transportation costs for which the handler was not reimbursed through the transportation credit pursuant to § 1002.55, but such charge shall be reduced by the amount that the class use location value of milk at the plant of first receipt exceeds its class use location value where the milk was accounted for as a receipt in the bulk tank unit from which the milk was transferred. Any such deduction, plus the transportation credit, and plus the amount of the increase in class use location value of the milk at the plant compared to the unit shall not exceed the actual transportation costs incurred. Any such deduction also must be made by the handler not later than the date on which the producer is required to be paid for such milk. If authorization for such deduction is cancelled by the producer or by the cooperative by notifying the handler in writing, such cancellation shall be effective on the first day of the month following its receipt by the handler; and

* * * * *

§ 1002.82 [Amended]

5. In § 1002.82, paragraph (b) is removed.

(Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674) Effective date: September 1, 1981

Signed at Washington, D.C., on August 13, 1981.

John Ford,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 81-24060 Filed 8-17-81; 8:45 am]

BILLING CODE 3410-02-M

Agricultural Marketing Service[1]

Food Safety and Quality Service

7 CFR Part 2851

U.S. Standards for Grades of Mixed Nuts in the Shell[2]

AGENCY: Food Safety and Quality Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the voluntary U.S. Standards for Grades of Mixed Nuts in the Shell and updates requirements for pecans in the shell. This action has been taken at the request of the major mixed nut packaging firms, users of USDA's voluntary continuous inspection program. The firms requested this revision to bring the grade standards in line with current industry practices and to provide consumers with an improved product.

EFFECTIVE DATE: August 18, 1981.

FOR FURTHER INFORMATION CONTACT: Michael A. Canon, Fresh Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447–2093.

SUPPLEMENTARY INFORMATION: William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined that this rule is not a major rule under Executive Order 12291. No substantial new costs are being imposed on the affected industry. The rule represents an adjustment of nut size requirements to enhance current industry marketing capabilities. Consequently, it will not result in an annual effect on the economy of $100 million or more; a major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined this rule would not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act, Pub. L. 96–354 (5 U.S.C. 601), because it reflects current marketing practices.

It is found that good cause exists for making this document effective upon publication in the **Federal Register** (5 U.S.C. 553) because: (1) Mixed nut packers purchase imported Brazil nuts in August for use in the peak fall marketing season, (2) mixed nut packers normally purchase USDA grade labeled packaging material in August for the upcoming marketing season, and (3) postponing the effective date of the final rule would serve no useful purpose and could cause administrative problems in the application of the U.S. Standards for Grades of Mixed Nuts in the Shell.

Background

The proposed revision of the voluntary grade standards for mixed nuts in the shell was published in the **Federal Register** on May 15, 1981 (46 FR 26787). At that time the responsibility for U.S. grade standards was assigned to the Food Safety and Quality Service. The Agricultural Marketing Service now has this responsibility.

These grade standards establish size, quality, and mix requirements for in-shell pecans, filberts, walnuts, almonds, and Brazil nuts. The size and quality requirements listed in the standards for mixed nuts are explained in the U.S. standards for each type of nut.

The three major mixed nut packaging firms, packaging approximately 70 percent of the mixed nuts marketed domestically, formally requested that the U.S. Standards for Grades of Mixed Nuts in the Shell be revised to change the mimimum size requirement of Brazil nuts from large (73/64 inches in diameter) to medium (59/64 inch in diameter) in the U.S. Extra Fancy grade.

According to representatives of the major mixed nut packers, larger size Brazil nuts are less consistent in quality than medium size ones and are generally in short supply. The Manaus area of Brazil produces most of the larger size Brazil nuts. Quality in the largen nuts from Manaus varies widely, and incidences of aflatoxin contamination from aspergillus mold have been frequent.

The three firms who have requested revision of the U.S. standards are under contract to use USDA continuous inspection during product packaging. Users of the voluntary continuous inspection program may legally label consumer-size film bags of mixed nuts with a USDA grade shield and/or the statement "packed under continuous USDA inspection." Inspectors are present during packaging, and quality is continuously monitored. Users of the service pay a fee to cover the cost of inspection. Advertising by these firms highlights the quality assurance of a grade labeled product.

The Agricultural Marketing Act of 1946 requires that the Department, in cooperation with industry, keep the requirements of the voluntary grade standards in line with current industry cultural and marketing practices. Although this revision would provide consumers with a smaller size Brazil nut, the consistently higher quality of the medium size nut would benefit consumers. Quality requirements have

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[1] The Commodity Services Program of the Food Safety and Quality Service of the U.S. Department of Agriculture (USDA) was transferred to the Agricultural Marketing Service of USDA by USDA Secretary's Memorandum 1000–1, issued June 17, 1981. A notice detailing the agencies' reorganization is being drafted for later publication.

[2] Compliance with the provisions of these standards shall not excuse failure to comply with provisions of applicable Federal or State laws.

been updated for pecans to reflect the 1976 revision of the U.S. Standards for Grades of Pecans in the Shell.

Comments on Proposal

Four comments were received in response to the Department's proposal to revise the U.S. Standards for Grades of Mixed Nuts in the Shell. The proposals to change the minimum size of Brazil nuts in the U.S. Extra Fancy grade and to update the quality factors for pecans were endorsed by the commenters. Those commenting included several major mixed nut packers who use grade labeling on consumer packages and users of the USDA Continuous Inspection Program.

The mixed nut packers expressed opposition to the Department's proposal to revise grade nomenclature to conform with the Uniform Grade Nomenclature Policy adopted in 1976. The policy states that upon revision, amendment, or development, uniform grade names (U.S. Fancy, U.S. No. 1, U.S. No. 2, and U.S. No. 3) will be used except in situations that compliance would be considered inappropriate or unreasonable. The present grade nomenclature for mixed nuts in the shell is U.S. Extra Fancy, U.S. Fancy, and U.S. Commercial/U.S. Select.

The mixed nut packers point out that substantial investments have been made in advertising mixed nuts as being USDA grade labeled to assure the consumer of a quality product. To change grade nomenclature at this time, they state, would place undue financial burdens on them to educate the consumer concerning the new USDA names as well as to purchase new film packaging material. The firms commenting state they currently have several years of packing material printed with labels and grades.

They also object to grade labeling mixed nuts that are currently labeled U.S. Commercial or U.S. Select as U.S. No. 2 quality when in fact each of the species of nuts required to be in mixed nuts must be U.S. No. 1 in quality, or a high percentage of U.S. No. 1 quality. The Uniform Grade Nomenclature Policy describes U.S. No. 2 as the "intermediate quality between U.S. No. 1 and U.S. No. 3". The mixed nut industry rightfully considers U.S. 2 quality to be less than U.S. No. 1 and to grade label their product below its certified quality due to a change only in nomenclature is unreasonable in their eyes.

The Department considers the industry's objections to applying the Uniform Grade Nomenclature Policy appropriate and reasonable, so this revision does not change the original grade nomenclature.

PART 2851—FRESH FRUITS, VEGETABLES, AND OTHER PRODUCTS (INSPECTION, CERTIFICATION, AND STANDARDS)

Therefore, Subpart—United States Standards for Grades of Mixed Nuts in the Shell (7 CFR 2851.3520–2851.3523) is revised to read as follows:

Subpart—United States Standards for Grades of Mixed Nuts in the Shell

General

Sec.
2851.3520 General.

Grades

2851.3521 U.S. Extra Fancy.
2851.3522 U.S. Fancy.
2851.3523 U.S. Commercial or U.S. Select.

Subpart—United States Standards for Grades of Mixed Nuts in the Shell

General

§ 2851.3520 General.

Any lot of mixed nuts in the shell which is classified as meeting the requirements of a U.S. grade for mixed nuts in the shell is required to conform to the applicable mixture, sizes, and grades set forth in one of the following grades. Each species of nut shall be graded individually in accordance with U.S. standards currently in effect for that species. The percentages in the mixture shall be determined on the basis of weight, and each species must conform to the minimum and maximum percentages specified in the mixture as set forth in section 2851.3521–2851.3523. A composite sample shall be drawn to determine mixture, size, and grade. When any species in a lot fails to meet the applicable requirements as to mixture, size, or grade prescribed for a particular U.S. grade for mixed nuts in the shell, the entire lot fails to meet the requirements of such U.S. grade.

Grades

§ 2851.3521 U.S. Extra Fancy.

Nut species	Allowable mixture: Minimum percent	Allowable mixture: Maximum percent	Minimum size	Minimum grade
Almonds	10	40	28/64 inch (11.1 mm)	U.S. No. 1
Brazils	10	40	Medium	U.S. No. 1
Filberts	10	40	Long type varieties: 44/64 inch (17.5 mm)	U.S. No. 1
			Round type varieties: 49/64 inch (19.4 mm)	
Pecans	10	40	Extra Large	U.S. No. 1
Walnuts	10	40	Large	U.S. No. 1

§ 2851.3522 U.S. Fancy.

Nut species	Allowable mixture: Minimum percent	Allowable mixture: Maximum percent	Minimum size	Minimum grade
Almonds	10	40	28/64 inch (11.1 mm)	U.S. No. 1
Brazils	10	40	Medium	U.S. No. 1
Filberts	10	40	Long type varieties: 44/64 inch (17.5 mm)	U.S. No. 1
			Round type varieties: 49/64 inch (19.4 mm)	
Pecans	10	40	Large	U.S. No. 1

Nut species	Allowable mixture: Minimum percent	Allowable mixture: Maximum percent	Minimum size	Minimum grade
Walnuts	10	40	Medium	U.S. No. 1

§ 2851.3523 U.S. Commercial or U.S. Select.

Nut species	Allowable mixture: Minimum percent	Allowable mixture: Maximum percent	Minimum size	Minimum grade
Almonds	5	40	28/64 inch (11.1 mm)	U.S. No. 1
Brazils	5	40	Medium	U.S. No. 1
Filberts	5	40	Long type varieties: 34/64 inch (13.5 mm) Round type varieties: 45/64 inch (17.9 mm)	U.S. No. 1
Pecans	5	40	Medium—(a) External quality: U.S. No. 1 (b) Internal quality: 75 percent U.S. No. 1 quality with not more than 10 percent seriously damaged kernels, including therein not more than 7 percent which are rancid, moldy, decayed, or injured by insects, including not more than one-half of one percent live insects inside the shell.	
Walnuts	5	40	Baby—(a) External quality: 85 percent U.S. No. 1 quality. (b) Internal quality: 85 percent U.S. No. 1 quality, except that the lot need only meet the requirements for U.S. No. 2 grade for kernel color; with not more than 8 percent seriously damaged kernels, including therein not more than 5 percent which are damaged by insects..	

(Agricultural Marketing Act of 1946, secs. 203, 205, 60 Stat. 1087, as amended, 1090 as amended; 7 U.S.C. 1622, 1624)

Done at Washington, D.C. on August 13, 1981.

William T. Manely,

Deputy Administrator.

[FR Doc. 81-24024 Filed 8-17-81; 8:45 am]

BILLING CODE 3410-02-M

Agricultural Marketing Service [1]

Food Safety and Quality Service

7 CFR Part 2852

United States Standards for Grades of Grapefruit Juice [2]

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The purpose of this final rule is to revise the voluntary U.S. Standards for Grades of Grapefruit Juice. The final rule was developed by the U.S. Department of Agriculture (USDA) at the request of the citrus industry. This rule revises the voluntary grade standards to: (1) permit the use of more mature grapefruit in the production of grapefruit juice; (2) permit the use of both pink-fleshed and white-fleshed grapefruit in the production of grapefruit juice; (3) replace dual grade nomenclature with single letter designation; and (4) combine the four current grade standards into a single format with easy-to-read tables.

Its effect will be to improve the standards and to promote orderly and efficient marketing of grapefruit juice.

EFFECTIVE DATE: September 17, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Jennings, Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, telephone (202) 447-6247.

SUPPLEMENTARY INFORMATION: William T. Manley, Deputy Administrator, Marketing Program Operations, Agricultural Marketing Service, has determined that this final rule is not major. It will not result in an annual effect on the economy of $100 million or more. There will be no major increase in cost or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. It will not result in significant adverse effects on competition, employment, investments, productivity, innovations, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

William T. Manley, Deputy Administrator, Marketing Program Operations, Agricultural Marketing Service, has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act, P.L. 96-354 (5 U.S.C. 601), because it reflects current marketing practices.

The effective dates for the current voluntary grade standards are: grapefruit juice, December 7, 1968; dehydrated grapefruit juice, July 1, 1964; concentrated grapefruit juice for manufacturing, May 22, 1954; frozen concentrated grapefruit juice, September 21, 1968.

The USDA was petitioned by the Florida Citrus Processors Association (FCPA) in 1977 to revise the quality standards for grapefruit juice. The Florida industry cited the present standard's bias against using ripe grapefruit as the reason for the requested change. Prior to proposing any change in the standards, a notice was published in the **Federal Register** (42 FR 51952), October 12, 1977, soliciting views and comments from interested persons until January 10, 1978. Over 175 letters and cards were received from grapefruit

[1] The Commodity Services Program of the Food Safety and Quality Service of the U.S. Department of Agriculture (USDA) was transferred to the Agricultural Marketing Service of USDA by USDA Secretary's Memorandum 1000-1, issued June 17, 1981. a notice detailing the agencies' reorganization is being drafted for later publication.

[2] Compliance with the provisions of these standards shall not excuse failure to comply with the provisions of the Federal Food, Drug, and Cosmetic Act, or with applicable State laws and regulations.

juice processors, individual consumers, parents, boards of education, and other interested persons. A majority of those who responded to the notice favored the removal of color as a quality factor for determining the grade of grapefruit juice. The Florida citrus industry, through the FCPA, favored the retention of color in the grapefruit juice standards, but with the major emphasis to be placed on the quality factor of flavor.

On June 30, ,1978, a proposed rule was published in the **Federal Register** (43 FR 28511) to remove color as a quality factor for determining the grade of grapefruit juice. Comments could be filed until August 29, 1978.

The comments which were received on the proposed rule were divided on the issue as to whether color should be a quality factor or classified as to "pink," "white," or "mixed." The Florida citrus industry, through the FCPA, favored retention of color as a quality factor; however, some individual processors within the FCPA opposed the FCPA's stand. Processors from California, Texas, and Arizona favored the elimination of color as a quality factor. Consumers felt that color could be eliminated if it resulted in no substantial hazard to the quality of grapefruit juice at the marketplace.

Since the Florida citrus industry was divided on the issue of the importance of color in the grapefruit juice standards, a meeting was held in Winter Haven, Florida, October 25, 1978, and the citrus industry elected to perform a consumer impact study which would reveal consumers' opinions about grapefruit juice color. The State of Florida funded the study. A concurrent study was performed on consumers' reactions to bitterness in grapefruit juice.

On December 1, 1978, an Extension of Time was published in the **Federal Register**, (43 FR 56245) granting a delay for comments until June 1, 1979, to allow sufficient time for a consumer impact study to be conducted.

On December 15, 1978, the Federal Food and Drug Administration (FDA) proposed to establish Standards of Identity and Fill of Container for Grapefruit Juice in order to adopt, to the extent practicable, the Codex Standards for Grapefruit Juice. This proposal would affect directly, the USDA's quality standards for grapefruit juice; however, it would not resolve the issue of color as a "quality factor" or a "classified factor," as proposed by the USDA.

On July 2, 1979, a representative of the USDA met with the FCPA's grapefruit juice committee in Winter Haven, Florida. The FCPA stated that its stand on grapefruit juice had not changed from previously submitted correspondence in reply to the **Federal Register** publication. The FCPA recognized that some of its membership did not concur with the majority on grapefruit juice color, and these members were represented at the meeting. The FCPA requested a delay until the fall of 1979 to restate its position. Since several delays had been granted previously, further delay was denied.

A tabulation of the comments received on the grapefruit juice proposal indicated that the issue is misunderstood by consumers, divisively supported and opposed by the citrus industry, and opposed by official USDA Agricultural Commodity Graders.

Due to the widely differing opinions of interested persons, a second Notice of Proposed Rulemaking was published in the **Federal Register** on February 15, 1980 (45 FR 10356).

Comments were received from the California-Arizona Citrus League, the FCPA, the Texas Canners and Freezers Association, and five individual processors. Some responders commented on more than one portion of the proposed rule.

Five of the commenters asked for the removal of color as a quality factory. The FCPA favored retention of color as a quality factor; however, some individual processors within the association opposed the FCPA's position. The most common request of the citrus industry was to allow for the processing of more mature grapefruit, which has the best flavor but does not have a bright color. After evaluation of all the comments, the USDA has concluded that U.S. Standards for Grades of Grapefruit Juice should place less emphasis on color as a quality factor, but that color should be retained as a quality factor because the color may be affected by abuse during processing.

Four of the comments objected to reference to the Food and Drug Administration's (FDA) proposed Standards of Identity for Grapefruit Juice. Since the U.S. Standards for Grades of Grapefruit Juice must be based on the contents of the final FDA Standards of Identity for Grapefruit Juice, the USDA has determined that reference to the proposed FDA Standards of Identity for Grapefruit Juice is valid.

Three comments were received desiring minimum Brix requirements to be established for grapefruit juice (Table I) and grapefruit juice from concentrate (Table II). FDA Standards of Identity, Fill, and Quality require minimum levels to assure receipt of fair value. The USDA has determined that the requirement, "Meets FDA requirements" assures the consumer of a quality product.

One comment suggested a change in the definition of "good flavor" to read "including a slight amount of bitterness." Under the USDA definition for flavor, "good flavor" means grapefruit juice that is typical of freshly extracted juice from mature, well-ripened grapefruit. USDA concluded that there could be a slight amount of bitterness within this definition, so no specific inclusion of bitterness was necessary.

Another comment addressed the inclusion of "K-early hybrids" in the product description. The proposed FDA Standards of Identity for Grapefruit Juice describe grapefruit juice as juice from sound, mature grapefruit (Citrus Paradisi Macfadyen). The USDA description refers to the FDA Standards of Identity and takes the position that the FDA Standards of Identity are binding. Should an amendment to the FDA Standards of Identity include "K-early hybrids," the USDA definition would allow the use of the "K-early hybrids."

The other comments dealt with minor editorial changes. After consideration of these views, the USDA has concluded that no purpose would be served by these changes.

After review of the comments received and in order to promote the orderly marketing of grapefruit juice, USDA hereby revises the four grade standards for grapefruit juice to:

(1) Permit more variance in the color of grapefruit juice but retain color as a quality factor;

(2) Replace dual grade nomenclature (U.S. Grade A, U.S. Fancy; U.S. Grade B, U.S. Choice) with single letter grade designation (U.S. Grade A; U.S. Grade B); and

(3) Combine the four current grade standards into a single format with easy-to-read tables.

PART 2852—PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

Accordingly, various sections of 7 CFR Part 2852 are amended as set forth below:

Subpart—United States Standards for Grades of Grapefruit Juice [Removed]

§§ 2852.6121-2852.6133 [Reserved]

1. Subpart—United States Standards for Grades of Grapefruit Juice (7 CFR 2852.6121–2852.6133) is removed and the

sections, excluding the Subpart title, are reserved.

Subpart—United States Standards for Grades of Concentrated Grapefruit Juice for Manufacturing [Removed]

§§ 2852.3481-2852.3491 [Reserved]

2. Subpart—United States Standards for Grades of Concentrated Grapefruit Juice for Manufacturing (7 CFR 2852.3481—2852.3491) is removed and the sections, excluding the Subpart title, are reserved.

Subpart—United States Standards for Grades of Dehydrated Grapefruit Juice [Removed]

§§ 2852.3021-2852.3032 [Reserved]

3. Subpart—United States Standards for Grades of Dehydrated Grapefruit Juice (7 CFR 2852.3021–2852.3032) is removed and the sections, excluding the Subpart title, are reserved.

4. The title of Subpart—United States Standards for Grades of Frozen Concentrated Grapefruit Juice (7 CFR Part 2852) is amended to read "Subpart–United States Standards for Grades of Grapefruit Juice" and the sections thereunder (7 CFR 2852.1221–2852.1232) are revised to read as follows:

* * * * *

Subpart—United States Standards for Grades of Grapefruit Juice

Sec.

* * * * *

Subpart—United States Standards for Grades of Grapefruit Juice

§ 2852.1221 Product description.

(a) "Grapefruit juice" is the product represented as defined in the Standards of Identity for Grapefruit Juice (21 CFR 146.132), issued under the Federal Food, Drug, and Cosmetic Act.

(b) "Grapefruit juice from concentrate" is the product represented as defined in the Standards of Identity for Grapefruit Juice from Concentrate (21 CFR 146.132), issued under the Federal Food, Drug, and Cosmetic Act.

(c) "Frozen concentrated grapefruit juice" is the product processed by concentrating and preserving by freezing the product represented as defined in the Standards of Identity for Grapefruit juice (21 CFR 146.132), issued under Federal Food, Drug, and Cosmetic Act.

(d) "Concentrated grapefruit juice for manufacturing" is the product processed by concentrating and preserving by physical means the product represented as defined in the Standards of Indentity for Grapefruit juice (21 CFR 146.132), issued under the Federal Food, Drug, and Cosmetic Act.

(e) "Dehydrated grapefruit juice" is the product processed by concentrating and preserving by dehydration the product represented as defined in the Standards of Identity for Grapefruit Juice (21 CFR 146.132), issued under the Federal Food, Drug, and Cosmetic Act.

§ 2852.1222 Styles.

(a) Unsweetened.

(b) Sweetened (Sweetener added).

§ 2852.1223 Color.

(a) White or amber.

(b) Pink or red.

§ 2852.1224 Definitions of terms.

In these U.S. standards, unless otherwise required by the context, the following terms shall be construed, respectively, to mean:

(a) *Acid* means the percent, by weight, of total acidity (calculated as anhydrous citric acid).

(b) *Appearance* means the physical properties of grapefruit juice which are evaluated by the human eye.

(c) *Brix* means the percent, by weight, of grapefruit soluble solids and added sweetener, if any.

(d) *Brix-acid ratio* means the proportion of grapefruit soluble solids and added sweetener, if any, to acid.

(e) *Coagulation* means curdling of grapefruit juice.

(f) *Color.*

(1) "Good color" means the grapefruit juice is representative of juice expressed from mature, well-ripened grapefruit; and the grapefruit juice may show fading and lack of luster. Grapefruit juice that is good color may be given a score of 18 to 20 points.

(2) "Reasonably good color" means the grapefruit juice is slightly affected by scorching, oxidation, or caramelization. Grapefruit juice that is reasonably good color may be given a score of 16 or 17 points and may not be graded above "Grade B" regardless of total score.

(3) "Poor color" means the grapefruit juice fails to meet the requirements for "reasonably good color." Grapefruit juice that is poor color may be given a score of 0 to 15 points and is "Substandard" regardless of total score.

(g) *Defects* means juice cells, pulp, seeds or portions of seeds, specks, particles of membrane, core, peel, or any other distinctive features that adversely affect the appearance or drinking quality of grapefruit juice.

(1) "Practically free from defects" means defects in excess of that normally expected in grapefruit juice are not present. Grapefruit juice that is practically free from defects may be given a score of 18 to 20 points.

(2) "Reasonably free from defects" means the presence of defects does not seriously affect the appearance or drinking quality of grapefruit juice. Grapefruit juice that is reasonably free from defects may be given a score of 16 or 17 points and may not be graded above "Grade B" regardless of total score.

Grapefruit juice that fails the requirements for "reasonably free from defects" may be given a score of 0 to 15 points and is "Substandard" regardless of total score.

(h) *Flavor.*

(1) "Good flavor" means:

(i) *Grapefruit juice* that is typical of freshly extracted juice from mature, well-ripened grapefruit. The grapefruit juice may be slightly affected by processing, packaging or storage conditions.

(ii) *Grapefruit juice from concentrate* that it typical of freshly extracted juice from mature, well-ripened grapefruit. The grapefruit juice may be slightly affected by processing, packaging or storage conditions.

(iii) *Frozen concentrated grapefruit juice* that is typical of freshly extracted juice from mature, well-ripened grapefruit; and does not have more than a slight trace of bitterness.

(iv) *Concentrated grapefruit juice for manufacturing* that is practically free from traces of scorching, caramelization, oxidation, and terpene.

(v) *Dehydrated grapefruit juice* that is free from terpene, caramelization, oxidation, and rancid flavors.

Grapefruit juice that has a good flavor may be given a score of 54 to 60 points.

(2) "Reasonably good flavor" means:

(i) *Grapefruit juice* that is materially but not seriously affected by bitterness, terpene, processing, storage, or container flavor.

(ii) *Grapefruit juice from concentrate* that is materially but not seriously affected by bitterness, terpene, processing, storage, or container flavors.

(iii) *Frozen concentrated grapefruit juice* that is fairly typical of freshly extracted grapefruit juice, no more than slightly affected by bitterness, and is free from abnormal flavors of any kind.

(iv) *Concentrated grapefruit juice for manufacturing* that is no more than

slightly affected by scorching, caramelization, or oxidation. It may have a trace of terpene, but is free from any other abnormal flavors.

(v) *Dehydrated grapefruit juice* that is no more than slightly affected by scorching, caramelization, oxidation, or terpene flavors, but is free from any other abnormal flavors.

Grapefruit juice that has a reasonably good flavor may be given a score of 48 to 53 points and may not be graded above "Grade B" regardless of total score.

(3) "Poor flavor" means the grapefruit juice fails the requirements for "reasonably good flavor." Grapefruit juice that has a poor flavor may be given a score of 0 to 47 points and is "Substandard," regardless of total score.

(i) *Free and suspended pulp* means the particles of membrane, core, peel, and similar material that separate from suspension by centrifuging.

(j) *Gelation* means the formation of gel-like properties in the grapefruit juice.

(k) *Reconstituted juice* means the grapefruit juice obtained by mixing thoroughly one (1) part by volume of concentrated grapefruit juice with a specific volume of water.

(l) *Reconstitutes properly* means that upon mixing with water the concentrate dissolves readily.

(m) *Recoverable oil* means the volume of oil that may be recovered from grapefruit juice as determined by the "Official Methods of Analysis of the Association of Official Analytical Chemists."

(n) *Sampling unit* means a portion of grapefruit juice used for grading.

(o) *Terpene* means a specific flavor in oils and resins.

§ 2852.1225 Recommended sample unit size.

The requirements for all factors of quality are based on the following:

(a) The entire contents of a container;

(b) A representative portion of the contents of a container; or

(c) A combination of the contents of two or more containers.

§ 2852.1226 Grades.

(a) "U.S. Grade A" is the quality of grapefruit juice that:

(1) Meets the applicable requirements of Tables I through V; and

(2) Scores not less than 90 points.

(b) "U.S. Grade B" is the quality of grapefruit juice that:

(1) Meets the applicable requirements of Tables I through V; and

(2) Scores not less than 80 points.

(c) "Substandard" is the quality of grapefruit juice that fails to meet the requirements for "Grade B."

§ 2852.1227 Factors of quality and analysis.

The grade for a lot of product is based on observation and analysis of grapefruit juice and reconstituted grapefruit juice for the following quality and analytical factors:

(a) *Quality:*

(1) Appearance;

(2) Coagulation;

(3) Color;

(4) Defects;

(5) Flavor;

(6) Gelation;

(7) Reconstitution; and

(8) Total score points.

(b) *Analytical:*

(1) Brix measurement;

(2) Brix/acid ratio;

(3) Free and suspended pulp; and

(4) Recoverable oil.

§ 2852.1228 Requirements for grades.

Table I.—*Grapefruit Juice*

Factors	Grade A	Grade B
Quality:		
Appearance	Fresh grapefruit juice	Fails grade A.
Coagulation	None	Slight.
Color	Good	Reasonably good.
Defects	Practically free	Reasonably free.
Flavor	Good	Reasonably good.
Score points	Minimum—90	Minimum—80.

Analytical	Unsweetened	Sweetened	Unsweetened	Sweetened
Brix: Minimum	Meets FDA requirements.			
Brix-acid ratio:				
Minimum	8:1	9:1	7:1	9:1
Maximum	14:1	14:1	None	None
Free and suspended pulp (percent by weight): Maximum	10		15	
Recoverable oil (percent by weight): Maximum	0.020		0.025	

Table II.—*Grapefruit Juice From Concentrate*

Factors	Grade A	Grade B
Appearance	Fresh grapefruit juice	Fails grade A.
Coagulation	None	Slight.
Color	Good	Reasonably good.
Defects	Practically free	Reasonably free.
Flavor	Good	Reasonably good.
Score points	Minimum—90	Minimum—80.

Analytical	Unsweetened	Sweetened	Unsweetened	Sweetened
Brix: Minimum	Meets FDA requirements.			
Brix-acid ratio:				
Minimum	8:1	9:1	7:1	9:1
Maximum	14:1	14:1	None	None
Free and suspended pulp (percent by weight): Maximum	10		15	
Recoverable oil (percent by weight): Maximum	0.020		0.025	

Table III.—*Frozen Concentrated Grapefruit Juice*

Factors	Grade A	Grade B
Quality:[1]		
Appearance	Fresh grapefruit juice	Fails grade A.
Color	Good	Reasonably good.
Defects	Practically free	Reasonably free.
Flavor	Good	Reasonably good.
Gelation	Slightly	Materially.
Reconstitution	Reconstitutes properly	Reconstitutes properly.
Score points	Minimum—90	Minimum—80.

[1] Reconstituted prior to grading.

Analytical	Unsweetened	Sweetened	Unsweetened	Sweetened
Brix of concentrate:				
Minimum (degrees)	38.0	38.0	38.0	38.0
Maximum (degrees)	42.0	48.0	42.0	48.0
Brix-acid ratio:				
Minimum	9:1	10:1	7:1	8:1
Maximum	14:1	13:1	16:1	13:1

Analytical	Unsweetened	Sweetened	Unsweetened	Sweetened
Free and suspended pulp (percent by weight-reconstituted juice): Maximum		10		10

Factors	Grade A		Grade B	
	Unsweetened	Sweetened	Unsweetened	Sweetened
Recoverable oil (percent by weight): Maximum.	0.020		0.020	
Seeds and portions of seeds (reconstituted juice):	Slightly detract		Materially detract.	
Pass through round perforations—3.2 mm (0.125 in). Fail to pass through round perforations 3.2 mm (0.125 in).			Practically none	

Table IV.—*Concentrated Grapefruit Juice for Manufacturing*

Factors	Grade A	Grade B
Quality: [1]		
Color	Good	Reasonably good.
Defects	Practically free	Reasonably free.
Flavor	Good	Reasonably good.
Gelation	Slightly	Materially.
Reconstitution		Reconstitutes properly
Score points	Minimum—90	Minimum—80.
Analytical:		
Brix-acid ratio: Minimum	6:1	5.5:1
Free and suspended pulp (percent by weight-reconstituted juice): Maximum.	10	12.

[1] Reconstituted prior to grading.

Table V.—*Dehydrated Grapefruit Juice*

Factors	Grade A	Grade B
Quality: [1]		
Appearance	Fresh grapefruit juice	Fails grade A.
Color	Good	Reasonably good.
Defects	Practically free	Reasonably free.
Flavor	Good	Reasonably good.
Reconstitution		Reconstitutes properly
Score points	Minimum—90	Minimum—80.

[1] Reconstituted prior to grading.

Analytical [1]	Unsweetened	Sweetened	Unsweetened	Sweetened
Brix: Minimum	Meets FDA Requirements			
Brix-acid ratio:				
Minimum	8:1	9:1	7:1	9:1
Maximum	14:1	14:1	None	None
Recoverable oil (percent by volume): Maximum	0.020		0.025	

[1] Reconstituted prior to analysis.

§ 2852.1229 Sample size.

The sample size to determine acceptance with the requirements of these standards shall be as specified in the sampling plans and procedures in the "Regulations Governing Inspection and Certification of Processed Fruits and Vegetables, Processed Products Thereof, and Certain Other Processed Food Products" (7 CFR 2852.1 through 2852.83).

§ 2852.1230 Lot requirements.

A lot of grapefruit juice is considered as meeting requirements for quality if:

(a) The requirements specified in Tables I, II, III, IV, and V, as applicable, are met; and

(b) The sampling plans and procedures in 7 CFR 2852.1 through 2852.83 are met.

§ 2852.1231 [Reserved]

§ 2852.1232 [Reserved]

* * * * *

(Agricultural Marketing Act of 1946, Secs. 203, 205, 60 Stat. 1087, as amended 1090, as amended; (7 U.S.C. 1622, 1624))

Done at Washington, D.C., on August 13, 1981.

William T. Manley,

Deputy Administrator, Marketing Program Operations

[FR Doc. 81-24048 Filed 8-17-81; 8:45 am]

BILLING CODE 3410-DM-M

FEDERAL HOME LOAN BANK BOARD

12 CFR Part 545

[No. 81-437]

Geographic Restrictions on Remote Service Unit Operations

Dated: August 6, 1981.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule.

SUMMARY: The Federal Home Loan Bank Board is amending its regulations by removing geographic restrictions on the establishment and use of remote service units ("RSUs") by federally chartered savings and loan associations and federally chartered mutual savings banks ("Federal associations").

EFFECTIVE DATE: August 6, 1981.

FOR FURTHER INFORMATION CONTACT: K. Diane Boyle, Office of Industry Development (202-377-6720), or Michael D. Schley, Office of General Counsel (202-377-6444), Federal Home Loan Bank Board, 1700 G Street, NW, Washington, D.C. 20552.

SUPPLEMENTARY INFORMATION: Section 5(a) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(a)) authorizes the Federal Home Loan Bank Board to regulate RSU operations of Federal associations. The Board's regulations at 12 CFR 545.4-2(c) currently impose the following geographic restrictions limiting RSU operations to the state of a Federal association's home office or the primary service area of any of its out-of-state branch offices:

(c) *General.* A Federal association may establish or use RSUs and participate with others in RSU operations in the State of its home office, in the county in which any of its out-of-State branches are located, or, where an out-of-state branch is located

in a Standard Metropolitan Statistical Area (SMSA), in that portion of the SMSA located in the same State as the out-of-State branch.

* * * * *

By Resolution No. 81–296 of May 29, 1981, 46 FR 30114, June 5, 1981, the Board proposed to remove the existing geographic restrictions and permit Federal associations to engage in RSU operations on an interstate basis. The Board cited the present competitive disadvantage of Federal associations in this area, and questioned the need to impose branching-type restrictions on the use of RSU facilities.[1] The comment period for the proposal ended July 7, 1981.

Forty-two commenters responded to the Board's solicitation of public comment. The comment letters were submitted by 29 Federal associations, 4 thrift industry trade associations, 4 commerical banks, 2 commercial bank trade associations, an association representing the electronic funds transfer ("EFT") industry, the operator of an interstate remote EFT terminal network, and the United States Department of Justice. Thirty-three commenters (79%) endorsed the proposal for interstate RSU authority; 9 commenters (21%) either recommended against any change in Federal associations' current RSU authority or suggested modifications to the Board's proposal. A summary of these comments, together with the Board's responses, follows.

1. Potential Benefits of Providing RSU Services to Existing out-of-State Customers

Several commenters emphasized the value of interstate RSU authority for serving existing out-of-state customers of a Federal association.[2] Twelve Federal associations noted that many of their customers live or work in another state, or regularly shop or travel in another state. One association commented that "one of the biggest benefits of RSUs is their availability during nonwork hours"; yet this benefit is lost to an urban association's customers who live in another state. An association located in Pennsylvania commented:

Within one hour, our customers can travel to several neighboring states for recreational reasons. However, their financial needs do not end at the Pennsylvania border.

One association that lends to customers across state lines mentioned that placement of RSUs near those customers would provide a fast and convenient method for those customers to make monthly loan payments; another association noted that RSUs provide a less labor-intensive alternative to travelers' convenience withdrawals, which are currently available to Federal association customers on an interstate basis (12 CFR 545.4(b)).

The operator of a shared remote EFT terminal network in the State of Washington described how the Board's current restrictions on RSU operations of Federal associations also hinder the establishment of remote EFT terminals in Oregon for the customers of other financial institutions that use the network. Furthermore, that commenter noted that it would be confusing for customers of one member Federal association in Washington, which has branch offices in Oregon, to be able to use those RSUs in Oregon that are located within the primary service area of a branch office but not other RSUs in Oregon that are part of the network.

The Board believes that interstate RSU authority will yield substantial, operational benefits both to Federal associations and their customers. RSUs enable routine customer account transactions in a format not limited by the locations and operating hours of branch offices. This convenience is particularly important to an out-of-state customer who would otherwise have to travel across state lines to a branch office, or use the mail to execute simple account transactions. In addition, an RSU program may provide a cost-efficient means for an association to serve its out-of-state customers.

2. Competitive Implications of Interstate RSU Authority

(a) *Federal associations vis-a-vis other institutions.* A major reason underlying the Board's proposal to allow interstate RSU operations of Federal associations was that the present geographic restrictions hinder Federal associations' ability to compete with other financial institutions in providing these services to their established customers. In its proposal, the Board pointed out the authority of national banks and credit unions, as well as many state-chartered commercial banks and thrift institutions, to engage in RSU-type activities on an interstate basis, and noted that numerous remote EFT terminal networks are already operating on a multistate regional basis in several parts of the country. The Board has concluded that the inability of Federal associations to participate in multistate EFT networks or establish competing RSU facilities constitutes a competitive disadvantage that should be eliminated. In addition, it is the Board's belief that the elimination of such impediments to open competition will facilitate the development of competitive markets consistent with the spirit of the Depository Institutions Deregulation and Monetary Control Act of 1980 (Pub. L. 96–221, 94 Stat. 132).

Five Federal associations confirmed the rationale for this conclusion by describing interstate remote EFT terminal networks established by competitors within the associations' own market areas. Typical of these commenters was one association located in a three-state standard metropolitan statistical area ("SMSA"), which noted that three commercial banks operating in the SMSA are already sharing an interstate automated teller machine ("ATM") system.

An additional factor to be considered is the emerging phenomenon of banking-type services offered on an unrestricted interstate basis by nondepository institutions such as investment firms, nationwide retailers, money market mutual funds, and travel and entertainment companies. To a varying degree, these institutions compete directly with Federal associations for deposit and loan customers, and some are rapidly developing nationwide EFT systems capable of providing services identical to those available through RSU devices. These nondepository competitors already enjoy a competitive advantage since they are not subject to reserve requirements and deposit ceilings imposed on depository institutions. Continued geographic restriction of Federal association RSU operations would further aggravate the competitive disparity between regulated and unregulated entities.

In contrast, five commenters from the commercial banking industry criticized the proposed rule as going beyond competitive parity. These commenters pointed out that the proposed rule technically exceeds the present authority of national banks to deploy or use customer-bank communications terminals ("CBCTs"), and that many state chartered banks are prevented by state laws from deploying or using RSU-type devices out-of-state.

The matter of parity with national banks turns on a technical legal

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[1] It has been judicially determined that Federal association RSUs are not branch offices. Bloomfield Fed. Sav. & Loan Ass'n v. American Community Stores Corp., 396 F. Supp. 384 (D. Neb., 1975).

[2] A recent study of EFT in the banking and thrift industries concludes that consumer usage of EFT services is "growing rapidly." Electronic Money Index: A Quantitative Measurement of the Nationwide Growth of EFT (Electronic Money Council, October, 1980), at 2.

distinction. By opinion of the Chief Counsel, Office of the Comptroller of the Currency, national banks may use a CBCT located across state lines "if (1) the compensation for its use is on a transactional fee basis and (2) such use does not give to national banks a competitive advantage over state banks situated in those states." [3] However, national banks are prevented by the McFadden Act from owning or renting CBCTs in other states.[4] Thus to the extent that the proposed rule would permit Federal associations to own or rent RSUs in other states, it would give Federal associations greater technical authority than national banks have in this area.

On this basis, four commenters recommended modifications of the proposed rule that would give Federal associations parity with national banks.[5] The Board has rejected these proposed modifications for several reasons. It is probably impossible to draft a rule that would give Federal associations authority identical to that of national banks.[6] A more important consideration is that authority for Federal associations to both own and use RSUs is necessary to relieve their competitive disadvantage with depository and nondepository institutions that already engage in such activities, and such authority would give Federal associations the most flexibility in developing cost-efficient RSU systems that best suit the needs of their customers. These interests outweigh the technical disadvantage of national banks that would result from the proposed rule, particularly since, as a practical matter, national banks may currently participate in remote EFT terminal networks on an interstate basis. Furthermore, the Board does not believe that Federal associations should be arbitrarily subjected to the rules on interstate CBCT operations that apply to national banks. Those rules are the result of broad judicial interpretation of the McFadden Act, which does not apply to Federal associations. The Board believes it is more consistent with the spirit of deregulation for national banks to petition their regulators and Congress for relief from such restrictions than to request that the Board impose those restrictions on another industry.

Two commenters from the commercial banking industry objected to the proposed rule on the ground that it would give Federal associations greater authority than most state chartered commercial banks. The Board acknowledges that many state banks do not now have authority to deploy and use RSU-type devices on an interstate basis; however, for the reasons cited above dealing with the authority of national banks, the Board has determined to adopt the rule as proposed. Depository institutions, such as credit unions and national banks, as well as many nondepository institutions offering banking-type financial services, may establish remote EFT terminals on a nationwide basis. it would be inappropriate to prevent a Federal association from competing with such institutions merely because state laws restrict remote EFT terminal operations of state banks in the association's home state. The Board believes that any resulting disadvantage to state banks in those states may best be resolved by their legislatures or regulatory authorities.

With respect to concerns that interstate RSU operations of Federal associations will be injurious to competing depository institutions that partially or totally lack such authority, the Board expects that out-of-state RSUs will be used only to serve existing customers. (The limited nature of RSU services is discussed more fully below.) Thus, the technical advantage of Federal associations will constitute a difference in authority to provide a certain customer service, which difference will only indirectly affect the competition for customers. In light of the traditionally broader authority of commercial banks to offer customer services, the Board believes the new RSU authority will not disrupt the current balance of competition.

(b) *Regulatory flexibility analysis: impact on small associations.* Several commenters expressed concern that the proposed interstate authority might benefit large Federal associations to the detriment of smaller institutions. These comments reflected two separate concerns: (1) that large Federal associations will invade new out-of-state markets through RSU operations and take customers from smaller institutions in those localities; and (2) that the capital costs inherent in RSU operations will prevent small institutions from effectively competing with larger Federal associations that can afford to purchase and maintain RSU equipment.

The Board believes small local associations that are serving the thrift and home financing needs of their communities will not lose customers to out-of-state associations engaging in interstate RSU operations. One study of EFT services in the banking industry concluded: "Offering EFT services does not appear to help a bank increase its share of the market but this service may help a bank maintain its competitive position."[7] Two studies recently commissioned by Congress noted the limited services available through remote EFT terminals, and recommended that deployment of such terminals by banks not be subject to the geographic restrictions imposed on branch banking.[8] Thus, the Board expects RSUs will be used on an interstate basis only to serve existing customers who live, work, shop, or travel on a regular basis in another state.[9]

Some commenters, noting the capital costs involved in establishing an RSU system, expressed concern that small institutions might not be able to compete by establishing comparative systems. These comments ignore the option of shared systems, both proprietary and nonproprietary, which have been developed by EFT providers to meet the needs of small institutions. The Board believes the cost savings of an RSU Program will actually enhance a smaller institution's ability to serve its market.

Citing the possibility that small associations might be precluded from sharing interstate RSU systems owned or used by competitors, two commenters recommended mandatory sharing of RSU systems by Federal associations in order to avoid this problem. The Board recently deleted a "sharing" requirement from its RSU regulations. (*See*

[3] Office of the Comptroller of the Currency, Letters of the Chief Counsel, No. 153, July 7, 1980.

[4] 12 U.S.C. 36(c); Independent Bankers Ass'n of Am. v. Smith, 534 F. 2d 921 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 862 (1976).

[5] Two commenters recommended adoption of the legal restrictions applicable to CBCT operations of national banks under 12 U.S.C. 36(c), and two commenters suggested prohibition of interstate deposit-taking through RSUs.

[6] Many issues regarding national banks' authority in this area have not yet been resolved by the courts. For example, the above-quoted opinion of the Chief Counsel, Comptroller of the Currency, has not yet been tested by litigation. In addition, it is not yet settled whether a national bank may use on a transactional fee basis an out-of-state CBCT owned by an affiliate.

[7] D. Walker, An Analysis of Financial and Structural Characteristics of Banks with Retail EFT Machines (FDIC Working Paper No. 79-1) (1979), at 1.

[8] National Commission on Electronic Fund Transfers, EFT in the United States: Policy Recommendations and the Public Interest (1977), at 11, 12; Dept. of Treasury, Geographic Restrictions on Commercial Banking in the United States: The Report of the President (1981), at 19.

[9] One commenter speculated that future technological advances may make possible RSU services comparable to those available now only through branch offices, and thus expressed concern that interstate RSU authority would be the equivalent of interstate branching. However, the Board believes that RSU services are inherently limited and do not raise the same competitive implications as branching. *see* note 8, *supra*.

Resolution No. 81-209, Apr. 23, 1981, 46 FR 24531, May 1, 1981.) The requirement was deleted as unnecessary and duplicative, in light of Federal antitrust laws which prevent anticompetitive practices in this field.

Another commenter suggested that a phase-in schedule for interstate authority would give small associations time to establish competitive RSU programs. The Board opposes adoption of a phase-in schedule for interstate authority in the absence of sufficient justification. Such a delay would serve to prolong and aggravate the competitive disadvantage of Federal associations in this area.

A statement of the need for and objectives of the rule, as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), appears elsewhere in the supplementary information. Because the rule does not impose new restrictions or burdens on the regulated industry, there are no tiering alternatives that would have less impact on small entities.

3. Authority of the Federal Home Loan Bank Board

Five commenters requested the Board not to act on the proposed rule, suggesting that Congress alone should determine the scope of Federal associations' RSU authority. One commenter opined that the authority to determine such issues rests only in Congress.

The Board is authorized by the Home Owners' Loan Act of 1933 (12 U.S.C. 1461 *et seq.*) to charter, supervise, and regulate Federal associations. This legislative mandate carries with it the responsibility and authority to regulate activities such as those in question here.[10]

This rule is intended to have the full effect and force of law, and to preempt any state law that might otherwise restrict the RSU operations of Federal associations.

Accordingly, the Board hereby amends Part 545, Subchapter C, Chapter V of Title 12, Code of Federal Regulations, as set forth below.

SUBCHAPTER C—FEDERAL SAVINGS AND LOAN SYSTEM

PART 545—OPERATIONS

Revise paragraph (c) of § 545.4-2, to read as follows:

[10] The Board is charged with overseeing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." People v. Coast Fed. Sav. & Loan Ass'n., 98 F. Supp. 311, 316 (S.D. Cal. 1951); Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n, 499 F. 2d 1145, 1147 (9th Cir. 1974).

§ 545.4-2 Remote service units (RSUs).

* * * * *

(c) *General.* A Federal association may establish or use RSUs and participate with others in RSU operations, on an unrestricted geographic basis. No RSU may be used to open a savings account or establish a loan account.

* * * * *

(12 U.S.C. 1464; Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071)

By the Federal Home Loan Bank Board.

J. J. Finn,

Secretary.

[FR Doc. 81-24067 Filed 8-17-81; 8:45 am]

BILLING CODE 6720-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33-6340]

Small Offering Exemption From Registration Requirements

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is amending the rules, forms, and disclosure requirements under Regulation A. Regulation A provides an exemption from the registration provisions of the Securities Act of 1933 which may be used by a variety of issuers to raise up to $1.5 million worth of securities during any twelve-month period. The amendments being adopted represent a comprehensive revision and updating of the disclosure requirements.

EFFECTIVE DATE: September 17, 1981.

FOR FURTHER INFORMATION CONTACT: Daniel Abdun-Nabi, Office of Small Business Policy, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C., 20549, (202)/272-2644.

SUPPLEMENTARY INFORMATION CONTACT: On January 12, 1981 there was published in the **Federal Register** [46 FR 2637] a notice of proposed rulemaking proposing amendments to the rules, forms, and disclosure requirements under Regulation A (17 CFR 230.252 et seq., 239.90, and 239.96). Interested parties were given the opportunity to submit, not later than March 23, 1981, their views and recommendations regarding the proposal.

The Commission, after considering the views of the commentators, has determined to adopt the revisions to Regulation A substantially as proposed.[1] However, in response to the comments received, the following changes in the proposals are being effected:

(1) General Instructions now include a checklist of supplemental information which is required to be furnished under various Items of Part II.

(2) General Instruction B(b)(1) and (2) have been merged for clarity.

(3) Item 7 of Part 1 (Notification) has been renumbered for clarity.

(4) Item 9(a) has been clarified to state that the remuneration table is to contain annual remuneration for the last fiscal year and to require an indication as to the number of individuals included in the group figure.

(5) The first sentence in the lead-in paragraph of Item 13 has been revised to more clearly state that under specified circumstances a reconciliation report is required to be filed as part of the financial statements. Additionally, the Commission has revised the lead-in paragraph of the item to clarify that Regulation S-X is applicable to financial statements included in Regulation A offering circulars only where the issuer has filed or is required to file with the Commission certified financial statements.

(6) Item 13(a) has been amended to require the filing of a year-end balance sheet where the offering statement is filed subsequent to 90 days after the fiscal year-end date.

(7) The language of the second sentence in Item 13(b) has been revised to state that in the opinion of management all adjustments necessary for a fair statement of the results for the interim period have been included.

(8) The first sentence of Item 13(c) has been altered to include a specific reference to "significant subsidiary" and, in the interest of clarity, has been divided into two sentences. Additionally, the note following Item 13(c)(2) has been moved to follow Item 13(c)(1).

(9) The reference to Item 3 appearing in Item 1(b) of Part III—Exhibits has been corrected to read Item 2.

(10) Item 2(7) of Part III has been clarified to require, as an exhibit, only those plans described in the offering statement.

(11) Form 7-A Optional Form of Escrow has been amended to remove a

[1] In a companion release, the Commission is publishing for comment a new regulation governing the offers and sales of certain securities without registration. The proposed regulation, if adopted, would replace the existing limited offering exemptions contained in Commission Rules 146, 240, and 242. *See* Securities Act Release No. 6339 (August 7, 1981).

discrepancy between paragraph 4 of the Form and Rule 253(c).

Certain other recommendations have been carefully considered but have not been accepted. The following suggestions were not adopted for the reasons stated:

(1) Item 3(b) of Part II, which requires disclosures regarding potential dilution and tracks the language of proposed Regulation S–K Item 506,[2] was the subject of one comment recommending additional guidelines be adopted. The Commission has determined not to expand the disclosure requirements contained therein, believing that the item as currently drafted will elicit the necessary disclosures in most contexts, and where additional disclosure is necessary it will be provided pursuant to the comment process.

(2) One commentator suggested that in the context of a dividend reinvestment plan the information required by Items 9, 10, and 11 of Part II should not be required if previously furnished to stockholders under the Securities Exchange Act of 1934. The Commission, however, believes that the Regulation A offering statement should stand alone with respect to the nature and extent of the information provided without the need to reference other filings.

(3) One commentator suggested the accountant's report need comply with Article 2 of Regulation S–X only where the issuer is subject to the Securities Exchange Act of 1934. It was suggested that in all other circumstances the report need only comply with generally accepted auditing standards. The Commission believes that standards regarding the independence of auditors should not turn on whether or not the issuer is subject to the Securities Exchange Act of 1934. Further, the Commission sees no substantive benefit in adopting two levels of independence for auditors. Thus it was determined to continue to require that the auditor's qualifications and reports comply with Article 2 of Regulation S–X. The language in Item 13 has been clarified to reflect this position.

(4) The historic pro forma requirements of Part II Item 13(c) were criticized for creating reporting obligations beyond those called for by APB No. 16. The Commission believes APB No. 16 provides minimum disclosure requirements in the context of disclosures regarding past successions to other businesses and that pro forma historical financial statements are meaningful and necessary for an informed investment decision. For this reason the item has not been altered.

[2] Securities Act Release No. 6332 (August 6, 1981).

(5) Two commentators suggested the test for significant subsidiary in Item 13(c) be raised from 10 percent to 25 percent. The basis for the comment is that APB No. 16 already requires financial statement disclosure of the details of business combinations and that such an increase would give recognition to the generally small asset, revenue, and net income base Regulation A issuers normally have. The Commission, noting that APB No. 16 differs in some significant respects from Item 13(c), believes that the recommended increase in the threshold test for the reasons stated above would, at best, lead to dual standards for disclosure as between acquisitions between 10 percent and 25 percent and acquisitions in excess of 25 percent. At worst, such an amendment would be interpreted under APB No. 16 as requiring no disclosure for acquisitions between the 10 percent and 25 percent levels. The Commission does not believe such an amendment is in the interest of investors or would lead to any significant cost benefits for the issuer. For these reasons the Commission declines to raise the test for significant subsidiary as suggested by the commentators.

Accordingly 17 CFR 230.251 et seq., 239.90, and 239.96 are revised and adopted as set forth below.

Effective Date

These amendments shall become effective September 17, 1981.

Statutory Authority

The Commission hereby adopts Form 7–A and revisions to Form 1–A, Rule 251, and Rules 253 through 264 pursuant to the Securities Act of 1933, particularly sections 3(b) and 19(a).

(Secs. 3(b), 19(a), 48 Stat. 75, 85; sec. 209, 48 Stat. 908; 59 Stat. 167; 84 Stat. 1480; sec. 306(a)(1)(2)(3), 90 Stat. 56, 57; sec. 18, 92 Stat., 275; sec. 2, 92 Stat. 962; 15 U.S.C. 77c(b), 77s(a))

By the Commission.

George A. Fitzsimmons,

Secretary.

August 7, 1981.

Text of Amendments

The text of the amendments is set forth below.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

Regulation A, § 230.251–§ 230.284, is amended as follows:

1. Section 230.251 is amended by adding the definition of "parent" to read as follows:

§ 230.251 Definitions of terms in this regulation.

* * * * *

Parent. A "parent" of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

* * * * *

2. Section 230.253 is amended by revising paragraph (c)(1) to read as follows:

§ 230.253 Special requirements for certain offerings.

* * * * *

(c) * * *

(1) All securities issued prior to the filing of the offering statement, a proposal to be issued, for a consideration consisting in whole or in part of assets or services and held by the person to whom issued; and

* * * * *

3. Section 230.254 is amended by revising paragraphs (b) and (d)(1) to read as follows:

§ 230.254 Amount of securities exempted.

* * * * *

(b) The aggregate offering price of securities which have a determinable market value shall be computed upon the basis of such market value as determined from transactions or quotations on a specified date within 15 days prior to the date of filing the offering statement or the offering price to the public, whichever is higher; *Provided,* That the aggregate gross proceeds actually received from the public for the securities offered hereunder shall not exceed the maximum aggregate offering price permitted in the particular case by paragraph (a) of this section.

* * * * *

(d) * * *

(1) Unsold securities the offering of which has been withdrawn with the consent of the Commission by amending the pertinent offering statement to reduce the amount stated therein as proposed to be offered;

* * * * *

4. Section 230.255 is revised to read as follows:

§ 230.255 Filing of offering statement.

(a) At least 10 days (Saturdays, Sundays and holidays excluded) prior to the date on which the initial offering or sale of any securities is to be made under this regulation, there shall be filed with the Regional Office of the Commission specified below five copies of the offering statement required by this Regulation which shall consist of Part I—Notification, Part II—Offering

Circular, and Part III—Exhibits. The Commission may, however, in its discretion, authorize the commencement of the offering prior to the expiration of such 10-day period upon a written request for such authorization.

(b) The offering statement shall be signed by the issuer and each person, other than the issuer, for whose account any of the securities are to be offered. If the offering statement is signed by any person on behalf of any other person, evidence of authority to sign on behalf of such other person shall be filed with the offering statement, except where an officer of the issuer signs on behalf of the issuer. At the time of filing an offering statement, the applicant shall pay to the Commission at the Regional Office where the offering statement is filed a fee of $100.00, no part of which shall be refunded.

(c) The offering statement shall be filed with the Regional Office for the region in which the issuer's principal business operations are conducted or proposed to be conducted in the United States. The offering statement of any issuer having or proposing to have its principal business operations in Canada shall be filed with the Regional Office nearest the place where the issuer's principal business operations are conducted or proposed to be conducted, unless the offering is to be made through a principal underwriter located in the United States, in which case the offering statement shall be filed with the Regional Office for the region in which such underwriter has its principal office.

(d) An amendment to any part of the offering statement will necessitate the filing of an amended offering statement which shall be signed in the same manner as the original offering statement. Five copies of such amendment shall be filed with the same Regional Office as the original offering statement at least 10 days prior to any offering or sale of the securities subsequent to the filing of such amendment, or such shorter period as the Commission, in its discretion, may authorize upon a written request for such authorization.

(e) An offering statement or any other document filed as a part thereof may be withdrawn upon application unless the offering statement is subject to an order under § 230.261 at the time the application is filed or becomes subject to such an order within 15 days (Saturdays, Sundays and holidays excluded) thereafter. *Provided* That an offering statement may not be withdrawn after any of the securities proposed to be offered thereunder have been sold. Any such application shall be signed in the same manner and filed with the same Regional Office as the offering statement.

(f) The manually signed original (or in the case of duplicate originals, one duplicate original) of all offering statements, reports, or other documents filed shall be numbered sequentially (in addition to any internal numbering which otherwise may be present) by handwritten, typed, printed, or other legible form of notation from the cover page of the document through the last page of that document and any exhibits or attachments thereto. Further, the total number of pages contained in a numbered orginal shall be set forth on the first on the first page of the document.

(g) Each offering statement shall contain an exhibit index, which should immediately precede the exhibits filed with such offering statement. The index shall list each exhibit filed and identify by handwritten, typed, printed, or other legible form of notation in the manually signed original, the page number in the sequential numbering system described in paragraph (f) of this section where such exhibit can be found or where it is stated that the exhibit is incorporated by reference. Further, the first page of the manually signed offering statement shall list the page in the filing where the exhibit index is located.

5. Section 230.256 is amended by revising paragraphs (a) introductory text, (a)(1), (b) and (c) introductory text, removing existing paragraph (d), and redesignating existing paragraphs (e) through (i) as paragraphs (d) through (h) revised to read as follows:

§ 230.256 Filing and use of the offering circular.

(a) Except as provided in paragraph (c) of this section and in § 230.257 of this part:

(1) No written offer of securities of any issuer shall be made under this regulation unless an offering circular containing the information specified in Part II of the offering statement is concurrently given or has previously been given to the person to whom the offer is made, or has been sent to such person under such circumstances that it would normally have been received by him at or prior to the time of such written offer; and

* * * * *

(b) In the case of transactions effected on a securities exchange, delivery of the offering circular (offering statement—Part II) shall be deemed to have been made if prior to such transactions a reasonable number of copies of the offering circular have been furnished to the exchange for delivery to any person or persons requesting copies thereof.

(c) Any written advertisement or other written communication, or any radio or television broadcast, which states from whom an offering circular containing the information specified in Part II of the offering statement may be obtained and in addition contains no more than the following information may be published, distributed or broadcast at or after the commencement of the public offering to any person prior to sending or giving such person a copy of such circular:

* * * * *

(d) If the offering is not complete within nine months from the date of the offering circular (offering statement—Part II) a revised offering circular shall be prepared, filed and used in accordance with these rules as for an original offering circular, except that in the case of offerings under stock purchase, savings, stock option or other similar plans for the benefit of employees, if the offering is not completed within 12 months from the date of the offering circular, a revised offering circular shall be prepared, filed and used in accordance with these rules as for an orginal offering circular. In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing.

(e) If the original offering circular (offering statement—Part II) is revised or amended, such revised or amended circular shall be filed as an amendment to the offering statement, as provided by § 230.255(d), with the appropriate Regional Office of the Commission at least 10 days prior to its use, or such shorter period as the Commission may, in its discretion, authorize upon a written request for such authorization.

(f) Sales by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction) of securities of an issuer not subject, immediately prior to the time of filing an offering statement, to the provisions of section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended, offered pursuant to this regulation and taking place prior to the expiration of ninety days after the first date upon which the securities were bona fide offered to the public, shall not be exempt pursuant to this regulation unless: (1) the dealer furnishes a copy of the then current offering circular (offering statement—Part II) to the purchaser prior to or with the purchaser's receipt of the confirmation of the sale; or (2) the offering circular has previously been mailed or delivered to such purchaser. Failure by a dealer to comply with the provision of this

subparagraph shall not otherwise affect the availability of the exemption for any other person, including the aggregate amount of securities exempted pursuant to Rule 254.

(g) The issuer or, if there is an underwriter, the underwriter shall provide reasonable quantities of copies of the offering circular (offering statement—Part II) to any dealer on request prior to the expiration of ninety days after the first date upon which securities of such issuer were bona fide offered to the public pursuant to this regulation.

(h) An offering circular filed pursuant to paragraph (e) of this section may be distributed prior to the expiration of the 10-day waiting period for offerings provided for in § 230.255 (a) and (d) and paragraph (e) of this section and such distribution may be accompanied or following by oral offers related thereto, provided the conditions in paragraphs (1) through (4) are met. For the purposes of this section, any offering circular distributed prior to the expiration of the ten day waiting period is called a Preliminary Offering Circular. Such Preliminary Offering Circular may be used to meet the requirements of paragraph (a)(2) of § 230.256: *Provided*, That if a Preliminary Offering Circular is inaccurate or inadequate in any material respect, a revised Preliminary Offering Circular or an offering circular of the type referred to in paragraph (4) of this section shall be furnished to all persons to whom the securities are to be sold at least 48 hours prior to the mailing of any confirmation of sale to such persons, or shall be sent to such persons under such circumstances that it would normally be received by them 48 hours prior to their receipt of confirmation of the sale.

(1) Such Preliminary Offering Circular contains substantially the information required by this section to be included in an offering circular, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commission, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price. For issuers not subject to the reporting provisions under section 13(a) or 15(d) of the Securities Exchange Act of 1934, the disclosure on the outside front cover page of the Preliminary Offering Circular should include a bona fide estimate of the range of the maximum offering price and maximum number of shares or other units of securities to be offered or should include a bona fide estimate of the principal amount of debt securities to be offered.

(2) The outside front cover page of the Preliminary Offering Circular shall bear the caption "Preliminary Offering Circular," the date of its issuance, and the following statement which shall run along the left hand margin of the page and be printed perpendicular to the text, in boldface type at least as large as that used generally in the body of such offering circular:

An offering statement pursuant to Regulation A relating to these securities has been filed with the Securities and Exchange Commission. Information contained in this Preliminary Offering Circular is subject to completion or amendment. These securities may not be sold nor may offers to buy be accepted prior to the time an offering circular which is not designated as a Preliminary Offering Circular is delivered. This Preliminary Offering Circular shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sales of these securities in any state in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such state.

(3) The Preliminary Offering Circular relates to a proposed public offering of securities which is to be sold by or through one or more underwriters who are broker-dealers registered under section 15 of the Securities Exchange Act of 1934, each of whom has furnished a signed Consent and Certification in the form prescribed as a condition to the use of such offering circular;

(4) An offering circular which contains all of the information specified in Part II of the offering statement and which is not designated as a Preliminary Offering Circular is furnished with or prior to delivery of the confirmation of sale to any person who has been furnished with a Preliminary Offering Circular pursuant to this paragraph.

6. Section 230.257 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 230.257 Offerings not in excess of $100,000.

Except as to issues specified in paragraph (a) of § 230.253 and issues of assessable stock, the offering circular (offering statement—Part II) need not be filed or used in connection with an offering of securities under this regulation if the aggregate offering price of all securities of the issuer, its predecessors and affiliates offered or sold without the use of such an offering circular does not exceed $100,000, computed in accordance with § 230.254, provided the following conditions are met:

(a) In addition to filing Part I—Notification and Part III—Exhibits, there shall be filed as an exhibit five copies of a statement setting forth the information (other than financial statements) required by Part II—Offering Circular of the offering statement.

* * * * *

7. Section 230.258 is amended by revising the introductory text and paragraph (c) to read as follows:

§ 230.258 Sales material to be filed.

Four copies of each of the following communications prepared or authorized by the issuer or anyone associated with the issuer, and of its affiliates or any principal underwriter for use in connection with the offering of any securities under §§ 230.251 to 230.265 shall be filed, with the office of the Commission with which the offering statement is filed, at least five days (exclusive of Saturdays, Sundays and holidays) prior to any use thereof, or such shorter period as the Commission, in its discretion, may authorize:

* * * * *

(c) every letter, circular or other written communication proposed to be sent, given or otherwise communicated to more than ten persons, except an offering circular (offering statement—Part II) filed pursuant to § 230.256(e).

8. Section 230.259 is revised to read as follows:

§ 230.259 Statement required in all offering circulars.

There shall be set forth on the cover page of every offering circular the following statement in capital letters printed in boldface roman type at least as large as ten-point modern type and at least two points leaded:

"THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION DOES NOT PASS UPON THE MERITS OF OR GIVE ITS APPROVAL TO ANY SECURITIES OFFERED OR THE TERMS OF THE OFFERING, NOR DOES IT PASS UPON THE ACCURACY OR COMPLETENESS OF ANY OFFERING CIRCULAR OR OTHER SELLING LITERATURE. THESE SECURITIES ARE OFFERED PURSUANT TO AN EXEMPTION FROM REGISTRATION WITH THE COMMISSION; HOWEVER, THE COMMISSION HAS NOT MADE AN INDEPENDENT DETERMINATION THAT THE SECURITIES OFFERED HEREUNDER ARE EXEMPT FROM REGISTRATION."

9. Section 230.260 is revised to read as follows:

§ 230.260 Reports of sales hereunder.

Within 30 days after the end of each six-month period following the date of

the original offering circular (offering statement—Part II) required by § 230.256, or of the statement required by § 230.257, the issuer or other person for whose account the securities are offered shall file with the Regional Office of the Commission with which the offering statement was filed four copies of a report on Form 2–A containing the information called for by that form. A final report shall be made upon completion or termination of the offering and may be made prior to the end of the six-month period in which the last sale is made.

10. Section 230.261 is amended by revising the introductory text of paragraph (a), and paragraphs (a)(2), (a)(4), (b), and (d) to read as follows:

§ 230.26 Suspension of exemption.

(a) The Commission may, at any time after the filing of an offering statement, enter an order temporarily suspending the exemption, if it has reason to believe that * * *

(2) The offering statement or any other sales literature contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

* * * * *

(4) Any event has occurred after the filing of the offering statement which would have rendered the exemption hereunder unavailable if it had occurred prior to such filing;

* * * * *

(b) Upon the entry of an order under paragraph (a) of this section the Commission will promptly give notice to the persons on whose behalf the offering statement was filed (1) that such order has been entered, together with a brief statement of the reasons for the entry of the order, and (2) that the Commission, upon receipt of a written request within 30 days after the entry of such order, will, within 20 days after the receipt of such request, set the matter down for hearing at a place to be designated by the Commission. If no hearing is requested and none is ordered by the Commission, the order shall become permanent on the thirtieth day after its entry and shall remain in effect unless or until it is modified or vacated by the Commission. Where a hearing is requested or is ordered by the Commission, the Commission will, after notice of an opportunity for such hearing, either vacate the order or enter an order permanently suspending the exemption.

* * * * *

(d) All notices required by this rule shall be given to the person or persons on whose behalf the offering statement was filed by personal service, registered or certified mail or confirmed telegraphic notice at the addresses of such persons given in the offering statement.

11. Section 230.262 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 230.262 Consent to service of process.

(a) If the issuer, any of its directors or officers, any person for whose account any of the securities are to be offered, or any underwriter of the securities to be offered, is not a resident of the United States, each such non-resident person shall, at the time of filing the offering statement required by § 230.255, furnish to the Commission in a form prescribed by or acceptable to it, a written irrevocable consent and power of attorney which—

* * * * *

12. Section 230.263 is revised to read as follows:

§ 230.263 Notice of delayed or suspended offering and sale.

If within three business days after the issuer had received notice that the Commission has no further comments with respect to the offering statement a bona fide effort is not made to proceed with the offering and sale of the securities proposed to be offered under this regulation, or if the offering or sale of such securities is suspended by the issuer or any underwriter within 15 days after the issuer has received such notice, a notice of the delay or suspension, stating the reasons therefor, shall be filed by the issuer or underwriter with the Regional Office of the Commission with which the offering statement was filed, unless such information is set forth in the offering statement. Such notice shall be sent promptly by telegraph or air mail and if sent by telegraph shall be confirmed in writing within a reasonable time by the filing of a signed copy of the notice.

13. Section 230.264 is revised to read as follows:

§ 230.264 Procedure with respect to abandoned offering statement.

When an offering statement under §§ 230.251 to 230.265, or the latest substantive amendment thereto, if any, has been on file with the Commission for a period of nine months from its filing date and the offering has not commenced, the Commission may, in its discretion, proceed in the following manner to determine whether such filing has been abandoned by the issuer.

(a) Notice will be sent to the issuer, and to any counsel for the issuer named in the offering statement, by registered or certified mail, return receipt requested, addressed to the most recent addresses for issuer and issuer's counsel as reflected in the offering statement. Such notice will inform the issuer and issuer's counsel that the offering statement or amendments thereto is out of date and must be either amended to comply with applicable requirements of §§ 230.251 to 230.265 or be withdrawn within thirty days after the date of such notice.

(b) If the issuer or issuer's counsel fails to respond to such notice by filing a substantive amendment or withdrawing the offering statement or does not furnish a satisfactory explanation as to why the issuer has not done so within thirty days, the Commission may, where consistent with the public interest and the protection of investors, enter an order declaring the offering statement abandoned.

(c) When such an order is entered by the Commission, the papers comprising the offering statement and any amendment thereto will not be removed from the files of the Commission but will be plainly marked in the following manner: "Declared abandoned by order dated ———."

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

1. Section 239.90 is revised to read as follows:

§ 239.90 Form 1–A, offering statement under Regulation A.

This form shall be used for filing of a notification under § 230.255 of Regulation A (§§ 230.251–230.264 of this chapter).

2. Section 239.96 is added to read as follows:

§ 239.96 Form 7A, optional form of escrow for securities that are subject to the provisions of Rule 253(c) of Regulation A (§ 230.253(c) of this chapter).

This form is an optional form of escrow for securities that are subject to the provisions of Rule 253(c) of Regulation A (§ 230.253(c) of this chapter).

Note.—Copies of Forms 1–A and 7–A are filed as part of the original document. Copies of the forms may be obtained upon request from the Office of Small Business Policy, Division of Corporation Finance, U.S. Securites and Exchange Commission, 500

North Capitol Street, Washington, D.C. 20549, (202) 272-2644.

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17 CFR Part 276

[Release No. IA-770]

Applicability of Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as an Integral Component of Other Financially Related Services

AGENCY: Securities and Exchange Commission.

ACTION: Statement of staff interpretive position.

SUMMARY: The Commission is publishing the views of the staff of the Division of Investment Management as to the applicability of the Investment Advisers Act of 1940 to financial planners, pension consultants, and other persons who, as an integral component of other financially related services, provide investment advisory services to others for compensation. The purpose of this release is to call to the attention of persons providing such services, as well as members of the general public who may utilize such services, the circumstances under which persons providing these services would be investment advisers under the Advisers Act and subject to the Act's registration, antifraud and other provisions. The guidance provided in this release should assist providers of financial advisory services in complying with the Advisers Act and reduce the number of requests for staff interpretive or no-action advice with respect to the applicability of the Advisers Act to such persons where the requests do not present any novel or interpretive issues. With one exception the interpretive views set forth in the release are based on positions consistently taken by the staff in the past. In the case of the one exception, the position articulated in the release may have the effect of excepting from the definition of investment adviser certain persons the staff would not regard as being in the business of providing investment advice.

FOR FURTHER INFORMATION CONTACT: Mary S. Champagne, Esq., Investment Advisers Study Group, Division of Investment Management, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549, (202) 272-2041.

SUPPLEMENTARY INFORMATION: The Staff of the Commission has received numerous requests for staff interpretive or no-action advice concerning the applicability of the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 *et seq.*] ("Advisers Act") to persons, such as financial planners, pension consultants, sports and entertainment representatives and others, who provide investment advisory services as an integral component of, or bundled with, other financially related services. In addition, it appears that many of these persons may not be aware of the provisions of the federal securities laws which may be applicable to their activities, particularly the fiduciary standards and registration requirements of the Advisers Act. It is the view of the staff that, for the reasons set forth below, many of the persons providing such services to the public are investment advisers under the definition of investment adviser contained in Section 202(a)(11) of the Advisers Act [15 U.S.C. 80b-2(a)(11)] and are not entitled to rely on any of the exceptions from that definition provided in clauses (A) to (F) of Section 202(a)(11). An investment adviser who uses the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser is subject to the registration, antifraud, and other provisions of the Advisers Act, unless the adviser is excepted from registration under Section 203(b) of the Advisers Act [15 U.S.C. 80b-3(b)]. An adviser excepted from registration under the Advisers Act remains subject to its antifraud provisions.

I. Background

Financial planning typically involves the provision of a variety of services, principally advisory in nature, to individuals or families with respect to management of financial resources based upon an analysis of individual client needs. Generally, financial planning services involve the preparation of a financial program for a client based upon information elicited from the client as to the client's financial circumstances and objectives. Such information normally would cover present and anticipated assets and liabilities, including insurance, savings, investments, and anticipated retirement or other benefits. The program developed for the client typically includes general recommendations for a course of activity, or specific actions, to be taken by the client. For example, recommendations may be made that the client obtain insurance or revise existing coverage, establish an individual retirement account, increase or decrease funds held in savings accounts, or invest funds in securities. A financial planner may develop tax or estate plans for the client or may refer the client to an accountant or attorney for these services. The provider of such financial planning services typically assists the client in implementing the recommended program by, among other things, making specific recommendations to carry out the general recommendations of the program, or by selling to the client insurance products, securities, or other investments. The financial planner may also review the client's program periodically and recommend revisions. Persons providing such financial planning services use various compensation arrangements. Some financial planners charge clients an overall fee for the development of an individual client program while others charge clients an hourly fee. In some instances financial planners are compensated, in whole or in part, through the receipt of sales commissions upon the sale to the client of insurance products, mutual fund shares, interests in real estate, or other investments.

A second common form of service relating to financial matters is that provided by "pension consultants" who typically offer, in addition to administrative services, a variety of advisory services to employee benefit plans and their fiduciaries based upon an analysis of the needs of the individual plan. Such advisory services may include advice as to the types of funding media available to provide plan benefits, general recommendations as to what portion of plan assets should be invested in various investment media, including securities, and, in some cases, recommendations regarding investment in specific securities or other investments. Pension consultants may also assist plan fiduciaries in determining plan investment objectives and policies and in designing funding media for the plan. They may also provide general or specific advice to plan fiduciaries as to the selection or retention of persons to manage the assets of the plan.[1] Persons providing such services to plans are customarily compensated for the provision of their services through the receipt of fees paid by the plan, its sponsor, or other

[1] The authority to manage all or a portion of a plan's assets often is delegated to a person who qualifies as an "investment manager" under the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1001 *et seq.*]. Under that statute, which is applicable to private sector pension and welfare benefit plans, an "investment manager" must be a registered investment adviser under the Advisers Act, a bank as defined in the Advisers Act, or an insurance company which is qualified to perform services as an investment manager under the laws of more than one state.

persons; by means of sales commissions on the sale of insurance products or investments to the plan; or through a combination of fees and commissions.

Another form of financial advisory service is that provided by persons offering a variety of financially related services to entertainers or athletes based upon the needs of the individual client. Such persons, who often use the designation "sports representative" or "entertainment representative," typically offer a number of services to clients, including the negotiation of employment contracts and development of promotional opportunities for the client, as well as advisory services related to investments, tax planning, or budget and money management. Some persons providing these services to clients may assume discretion over all or a portion of a client's funds by collecting income, paying bills and making investments for the client. Sports or entertainment representatives are customarily compensated for the provision of their services primarily through fees charged for negotiation of employment contracts but may also receive compensation in the form of fixed charges or hourly fees for other services, including investment advisory services, which they provide.

There are other persons who, while not falling precisely into one of the foregoing categories, provide financial advisory services. As discussed below, financial planners, pension consultants, sports or entertainment representatives, or other persons providing financial advisory services, may be investment advisers within the meaning of the Advisers Act.

II. Status as an Investment Adviser

A. Definition of Investment Adviser

Section 202(a)(11) of the Advisers Act defines the term "investment adviser" to mean:

> * * * any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. * * *

Whether a person providing financially related services of the type discussed in this release would be an investment adviser within the meaning of the Advisers Act would depend upon all the relevant facts and circumstances. As a general matter, however, if the activities of any person providing such integrated advisory services satisfy each element of either part of the foregoing two part definition, such person would be an investment adviser within the meaning of the Advisers Act, unless entitled to rely on one of the exceptions from the definition of investment adviser in clauses (A) to (F) of Section 202(a)(11).[2] Accordingly, a determination as to whether a person providing financial planning, pension consulting, or other integrated advisory services is an investment adviser will depend upon whether such person: (1) provides advice, or issues reports or analyses, regarding securities; (2) whether he is in the business of providing such services; and (3) whether he provides such services for compensation. These three elements are discussed below.

1. *Advice or analyses concerning securities.* It would seem apparent that a person who gives advice or makes recommendations or issues reports or analyses with respect to specific securities is an investment adviser under Section 202(a)(11), assuming the other elements of the definition of investment adviser are met, i.e., that such services are performed as part of a business and for compensation. However, it has been asked on a number of occasions whether advice, recommendations or reports that do not pertain to specific securities satisfy this element of the definition. In the view of the staff, a person who provides advice, or issues or promulgates reports or analyses, which concern securities, but which do not relate to specific securities, would generally be an investment adviser under Section 202(a)(11), assuming such services are performed as part of a business [3] and for compensation. The staff has interpreted the definition of investment adviser to include persons who advise clients either directly or through publications or writings concerning the relative advantages and disadvantages of investing in securities in general as compared to other investment media.[4] A person who, in the course of developing a financial program for a client, advises a client as to the desirability of investing in securities as opposed to, or in relation to, stamps, coins, direct ownership of commodities, or any other investment vehicle would also be "advising" others within the meaning of Section 202(a)(11).[5] Similarly, a person who advises employee benefit plans on funding plan benefits by investing in securities, as opposed to, or in addition to, insurance products, real estate or other funding media, would be "advising" others within the meaning of Section 202(a)(11). A person providing advice to a client as to the selection or retention of an investment manager or managers also would, under certain circumstances, be deemed to be "advising" others within the meaning of Section 202(a)(11).[6]

2. *The "business" standard.* In order to come within the defintion of an investment adviser, a person must engage for compensation in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or issue or promulgate reports or analyses concerning securities as part of a regular business. Under this definition, the giving of advice or issuing of reports or analyses concerning securities for compensation need not constitute the principal business activity or any particular portion of the business activities of a person in order for the person to be an investment adviser under Section 202(a)(11). However, a person who provides investment advice for compensation but is not *in the business* of advising others as to the value of securities or the advisability of investing in securities, or does not issue reports or analyses concerning securities as part of *a regular business*, does not come within the Advisers Act's definition of an investment adviser.

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[2] See discussion of Section 202(a)(11) (A) to (F) in Section II B, *infra*.

[3] In this regard, as discussed in detail below, it is the staff's view that a person who gives advice or prepares analyses concerning securities generally may, nevertheless, not be "in the business" of doing so and, therefore, will not be considered an "investment adviser" as that term is used in Section 202(a)(11).

[4] *See, e.g.* Richard K. May (avail. Dec. 11, 1979); Hayes Martin (avail. Feb. 15, 1980); Pauline Wang (avail. Mar. 21, 1980).

[5] *See, e.g.* Thomas Beard (avail. May 8, 1975); Sinclair-deMarinis Inc. (avail. May 1, 1981).

[6] *See, e.g.*, FPC Securities Corp. (avail. Dec. 1, 1974) (program to assist client in selection and retention of investment manager by, among other things, recommending investment managers to clients, monitoring and evaluating the performance of a client's investment manager, and advising client as to the retention of such manager); William Bye Co. (avail. Apr. 26, 1973) (program involving recommendations to client as to selection and retention of investment manager based upon client's investment objectives and periodic monitoring and evaluation of investment manager's performance). On occasion in the past the staff has taken no-action positions with respect to certain situations involving persons providing advice to clients as to the selection or retention of investment managers. *See, e.g.*, Sebastian Associates, Ltd., (avail. Aug. 7, 1975) (provision of assistance to clients in obtaining and coordinating the services of various professionals such as tax attorneys and investment advisers, including referring clients to such professionals, in connection with business as agent for clients with respect to negotiation of employment and promotional contracts); Hudson Valley Planning Inc. (avail. Feb. 25, 1978) (provision of names of several investment managers to client upon request, without recommendation, in connection with business of providing administrative services to employee benefit plans).

Whether or not a person's activities constitute being engaged in the business of advising others as to the value of securities or the advisability of investing in securities or issuing reports or analyses concerning securities as part of a regular business will depend on (1) whether the investment advice being provided is solely incidental to a non-investment advisory, primary business of the person providing the advice; (2) the specificity of the advice being given; and (3) whether the provider of the advice is receiving, directly or indirectly, any special compensation therefor.[7] As a general matter, the staff would take the position that a person who provides financial services including investment advice for compensation is *in the business* of providing investment advice within the meaning of Section 202(a)(11) unless the advice being provided by such person is solely incidental to a non-investment advisory business of the person, is non-specific, and is not rewarded by special compensation for such investment advice.

If a person holds himself out as an investment adviser or as one who provides investment advice, he would be considered to be in the business of providing investment advice. However, a person whose principal business is providing financial services other than investment advice would not be regarded as being *in the business* of giving investment advice if, as part of his service, he merely discusses in general terms the advisability of investing in securities in the context of, for example, a discussion of economic matters or the role of investments in securities in a client's overall financial plan. The staff would, however, take the position that such a person is in the business of providing investment advice if, on anything other than rare and isolated instances, he discusses the advisability of investing in, or issues reports or analyses as to, specific securities or specific categories of securities (e.g., bonds, mutual funds, technology stocks, etc.).[8] In addition, a person who provides market timing services would be viewed as being in the business of giving investment advice. Finally, as previously indicated, a person will be regarded as being in the business of providing such advice if he receives any special compensation therefor or receives any direct or indirect remuneration in connection with a client's purchase or sale of securities. A person would generally not be considered to be receiving special compensation for the provision of advisory services if he makes no charge for the advisory portion of his services or if he charges an overall fee for financial advisory services of which the investment advice is an incidental part.

3. *Compensation.* The definition of investment adviser applies to persons who give investment advice and receive compensation therefor. This compensation element is satisfied by the receipt of any economic benefit, whether in the form of an advisory fee, some other fee relating to the total services rendered, commissions, or some combination of the foregoing. It is not necessary that a person who provides investment advisory and other services to a client charge a separate fee for the investment advisory portion of the total services. The compensation element would be satisfied if a single fee were charged for the provision of a number of different services, which services included the giving of investment advice or the issuing of reports or analyses concerning securities within the meaning of the Advisers Act.[9] As discussed above, however, the fact that no separate fee is charged for the investment advisory portion of the service could be relevant to whether the person is "in the business" of giving investment advice.

It is not necessary that an adviser's compensation be paid directly by the person receiving investment advisory services, but only that the investment adviser receive compensation from some source for his services.[10] Accordingly, a person providing a variety of services to a client, including investment advisory services, for which the person receives any economic benefit, for example, by receipt of a single fee or commissions upon the sale to the client of insurance products or investments, would be performing such advisory services "for compensation" within the meaning of Section 202(a)(11) of the Advisers Act.[11]

B. Exceptions From Definition of Investment Adviser

Clauses (A) to (E) of Section 202(a)(11) of the Advisers Act set forth limited exceptions from the definition of investment adviser available to certain persons.[12] Whether an exception from the definition of investment adviser is available to any financial planner, pension consultant, or other person, providing investment advisory services within the meaning of Section 202(a)(11), will depend upon the relevant facts and circumstances.

A person relying on an exception from the definition of investment adviser must meet all of the requirements of such exception. It is the view of the staff that the exception contained in Section 202(a)(11)(B) would not be available, for example, to a lawyer or accountant who holds himself out to the public as providing financial planning, pension consulting, or other financial advisory services. In such a case it would appear that the performance of investment advisory services by such person would be incidental to the practice of his financial planning or pension consulting profession and not incidental to his practice as a lawyer or accountant.[13] Similarly, the exception for brokers or dealers contained in Section 202(a)(11)(C) would not be available to a broker or dealer, or associated person of a broker or dealer, acting within the

[7] These criteria were developed as part of the staff's on-going review of prior staff interpretive letters and have not previously been articulated.

[8] *Compare, Zinn* v. *Parrish*, 644 F.2d 360 (7th Cir. 1981), CCH Sec. L. Rep. ¶97,920.

[9] *See, e.g.* FINESCO, (avail. Dec. 11, 1979).

[10] *See, e.g.* Warren H. Livingston (avail. Mar. 8, 1980).

[11] Section 202(a)(11)(C) of the Advisers Act excepts from the definition of investment adviser a broker or dealer who performs investment advisory services which are incidental to the conduct of its broker-dealer business and who receives no special compensation therefor. See discussion of Section 202(a)(11)(C) *infra*.

[12] Section 202(a)(11) provides that the definition of investment adviser does not include:

(A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company;

(B) any lawyer, accountant, engineer, or teacher whose performance of such [advisory] services is solely incidental to the practice of his profession;

(C) any broker or dealer whose performance of such [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor;

(D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation;

(E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall be designated by the Secretary of the Treasury, pursuant to Section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act. * * *

Section 202(a)(11)(F) excepts from the definition of investment adviser "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

[13] *See, e.g.* Mortimer M. Lerner (avail. Feb. 15, 1980). The "professional" exception provided in Section 202(a)(11)(B) by its terms is only available to lawyers, accountants, engineers, and teachers. A person engaged in a profession other than one of thos enumerated in Section 202(a)(11)(B) who performs investment advisory services would be an investment adviser within the meaning of Section 202(a)(11) whether or not the performance of investment advisory services is incidental to the practice of such profession. Unless another basis for excepting such person from the definition of investment adviser is available, such person would be subject to the Advisers Act.

scope of its business as broker or dealer, if such person receives any special compensation for the provision of investment advisory services.[14] Moreover, the exception from the definition of investment adviser contained in Section 202(a)(11)(C) would not be available to an associated person of a broker-dealer or "registered representative" who provides investment advisory services to clients outside of the scope of such person's employment with the broker-dealer.[15]

III. Registration as an Investment Adviser

Any person who is an investment adviser within the meaning of Section 202(a)(11) of the Advisers Act, who is not expected from the definition of investment adviser by virtue of one of the exceptions in Section 202(a)(11) (A) to (F), and who makes use of the mails or any instrumentality of interstate commerce in connection with such person's business as an investment adviser, is required by Section 203(a) of the Advisers Act to register with the Commission as an investment adviser unless specifically excepted from registration by Section 203(b) of the Advisers Act.[16] The materials necessary for registering with the Commission as an investment adviser can be obtained by writing Publications Unit, Securities and Exchange Commission, Washington, D.C. 20549.

IV. Application of Antifraud Provisions

The antifraud provisions of Section 206 of the Advisers Act [15 U.S.C. 80b–6], and the rules adopted by the Commission thereunder, apply to any person who is an investment adviser as defined in the Advisers Act, whether or not such person is required to be registered with the Commission as an investment adviser. Sections 206 (1) and (2) make it unlawful for an investment adviser, directly or indirectly, to "employ any device, scheme, or artifice to defraud any client or prospective client" or to "engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[17] An investment adviser is a fiduciary who owes his clients "an affirmative duty of 'utmost good faith, and full and fair' disclosure of all material facts."[18] The Supreme Court has stated that a "[f]ailure to disclose material facts must be deemed fraud or deceit within its intended meaning, for, as the experience of the 1920's and 1930's amply reveals, the darkness and ignorance of commercial secrecy are the conditions under which predatory practices best thrive."[19] Accordingly, the duty of an investment adviser to refrain from fraudulent conduct includes an obligation to disclose material facts to his clients whenever the failure to do so would defraud or operate as a fraud or deceit upon any client or prospective client. In this connection the adviser's duty to disclose material facts is particularly pertinent whenever the adviser is in a situation involving a conflict, or potential conflict, of interest with a client.

The type of disclosure required by an investment adviser who has a potential conflict of interest with a client will depend upon all the facts and circumstances. As a general matter, an adviser must disclose to clients all material facts regarding the potential conflict of interest so that the client can make an informed decision as to whether to enter into or continue an advisory relationship with the adviser or whether to take some action to protect himself against the specific conflict of interest involved. The following examples, which have been selected from cases and staff interpretive and no-action letters, illustrate the scope of the duty to disclose material information to clients in certain common situations involving conflicts of interests.

An investment adviser who is also a registered representative of a broker-dealer and provides investment advisory services outside the scope of his employment with the broker-dealer must disclose to his advisory clients that his advisory activities are independent from his employment with the broker-dealer.[20] Additional disclosures would be required, depending on the circumstances, if the investment adviser recommends that his clients execute securities transactions through the broker-dealer with which the investment adviser is associated. For example, the investment adviser would be required to disclose fully the nature and extent of any interest the investment adviser has in such recommendation, including any compensation the investment adviser would receive from his employer in connection with the transaction.[21] In addition, the investment adviser would be required to inform his clients of their ability to execute recommended transactions through other broker-dealers.[22] Finally, the Commission has stated that "an investment adviser must not effect transactions in which he has a personal interest in a manner that could result in preferring his own interest to that of his advisory clients."[23]

An investment adviser who structures his personal securities transactions to trade on the market impact caused by his recommendations to clients must disclose this practice to clients.[24] An investment adviser generally also must disclose if his personal securities transactions are inconsistent with the advice given to clients.[25] Finally, an investment adviser must disclose compensation received from the issuer of a security being recommended.[26]

Unlike other general antifraud provisions in the Federal securities laws which apply to conduct "in the offer or sale of any securities"[27] or "in connection with the purchase or sale of any security,"[28] the pertinent provisions

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[14] *See, e.g.* FINESCO, *supra*. For a general statement of the views of the staff regarding special compensation under Section 202(a)(11)(C), see Investment Advisers Act Release No. 640 (October 5, 1978).

[15] *See, e.g.* George E. Bates (avail. Apr. 20, 1979).

[16] Section 203(b) excepts from registration:

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the [Investment Company Act]. * * *

[17] In addition, Section 206(3) of the Advisers Act generally makes it unlawful for an investment adviser acting as principal for his own account knowingly to sell any security to or purchase any security from a client, or, acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The responsibilities of an investment adviser dealing with a client as principal or as agent for another person are discussed in Advisers Act Release Nos. 40 and 470 (February 5, 1945 and August 20, 1975 respectively).

[18] *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963) quoting Prosser, Law of Torts (1955), 534–535.

[19] *Id.*, at 200.

[20] David P. Atkinson (avail. Aug. 1, 1977).

[21] *Ibid.*

[22] Don P. Matheson (avail. Sept. 1, 1976).

[23] Kidder, Peabody & Co., Inc., 43 S.E.C. 911, 916 (1968).

[24] *SEC* v. *Capital Gains Research Bureau*, *supra* at 197.

[25] *In the Matter of Dow Theory Letters et al.*, Advisers Act Release No. 571 (February 22, 1977).

[26] *In the Matter of Investment Controlled Research et al.*, Advisers Act Release No. 701 (September 17, 1979).

[27] Section 17(a) [15 U.S.C. 77q(a)] of the Securities Act of 1933 [15 U.S.C. 77a et seq.].

[28] Rule 10b-5 [17 CFR 240.10b-5] under the Securities Exchange Act of 1934 [15 U.S.C. 78a et

Continued

of Section 206 do not refer to dealings in securities but are stated in terms of the effect or potential effect of prohibited conduct on the client. Specifically, Section 206 (1) prohibits "any device, scheme, or artifice to defraud any client or prospective client," and Section 206(2) prohibits "any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." In this regard, the Commission has applied Sections 206 (1) and (2) in circumstances in which the fraudulent conduct arose out of the investment advisory relationship between an investment adviser and its clients, even though the conduct did not involve a securities transaction. For example, in an administrative proceeding brought by the Commission against an investment adviser, the respondent consented to a finding by the Commission that the respondent had violated Sections 206(1) and (2) by persuading its clients to guarantee its bank loans and ultimately to post their securities as collateral for its loans without disclosing the adviser's deteriorating financial condition, negative net worth, and other outstanding loans.[29] Moreover, the staff has taken the position that an investment adviser who sells non-securities investments to clients must, under Sections 206 (1) and (2), disclose to clients and prospective clients all its interests in the sale to them of such non-securities investments.[30]

V. Need for Interpretive Advice

The general interpretive guidance provided in this release should facilitate greater compliance with the Advisers Act. The staff will respond to routine requests for no-action or interpretive advice relating to the status of persons engaged in the types of businesses described in this release by referring persons making such requests to the release, unless the requests present novel factual or interpretive issues such as material departures from the nature and type of services and compensation arrangements discussed above. Requests for no-action or interpretive advice from the staff should be submitted in accordance with the procedures set forth in Investment Advisers Act Release No. 281 (Jan. 25, 1971).

seq.] *See also* Section 15(c) [15 U.S.C. 78o(c)] of the Securities Exchange Act of 1934.

[29] *In the Matter of Ronald B. Donati Inc. et al.*, Advisers Act Rel. Nos. 666 and 683 (February 8, 1979 and July 2, 1979 respectively). *See also Intersearch Technology, Inc.* CCH Fed. Sec. L. Rep. 1974–1975 Trans. Binder ¶ 80,139 (Feb. 28, 1979) at 85,189.

[30] *See, Boston Advisory Group* (avail. Dec. 5, 1976).

PART 276—INTERPRETIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

Accordingly, Part 276 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding Investment Advisers Act Release No. IA–770, Statement of the staff as to the applicability of the Investment Advisers Act to financial planners, pension consultants, and other persons who provide investment advisory services as an integral component of other financially related services, thereto.

By the Commission.

Shirley E. Hollis,

Assistant Secretary.

August 13, 1981.

[FR Doc. 81-24073 Filed 8-17-81; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1312

[Docket No. 80–18]

Limitations on Imports of Narcotic Raw Materials

AGENCY: Drug Enforcement Administration, Justice.

ACTION: Final rule.

SUMMARY: This rule amends § 1312.13 of Title 21, Code of Federal Regulations relating to the issuance of import permits for narcotic raw materials. Importation of approved narcotic raw materials (opium, poppy straw and concentrate of poppy straw) into the United States shall be permitted only from Turkey, India, Yugoslavia, France, Poland, Hungary and Australia. At least 80% of the narcotic raw material imported into the United States each year shall have as its original source Turkey or India. Except under conditions of insufficient supplies of narcotic raw materials, not more than 20% of the narcotic raw materials imported into the United States annually shall originate in Yugoslavia, France, Poland, Hungary or Australia.

DATES: This rule is effective September 17, 1981.

FOR FURTHER INFORMATION CONTACT: Gene R. Haislip, Director, Office of Compliance and Regulatory Affairs, Telephone: 202–633–1172.

SUPPLEMENTARY INFORMATION: On June 12, 1979, in response to United Nations Commission on Narcotic Drugs Resolution 471, the Administrator of the Drug Enforcement Administration (DEA) published an Advanced Notice of Proposed Rulemaking (ANPR) in which he set forth a proposal to limit United States imports of narcotic raw materials to such materials having their origins in certain supply countries which produced and exported *Papaver somniferum* gum opium during the ten year period immediately prior to January 1, 1961, and which have instituted and maintained adequate control systems for narcotic raw materials as required under the Single Convention. (See 44 FR 33695 (1979)). After consideration of the comments received in response to the ANPR, a Notice of Proposed Rulemaking was published on February 12, 1980 (45 FR 92289). The Notice of Proposed Rulemaking resulted in the receipt of numerous comments, pro and con, as well as several requests for a hearing.

Accordingly, by letter dated June 27, 1980, then-Administrator Peter B. Bensinger requested Administrative Law Judge Francis L. Young to conduct a hearing with respect to the proposed rulemaking in order that all interested parties might have the fullest opportunity to make their views known and to have their positions considered. The letter also specifically requested the Administrative Law Judge to include in his report to the Administrator, recommended findings and conclusions with respect to the following questions:

1. Whether the United States, consistent with its international obligations in general, and with CND Resolution 471 in particular, can require that a fixed portion of the narcotic raw materials it imports be derived from opium grown by the "traditional" producing countries, while permitting the remainder of its needs to be imported from other "non-traditional" sources; and, if so,

2. What ratio of traditional source to non-traditional source importation should be permitted?

Pursuant to a notice published in the **Federal Register** on July 24, 1980 (45 FR 49295), the hearing in this matter was conducted on September 9 and 10, 1980. Representatives of several countries, domestic and foreign commercial interests, and U.S. governmental agencies participated, presenting their views orally and in written presentations. On January 16, 1981, Judge Young submitted his report in this matter to the Administrator. Judge Young concluded *inter alia*, that regulatory amendments limiting the importation of narcotic raw materials could be lawfully promulgated; that the Administrator could lawfully require

that a major portion of the narcotic raw materials imported into the United States be produced by Turkey and India while permitting the remainder of U.S. needs to be imported from other countries which maintain adequate controls; that such an allocation would be in harmony with U.S. international trade agreements and would not be inconsistent with Resolutions 471 and 497; and that DEA staff personnel should determine an allocation ratio based upon world market shares existing during a recent representative period.

The Acting Administrator has considered the record of these proceedings and, after adopting the recommended findings and conclusions of the Administrative Law Judge, has decided to modify the proposed regulation in the following manner and based upon the following considerations.

An allocation ratio has been determined requiring the major portion of the narcotic raw materials imported into the United States to originate in Turkey or India with the remainder coming from Yugoslavia, France, Poland, Hungary and Australia. In determining the percentage allocated to Turkey and India, factors over and above their shares of world exports of narcotic raw materials between 1975 and 1979 were considered.

Turkey and India have been the principal sources of the narcotic raw materials imported into the United States and as our traditional trading partners for those commodities have been reliable sources of supply. Both nations fully fall within the parameters of the Single Convention as nations allowed to produce narcotic raw materials for export.

Turkey in particular has taken extraordinary measures to curtail the diversion of narcotic raw materials which formerly were the principal source of the heroin in the U.S. Furthermore, Turkey continues to actively cooperate with the U.S. in suppressing the illicit narcotic traffic which transits its borders.

However, in view of the past commercial relations with certain other countries as sources of narcotic raw material supply and the desirability of preserving alternate sources of narcotic raw materials, it is appropriate to allow certain specific countries to compete for the U.S. narcotic raw materials market on a limited basis. These countries, France, Poland, Hungary and Yugoslavia have provided the United States with supplies of narcotic raw materials during the period 1975 through 1979 and represent appropriate alternate sources. Australia is included as well since it was the source of material for which import permits had been requested during that period of time. In addition, we are presently persuaded that the nations mentioned above impose adequate controls over their production of narcotic raw materials in adherence to their obligations under the Single Convention.

During the course of the hearing and related proceedings in this matter, a number of participants discussed their concerns about the future availability of thebaine due to increased world-wide reliance upon the concentrate of poppy straw process which limits the amount of thebaine available in the raw material imported by U.S. manufacturers. The Acting Administrator has considered this issue and has concluded that the concerns are well-founded. Accordingly, the Drug Enforcement Administration will give further consideration to currently existing policy with respect to narcotic raw materials including the possibility of limited domestic production of *Papaver bracteatum* to satisfy some portion of this country's narcotic raw material needs.

Because this regulation involves foreign policy issues, it is exempt from formal OMB review. However, informal discussions with OMB have taken place regarding this final rule.

The Administrator hereby certifies that this rulemaking action will have no significant impact upon small entities within the meaning and intent of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This regulation allocates portions of the total quantities of narcotic raw materials imported by U.S. manufacturers to certain countries or groupings of countries. This importation is done by a very small number of major pharmaceutical manufacturers. It is anticipated to have no adverse impact upon any segment of the domestic narcotic manufacturing and distribution chain.

Therefore, the Acting Administrator of the Drug Enforcement Administration under the authority vested in the Attorney General by section 1002 of the Controlled Substances Import and Export Act, 21 U.S.C. 952, and delegated to the Administrator of the Drug Enforcement Administration by section 0.100(b) of Title 28 of the Code of Federal Regulations, amends section 1312.13, Title 21 of the Code of Federal Regulations by adding the following paragraphs (d) and (e) to read as follows:

PART 1312—IMPORTATION AND EXPORTATION OF CONTROLLED SUBSTANCES

§ 1312.13 Issuance of import permit.

* * * * *

(d) Notwithstanding paragraphs (a)(1) and (a)(2) of this section, the Administrator shall permit, pursuant to 21 U.S.C. 952(a)(1) or (a)(2)(A), the importation of approved narcotic raw material (opium, poppy straw and concentrate of poppy straw) having as its source:

(1) Turkey,
(2) India,
(3) Yugoslavia,
(4) France,
(5) Poland,
(6) Hungary, and
(7) Australia.

(e) At least eighty (80) percent of the narcotic raw material imported into the United States shall have as its original source Turkey and India. Except under conditions of insufficient supplies of narcotic raw materials, not more than twenty (20) percent of the narcotic raw material imported into the United States annually shall have as its source Yugoslavia, France, Poland, Hungary and Australia.

Francis M. Mullen, Jr.,
Acting Administrator.
July 29, 1981.

[FR Doc. 81-24019 Filed 8-17-81; 8:45 am]
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DEPARTMENT OF STATE

Office of the Secretary

22 CFR Part 41

[Departmental Regulation 108.810]

Nonimmigrant Visas; Validity, Termination and Replacement

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: Section 41.122(c) is amended to provide that an indefinite validity visa stamped in a passport which has expired shall be valid for application for admission into the United States if the alien also presents a valid passport as required by section 212(a)(26) of the Immigration and Nationality Act and § 41.112. Currently, § 41.122 recognizes such a visa as valid under these circumstances only for the alien's first application for admission after the expiration of the original passport.

EFFECTIVE DATE: August, 18, 1981.

FOR FURTHER INFORMATION CONTACT: Gerald M. Brown, Chief, Legislation and Regulations Division, Visa Services, Bureau of Consular Affairs, (202) 632-1900.

SUPPLEMENTARY INFORMATION: Consular officers abroad are authorized to issue indefinite validity visitor visas for unlimited applications for admission to the United States to nationals of certain countries which do not require visitor visas of U.S. nationals. However, an indefinite validity visa is not valid for entry into the United States if the passport in which it has been stamped has expired, even if the alien concurrently presents a valid passport, except for a single admission after the expiration of the original passport. Since the maximum passport validity in most countries is ten years or less, and since aliens rarely apply for a visa with a newly-issued, full-validity passport, in many cases the indefinite validity visa is usable only for a few years before the bearer must obtain a new passport and hence a new visa. In contrast, a nonimmigrant visa with a specified expiration date is valid until the stated expiration date for as many entries as are specified in the visa, even when the passport in which the visa was issued has expired, provided the alien also presents a valid passport at the port of entry.

It is desirable, for several reasons, to amend § 41.122(c) to recognize an indefinite validity visa stamped in an expired passport as valid without regard to the number of applications for admission after the expiration date of the original passport, provided the alien also concurrently presents a valid passport. This amendment will save personnel resources for consular offices abroad which issue indefinite validity visas by making it unnecessary to reissue such visas each time the alien obtains a new passport; it will eliminate the inconvenience to the alien of applying for a new visa each time a new passport is obtained; and it will bring the United States closer to true reciprocity with those countries which do not require visitor visas of U.S. nationals. It will also provide for application of the same criteria to indefinite validity visas as are now applied to other nonimmigrant visas with respect to the validity of the visa for entry into the United States when the passport in which it is stamped has expired.

Since the amendment contained in this order establishes uniformity in the application of certain visa validity criteria and removes an existing restriction, the provisions of the Administrative Procedure Act (5 U.S.C. 553) relative to Notice of Proposed Rulemaking do not apply in this instance.

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

Accordingly in § 41.122 the fourth sentence of paragraph (c) is removed and the third sentence is revised to read:

§ 41.122 Validity, termination, and replacement of visas.

* * * * *

(c) * * * An indefinite validity visa shall be valid for application for admission into the United States if the passport in which the visa is stamped has expired, provided the alien is also in possession of a valid passport issued by the appropriate authorities of the country of which the alien is a national as required by section 212(a)(26) of the Act and § 41.112.

* * * * *

(Sec. 104, 66 Stat. 174; 8 U.S.C. 1104; Section 109(b)(1), 91 Stat. 847)

Dated: July 22, 1981.

Diego C. Asencio,

Assistant Secretary for Consular Affairs.

[FR Doc. 81-24057 Filed 8-17-81; 8:45 am]

BILLING CODE 4710-06-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-3-FRL 1889-3]

State of Maryland Approval of Revision of the Maryland State Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This notice announces the Administrator's approval of a revision to the Maryland State Implementation Plan which relates to visible emissions. The revision consists of a variance for the General Refractories Company of Baltimore, Maryland from the "no visible emissions" requirements of COMAR 10.18.04.02A for a period of three years while the Company continues to research further process changes to reduce or eliminate the visible emissions. During the variance period, visible emissions may not exceed 20% opacity.

EFFECTIVE DATE: September 17, 1981.

ADDRESSES: Copies of the SIP variance and the accompanying support documents are available for inspection during normal business hours at the following offices:

U.S. Environmental Protection Agency, Region III, Curtis Building, Tenth Floor, Sixth and Walnut Streets, Philadelphia, PA 19106, Attn: Patricia Sheridan

Maryland Air Management Administration, State of Maryland, O'Conor Office Building, 201 West Preston Street, Baltimore, MD 21203, Attn: George Ferreri

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

FOR FURTHER INFORMATION CONTACT: Vernon Butler, Air Media & Energy Branch (3AH12), U.S. Environmental Protection Agency, Region III, Curtis Building, 6th & Walnut Streets, Philadelphia, Pennsylvania 19106, telephone (215) 597-2711.

SUPPLEMENTARY INFORMATION:

I. Background

On September 10, 1980, the Administrator of the Air Management Administration for the State of Maryland submitted to EPA, Region III, a proposed variance from the Maryland State Implementation Plan. The proposed variance consists of a Secretarial Order for the General Refractories Company of Baltimore, Maryland. In his letter, the Administrator of the Maryland Air Management Administration certified that the Order was adopted in accordance with the public hearing and notice requirements of 40 CFR Part 51.4 and all relevant State procedural requirements. He asked that EPA consider the Secretarial Order as a revision of the State Implementation Plan. The order consists of a variance for a period of three (3) years starting September 2, 1980, from the State regulations which prohibit visible emissions (COMAR 10.18.-04.02A). During this period, visible emissions may not exceed 20% opacity.

Also during this three-year period, the company will continue to research further product and process changes in order to reduce or eliminate the visible emissions, and submit annual reports of the findings to Maryland. Then, if necessary, determinations will be made whether to extend the variance once the three-year period expires.

Since particulate emissions meet all applicable air quality regulations, and will not increase as a result of this revision, there is no need to revise these regulations.