filing the Schedule 13E–3 and certain related persons enumerated in General Instruction C to the Schedule. General Instruction C provides that if the person filing the Schedule is a general or limited partnership, a syndicate or other group, or a corporation, the Schedule must include the information called for by Item 2 regarding each (i) partner of such general partnership; (ii) general partner of such limited partnership; (iii) member of such syndicate or group; (iv) person controlling such partner or member; (v) executive officer, director, and controlling person of such corporation; and (vi) each executive officer and director of any corporation ultimately in control of such corporation. Do these provisions require the disclosure of information regarding natural persons having the specified relationship with the person filing the Schedule?

Response: Yes. In addition to requiring information regarding the entities enumerated in General Instruction C which are other than natural persons, Item 2 provides that, if any person enumerated in General Instruction C is a natural person, the required information must be supplied with respect to each such person.

19. *Question:* Paragraphs (a) and (b) of Item 8 relate to disclosure of the belief of the issuer and each of its affiliates engaged in the Rule 13e–3 transaction regarding whether the transaction is fair or unfair to unaffiliated security holders, and the basis for such belief. If the transaction may have a different impact on different groups of unaffiliated security holders, must this disclosure include a discussion of the fairness of the transaction as to each such group?

Response: Yes. The disclosure should include consideration of the fairness of the Rule 13e–3 transaction to *all* unaffiliated security holders. For example, if the transaction is a tender offer or a reverse stock split, the disclosure should specifically address the fairness of the transaction to security holders who would retain their interest in the company as well as to those who would not. If security holders may elect to receive different forms or amounts of consideration, it is sufficient to disclose a reasonable belief (together with the bases therefor) that at least one of the alternatives offered is fair to unaffiliated security holders; if the form or amount to be received by different security holders is determined by the issuer or affiliate engaging in the transaction rather than according to the option of the individual security holders, the Item 8 disclosure should be given with respect to each form and amount.

20. *Question:* Item 8(b) of the Schedule requires a discussion of the material factors upon which the belief as to fairness is based and, to the extent practicable, of the weight assigned to each such factor. The Item provides that this discussion should include an analysis of the extent, if any, to which such belief is based on certain specified factors which will normally be important in determining the fairness of a Rule 13e–3 transaction.[50] Must all of these factors be discussed in every case?

Response: The factors need be discussed only to the extent that they are material in the context of the transaction. Ordinarily, possible alternative courses of action should be discussed, and the absence of an intention to liquidate is not determinative of whether the discussion should address liquidation values. However, when a factor which would otherwise be important in determining the terms of the transaction is not

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[48] Materials incorporated by reference into the Schedule are deemed to be filed with the Commission for all purposes of the Exchange Act and the applicable antifraud provisions of Rule 13e–3.

[49] Accountants' reports on audited financial statements in a Schedule 13E–3 must be manually signed and, if such financial statements and accountants' reports are incorporated by reference in a Schedule 13E–3, the copies of such materials included as exhibits to the manually signed copy of the Schedule must include manually signed accountants' reports.

[50] The specified factors are whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:

(i) Current market prices
(ii) Historical market prices
(iii) Net book value
(iv) Going concern value
(v) Liquidation value
(vi) The purchase price paid in previous purchases disclosed in Item 1(f) of Schedule 13e–3
(vii) Any report, opinion, or appraisal described in Item 9 of Schedule and
(viii) Firm offers of which the issuer or affiliate is aware made by any unaffiliated person, other than the person filing the statement during the preceding eighteen months for (A) the merger or consolidation of the issuer into or with such person or of such person into or with the issuer, (B) the sale or other transfer of all or any substantial part of the assets of the issuer or (C) securities of the issuer which would enable the holder thereof to exercise control of the issuer; and

whether a majority of non-employee directors has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for the purposes of negotiating the terms of the Rule 13e–3 transaction and/or preparing a report concerning the fairness of the transaction; and whether the transaction was approved by a majority of non-employee directors and is structured so that approval of at least a majority of unaffiliated security holders is required.

considered or is given little weight because of particular circumstances, this may be a significant aspect of the decision-making process which should be discussed in order to make the Item 8 disclosure understandable and complete. For example, if liquidation value was disregarded because the issuer or affiliate believed that the company's assets would be very difficult to sell,[51] or if historical market prices were believed not to be indicative of the value of the securities because of recent adverse developments, the bases for such beliefs should be discussed. In addition, the discussion of these factors must be that of the issuer or affiliate engaging in the transaction. Thus, a reference to or extract from an opinion of an investment banker, appraiser or similar advisor which fully analyzes the factors does not satisfy the requirements of Item 8(b) unless the issuer or affiliate expressly adopts the advisor's discussion of the factors.

21. *Question:* Instruction 2 to Item 8(b) provides that, in discussing in reasonable detail the material factors upon which the belief as to fairness is based, "[c]onclusory statements, such as 'The Rule 13e–3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer' will not be considered sufficient * * *." Is an itemization of the factors considered by the issuer or affiliate in approving the transaction adequate in response to Item 8(b)?

Response: No. The requirement of a reasonably detailed discussion of the material factors underlying the issuer's or affiliate's belief as to the fairness of the transaction is designed to assist security holders in making their investment decision by providing them with information, from the most knowledgeable source, regarding the terms and effect of the transaction in relation to the business and prospects of the issuer. The Division is concerned that in many instances the Item 8(b) disclosure being made to security holders is vague and nonspecific and is therefore of limited utility to security holders. While the Division recognizes that the material factors upon which the fairness determination is based cannot always be addressed with mathematical precision, it believes that at least certain minimal elements should be included in the issuer's or affiliate's discussion. The discussion of factors relating to fairness should normally include the specific factors identified in Item 8(b), which are of two types.[52]

The first type relates to whether the consideration offered to unaffiliated security holders constitutes fair value in relation to certain factors specified in subparagraphs (i) through (viii) of Instruction 1 to the Item. Each of these factors relates to a possible source of valuation of securities of the class which is the subject of the transaction. Each such factor which is material to the transaction should be discussed and, in particular, if any of the sources of value indicate a value higher than the value of the consideration offered to unaffiliated security holders, the discussion should specifically address such difference and should include a statement of the bases for the belief as to fairness in light of the difference.

The other type of factor identified in Instruction 1 relates to the existence of procedures designed to enhance the protection of unaffiliated security holders in the effectuation of the transaction. In discussing the issuer's or affiliate's belief as to the fairness of the transaction in the context of these factors, it is not sufficient simply to acknowledge the lack of one or more of the specified procedural safeguards. If any of these safeguards are not provided, the discussion should include a statement of the basis for the belief as to fairness despite the absence of these safeguards.

22. *Question:* Item 8(c) of Schedule 13E–3 requires disclosure of whether the transaction is structured so as to require the approval of at least a majority of unaffiliated security holders (as defined in paragraph (a)(5) of Rule 13e–3). Does this requirement relate to approval by a majority of the outstanding shares held by unaffiliated security holders or by a majority of the shares held by unaffiliated security holders and voted on the transaction?

Response: In the Division's view, the information that must be disclosed in response to Item 8(c) of the Schedule is whether the transaction requires approval by the holders of at least a majority of the shares held by non-affiliates and actually voted on the transaction.

Accordingly, 17 CFR Part 241 is amended by adding this release thereto.

By the Commission.

George A. Fitzsimmons,

Secretary.

April 13, 1981.

[FR Doc. 81–11743 Filed 4–17–81; 8:45 am]

BILLING CODE 8010–01–M

[51] For a discussion of the Division's views regarding related disclosure issues in connection with prospective liquidation transactions, *see* Release No. 34–16833 (May 27, 1980) [45 FR 36374].

[52] *See* footnote 50, *supra.*

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD 12-81-MP1]

Regattas and Marine Parades; Safety of Life on Navigable Waters; San Francisco Bay

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: This is a final rule detailing the special local regulations for the 1981 Pacific Inter-Club Yacht Association Opening Day Parade for San Francisco Bay. The purpose is to control vessel traffic in designated areas and within the vicinity of the marine parade. This rule is necessary due to the confined areas involved and the anticipated vessel congestion during the event.

EFFECTIVE DATE: From 0930 to 1400 PST, April 26, 1981.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Robert A. Byers, c/o Commander (bb), Twelfth Coast Guard District, 630 Sansome Street, San Francisco, CA (415) 556–6075.

SUPPLEMENTARY INFORMATION: This special local regulation is issued pursuant to 46 USC 454 and 33 CFR Part 100.35, for the purpose of promoting the safety of life and property in San Francisco Bay during the 1981 PACIFIC INTER-CLUB YACHT ASSOCIATION OPENING DAY PARADE FOR SAN FRANCISCO BAY. It is anticipated that there will be considerable vessel congestion at the time of the parade due to large numbers of participating and spectator vessels, the presence of commercial vessel traffic in the area and the confined nature of certain areas to be utilized by the parade. Therefore these special local regulations are deemed necessary for the promotion of safety of life and property in the area during the marine parade.

The regulations are published as a final rule since there was insufficient time to publish a notice of proposed rule making prior to the date of the event and the regulations are needed in order to protect life and property. The final rule has been submitted to the Director, Office of Management and Budget, for a 10-day review in accordance with Section 3.(c)(3) of Executive Order 12291. It is not considered to be a major rule under the terms of Executive Order 12291 since it involves negligible cost and will not have significant impact on recreational vessels, commercial vessels or other marine interests. For this reason, the District Commander has

determined this rule will not have significant economic impact on a substantial number of small entities. Also, in accordance with DOT Order 2100.5, economic impact is so minimal that it does not require an evaluation. Further, the rule is necessary for the protection of life and property in the area during this marine event.

Drafting Information

The principal persons involved in drafting this final rule are LCDR Robert A. Byers, Project Manager, Twelfth Coast Guard District, Boating Affairs Branch and LCDR Ronald S. Matthew, Project Attorney, Assistant Legal Officer, Twelfth Coast Guard District.

Accordingly, Part 100 of Title 33, of the Code of Federal Regulations is amended by adding the following section:

§ 100.35-1201 1981 Opening Day Marine Parade, San Francisco Bay.

(a) The following areas are designated "regulated areas" during the marine parade.

(1) *Raccoon Straits.* The area between a line drawn from Bluff Point on the Tiburon Peninsula to Pt. Campbell on Angel Island and a line drawn from Peninsula Point on the Tiburon Peninsula to Point Stuart on Angel Island.

Southern Area. The area defined by a line drawn from Fort Point (37°48'40" N, 122°28'34" W) 079°T approximately 5,000 yards to a point located at 37°49'09" N, 122°25'28" W thence 173°T to the tip of Aquatic Park peninsula (37°48'39" N, 122°25'24" W).

(b) Regulation:

(1) All vessels entering the regulated areas shall follow the parade route and maintain an approximate speed of six knots.

(2) All vessels in the Raccoon Straits area shall proceed in a generally southwesterly direction except in that area immediately adjacent to the shore of Angel Island where vessels may travel in a northeasterly direction.

(3) Vessels departing the St. Francis Yacht Harbor in the southern area may exit through the area subject to direction of Coast Guard patrol boats.

(4) The parade will be interrupted, as necessary, to permit the passage of commercial vessel traffic.

(5) All vessels in the vicinity of the parade shall comply with the instructions of the U.S. Coast Guard patrol personnel.

(Sec. 1, Pub. L. 60-120, 35 Stat. 69, as amended, sec. 6(b)(1), 80 Stat. 937; 46 USC § 454, 49 USC § 1655(b)(1); 33 CFR Part 100.35, 49 CFR § 1.46(b))

March 27, 1981.

J. S. Gracey,

Vice Admiral, U.S. Coast Guard, Commander, Twelfth Coast Guard District.

[FR Doc. 81-11859 Filed 4-17-81; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

National Forest Timber Sales; Export and Substitution Restrictions; Correction

AGENCY: Forest Service, USDA.

ACTION: Correction to final rule.

SUMMARY: Revised regulations regarding the export of timber from National Forest System lands and the use of such timber in substitution for private timber which is exported by the purchaser were published in the **Federal Register** on December 5, 1980, (45 FR 80526). They became effective March 30, 1981. This document further clarifies the definition of tributary area and incorporates a revised definition of unprocessed western red cedar to conform to the requirements of section 101(o) of Public Law 96-536, and H.R. 7584 as enrolled.

EFFECTIVE DATE: April 20, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. George M. Leonard, Timber Management Staff, Forest Service, USDA, P.O. Box 2417, Washington, DC 20013, (202) 447-4051.

SUPPLEMENTARY INFORMATION: The revision in the definition of tributary area brings it into conformance with the definition which has been in use since the log export and substitution restrictions were first imposed in 1974.

1. Section 223.10(a) (5) and (7) are revised to read as follows:

§ 223.10 Timber export and substitution restrictions.

(a) * * *

(5) Tributary area means the geographic area from which unprocessed timber is delivered to a specific processing facility or complex. A tributary area is expanded when timber outside an established tributary area is hauled to the processing facility or complex.

* * * * *

(7) Unprocessed western red cedar timber in the contiguous 48 States means trees or portions of trees of that species which have not been processed into (i) lumber of American Lumber Standards Grades of Number 3 dimension or better, or Pacific Lumber Inspection Bureau Export R-List Grades of Number 3 Common or better; (ii) chips, pulp, and pulp products; (iii) veneer and plywood; (iv) poles, posts, or piling cut or treated with preservatives for use as such and not intended to be further processed; or (v) shakes and shingles; provided that lumber from private lands manufactured to the standards established in the lumber grading rules of the American Lumber Standards Association or the Pacific Lumber Inspection Bureau and manufactured lumber authorized to be exported under license by the Department of Commerce shall be considered processed.

* * * * *

(Sec. 301, 90 Stat. 1063, Public Law 94-373; Sec. 1, 30 Stat. 35, as amended (16 U.S.C. 551))

John R. Block,

Secretary.

April 6, 1981.

[FR Doc. 81-11790 Filed 4-17-81; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-3-FRL-1796-2]

Approval and Disapproval of Revisions of the Virginia State Air Quality Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This notice announces the Administrator's approval and disapproval of revisions of the Virginia State Implementation Plan which include amendments to the Virginia State Regulations for the Control of Air Pollution submitted by the Commonwealth of Virginia. The Commonwealth has submitted several revisions to amend the regulations for the Control and Abatement of Air Pollution. These revisions to the Virginia State Implementation Plan (SIP) include changes to Part IV, Emissions Standards for Particulate Emissions from Fuel Burning Equipment, (Rule EX-3) and to Part I, Definitions. The revisions were submitted August 14, 1975, June 16, 1976, and September 21, 1979.

EFFECTIVE DATE: May 20, 1981.

ADDRESSES: Copies of the materials submitted by the Commonwealth of Virginia are available for public inspection during normal business hours at the following locations:

U.S. Environmental Protection Agency, Region III, Air Programs Branch, 6th & Walnut Streets, Philadelphia, PA 19106, Attn.: Patricia Sheridan

Virginia State Air Pollution Control Board, Room 1106, Ninth Street Office Building, Richmond, VA 23219, Attn.: William Meyer, Executive Director

Public Information Reference Unit, EPA Library, Room 2922, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460

The Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, D.C. 20408

FOR FURTHER INFORMATION CONTACT:

Carol D. Peters (3AH11), U.S. Environmental Protection Agency, Region III, 6th and Walnut Streets, Philadelphia, PA 19106, Phone: (215) 597-9139.

SUPPLEMENTARY INFORMATION:

Introduction

On August 14, 1975, June 16, 1976, and September 21, 1979, the Commonwealth of Virginia submitted revisions to the Virginia State Implementation Plan (SIP). Only the revisions dealing with changes to part IV, Emission Standards for Particulate Emissions from Fuel Burning Equipment (Rule EX-3) and two definitions from Part I will be subject to final action at this time. All other parts in these submittals have been or will soon be dealt with in other **Federal Register** notices.

Background

The appropriate portions of the August 14, 1975 submittal were proposed in the **Federal Register** on November 19, 1975 (40 FR 53595) March 25, 1977 (42 FR 16446) and September 24, 1980 (45 FR 63300). The appropriate portions of the June 16, 1976 submittal were proposed in the **Federal Register** on February 8, 1977 (42 FR 7969) and September 24, 1980 (45 FR 63300). The appropriate portions of the September 21, 1979 submittal were proposed in the **Federal Register** on September 24, 1980 (45 FR 63300).

The Commonwealth of Virginia submitted proof that the following public hearings were held:

Submittal date	Public hearing date	Locations
Aug. 14, 1975	May 12, 1975	Abingdon, Radford, Lynchburg, Fredericksburg, Richmond, Virginia Beach, and Fairfax.
June 16, 1976	Jan. 12, 1976	Abingdon, Radford, Lynchburg, Fredericksburg, Richmond, Virginia Beach, and Falls Church.
	March 22, 1976	Same as above.
Sept. 21, 1979	May 14, 1979	Same as above.
	July 16, 1979	Same as above.

These hearings were held in accordance with the public hearing and notice requirements of 40 CFR Part 51.4 and all relevant State procedural requirements.

Part I—Definitions

The two definitions under consideration in this notice are "Rated Capacity" and "Total Capacity."

"Rated Capacity" was first submitted on June 16, 1976 and was proposed in the **Federal Register** on February 8, 1977. This definition was modified, in the September 21, 1979 submittal, so that good engineering judgment is to be used by the Board and owner in determining the rated capacity. This change is consistent with 40 CFR 52.01, and is being approved as written September 21, 1979.

"Total Capacity" was modified August 14, 1975, June 16, 1976 and September 21, 1979. The modifications, as submitted September 21, 1979, restructure the sentence format. This is consistent with good grammatical practices and with 40 CFR 52.01 and is being approved as written September 21, 1979.

Part IV—(Rule EX-3)

The submittal of August 14, 1975 introduced a new numbering system. Sections 4.03.01 and 4.703.01 were combined and modified to make § 4.30. Section 4.03.03 was modified to form § 4.31. Section 4.703.04 was deleted in 43 FR 38700, August 30, 1978, before it was proposed by Virginia to be renumbered to § 4.32.

The June 16, 1976 submittal modified § 4.30(a). Section 4.30(b) was deleted and a new § 4.30(b) was added. Section 4.31 was changed to § 4.32 and a new § 4.31 was added.

On September 21, 1979, § 4.31 was deleted, § 4.30 was renumbered § 4.31, and a new § 4.30 was added. The new § 4.31 (a) and (b) were modified from the previous submittals, and § 4.31 (c), (d) and (e) were added. The September 21, 1979 submittal completely modified the previous regulations both administratively and substantively.

Therefore, only §§ 4.30, 4.31, and 4.32 as submitted on September 21, 1979 are being considered:

A summary of these regulations follows:

Regulation and Description

4.30—Applicability and Designation of Affected Facility—added to specify the types of sources to which these provisions apply.

4.31—Standard for Particulate Matter—minor administrative changes to § 4.31 (a) and (b). Sections 4.31 (c), (d), and (e) are added to clarify the emission standards.

4.32—Exceptions—minor administrative changes to § 4.32 (a) and (b). Section 4.32(c), was added to exempt intermittently operated gas, oil or coal-fired equipment from § 4.31(c).

All of the above revisions have been reviewed and found to be acceptable except for § 4.31(d)(3). The submittal of June 16, 1976 changed the standards for particulate matter (§ 4.30(a)). The criteria were revised to cover smaller categories of sources, while at the same time, the emission ratio was changed to allow slightly higher particulate emissions. Section 4.30(b), in the June 16, 1976 submittal, determines the maximum allowable particulate emissions to be the product of the total capacity and the emission ratio. Section 4.30 was subsequently renumbered to § 4.31 in the September 21, 1979 submittal. Minor administrative changes were made to § 4.31 (a) and (b). Section 4.31(c) was added for determining allowable particulate emissions for an affected facility operating at less than total capacity. Section 4.31(c) was added for determining allowable particulate emissions for an affected facility operating at less than total capacity. Section 4.31(d) was added for the determination of efficiency factors for collection equipment. Section 4.31(e) was added to designate the portion of the emission contribution allocated for each of the fuel burning equipment units of the affected facility. The addition of § 4.30, in the September 21, 1979 submittal, makes Rule EX-3 applicable to all fuel burning equipment at the plant. Section 4.32(c) was added in the September 21, 1979 submittal. This exempted all fuel burning equipment units with intermittently operated gas, oil or coal-firing equipment from complying with § 4.31(c). All of the above changes comply with Federal guidelines except § 4.31(d)(3). The control strategy demonstrated that the National Ambient Air Quality Standards for Total Suspended Particulates (TSP) will not be violated by the increased emissions allowed by this revision.

The Commonwealth, in § 4.31(d)(3), lists the following substitute criteria for determining the efficiency factor for collection equipment:

Manufacturer's specifications, emission test results, operating conditions (such as percent ash in coal, gradation of particulates entering collector, variations in gas volume and resulting velocity in collector due to boiler rating, cleanliness of boiler surfaces, furnace temperature and amount of excess air).

All of the substitute criteria shown above (as excerpted from the September 21, 1979 submittal), with the exception of emission test results, contain inherent variations in quality control which do not present an accurate representation of collection efficiency. All of the conditions listed do affect the collection efficiency of mechanical collectors. However, there is only one way to quantify accurately the effects of any operational change, and that is by running a series of stack tests over the range of variables likely to be encountered during normal operations. Therefore, these criteria should be deleted in order to make the regulation acceptable. Therefore, the Administrator is disapproving § 4.31(d)(3).

Summary of Public Comments

No public comments were received during the public comment period following publication of EPA's Notice of Proposed Rulemaking.

Conclusion

Based on the above discussion, the Administrator approves the amendments to Part I and IV, except for § 4.31(d)(3) of Virginia's Regulations for the Control of Air Pollution as revisions to the Virginia Implementation Plan.

In conjunction with the Administrator's approval; 40 CFR 52.2420 (Identification of Plan) of Subpart VV (Virginia) is revised to incorporate these amendments.

At the same time, EPA disapproves § 4.31(d)(3) as a revision to the Virginia SIP. Accordingly, 40 CFR 52.2023 (Approval Status) of Subpart VV (Virginia) should be revised to reflect the Administrator's disapproval action.

Under Section 307(b)(1) of the Clean Air Act, judicial review of this action is available *only* by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of today. Under Section 307(b)(2) of the Clean Air Act, the requirements which are the subject of today's notice may *not* be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements. Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. The SIP approvals announced today are not major because they only approve state actions. They do not approve any new regulatory requirements. The disapproval of § 4.31(d)(3), listing substitute criteria for determining the efficiency factor for collection equipment, is also not major. This section only contains some alternate methods for demonstrating the efficiency of TSP collection equipment. Other sections of the State's submittal which are being approved today contain acceptable methods of making the same demonstration. These acceptable methods are not more costly to implement. Accordingly this disapproval will not increase regulatory costs to either TSP sources or the public.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection at EPA Region III, 6th and Walnut Streets, Philadelphia, PA 19106.

(42 U.S.C. 7401–642)

Dated: April 13, 1981.

Walter C. Barber,

Acting Administrator.

Note.—Incorporation by reference of the State Implementation Plan for the State of Virginia was approved by the Director of the Federal Register on July 1, 1980.

Part 52 of Title 40, Code of Federal Regulation is amended as follows:

Subpart VV—Virginia

1. In § 52.2420, paragraph (c)(39) is added as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) The plan revisions listed below were submitted on the dates specified.

* * * * *

(39) Amendments to Part I (Definitions), § 1.02; and Part IV (Emission Standards for Particulate Emissions from Fuel Burning Equipment, Rule EX–3), §§ 4.30, 4.31 (except § 4.31(d)(3)) and 4.32 submitted on September 21, 1979.

2. Section 52.2423 is amended by adding paragraph (g) to read as follows:

§ 52.2423 Approval status.

* * * * *

(g) Section 4.31(d)(3) of Part IV of the Virginia Regulations for the Control and Abatement of Air Pollution is not considered part of the applicable plan because the substitute criteria, listed in § 4.31(d)(3), contain inherent variations in quality control which do not present an accurate representation of collection efficiency.

[FR Doc. 81–11846 Filed 4–17–81; 8:45 am]

BILLING CODE 6560–38–M

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40 CFR Part 52

[A–3–FRL 1798–2]

Approval of Revision of Pennsylvania State Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: In a **Federal Register** notice dated May 20, 1980, 45 FR 33607, EPA conditionally approved the Commonwealth of Pennsylvania's State Implementation Plan (SIP). One of the five conditions of the approval of this SIP was that each designated lead planning agency and metropolitan planning organization in four areas of Pennsylvania submit written assurances that no project, program or plan will be approved that does not conform to the SIP.

In a letter dated July 15, 1980, Secretary Clifford L. Jones of the Pennsylvania Department of Environmental Resources submitted to EPA the required commitments by regional planning commissions.

Today, EPA is approving these commitments for inclusion in the SIP, thus correcting deficiency number 4 as noted in the **Federal Register** notice of May 20, 1980, 45 FR 33607.

DATE: Effective April 20, 1981.

ADDRESSES: Copies of the materials submitted by the Commonwealth of Pennsylvania and comments received on these materials may be examined during normal business hours at:

U.S. Environmental Protection Agency, Air Programs Branch, Curtis Building, 6th and Walnut Streets, Philadelphia, PA 19106, Attn.: Patricia Sheridan

Department of Environmental Resources, Bureau of Air Quality Control, Fulton Bank Building, Third and Locust Streets, Harrisburg, PA 17120, Attn.: Gary L. Triplett

Public Information Reference Unit, Room 2922, EPA Library, U.S. Environmental Protection Agency, 401 M Street SW., Waterside Mall, Washington, D.C. 20460

Office of the Federal Register, 1100 L Street SW., Room 8401, Washington, D.C. 20408

FOR FURTHER INFORMATION CONTACT: Gregory D. Ham (3AH12), U.S. Environmental Protection Agency, Region III, 6th and Walnut Streets, Philadelphia, PA 19106, telephone: 215/597-2745.

SUPPLEMENTARY INFORMATION: The Pennsylvania State Implementation Plan (SIP) for nonattainment areas was conditionally approved on May 20, 1980, 45 FR 33607. One of the five conditions was that each designated lead planning agency and metropolitan planning organization in the Allentown-Bethlehem-Easton, Scranton, Wilkes-Barre, and Harrisburg areas would provide written assurances to EPA, with endorsements by the Commonwealth, that no project, program, or plan will be approved that does not conform with the approved SIP.

On July 15, 1980, Secretary Clifford L. Jones submitted to EPA these assurances in the form of consistency/conformity resolutions. These resolutions were submitted by the following organizations:

Lackawanna-Luzerne Transportation Study (For Scranton and Wilkes-Barre)

Tri-County Regional Planning Commission, Harrisburg Area Transportation Study Coordinating Committee (For the Harrisburg area)

Lehigh Valley Transportation Study Area Coordinating Committee (For the Allentown-Bethlehem-Easton area)

The following statement (or a similar statement) was added to the consistency resolutions for these areas: the organization "further resolves that no project, program, or plan will be approved that does not conform to the SIP, when specific guidelines for conformity are jointly developed by the EPA and U.S. DOT." These guidelines were developed and signed on June 12, 1980, and have been distributed to the appropriate MPO's and lead agencies.

Based on the foregoing, it is the decision of the Administrator to accept these commitments as satisfying the appropriate deficiencies in the Pennsylvania SIP.

EPA did not publish a separate proposed approval for these conformity resolutions because the condition requiring these resolutions was discussed in detail in the **Federal Register** notice conditionally approving the Pennsylvania SIP. See 45 FR 33607 (May 20, 1980). Also, no comments were received on this issue.

Under Section 307(b)(1) of the Clean Air Act, judicial review of this action is available *only* by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of today. Under Section 307(b)(2) of the Clean Air Act, the requirements which are the subject of today's notice may *not* be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. The SIP approvals announced today are not major because they only approve state actions. They impose no new regulatory requirements.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any comments from OMB to EPA and any EPA response to those comments, are available for public inspection at EPA Region III, Air Programs Branch, 6th & Walnut Streets, Philadelphia, Penna. 19106.

Pursuant to the provisions of 5 U.S.C. 605(b) I herby certify that this proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This action only approves State action. Due to the nature of the Federal-State relationship under the Clean Air Act, federal inquiry into the economic reasonableness of the State action would serve no practical purpose and could well be improper.

(42 U.S.C. 7401-642)

Dated: April 13, 1981.

William C. Barber,

Acting Administrator.

Note.—Incorporation by reference of the State Implementation Plan for the Commonwealth of Pennsylvania was approved by the Director of the Federal Register on July 1, 1980.

Title 40, Part 52 of the Code of Federal Regulations is amended as follows:

Subpart NN—Pennsylvania

§ 52.2037 [Amended]

Section 52.2037, Control Strategy, is amended by removing paragraph (a)(4).

[FR Doc. 81-11862 Filed 4-17-81; 8:45 am]

BILLING CODE 6560-38-M

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40 CFR Part 122

[EN-FRL 1790-8]

Consolidated Permit Regulations; NPDES Application Requirements for Textile Mills, Ore Mines, and Porcelain Enameling

AGENCY: Environmental Protection Agency (EPA).

ACTION: Suspension of portion of final rule.

SUMMARY: This action suspends for the Textile Mills, Ore Mining and Dressing, and Porcelain Enameling point source categories a portion of the requirement in EPA's consolidated permit regulations that certain effluent testing data for organic toxic pollutants be submitted as part of the application for a National Pollutant Discharge Elimination System (NPDES) permit. This action is in response to public comments and a preliminary evaluation of newly presented data. During the suspension, EPA will reconsider the appropriateness of this requirement for this group of industrial facilities, based upon the newly presented data.

EFFECTIVE DATE: April 20, 1981.

FOR FURTHER INFORMATION CONTACT: Gail Goldberg, Office of Water Enforcement and Permits (EN-336), Washington, D.C. 20460 (202) 426-7035.

SUPPLEMENTARY INFORMATION: On May 19, 1980, EPA issued final consolidated permit regulations and the consolidated permit application forms including NPDES permit application forms under the Clean Water Act (45 FR 33290). Those regulations and NPDES permit application Form 2c require that applicants with processes in primary industries provide data obtained through sampling and analyses to characterize their process wastestreams for those toxic organic pollutants designated for that industry category in Appendix D to 40 CFR Part 122. The Textile Mills, Ore Mining and Dressing, and Porcelain Enameling Point Source Categories are listed as primary industries in the Consent Decree issued in *NRDC v. Train,* 8 ERC 2120 (D.D.C. 1976), modified March 9, 1979, 12 ERC 1833, 1841.

The consolidated permit regulations, at 40 CFR 122.53(d)(7)(ii)(A), contain the following testing requirement:

> (ii) Each applicant with processes in one or more primary industry category (see Appendix A to Part 122) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:
>
> (A) The organic toxic pollutants in the fractions designated in Table I of Appendix D for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (d)(8) of this section * * *.

Table I of Appendix D requires that applicants in the Textile Mills and Ore Mining and Dressing industries test and report quantitative data on all four organic pollutant fractions, and that applicants in the Porcelain Enameling