SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 211

[Release No. 34-18451; AS-305]

Statement of Management on Internal Accounting Control

AGENCY: Securities and Exchange Commission.

ACTION: Interpretive release.

SUMMARY: The Commission announces that it is no longer considering further action to require disclosure of a statement of management on internal accounting control in annual reports to security holders or filings with the Commission. In reaching this conclusion the Commission has considered the significant private-sector initiatives in this area, including the increased number of management reports included in annual reports to security holders of large companies.

EFFECTIVE DATE: January 28, 1982.

FOR FURTHER INFORMATION CONTACT: David F. Martin or Edmund Coulson (202-272-2130), Office of the Chief Accountant, Securities and Exchange Commission, 500 North Capitol Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION:

I. Background

On June 6, 1980, the Commission issued ASR 278* that announced the withdrawal of rule proposals which, if adopted, would have required inclusion of a statement of management on internal accounting control in annual reports on Form 10-K filed with the Commission under the Securities Exchange Act of 1934 and in annual reports to security holders furnished pursuant to the proxy rules. The rule proposals would also have required that the management statement be examined and reported on by an independent accountant.

The Commission's decision to withdraw the rule proposals was based, in part, on a determination that the private-sector initiatives for public reporting on internal accounting control had been significant and should be allowed to continue. The Commission stated its belief that this action would encourage further voluntary initiatives and permit public companies a maximum of flexibility in experimenting with various approaches to public reporting on internal accounting control. The Commission urged similar experimentation concerning auditor association with such statements.

In conjunction with the withdrawal of the rule proposals, the Commission announced its intention to monitor registrants' voluntary disclosure of management statements on internal accounting control and reports of independent accountants on such statements and implementation of the broader recommendations of the Commission on Auditors' Responsibilities (Cohen Commission) concerning comprehensive management reports.

II. Activities After ASR 278

Since ASR 278 was issued, the Commission's staff has reviewed a sample of annual reports to security holders. The results of the review indicate a significant increase, particularly in larger companies, in the number of annual reports which include a management report. Several surveys conducted by private-sector organizations indicate similar results.

In addition to comments about the system of internal accounting control, many reports have included comments on topics recommended by the Cohen Commission, the Financial Executives Institute (FEI) and the Special Advisory Committee on Reports by Management of the American Institute of Certified Public Accountants (AICPA). The variety of reports demonstrates the willingness of public companies to experiment with a new form of reporting and to avoid boiler-plate reporting.

Certain private-sector groups have taken actions which indicate that the private sector continues to be generally supportive of the development of the concept of management reports and is seeking to improve internal accounting control systems. As noted in ASR 278, the AICPA and FEI have encouraged the development of management statements. In August 1981, the American Bar Association Section of Corporation, Banking and Business Law approved a Discussion Paper which encourages the use of company reports. In addition, the FEI has sponsored extensive research in the area of internal controls. This research resulted in the publication in 1980 of a research study and report titled "Internal Control in U.S. Corporations: The State of the Art" and, just recently, a report on "Criteria for Management Systems." The current research project is exploring criteria for management use and control of data processing systems. The Commission is encouraged by this kind of private sector research effort which should lead to continued improvements in corporate internal control systems.

The experimentation with public reporting by independent accountants on internal accounting control systems has not yet had time to develop. In July 1980, the AICPA's Auditing Standards Board issued Statement on Auditing Standards No. 30 (SAS 30), "Reporting on Internal Accounting Control," which sets forth guidance for auditors on how to review and report on a system of internal accounting control. As companies and their auditors become more familiar with the provisions of SAS 30 they may be able to integrate SAS 30 review procedures into annual audit procedures. Such integration may facilitate the conduct of these reviews and could result in increased reporting pursuant to SAS 30.

III. Conclusion

Although the importance to companies of effective systems of internal accounting control has not diminished, the Commission now believes that there is no need for a regulatory requirement for disclosures about such systems. In the light of developments since the issuance of ASR 278, the Commission now believes that the private sector should determine the need for and nature of such disclosure. In reaching this conclusion the Commission has considered the significant private-sector initiatives in this area, including the increased number of management reports to security holders of large companies.

By the Commission.

George F. Fitzsimmons,

Secretary.

January 28, 1982.

[FR Doc. 82-2903 Filed 2-3-82; 8:45 am]

BILLING CODE 8010-01-M

*Accounting Series Release 278, "Statement of Management on Internal Accounting Control," Securities Exchange Act Release No. 16877, June 6, 1980 (45 FR 40134).

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17 CFR Parts 230, 240, 250, 260, 270, and 275

[Release Nos. 33-6380, 34-18452, 35-22371, 39-693, IC-12194, and IA-791; File No. S7-879]

Final Definitions of "Small Business" and "Small Organization" for Purposes of the Regulatory Flexibility Act

AGENCY: Securities and Exchange Commission.

ACTION: Final rulemaking.

SUMMARY: The Securities and Exchange Commission is adopting final definitions of the terms "small business" and "small organization" as those terms will be

used in connection with future Commission rulemaking proceedings under the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1940 regarding disclosure, reporting and regulatory requirements applicable to business concerns and other organizations which are subject to these statutes. The definitions are being adopted specifically for purposes of the Regulatory Flexibility Act, which requires the Commission to consider the impact of its regulations on small entities.

EFFECTIVE DATE: March 8, 1982.

FOR FURTHER INFORMATION CONTACT:

General

Ann Stansbury, Esquire, Special Counsel, Office of General Counsel, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549, (202–272–2427).

Offices With Particular Responsibilities

Daniel Abdun-Nabi, Esquire, Division of Corporation Finance (Definitions applicable to the Securities Act of 1933, the reporting and disclosure provisions of the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939) (202)–272–2644)

Jonathan Kallman, Esquire, Division of Market Regulation (Definitions applicable to brokers, dealers, clearing agencies, exchanges, bank municipal securities dealers, securities information processors, and transfer agents) (202–272–2843)

James E. Lurie, Special Counsel, Division of Corporate Regulation (Definitions applicable to public utility holding company systems) (202–523–5683)

Elizabeth T. Tsai, Esquire, Division of Investment Management (Definitions applicable to investment companies and investment advisers) (202–272–2032)

SUPPLEMENTARY INFORMATION: On March 20, 1981, in Release 33–6302 (46 FR 19251) the Commission proposed rules to define the terms "small business" and "small organization," for the purposes of Chapter Six of the Administrative Procedure Act, 5 U.S.C. 601 et seq., (the Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164 (September 19, 1980)), as those terms may apply to organizations and entities that are issuers of securities or otherwise engaged in securities or other business activities subject to disclosure and reporting requirements or regulation by the Commission pursuant to the Securities Act of 1933, 15 U.S.C. 77a et seq., (the "Securities Act"), the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq., (the "Securities Exchange Act"), the Public Utility Holding Company Act of 1935, 15 U.S.C. 79a et seq., (the "Holding Company Act"), the Trust Indenture Act of 1939, 15 U.S.C. 77aaa et seq., (the "Trust Indenture Act"), the Investment Company Act of 1940, 15 U.S.C. 80a et seq., (the "Investment Company Act"), or the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 et seq., (the "Advisers Act"). The Regulatory Flexibility Act (the "RFA") requires that the Commission, among other things, consider the economic impact of Commission rulemaking action on entities that qualify as "small" under applicable standards as set forth in the RFA, the Small Business Act [1] or the regulations promulgated by the Small Business Administration ("SBA").[2] In view of the apparent absence of appropriate standards in those statutes and regulations for defining small entities subject to its regulation, the Commission proposed for public comment pursuant to the RFA definitions that it considered appropriate to the regulation of issuers and other entities in the securities industry or otherwise subject to regulation under statutes administered by the Commission.[3] After consultation with the Office of Advocacy of the SBA and considering the comments received from the public on the proposed definitions, the Commission is now adopting final definitions, which are discussed in more detail below. Although the definitions will be generally applicable in Commission rulemaking, the rules also provide, as permitted by the RFA, that the Commission may, in particular instances, if the circumstances so warrant, define a particular entity in a manner different from that set forth in the rules. In any such case, appropriate notice will be provided that the Commission intends to use or is using a different definition.

[1] 15 U.S.C. 631 et seq.

[2] 13 CFR Part 121.

[3] The RFA provides that an agency, after consultation with the Office of Advocacy of the SBA and an opportunity for public comment, may establish one or more definitions of "small entity" that are applicable to the activities of the agency. *See* Securities Act Release No. 6302 (March 20, 1981), 22 SEC Doc. 546 (April 7, 1981), for a discussion of the reasons why the Commission considered the SBA definitions inappropriate.

Description of the Final Definitions

Securities Act—Issuers Engaged in Small Business Financing; The Securities Exchange Act—Reporting Requirements, Tender Offers, Issuer Repurchases, Proxy Rules, and Short Swing Profits.

In the release proposing the definitions of "small business" and "small organization" for purposes of the Regulatory Flexibility Act (the "RFA") [4] the Commission proposed to amend its rules under the Securities Act of 1933 [5] (the "Securities Act") by adding new Rule 157 [6] which would define those terms to mean any issuer, other than an investment company, that is engaged in small business financing and whose total assets on the last day of its most recent fiscal year were $2.5 million or less. Smalll business financing is defined to mean any issuer that is engaged or proposed to engage in the offer and sale of its securities that does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act.

Similarly, for purposes of the RFA, the Commission proposed a definition of "small business" and "small organization" which, when used in reference to entities that are subject to the reporting provisions of the Securities Exchange Act of 1934,[7] ("the Securities Exchange Act"), pursuant to Sections 12, 13, 14, 15(d) and 16 of that Act, would mean an issuer that on the last day of its most recent fiscal year had assets of $2.5 million or less.

The asset tests proposed in the definitions under both the Securities Act and the Securities Exchange Act were intended to reflect an inflationary adjustment to the $1 million asset test, established for reporting purposes in the 1964 Amendments.[8]

The proposed Securities Act definition included a size of the offering standard in addition to an asset test primarily because the Securities Act is transaction oriented; *i.e.*, the registration of securities under the Securities Act is required only when certain transactions are proposed or occur.[9] Moreover there

[4] Release No. 33–6302, 34–17645 (March 20, 1981) (46 FR 19251).

[5] 15 U.S.C. 77a–77aa, as amended.

[6] 17 CFR 230.157.

[7] 15 U.S.C. 78a–78jj, as amended.

[8] 78 Stat. 565 (U.S. Code Cong & Ad. News 2798 (1964)). In the proposing release the Commission noted that an inflationary adjustment to the $1 million asset test established in Section 12(g) of the Securities Exchange Act would result in a $2,470,000 asset threshold in 1979.

[9] Congress has consistently recognized that a Securities Act exemption based on the size of the

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exists substantial factual data indicating a significant direct relationship between the size of the offering and the size of the issuer.[10] It was anticipated that this standard would assure that any evaluation of the impact of compliance regarding proposed or adopted rules under the Securities Act would include only an analysis of those issuers for which fixed costs become disproportionately expensive.

The Commission received eleven comments regarding the proposed standards. Several of these commentators urged that the total asset criterion should be raised, with the recommendations ranging from $4 million to $15 million. In several cases no justification was presented for the standards recommended.

The SBA, in its comments on the proposed standards, supported increasing the total asset threshold to $15 million on the ground that while the total number of shareholders affected by such a standard would be relatively small, the number of issuers which would fall within the definition of "small business" would significantly increase. This, the SBA argues, would bestow substantial regulatory cost savings upon issuers without significantly diluting investor protection for large numbers of shareholders. In making this recommendation, however, the SBA does not maintain that any direct or indirect correlation exists between the ability of an issuer to bear the costs of regulation and the total number of shareholders which would be affected by a specified size standard. Since the basic concept underlying the RFA is that uniform regulations often have a disproportionately greater economic impact upon small businesses, and thus upon their competitive position,[11] the Commission is of the view that definitional standards should be established at levels below which there would exist a disproportionate economic impact in the uniform application of its regulations.

In reaching the $3 million total asset figure, the Commission examined, among other factors, the Congressional rationale for including a $1 million asset test in Section 12(g) of the Securities Exchange Act when it amended that Act in 1964.[12] The legislative history of the 1964 amendments reveals that although the amount of assets would seem to be no more than a secondary criterion, "it may ultimately have relevance in defining a limit where burdens may be disproportionate to needs."[13] Thus, it seems appropriate that an inflationary adjustment to the $1 million asset test is relevant in defining the extent to which the compliance burdens could be met by issuers involved. Additionally, the Commission believes that with the definitional standards established at such levels, the regulatory flexibility analyses required by the RFPA would have maximum utility and greatest significance. One commentator, the Texas Independent Producers & Royalty Owners Association, suggested that a figure of $4 million would more accurately reflect the inflation adjustment desired. As indicated earlier, the Commission noted in the proposing release that an inflationary adjustment to the Section 12(g) $1 million total asset standard would result in a $2,470,000 asset threshold in 1979. An update of this analysis through 1981 suggest that a more appropriate standard would be one which approximates $3 million.

Several commentators suggested that the definitions under both the Securities Act and the Securities Exchange Act should include a revenue test in addition to the asset test proposed. The recommendations ranged from $10 million to $15 million in revenues. As noted above, the legislative history of the 1964 amendments to the Securities Exchange Act established an asset threshold as relevant and appropriate in defining the extent to which compliance burdens could be met by the issuers involved. Additionally, several commentators responding to the Commission's release regarding the advisability of classifying issuers for purposes of the Securities Exchange Act [14] expressed the view that an asset test represents a simple and functional criterion for measuring an issuer's size in relation to the cost of complying with reporting obligations.[15] Moreover, the Commission does not anticipate that a revenue criterion would bestow any significant benefits upon small businesses in the context of the RFA, although additional criteria or modified asset standards which take into account the number of shareholders affected may have significance in the context of the Commission's proposed classification system.[16] In light of the foregoing, the Commission does not believe it is either necessary or desirable to adopt a revenue standard in the final definitions.

Accordingly, the Commission is adopting new Rule 157 under the Securities Act, which defines the terms "small business" and "small organization" for purposes of the RFA as any issuer, other than an investment company, whose total assets on the last day of its most recent fiscal year were $3 million or less and that is engaged in small business financing; *i.e.*, any issuer that engages or proposes to engage in the offer and sale of its securities in an amount that does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act.

Additionally, the Commission is adopting new Rule 0–10 under the Securities Exchange Act,[17] which defines "small business" and small organization for purposes of the RFA to mean any "issuer" or any "person" whose total assets on the last day of its most recent fiscal year were $3 million or less. The Commission may consider the advisability of similar adjustments in the future, if appropriate.

As indicated in the proposing release, the Commission has for some time been taking steps to facilitate the integration of the disclosure systems of both the Securities Act and the Securities Exchange Act so that investors and the marketplace are provided meaningful, nonduplicative information, while the costs of compliance are decreased.[18] The integration effort is based on the idea that, generally, there is no distinction between information that is material for

transaction, rather than solely on the size of the issuer, is appropriate. As an example, Section 3(b) of the Securities Act authorizes the Commission to exempt transactions from registration if it finds that registration is not necessary in the public interest because of the small dollar amount involved or the limited character of the public offering. The dollar ceiling under Section 3(b) has been raised on several occasions, most recently, from $2 million to $5 million pursuant to Section 301 of the Small Business Investment Incentive Act of 1980 (the "Incentive Act") [Pub. L. No. 96–477 (October 21, 1980)]. This Congressional action was intended to provide the Commission with increased flexibility in developing exemptions targeted to smaller issuers. Additionally, Congress adopted the transaction size approach when it enacted, in the Incentive Act, new Section 4(6) of the Securities Act.

[10] Rule 242: A Monitoring Report on the First Six Months of Its Use (December, 1980); Form S–18: A Monitoring Report on Its Use in 1979 (March, 1980).

[11] Senate Report No. 96–878, Senate Committee on the Judiciary, 96th Congress, 2d Sess., July 30, 1980.

[12] 78 Stat. 565 (U.S. Code Cong. & Ad. News 2798 (1964)).

[13] Report of the Special Study of Securities Markets of the Securities and Exchange Commission, House Document No. 95, Pt. 3, House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. (1963) at 18.

[14] Release No. 34–16866 (June 2, 1980) (45 40145).

[15] Summary of Comments relating to Classification of Exchange Act Reporting Companies, File No. S7–837.

[16] Securities Exchange Act Release No. 18189 (October 20, 1981) (46 FR 52382). In this release the Commission proposed for comment a new rule and rule amendments which would exempt a class of smaller issuers from the registration and reporting provisions under the Securities Exchange Act. Where appropriate the Commission will consider the views of the commentators in establishing a Securities Exchange Act classification system.

[17] 17 CFR 240.0–10.

[18] Release Nos. 33–6331 to 33–6338 (August 6 1981) (46 FR 41902).

the distribution of securities in transactions covered by the Securities Act on the one hand, and for periodic reporting under the Securities Exchange Act on the other hand, by companies whose securities are traded in the markets.

As a result of this effort, there will be instances in which amendments to rules, forms and schedules under the Securities Exchange Act that are a part of the integrated disclosure system will also affect disclosures under the Securities Act. The Commission does not intend to imply, however, that an issuer that is subject to the reporting requirements of the Securities Exchange Act may furnish less disclosure in a limited size offering than would normally be furnished to the marketplace under the Securities Exchange Act. Therefore, any impact analysis of rules under the Securities Exchange Act that are a part of the integrated disclosure system will normally be expected to satisfy the similar analysis under the Securities Act.

Trust Indenture Act—Issuers Engaged in Small Business Financing

In its consideration of the proposed definition of "small business" and "small organization" for purposes of the RFA to be applicable to rulemaking under the Trust Indenture Act of 1939, the Commission noted that the Trust Indenture Act definitions, exemptions, requirements, and procedures for qualification of indentures and trustees are closely related to the Securities Act. Consequently, the Commission believed that the considerations affecting small entities under the Trust Indenture Act should be determined in tandem with those under the Securities Act. The Commission therefore proposed to adopt, under the Trust Indenture Act, a rule defining "small business" and "small organization" in a manner which was identical to proposed Rule 157.

The commentators raised no objection to a Trust Indenture Act definition which corresponds to the Securities Act definition and in fact several commentators specifically endorsed the concept. However, the comments raised with respect to the asset test in proposed Rule 157 were made specifically applicable to the proposed definition under the Trust Indenture Act.

The Commission, based on the need for consistency between the Securities Act and Trust Indenture Act definitions, and for the reasons specified above, has determined to amend 17 CFR Part 260 by adopting § 260.0–7 which, for the purposes of the Trust Indenture Act, defines "small business" and "small organization" to mean an issuer whose total assets on the last day of its most recent fiscal year were $3 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to be engaged in small business financing under this section if it is conducting or proposing to conduct an offering of securities which does not exceed the dollar limitation prescribd by § 260.4a–2.[19]

The Securities Exchange Act—Brokers, Dealers and Other Regulated Entities

As noted above, the Commission is also adopting definitions of the terms "small business" and "small organization" for purposes of the RFA with respect to certain entities in the securities industry whose activities are regulated by the Commission pursuant to the Securities Exchange Act. Those entities include brokers, dealers, clearing agencies, exchanges, bank municipal securities dealers, securities information processors and transfer agents. The definitions with respect to brokers and dealers have been revised in response to the views expressed by the commentators. The Commission did not receive any adverse comments on the other definitions [20] and is adopting the definitions as proposed.[21]

The definitions in Rule 0–10 as adopted incorporate the concept of affiliation and provide that a broker-dealer, clearing agency, exchange, bank municipal securities dealer, securities information processor or transfer agent is not a small business or small organization if that entity is affiliated with any person (other than a natural person) that is not a small business or small organization as defined in Rule 0–10. A person is said to be "affiliated" with another if that person controls, is controlled by, or is under common control with such other person. "Control" is defined as, among other things, the right to vote 25 percent or more of the voting securities of an entity and the right to receive 25 percent or more of the net profits of such entity.

As indicated in the proposal release, the Commission believes that it is appropriate to take into account the structure of business organizations in the securities industry when defining the terms "small business" and "small organization." The Commission believes that an ownership or profit-sharing interest of 25 percent or more is an appropriate threshold for determining when the financial resources of affiliates of a securities firm or a securities service firm should be considered in determining the size of that firm for purposes of the RFA and Commission rulemaking. The Standard Oil Company of California objected to the 25 percent threshold because of its belief that equating "control" with a 25 percent interest in an entity would create an unnecessary and undesirable exception to generally accepted terminology.[22] The Commission notes, however, that the threshold as established in Rule 0–10 applies exclusively to the securities industry for limited purposes in the course of Commission rulemaking proceedings affecting only members of that industry and their affiliates.

As indicated above, the Commission is adopting revised definitions of "small business" and "small organization" with respect to brokers and dealers. Proposed Rule 0–10, as published for public comment, would have defined as small those brokers or dealers that are permitted to maintain a certain specified minimum level of net capital, had fewer than five employees at the end of the preceding calendar year, and are not associated with any entities that are not small businesses or small organizations under Rule 0–10. The commentators, however, generally opposed this definition and the use of net capital and number of employees as size standards, and contended that the threshold levels were set too low.[23]

In light of the comments received, the Commission has substantially revised the definitions for broker-dealers and has determined to adopt those definitions as revised. As adopted,

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[19] 17 CFR 260–4a–2 provides:

"The provisions of the Trust Indenture Act of 1939 shall not apply to any security which has been or is to be issued under an indenture which limits the aggregate principal amount of securities at any time outstanding thereunder to $5,000,000 or less, but this exemption shall not be applied within a period of thirty-six consecutive months to more than $5,000,000 aggregate amount of securities of the same issuer."

[20] The only comment that the Commission received on these proposed definitions was from the Small Business Administration, which noted that the proposed definitions for regulated entities under the Securities Exchange Act appeared to be adequate to meet the requirements of the RFA.

[21] *See* paragraphs (d) through (h) of Rule 0–10, *infra*.

[22] That commentator suggested, among other things, that the threshold might be lowered to 20 percent.

[23] The Securities Industry Association proposed that the Commission measure firm size by reference to total capital (defined as net worth plus subordinated liabilities). The Small Business Administration suggested that the Commission choose a size standard from among the possible measures after consultation with the National Association of Securities Dealers, Inc. One broker-dealer suggested a size standard of 19 or fewer employees; another suggested a size standard of $2 million in equity capital and fewer than 30 employees.

paragraph (c) of Rule 0–10 would define as a small business or a small organization, for purposes of Commission rulemaking, a broker or dealer that had total capital of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d) or, if not required to file such statements, a broker or dealer that had total capital of less than $500,000 on the last business day of the preceding fiscal year (or in the time it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) this is not a small business or small organization as defined in the Rule. "Total capital" for purposes of the rule consists of net worth plus subordinated liabilities, including those subordinated liabilities that do not qualify for purposes of determining a firm's net capital under Rule 15c3–1 (17 CFR 240.15c3–1).

Determination of the size of a firm under Rule 0–10, for most broker-dealers, would be based on the total capital that firm reported to the Commission on its annual audited financial statements as of a particular date in the prior fiscal year. Most broker-dealers are required to file audited financial statements with the Commission pursuant to Rule 17a–5(d) under the Securities Exchange Act (17 CFR 240.17a–5(d)). For those firms that are not required to file annual audited financial statements,[24] or that have been in existence for less than one year, size would be determined on the basis of the level of the firm's total capital on the last business day of the preceding fiscal year or, if shorter, during the life of firm.

The Commission believes that $500,000 in total capital is an appropriate benchmark for determining whether a firm is small for purposes of the RFA.[25] All firms are generally aware of their total capital and information concerning the distribution of brokers and dealers according to specified levels of total capital is readily available to the Commission. Total capital appears to be preferable to other possible size standards, such as gross revenues or net capital, because it appears to be less volatile in the face of short-term shifts in factors affecting economic profitability. Data compiled by the Commission's Directorate of Economic Policy Analysis from the reports filed pursuant to Rule 17a–5 by broker-dealers for 1979[26] indicates that approximately 4100 broker-dealers had total capital of less than $500,000.[27] A substantial majority of broker-dealers that are registered with the Commission may qualify as "small" under Rule 0–10, including some firms that engage in underwriting and general brokerage.[28] The Commission does not believe that the RFA mandates establishing a definition of "small" within an industry by reference to the very largest firms in that industry. While there has been in recent years some concentration of firms, the securities industry has usually characterized itself as a competitive industry with a substantial number of national and regional firms competing with one another in various lines of business. The Commission also believes that the definition adopted with regard to broker-dealers is appropriate, since it may serve as a basis for the possible "tiering" of regulations applicable to those entities.[29]

Although the Commission is adopting definitions with regard to the above mentioned entities, the Commission welcomes future comment from interested persons and the public concerning the operation and appropriateness of those definitions. The Commission, in consultation with the Small Business Administration, will consider any changes to such definitions as experience dictates.[30]

Public Utility Holding Companies

The Commission has concluded that it is desirable to adopt a special definition of the terms "small business" and "small organization" for purposes of the RFA to apply to rulemaking under the Public Utility Holding Company Act. In this connection, the Commission does not believe that the Small Business Act and regulations promulgated by the SBA provide size standards that are appropriate for public utility holding companies.[31] Moreover, the Commission believes that the size standards currently in use in connection with federal programs to assist small manufacturing or service enterprises are not appropriate for measuring the impact of rules on small entities that are in "holding company" systems under the Holding Company Act.

Under the Holding Company Act, the Commission exercises comprehensive authority over the issuance of securities or the acquisition of securities or utility assets by registered holding companies and their subsidiaries, intrasystem transactions, and accounting requirements, among other things. A "holding company" is defined under the Holding Company Act as any company which owns 10 percent or more of the voting securities of a public utility company, which is defined as an electric or gas utility company.[32] While the Holding Company Act also provides

[24] Rule 17a–5(d)(iii), for instance, specifically excludes certain brokers that are members of a national securities exchange from those provisions of the rule that require the filing of audited financial statements with the Commission. *See* 17 CFR 240.17a–(d)(iii).

[25] Rule 0–10 as proposed for public comment would have primarily focused, through a particular provision of the Commission's regulation regarding broker-dealer minimum net capital requirements, on the business activities of broker-dealers. The commentators expressed concern that such a focus would have excluded, for instance, broker-dealers that carried customer accounts or cleared their own transactions and, under any other measure of size, would be considered "small" entities. In light of the Commission's determination to expand the scope of the definition to include such broker-dealers, the Commission, as discussed in text, *infra*, believes that total capital is a better economic proxy than net capital for measuring firm size outside of the context of a particular segment of the brokerage community.

[26] *See generally*, Securities and Exchange Commission, staff Report on the Securities Industry in 1979 (1980).

[27] As proposed for comment, Rule 0–10 would have restricted the class of broker-dealers potentially qualifying as small to certain broker-dealers that are permitted to maintain a certain level of minimum net capital pursuant to Rule 15c3 – 1(a)(2) or –1(a)(3), 17 CFR 240.15c3–1 (a)(2)–(a)(3). The Commission estimates that approximately 1,850 broker-dealers maintain minimum net capital pursuant to those provisions.

[28] The approximately 925 firms that would appear not to qualify as "small" accounted for approximately 91 percent of the underwriting profits and 96 percent of the securities commissions earned by broker-dealers in 1979 as reported on the Rule 17a–5 reports for that year.

[29] The SIA recommended that the Commission define as small those broker-dealers having total capital of less than $5 million, thereby defining as small all but approximately 140 SIA members or 200 registered broker-dealers. While that standard might in a few instances be appropriate, the Commission believes that the definition adopted today will generally provide a better basis for tiering regulations. The "tiering" of regulations will, of course, be considered in the context of each rulemaking proceeding subject to the RFA, at which time the Commission may consider whether alternative definitions of a "small' broker-dealer are appropriate.

[30] The Small Business Administration suggested that the Commission periodically evaluate the definitions being adopted today.

[31] The SBA's small business size standards, contained in 13 CFR Part 121 (1980), do not include a standard which is appropriate or practicable to apply in the context of rulemaking under the Holding Company Act. Only one subsection thereof, 13 CFR 121.33–10(d)(11), deals expressly with electric or gas utility companies. That subsection classifies as "small," for purposes of SBA loans, a conceren primarily engaged in the generation, transmission and/or distribution of electric energy for sale whose total output (including that of its affiliates) for the preceding fiscal year did not exceed 4 million megawatt hours. The SBA has proposed for comment amendments to its size standard regulations. Small Business Size Standards; Revision to Method of Establishing Size Standards and Definitions of Small Business, 45 FR 15442 (March 10, 1980). The proposed standards are all stated in terms of number of employees. *Id.* at 15443. Although electric and gas services are listed in the heading of Major Group 49 therein, there are no proposed size standards for electric or gas utilities. *Id.* at 15449.

[32] Sections 2(a)(7)(A) and 2(a)(5).

definitions of "electric utility company" and "gas utility company," the basic regulated unit for purposes of the Holding Company Act is the "holding company system," which is defined to include the holding company and each subsidiary company which is a member of that system,[33] whether it is a utility subsidiary or a non-utility subsidiary.

The Commission further believes that it is appropriate to assess the burdens of regulation under the Holding Company Act for purposes of the RFA by reference to the size of the holding company system as a whole, rather than by reference to its member companies, for three reasons. First, the holding company system is a single control group. Under the standards of the Holding Company Act, subsidiaries of the registered holding companies are wholly-owned or are specialized joint ventures with co-owners of comparable size and character. They would not, within the meaning of Section 3 of the Small Business Act, be considered "independently owned." Second, while most holding companies own more than one public utility subsidiary, the Holding Company Act requires that all such subsidiaries constitute but a single integrated public utility system.[34] And third, the regulatory provisions of the Holding Company Act generally apply to the holding company and to each of its subsidiaries; that is, to the entire holding company system. Accordingly, the rule establishes a definition of the terms "small business" and "small organization" for purposes of the RFA with respect to "holding company systems."

Rule 110, 17 CFR 250.110, defines the terms "small business" or "small organization" as a holding company system whose consolidated revenues from electric or gas utility operations did not exceed $1,000,000 in its last fiscal year. The Commission believes that it is appropriate to measure the size of a holding company system by reference to its consolidated gross utility revenues, a standard familiar to the industry and for which data are currently available. In establishing this size standard, the Commission has considered, among other things, the number of firms in the industry and the purposes of the Holding Company Act that form the predicate for regulation by the Commission. Holding companies, as such, do not constitute a relevant industry group. The relevant industry is the electric and gas utility industry. Upon the basis of available data, as of 1979, the latest available year, the Commission estimates that there are approximately 130 investor-owned electric utility systems and 500 investor-owned gas utility systems, of which it is believed approximately 14 and 180, respectively, have utility revenues below $1,000,000.[35]

There are currently nine registered electric utility holding company systems and three registered gas utility holding company systems that include 53 wholly or partly owned electric utility subsidiaries and 19 gas distribution and transmission subsidiaries. Under the size standard adopted, none of the currently registered holding company systems is a small entity.

There were no substantive coments received regarding the proposed definitions as initially published.

Investment Companies and Investment Advisers

In view of the comments recieved and the reasons given below, the Commission has revised the definitions of "small business" and "small organization" that were proposed with respect to investment companies and investment advisers and is adopting the revised definitions as Rule 0–10, 17 CFR 270.0–10, and Rule 0–7, 17 CFR 275.0–7.

Rule 0–10, 17 CFR 270.0–10, classifies as small any investment company with net assets of $50 million or less as of the end of its most recent fiscal year. The Commission received two letters commenting specifically on this size standard. One urged that $50 million was an appropriate cut-off point.[36] The SBA, being of the impression that only 14 percent, rather than 62.4 percent, of the investment companies in the Commission's statistical sample have assets of $50 million or less, suggested raising the figure to $100 million so that a greater proportion of investment companies might be classified as small.[37] Both commentators suggested that any investment company that primarily invests in small businesses be deemed small even though its net assets exceed the cut-off point that may be adopted.

The Commission believes that had the SBA realized that 62.4 percent of the investment companies would be deemed small under the Commission's size standard it might not have suggested raising the cut-off point to $100 million. Moreover, the Commission continues to believe that, since investment companies with high expense ratios would generally be more adversely affected by regulatory costs than those with lower expense ratios, they are the appropriate subject of relief for purposes of the RFA. Since its statistical study shows that investment companies with net assets from $6 million to $47.2 million had expense ratios exceeding the mean (average) adjusted expense ratio plus one standard deviation (and all the companies with net assets of over $47.2 million had expense ratios falling below this boundary), the Commission is adopting $50 million as the cut-off point.

Having thus identified the small entities in the investment company industry, the Commission is not persuaded that it must, in addition, provide special treatment for investment companies which, although not small, invest in small businesses on the assumption that the benefit of reduced regulatory cost on such investment companies would filter down to its portfolio companies. These portfolio companies are a step removed from the purpose of the Commission's size standard which is to distinguish those investment companies that, due to their size, bear a disproportionate burden of the costs of complying with regulations.

Paragraph (a)(1) of Rule 0–7, 17 CFR 275.0–7(a)(1), classifies as small any investment adviser that manages assets with a total value of $50 million or less, in discretionary or non-discretionary accounts, as of the end of its most recent fiscal year and does not render other advisory services. The Commission received three letters commenting specifically on this size standard. One recommended $50 million as a realistic cut-off point, if indexed for inflation by tying it to the GNP deflator. The Commission believes that this is not necessary because $50 million is only an estimate and it can be changed in the future if necessary.

The SBA suggested that the Commission raise the cut-off point to $100 million to increase the number of investment advisers that will be eligible for regulatory relief. Another commentator also suggested raising the cut-off point to $100 million, but would add, as alternatives, "maintains 25 or less accounts or employs 5 or less persons."[38] The Commission has no information about the specific number of employees of investment advisers or how many investment advisers employ 5

[33] Section 2(a)(9).

[34] Section 11(b)(1).

[35] Source: "Electric Utility Statistics," Public Power, Jan–Feb. 1981, p. D–3, Federal Energy Regulatory Commission Form 1's for Class C and D electric utility companies (1979); Brown's Directory of American and International Gas Companies (93d ed. 1979); Statistics supplied by the American Gas Association.

[36] National Association of Small Business Investment Companies, letter dated May 19, 1981 ("NASBIC").

[37] Small Business Administration letter dated May 27, 1981 ("SBA").

[38] Myerson, Den Berg and Co., letter dated May 5, 1981.

or less persons. Aside from the difficulty of defining "employee" (whether to include half-time, full-time, temporary, permanent, partners, etc.), an attempt to solicit this information from investment advisers would impose unnecessary burdens on them to provide information, contrary to the spirit of the Paperwork Reduction Act.[39] Although it is possible to gather from Form ADV the number of accounts of investment advisers,[40] the number of accounts will not necessarily identify the small investment advisers that only manage assets because of the varying size of the accounts. Thus, an investment adviser with just one account—a $1 billion money market fund—would not be small compared to an investment adviser with fifty $1 million accounts. Therefore, the Commission is not adopting these alternatives size standards.

As to raising the cut-off point for investment advisers that only manage assets, the Commission notes that it proposed $50 million as the cut-off point because of the similarities, with respect to the management of assets, between the investment company and the investment advisory businesses. Therefore, having adopted $50 million as the cut-off point for investment companies, the Commission also adopts it for investment advisers that only manage assets. The Commission is not persuaded that the cut-off point should be raised simply to increase the number of investment advisers that will be eligible for relief. To adopt such an approach would be to depart from the purpose of adopting a size standard, which is to identify the small entities among a particular type of entities so that the Commission may determine whether a particular rulemaking has "a significant economic impact on a substantial number of small entities."[41]

Paragraph (a)(2) of Rule 0–7, 17 CFR 275.0–7(a)(2), classifies as small any investment adviser that solely, or in addition to managing assets of $50 million or less, renders other advisory services and the assets related to its advisory business do not exceed in value $50,000 as of the end of its most recent fiscal year. As originally proposed, the size standard for this type of adviser was that its business-related assets, as shown in the balance sheet most recently filed with the Commission, did not exceed in value 50 percent of the average business-related assets for this type of adviser. As stated in the proposal, the Commission expected to determine such average assets from the balance sheets in its files and to express the size standard in dollars in the final rule. This size standard encountered several objections. One commentator suggested that "$50 million or less" be changed to "$100 million or less, 25 or less accounts or employs 5 or less persons." For the reasons stated in the preceding two paragraphs, the Commission has not adopted this suggestion.

Another commentator suggested that the Commission use the 500-employee size standard proposed by the SBA for miscellaneous publishers.[42] The Commission does not adopt this suggestion because some investment advisers in this category are not publishers at all[43] and, to the extent that some of them issue publications on a subscription basis, the standard would probably embrace all of them for it is unlikely that any of them has more than 500 employees. The standard, therefore, would not identify those that are small among this type of advisers. For this reason, the standard would not serve the purposes of the RFA. This reasoning also supports the Commission's not following suggestions that there should be a separate standard classifying as small all investment advisers who solely or mainly publish newsletters.[44]

Finally, one commentator pointed out potential problems with using the "average" business-related assets as a point of reference for the size standard in the absence of data showing the distribution of this type of investment advisers.[45] This comment is well-taken. The size standard in paragraph (a)(2) of Rule 0–7, 17 CFR 275.0–7(a)(2), uses the median business-related assets, not the average business-related assets, as the point of reference. In a random sample of 100 investment advisers out of about 2,300 investment advisers that solely, or in addition to managing assets of $50 million or less, render other advisory services[46] the Commission found that the median value of their business-related assets was approximately $50,000. The information about the business-related assets of those advisers in the sample was taken from such advisers' latest balance sheets in the Commission's files.[47] Using the median assets of investment advisers in the sample ($50,000), instead of 50 percent of such median assets ($25,000), as the cut-off point would classify as small 55 percent of investment advisers in the sample—a segment which compares with 62.4 percent of investment companies in the Commission's earlier sample that are classified as small under the size standard for investment companies.

Text of Amendments

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

Part 230 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 230.157 to read as follows:

§ 230.157 Small entities for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise

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[39] Under the Paperwork Reduction Act of 1980, effective on April 1, 1981, the Commission must obtain approval from the Office of Management and Budget ("OMB") for every questionnaire calling for answers to identical questions posed to ten or more persons.

[40] Items 15(ii)(a) and 16(ii)(a), Part I, Form ADV, require an investment adviser to state the total number of accounts under discretionary management and of accounts under management or supervision, respectively, as of the end of the adviser's last fiscal year.

[41] Increasing the number of entities within the class deemed small might even be counterproductive in applying this statutory standard in that the bigger the class, the greater the number of entities within it that must be adversely affected by a particular rulemaking before it can be said that the rulemaking affects a "substantial" number of the class.

[42] At the time of the proposal the Commission rejected a size standard based on the number of subscribers because it had no information about the number of these subscribers. The Commission still does not have this information, but it is proposing to amend item 17 of Part I of Form ADV to require an applicant that issues periodic publications relating to securities on a subscription basis to state the number of subscribers thereto as of the end of the applicant's last fiscal year. If this proposed amendment is adopted, the Commission, with available information about the number of subscribers, might reconsider amending the size standard applicable to publishers of market letters.

[43] This category includes not only those advisers that issue periodic publications relating to securities on a subscription basis, but also those that furnish investment advice through consultations (without furnishing investment supervisory services or otherwise managing investment advisory accounts), prepare or issue special reports or analyses relating to securities, or prepare or issue any charts, graphs, formulas, or other devices which clients may use to evaluate securities.

[44] SBA; Newsletter Association of America, letter dated May 13, 1981.

[45] NAIC Investor Advisory Service, letter dated May 14, 1981.

[46] As used in this proposed definition, "other advisory services" means services referred to in item 1(c), (d), (e), (f), and (h), Part II, of Form ADV, 17 CFR 279.0–1.

[47] The Commission is proposing to delete the unaudited balance sheet requirement in item 17, Part I, Form ADV. This deletion, if adopted, should not affect the Commission's application of the size standard in view of the data already available or the monitoring of its continued propriety in view of the balance sheet data that the Commission obtains in its routine adviser inspections.

defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization" shall—

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were $3,000,000 or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b) of the Securities Act.

(b) When used with reference to an investment company that is an issuer for purposes of the Securities Act of 1933, mean an investment company with net assets of $50 million or less as of the end of its most recent fiscal year.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

Part 240 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 240.0–10 to read as follows:

§ 240.0–10 Small entities for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization" shall—

(a) When used with reference to an "issuer" or a "person," other than an investment company, under sections 12, 13, 14, 15(d) or 16(b) of the Securities Exchange Act of 1934, mean an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $3,000,000 or less;

(b) When used with reference to an "issuer" or "person" that is an investment company, mean an investment company with net assets of $50 million or less as of the end of its most recent fiscal year;

(c) When used with reference to a broker or dealer, mean a broker or dealer that:

(1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and

(2) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(d) When used with reference to a clearing agency, mean a clearing agency that:

(1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter);

(2) Had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(e) When used with reference to an exchange, mean any exchange that has been exempted from the reporting requirements of § 240.11Aa3–1;

(f) When used with reference to a municipal securities dealer that is a bank (including any separately identifiable department or division of a bank), mean any such municipal securities dealer that:

(1) Had, or is a department of a bank that had, total assets of less than $10 million at all times during the preceding fiscal year (or in the time that it has been in business, if shorter);

(2) Had an average monthly volume of municipal securities transactions in the preceding fiscal year (or in the time it has been registered, if shorter) of less than $100,000; and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section;

(g) When used with reference to a securities information processor, mean a securities information processor that:

(1) Had gross revenues of less than $10 million during the preceding fiscal year (or in the time it has been in business, if shorter);

(2) Serviced less than 100 interrogation devices or moving tickers as those terms are defined in § 240.11Aa–3–1 at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section; and

(h) When used with reference to a transfer agent, mean a transfer agent that:

(1) Received less than 500 items for transfer and less than 500 items for processing during the preceding six months (or in the time that it has been in business, if shorter);

(2) Maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and

(3) Is not affiliated with any person (other than a natural person) that is not a small business or small organization under this section.

(i) For purposes of paragraphs (c) through (h) of this section, a person is affiliated with another person if that person controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25% or more of the voting securities of such other person or is entitled to receive 25% or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person.

PART 250—GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Part 250 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 250.110 to read as follows:

§ 250.110 Small entities for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise defined for purposes of a particular rulemaking proceeding, the terms "small business" and "small organization," for purposes of the Public Utility Holding Company Act of 1935, shall mean a holding company system whose gross consolidated revenues from sales of electric energy or of natural or manufactured gas distributed at retail for its previous fiscal year did not exceed $1,000,000. There may be excluded from such gross revenues:

(a) Sales or electric energy or natural or manufactured gas to tenants or employees of any operating subsidiary company of such holding company for their own use and not for resale; and

(b) Sales of gas to industrial consumers or in enclosed portable containers.

PART 260—GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

Part 260 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 260.0–7 to read as follows:

§ 260.0–7 Small entities for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization," for purposes of the Trust Indenture Act of 1939 shall mean an issuer whose total assets on the last day of its most recent fiscal year were $3 million or less that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to be engaged in small business financing under this section if it is conducting or proposing to conduct an offering of securities which does not exceed the dollar limitation prescribed by § 260.4a–2.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 270.0–10 to read as follows:

§ 270.0–10 Small entities for purposes of the Regulatory Flexibility Act.

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization," for purposes of the Investment Company Act of 1940 shall mean an investment company with net assets of $50 million or less as of the end of its most recent fiscal year.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

Part 275 of Chapter II of Title 17 of the Code of Federal Regulations is amended by adding § 275.0–7 to read as follows:

§ 275.0–7 Small entities for purposes of the Regulatory Flexibility Act.

(a) For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 et seq.), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term "small business" or "small organization" for purposes of the Investment Advisers Act of 1940 shall mean an investment adviser that:

(1) Manages assets with a total value of $50 million or less, in discretionary or non-discretionary accounts, as of the end of its most recent fiscal year and does not render other advisory services; or

(2) Solely, or in addition to managing assets of $50 million or less, renders other advisory services, and the assets related to its advisory business do not exceed in value $50,000 as of the end of its most recent fiscal year.

(b) As used in this rule, the term "other advisory services" means the services referred to in Form ADV, Part II, items 1(c) through (f) and (h). (17 CFR 279.0–1).

Statutory Authority

The Commission hereby adopts Rules 157, 0–10, 110, 9–7, 0–9 and 0–7, 17 CFR 230.157, 240.0–10, 250.110, 260.0–7, 270.0–10 and 275.0–7 respectively, pursuant to chapter 6 of title 5 of the United States Code (and particularly section 601 thereof (5 U.S.C. 601)) and pursuant to the Securities Act of 1933 (15 U.S.C. 77a et seq. and particularly section 19 thereof (15 U.S.C. 77s)), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq. and particularly section 23 thereof (15 U.S.C. 78w)), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq. and particularly section 20 thereof (15 U.S.C. 79t)), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq. and particularly section 319 thereof (15 U.S.C. 77sss)), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq. and particularly section 38 thereof (15 U.S.C. 80a–37)), and the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq. and particularly section 211 thereof (15 U.S.C. 80b–11)).

By the Commission.

George A. Fitzsimmons,

Secretary.

January 28, 1982.

[FR Doc. 82–2905 Filed 2–3–82; 8:45 am]

BILLING CODE 8010–01–M

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17 CFR Part 250

[Release No. 35–22369]

Technical Amendments to Rules 70, 72 and 100

AGENCY: Securities and Exchange Commission.

ACTION: Technical amendments to rules.

SUMMARY: The Commission announces the adoption of technical amendments to Rules 70, 72 and 100 promulgated under the Public Utility Holding Company Act of 1935 ("1935 Act"). These amendments identify the correct forms for filing reports pursuant to section 17(a) of the 1935 Act and eliminate certain duplicate text and an obsolete reference.

DATE: February 4, 1982.

FOR FURTHER INFORMATION CONTACT: James E. Lurie, Special Counsel, Division of Corporate Regulation, Securities and Exchange Commission, Washington, D.C. 20549 (202) 523–5683.

SUPPLEMENTARY INFORMATION: Sections 17(a) and (b) of the 1935 Act concern the filing of statements of beneficial ownership and the liability for short-swing profits by certain insiders involving any security of a registered holding company or subsidiary thereof. These provisions parallel the reporting and liability provisions of sections 16(a) and (b) of the Securities Exchange Act of 1934 ("Exchange Act"). On January 8, 1981, the Commission amended Rule 72(b) under the 1935 Act so that it applied the rules, including exemptive rules, promulgated under sections 16(a) and (b) of the Exchange Act to transactions involving any security of a registered holding company or subsidiary thereof under sections 17(a) and (b) of the 1935 Act.[1] Duplication of filing requirements had previously been avoided by specifying Forms 3 and 4 prescribed under section 16(a) of the Exchange Act as filings also under the 1935 Act.[2] On March 20, 1981, these forms were deleted from the list of 1935 Act forms (previously at 17 CFR 259.271(a) and (b)), since the amendment to rule 72(b) made the dual designation superfluous.[3] The fact that other rules still referred to them was overlooked, a technical oversight corrected here.

The technical amendment revises Rule 72(a) to make clear that only the Exchange Act filing is contemplated. Parallel revisions to reflect this change are made to footnote 5, a note to the subheading preceding rule 70, and to the text of rule 70(b)(4), each of which refers to the filing requirements under section 17(a) of the 1935 Act.

The Commission is also deleting as obsolete footnote 6 to the 1935 Act rules. The footnote, a note accompanying rule 70(c)(5), refers to temporary provisions concerning exemptions in rule 201(b).

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[1] HCAR No. 21863 (December 31, 1980), 46 FR 2036 (January 8, 1981).

[2] HCAR No. 14383 (March 9, 1961), 26 FR 2465 (March 23, 1961).

[3] HCAR No. 21960 (March 12, 1981), 46 FR 17756 (March 20, 1981).

which latter rule was rescinded in 1945.[4] Present footnote 7, found as a note accompanying a portion of Rule 100, is accordingly renumbered as footnote 6.

Finally, the Commission is correcting rule 70(c)(4) by deleting subparagraph (iii) thereof, and renumbering subparagraphs (iv) and (v) as subparagraphs (iii) and (iv). The deleted subparagraph is merely a misplaced duplication of the final sentence of rule 70(c)(4). The amendment to Rule 70 adopted and published by the Commission [5] did not include this sentence as subparagraph (iii), and numbered as subparagraphs (iii) and (iv) the subparagraphs which appear in the Code of Federal Regulations as subparagraphs (iv) and (v). The source of the error is unknown. Statutory Basis and Text of Amendments.

The Securities and Exchange Commission hereby amends Title 17, Chapter II of the Code of Federal Regulations, pursuant to its authority under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a *et seq.*) and particularly sections 17(a) and 20(a) thereof (15 U.S.C. 79q(a) and 79t(a)), by amending §§ 250.70, 250.72 and 250.100 to read as set forth below. Since these amendments are technical and administrative in nature, the Commission finds that notice and comment procedures are unnecessary and therefore the amendments may become effective immediately.

PART 250—GENERAL RULES AND REGULATIONS, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

1. The footnote reference in the subheading "Officers, Directors and Representatives of Registered Holding Companies and Their Subsidiaries" is revised to read as follows:

[5] The statements which section 17(a) requires to be filed by officers and directors of registered holding company systems are filed on the forms prescribed under section 16(a) of the Securities Exchange Act of 1934.

2. Section 250.70 is amended by removing footnote reference [6] from paragraph (a)(5), revising paragraph (b)(4), removing paragraph (c)(4)(iii), and redesignating paragraphs (c)(4)(iv) and (v) as (iii) and (iv) as follows:

§ 250.70 Exemptions from section 17(c) of the act.

* * * * *

(b) * * *

(4) *Agreement by exempt persons and their firms.* No exemption shall be effective as to any officer or director having any financial connection with any investment banker, unless such officer or director and such investment banker shall enter into an agreement with such company, and file a copy thereof with the Commission, undertaking to comply with the conditions specified in paragraph (b)(3) of this section and undertaking that such investment banker will file reports as to its holdings of, and transactions in, securities in such holding company system (on the forms prescribed under section 16(a) of the Securities Exchange Act of 1934).

(c) * * *

(4) * * *

(iii) [Removed]

3. Section 250.72 is amended by revising paragraph (a) to read as follows:

§ 250.72 Filing of statements pursuant to section 17(a).

(a) The filing of initial statements of beneficial ownership of securities and statements of changes in such beneficial ownership, as prescribed under section 16(a) of the Securities Exchange Act of 1934, shall satisfy the corresponding requirements of section 17(a) of the Public Utility Holding Company Act of 1935.

* * * * *

§ 250.100 [Amended]

4. Section 250.100 is amended by renumbering footnote 7 therein as footnote 6.

By the Commission.

George A. Fitzsimmons,

Secretary.

January 28, 1982.

[FR Doc. 82-2904 Filed 2-3-82; 8:45 am]

BILLING CODE 8010-01-M

[4] HCAR No. 6318 (December 27, 1945), 10 FR 15412 (December 29, 1945).

[5] *See* HCAR No. 19392 (February 10, 1976), 41 FR 8757 (March 1, 1976).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 271

[Docket No. RM79-76 (Louisiana—2 Addition); Order No. 207]

High-Cost Gas Produced from Tight Formations; Louisiana; Final Rule

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is authorized by section 107(c)(5) of the Natural Gas Policy Act of 1978 to designate certain types of gas as high-cost gas where the Commission determines that the gas is produced under conditions which present extraordinary risks or costs. Under section 107(c)(5), the Commission issued a final regulation designating natural gas produced from tight formations as high-cost gas which may receive an incentive price (18 CFR 271.703). This rule established procedures for jurisdictional agencies to submit to the Commission recommendations of areas for designation as tight formations. This final order adopts the recommendation of the Louisiana Office of Conservation that an additional area of the Haynesville Formation be designated as a tight formation under § 271.703(d).

EFFECTIVE DATE: This rule is effective January 28, 1982.

FOR FURTHER INFORMATION CONTACT: Leslie Lawner, (202) 357-8511 or Walter W. Lawson, (202) 357-8556.

SUPPLEMENTARY INFORMATION:

Issued: January 28, 1982.

The Commission hereby amends § 271.703(d) of its regulations to include an additional area in the Haynesville Formation in the northwestern part of Louisiana as a designated tight formation eligible for incentive pricing under § 271.703. The amendment was proposed in a Notice of Proposed Rulemaking by the Director, OPPR, issued October 21, 1981 (46 FR 52389, October 27, 1981)[1] based on a recommendation by the State of Louisiana Office of Conservation (Louisiana) in accordance with § 271.703(c) that the said area be designated as a tight formation.

Evidence submitted by Louisiana supports the assertion that the additional area of the Haynesville Formation meets the guidelines contained in § 271.703(c)(2). The Commission adopts the Louisiana recommendation.

This amendment shall become effective immediately. The Commission has found that the public interest dictates that new natural gas supplies be developed on an expedited basis, and, therefore, incentive prices should be made available as soon as possible. The need to make incentive prices available immediately establishes good cause to waive the thirty-day publication period.

(Department of Energy Organization Act, (42 U.S.C. 7101 *et seq.*); Natural Gas Policy Act of 1978, (15 U.S.C. 3101-3342); Administrative Procedure Act, (5 U.S.C. 553.))

[1] Comments were invited and none were received. No party requested a public hearing and no hearing was held.

PART 271—CEILING PRICES

In consideration of the foregoing, Part 271 of Subchapter H, Chapter I, Title 18, Code of Federal Regulations, is amended as set forth below, January 29, 1982.

By the Commission.

Kenneth F. Plumb,

Secretary.

Section 271.703(d) is revised in subparagraph (22) to read as follows:

§ 271.703 Tight formations.

* * * * *

(d) *Designated tight formations.* * * *

(22) *Haynesville Formation in Louisiana. RM79–76 (Louisiana—2)*—(i) *Delineation of formation.* The Haynesville Formation is found in the northern portion of Bossier Parish, Louisiana, on the Arkansas border and consists of the following: Township 23 North, Range 12 West, Sections 5 through 8, and 17 through 19; Township 23 North, Range 13 West, Sections 1 through 24; Township 23 North, Range 14 West, Sections 1, 2, 6 through 24, and 27 through 34 and Township 23 North, Range 15 West, Sections 1 through 3, 10 through 15, 22 through 27 and 34 through 36.

(ii) *Depth.* The top of the Haynesville Formation is located at a measured depth of 10,360 feet, with the base located at 10,845 feet on the induction electrical log of the Crystal Oil Company Hall No. 1 Well. In the Arkana Field, the Haynesville Formation consists of three members: the upper member varies in thickness from 120 to 220 feet thick, the middle member, the Haynesville Sand, ranges between 120 and 220 feet thick, and the lowest member, the Buckner, is between 200 and 400 feet thick.

[FR Doc. 82-2960 Filed 2-3-82; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T.D. 82-28]

Vessels in Foreign and Domestic Trades; Illegal Discharge of Oil and the Pollution of Coastal and Navigable Waters

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This notice amends the Customs Regulations relating to the illegal discharge of oil and the pollution of coastal and navigable waters by the deposit of refuse matter or hazardous substances. The amendments conform the Customs Regulations to changes made by the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92–500), which were enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

EFFECTIVE DATE: March 5, 1982.

FOR FURTHER INFORMATION CONTACT: Paul Hegland, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 91, title 46, United States Code (46 U.S.C. 91), before any vessel may depart the United States for a foreign port, clearance must be obtained from customs at the port of departure. To assist in the enforcement of the Federal Water Pollution Control Act, as amended, the Water Quality Improvement Act of 1970 (33 U.S.C. 1161, 1162), provides that the Secretary of the Treasury, at the request of the Secretary of the Department in which the Coast Guard is operating (since 1967, the Department of Transportation), shall withhold clearance of any vessel the owner or operator of which is subject to a penalty for violation of the Act.

Section 4.66a, Customs Regulations (19 CFR 4.66a), provides that if a district director of Customs receives a request from an officer of the Coast Guard to withhold clearance of a vessel whose owner or operator is subject to a civil penalty for *knowingly* discharging oil in violation of the Water Quality Improvement Act of 1970, clearance shall not be granted until the request is withdrawn or a bond or other surety satisfactory to the Coast Guard has been filed.

Section 4.66b, Customs Regulations (19 CFR 4.66b), provides procedures for Customs officers to follow in reporting to the Coast Guard discharges of refuse matter, hazardous substances, or oil in U.S. waters in violation of section 13 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), and the Water Quality Improvement Act of 1970 (33 U.S.C. 1161, 1162).

The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1321 (1976)), extended the provision for withholding clearance to include discharges of hazardous substances as well as oil, *whether discharged knowingly or not,* and deleted the provision for granting clearance upon withdrawal of the Coast Guard's request to withhold clearance. In addition, the authority cited for sections 4.66a and 4.66b was changed to section 2, 86 Stat. 862, 864, 865, as amended; 33 U.S.C. 1321.

In order to conform its regulations to the amended law, Customs published a notice of proposed rulemaking in the **Federal Register** on April 29, 1981 (46 FR 23952), setting forth the necessary changes and the reasons therefor. Interested parties were given until June 29, 1981, to submit comments on the proposal. No comments were received in response to the notice. Accordingly, Customs has determined to adopt the changes as proposed.

Executive Order 12291

Because this will not result in a "major rule"as defined in section 1(b) of Executive Order 12291, the regulatory impact analysis and review prescribed by section 3 of the Executive Order is not required.

Inapplicability of Regulatory Flexibility Act

Because the contemplated effects of the Federal Water Pollution Control Act Amendments of 1972 are presumed to have been considered by the Congress, and are considered to flow from that legal authority, not from the regulation, the regulation is not expected to; have a significant secondary or incidental effect on a substantial number of small entities; impose, or otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities; or generate significant interest or attention from small entities.

Accordingly, pursuant to the provisions of section 3 of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601 *et seq.*), the Secretary of the Treasury has determined that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, these regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Lawrence P. Dunham, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Amendment to the Regulations

The proposed amendments to the regulations set forth in the notice of proposed rulemaking published in the

Federal Register on April 29, 1981 (46 FR 23952) are adopted as set forth below.

Approved: January 26, 1982.

William T. Archey,

Acting Commissioner of Customs.

John M. Walker, Jr.,

Assistant Secretary of the Treasury.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

Sections 4.66a and 4.66b(a) and the authority cited after § 4.66b are revised to read as follows:

§ 4.66a Illegal discharge of oil and hazardous substances.

If a district director receives a request from an officer of the U.S. Coast Guard to withhold clearance of a vessel whose owner or operator is subject to a civil penalty for discharging oil or a hazardous substance into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in quantities determined to be harmful by appropriate authorities, such clearance shall not be granted until the district director is informed that a bond or other surety satisfactory to the Coast Guard has been filed.

(Sec. 2, 86 Stat. 862, *et seq.*, as amended; R.S. 4197, as amended (33 U.S.C. 1321, 46 U.S.C. 91))

§ 4.66b Pollution of coastal and navigable waters.

(a) If any Customs officer has reason to believe that any refuse matter is being or has been deposited in navigable waters or any tributary of any navigable waters in violation of section 13 of the Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407), or oil or a hazardous substance is being or has been discharged into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in violation of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, 1321), he shall promptly furnish to the district director a full report of the incident, together with the names of witnesses and, when practicable, a sample of the material discharged from the vessel in question.

(30 Stat. 1152; sec. 2, 86 Stat. 862, *et seq.*, as amended (33 U.S.C. 407,1321))

[FR Doc. 82-2895 Filed 2-3-82; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Government National Mortgage Association

24 CFR Part 300

[Docket No. R-82-964]

Updating of List of Attorneys-in-Fact

AGENCY: Government National Mortgage Association, HUD.

ACTION: Final rule.

SUMMARY: This amendment updates the current list of attorneys-in-fact by amending paragraph (c) of 24 CFR 300.11. These attorneys-in-fact are authorized to act for the Association by executing documents in its name in conjunction with servicing GNMA's mortgage purchase programs, all as more fully described in paragraph (a) of 24 CFR 300.11.

EFFECTIVE DATE: March 18, 1982.

ADDRESS: Rules Docket Clerk, Office of General Counsel, Room 5218, Department of Housing and Urban Development, 451 7th Street, SW., Washington, D.C. 20410.

FOR FURTHER INFORMATION CONTACT: Mr. William J. Linane, Office of General Counsel, on (202) 755-7186

SUPPLEMENTARY INFORMATION: Notice and public procedure on this amendment are unnecessary and impracticable because of the large volume of legal documents that must be executed on behalf of the Association.

PART 300—GENERAL

§ 300.11 [Amended]

1. Paragraph (c) of § 300.11 is amended by adding the following names from the current list of attorneys-in-fact:

* * * * *

(c) * * *

Name and Region

W. James Bradley, Washington, D.C.
John M. Coan, Washington, D.C.

§ 300.11 [Amended]

2. Paragraph (c) of § 300.11 is amended by removing the following names from the current list of attorneys-in-fact:

Name and Region

Richard M. Jaegle, Washington, D.C.
William Kane Halapin, Washington, D.C.

(Sec. 309(d), National Housing Act, 12 U.S.C. 1723a(d), and sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)))

Issued at Washington, D.C., January 8, 1982.

R. Frederick Taylor,

Executive Vice President, Government National Mortgage Association.

[FR Doc. 82-2902 Filed 2-3-82; 8:45 am]

BILLING CODE 4210-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 80-605]

Use of Certain kHz Offset Assignments in a Certain MHz Band in the Private Land Mobile Radio Services; Correction

AGENCY: Federal Communications Commission.

ACTION: Final rule; correction.

SUMMARY: The Commission adopted rules permitting radio stations in any of the frequency-coordinated Private Land Mobile Radio Services to use kHz offset frequencies after such uses were properly coordinated. This document makes corrections to inappropriate designators following certain frequencies in the list in the appendix to the Report and Order.

ADDRESS: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Arthur C. King, Private Radio Bureau, (202) 632-6497.

SUPPLEMENTARY INFORMATION:

Released: January 20, 1982.

In the matter of amendment of Subpart D of Part 90 of the Commission's rules and regulations to permit the use of 12.5 kHz offset assignments in the 450-470 MHz band in the Private Land Mobile Radio Services, PR Docket No. 80-605.

The Report and Order in this proceeding (46 FR 45953) included an appendix containing a list of frequencies 12.5 kHz removed from primary frequencies in the Land Mobile Radio Services. Opposite each frequency in the list were designators for the services in which the frequency is available. Six of those frequencies bore designators related to Industrial Radio Services inappropriate for offset frequencies adjacent to frequencies assigned in the Public Safety Radio Services. This Errata corrects the frequency list by deleting the designators on those six frequencies relating to the Industrial Radio Services.

§ 90.267 [Corrected]

In § 90.267(b), correct the following entries in the list of frequency available to read as follows:

* * * * *

(b) Frequencies available for assignment under this section are as follows:

Offset Channels Available in Services Indicated:

* * * * *

453.0125 PL PS

* * * * *

453.9875 PL

* * * * *

458.0125 PS

* * * * *

458.9875 PL

* * * * *

460.6375 PF

* * * * *

465.6375 PF

* * * * *

467.7375 Not Available, Adjacent to General Mobile

* * * * *

467.7625 IB

* * * * *

Federal Communications Commission

William J. Tricarico,

Secretary.

[FR Doc. 82-2952 Filed 2-3-82; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Urban Mass Transportation Administration

49 CFR Part 670

[UMTA Docket No. 82-B]

Transfer of Conrail Commuter Service Operations

AGENCY: Federal Railroad Administration (FRA) and Urban Mass Transportation Administration (UMTA), Transportation (DOT).

ACTION: Emergency interim final rule.

SUMMARY: The purpose of this document is to prescribe standards for the obligation and equitable distribution of funds authorized to ensure that commuter rail services operated by the Consolidated Rail Corporation under contract to commuter authorities are transferred, on or before January 1, 1983, either to those commuter authorities for operation directly or to the Amtrak Commuter Services Corporation for operation on their behalf. This document establishes applicant eligibility criteria, sets forth a formula for the allocation of funds appropriated for the transfer, identifies eligible uses for the allocated funds, and outlines application procedures. This emergency interim final rule is effective retroactively so as to provide prompt assistance to Amtrak Commuter Services Corporation and the affected commuter authorities with activities attending the transfer of commuter service operations.

DATES: This emergency interim final rule is effective on October 1, 1981. Comments must be received on or before March 22, 1982.

ADDRESSES: Comments should identify the docket number and should be submitted to: Office of the Chief Counsel, Urban Mass Transportation Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Persons desiring to be notified that their written comments have been received by UMTA should submit a stamped, self-addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for written comments, during regular business hours in Room 9228 of the Nassif Building, 400 Seventh Street, SW., Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: S. Mark Lindsey, Office of the Chief Counsel of the Federal Railroad Administration, (202)–426–7710, or Anthony Anderson, Office of the Chief Counsel of the Urban Mass Transportation Administration, (202)–426–4011, both located at 400 Seventh Street, SW., Washington, D.C. 20590. FRA and UMTA office hours are from 8:30 a.m. to 5:00 p.m. ET, Monday through Friday.

SUPPLEMENTARY INFORMATION: This document prescribes standards for the obligation and equitable distribution of funds authorized under section 1139(b) of the Northeast Rail Service Act of 1981, Subtitle E of Title XI of Pub. L. 97–35. Because the rule is limited in scope, the FRA and UMTA have concluded that the rule will not constitute a major rule under the terms of Executive Order 12291 or a significant rule under DOT's regulatory policies and procedures. The agencies will review this determination in light of any comments received in response to this emergency interim final rule prior to issuance of a final rule.

The final rule will only have a direct economic impact on five commuter authorities and upon the Amtrak Commuter Services Corporation. The rule does not place any new requirements or burdens on the public and to some extent it is deregulatory in nature. The rule will not have a significant economic impact on any small entity. Based on these facts, it is certified that the rule will not have a significant impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act (Pub. L. 95–354, 94 Stat. 1164, September 19, 1980).

This rule is effective retroactively because commuter authorities, mindful of the 1983 transfer date, have already commenced planning activities which must necessarily be completed in anticipation of the transfer of commuter rail services. FRA and UMTA have afforded the rule retroactive effect so as not to penalize those commuter authorities with the foresight to have begun planning prior to the publication of this rule. The Northeast Rail Service Act requires each affected commuter authority to determine by April 1, 1981, whether it will directly provide commuter service presently provided by Conrail or whether it will contract with ACS. This rule is issued as an emergency rule to provide the commuter authorities with prompt assistance and to enable them to make that determination withing the statutory deadline. The emergency issuance also permits ACS to organize and prepare for the transfer. FRA and UMTA have issued this regulation as an interim final rule to provide interested parties an opportunity to comment upon the regulation. The agencies will consider all comments received during the 45 day comment period and amend the rule, as necessary and appropriate, on the basis of the comments received.

Background

On August 13, 1981, Congress enacted the Northeast Rail Service Act of 1981, Subtitle E of Title XI of Pub. L. 97–35, which provides for the transfer of commuter rail service operations from Conrail either to the Amtrak Commuter Services Corporation or directly to the commuter authorities for which Conrail presently operates commuter rail services. Section 1139(b) of the Northeast Rail Services Act authorizes $50,000,000 to be appropriated to the Secretary of Transportation to facilitate the transfer of commuter rail services from Conrail to other operators. Congress appropriated $45,000,000 for this purpose. The provision also requires that the Secretary issue regulations to govern the obligation and distribution of the transition assistance. This emergency interim final rule is issued in compliance with and to forward the purposes of section 1139(b).

Conrail currently contracts with five commuter authorities to provide commuter rail services. The Northeast Rail Service Act requires each of these commuter authorities to determine by April 1, 1982, whether it will provide commuter service directly or whether it will contract with the Amtrak Commuter Services Corporation (ACS). ACS is a wholly-owned, but financially separate, subsidiary of the National Railroad Passenger Corporation (AMTRAK), organized and incorporated in compliance with the District of Columbia Business Corporation Act on November 20, 1981, for the purpose of providing commuter rail passenger service on behalf of these commuter authorities. These commuter authorities (the Metropolitan Transportation Authority, the Connecticut Department of Transportation, the New Jersey Transit Corporation, the Southeastern Pennsylvania Transportation Authority, and the Maryland Department of Transportation), are in the process of collecting information to render that determination and make other decisions necessary to the transfer of commuter services.

This emergency interim final rule is effective retroactively to facilitate a smooth and prompt transfer of commuter rail services from Conrail to either the commuter authorities or to Amtrak Commuter.

A. *The Allocation Formula.* Although several approaches were considered, an allocation method relying on the use of a relatively simple formula was chosen. One advantage of using a formula is the ease with which DOT may administer an allocation program centered on a simple formula, and the opportunity accorded the applicants to plan for the transition process knowing in advance the level of limited Federal funding available to them.

In fashioning a formula that would be attuned to the applicant's needs in meeting the unique costs associated with the transfer process, the Secretary was cognizant of the diversity which characterizes the commuter services provided by the authorities and that, inevitably, each would benefit differently under any formula chosen. The Secretary and the affected authorities decided that a formula based on car mile and revenue data for the year 1980 would be the most effective and equitable of several alternatives. Comments made by the commuter authorities with respect to the formula will appear in Docket 82-B. The derivation of each commuter authority's allocation is presented in Appendix A to the rule.

B. *Pre-Transfer Allocations.* The Secretary has determined that the expeditious transfer of commuter services can most efficiently be accomplished if funds for planning activities and start-up costs are made promptly available to both ACS and the several commuter authorities. The authorities will receive $3,500,000 to be divided among them according to the allocation formula, and ACS will receive $4,000,000. The amount allotted to ACS, except for certain unallocable expenses, is to be expended on the commuter authorities in proportions determined by the formula.

Since ACS is intended by the Act to be a service corporation whose form will be shaped by the needs of the authorities, an authority may exercise its option to operate commuter services directly and claim a portion of ACS's undisbursed and unobligated pre-transfer allocation. The amount to which each authority will be entitled will, once again, be determined by the allocation formula.

C. *Transfer Allocations.* Upon transfer, the commuter service providers (either ACS or the commuter authorities), will require funds for expenses associated with the purchase of inventories and other transfer-related costs. In anticipation of this need, the emergency interim final rule permits ACS and the commuter authorities to receive, in fiscal year 1983, sixty-five percent of the funds appropriated under section 1139(b) and not allocated prior to the transfer of service. To provide ACS and the commuter authorities with a source of working capital, the rule permits ACS and the commuter authorities to receive twenty-five percent of the transfer allocation in fiscal year 1984 and the remaining funds in 1985.

D. *Eligible Expenses.* Section 1139(b) authorizes $50,000,000 for the purpose of offsetting the transfer and planning expenses of the commuter authorities, as well as the specialized one-time start-up costs of both the authorities and ACS. Although the amount authorized is small in comparison to the annual operating subsidies provided by local governments, it should be emphasized that this limited Federal assistance is not intended to supplant local funding or to be continuous in nature.

Congress has clearly indicated its intention that flexibility be accorded the applicants in the use of authorized funds. Thus, eligible expenses embrace such items as the purchase of parts and fuel from Conrail, the interim staffing and operating costs of ACS, non-operating working capital for both ACS and the commuter authorities, as well as certain post-transfer planning and study costs. In addition, eligible costs may include expenses incurred from October 1, 1981. It is equally clear, however, that an underwriting of operating expenses of the commuter authorities is not a purpose to be served by the transition program.

These regulations have been designed both to achieve the Congressional goals of timeliness and efficiency with regard to the transfer of Conrail's commuter responsibilities, and to ultimately enhance the quality of commuter rail services in the Northeast.

Issued on: January 29, 1982.

Richard J. Schiefelbein,

Deputy Administrator, Federal Railroad Administration.

Charles A. Gargano,

Deputy Administrator, Urban Mass Transportation Administration.

The Emergency Interim Final Rule

In consideration of the foregoing, 49 CFR is amended by—

1. Adding a new Part 670 (49 CFR Part 670) to read as follows:

PART 670—TRANSFER OF COMMUTER SERVICES

Sec.

Authority: Sec. 1139(b) of the Northeast Rail Service Act of 1981, Subtitle E, Title XI, Pub. L. 97-35 [95 Stat 652]; regulations of the Office of the Secretary of Transportation, 49 CFR 1.49 and 1.51.

§ 670.1 Purpose.

The purpose of this part is to prescribe standards for the obligation of funds authorized under section 1139(b) of the Northeast Rail Service Act of 1981, Subtitle E of Title XI of Pub. L. 97-35, to ensure that commuter rail services operated by the Consolidated Rail Corporation under contract to commuter authorities are transferred either to those commuter authorities for operation directly or to Amtrak

Commuter Services Corporation for operation on their behalf on or before January 1, 1983 and to ensure the equitable distribution of those funds.

§ 670.3 Applicability.

This Part applies to applications for and disbursement of transition funds to facilitate the transfer of rail commuter services from Conrail to other operators under section 1139(b) of the Northeast Rail Service Act of 1981.

§ 670.5 Definitions.

As used in this part—

(a) "ACS" means Amtrak Commuter Services Corporation created under section 1137 of the Northeast Rail Service Act of 1981.

(b) "Act" means the Northeast Rail Service Act of 1981, Subtitle E, Title XI, Pub. L. 97–35.

(c) "Applicant" means ACS or a commuter authority that submits an application for Federal assistance pursuant to this part.

(d) "Commuter authority" means any State, local, or regional authority, corporation, or other entity that provides commuter service, as defined in section 1135(a)(4) of the Act, and for which Conrail was providing commuter service under section 303(b)(2) or 304(e) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. 743(b)(2), 744(e), on August 13, 1981. Successors to these entities are also deemed to be commuter authorities.

(e) "Conrail" means the Consolidated Rail Corporation.

(f) "Administrators" means the Federal Railroad Administrator or his delegate and the Urban Mass Transportation Administrator or his delegate.

§ 670.7 Eligibility.

ACS or commuter authorities may apply to the Administrators under § 670.9 for such commuter service transition assistance as is provided under this part.

§ 670.9 Commuter service transition assistance.

(a) *Formula Allocation.* Transition assistance funds appropriated by Congress under section 1139(b) of the Act shall be allocated among commuter services on the basis of calendar year 1980 car mile and revenue passenger data. The allocation for the benefit of each commuter authority shall be an amount equal to the sum of: (1) Fifty percent of the total amount available multiplied by the percentage that the number of car miles of commuter service operated for the commuter authority by Conrail in 1980 represents of the total number of car miles for all commuter service operated by Conrail in 1980; and (2) fifty percent of the total amount available multiplied by the percentage that the number of revenue passengers carried by Conrail for the commuter authority in 1980 represents of the total number of revenue passengers for all commuter service operated by Conrail in 1980. The derivation of each commuter authority's allocation is presented in Appendix A. Except for general administrative expenses and expenses that are not attributable to particular commuter services, ACS shall allocate and expend funds it receives under this part in accordance with the formula set forth in this subsection: *Provided, however,* That, if a commuter authority elects to operate its commuter service directly, the commuter authority shall be eligible to receive its share, determined in accordance with the allocation formula set forth in this subsection, of the funds not yet disbursed to ACS under paragraph (b) of this section or not yet obligated or expended by ACS.

(b) *Pre-transfer Allocation.* Not more than $7,500,000 of the funds appropriated and available for disbursement under this part will be made available for disbursement to applicants prior to the transfer of commuter service operation from Conrail to a commuter authority or to ACS. Of that amount, up to $3,500,000 shall be available for distribution to commuter authorities in accordance with the allocation formula set forth in paragraph (a) of this section. Of the funds available prior to transfer of commuter service, up to $4,000,000 shall be available for distribution to ACS.

(c) *Transfer Allocation.* Upon the transfer of commuter service operation from Conrail to ACS or to commuter authorities, not more than sixty-five percent of the appropriated and available funds not obligated under paragraph (b) of this section shall be made available in accordance with the allocation formula set forth in paragraph (a) of this section in fiscal year 1983, not more than twenty percent shall be made available in fiscal year 1984, and the remaining funds shall be made available in fiscal year 1985.

§ 670.11 Projects or activities for which transition assistance may be expended.

Transition projects or activities which qualify for Federal funding include, but are not limited to:

(a) Planning and study costs incurred in deciding whether to provide post-transfer service directly or through ACS;

(b) Legal expenses incurred in effecting transfer of service from Conrail;

(c) Purchase of parts and fuel inventory from Conrail;

(d) Legal and planning costs incurred in negotiating new labor agreements;

(e) Planning and study costs incurred in making decisions about post-transfer routes and levels of service;

(f) Planning and transition costs incurred by ACS on behalf of a commuter authority; and

(g) Costs of staffing and operating ACS, including working capital.

Eligible costs for ACS and the commuter authorities include expenses incurred from October 1, 1981.

§ 670.13 Applications.

(a) *Applications for pre-transfer allocation funds.* Each application shall include, in the order indicated and identified by applicable section numbers and letters corresponding to those used in this part, the following information as to the applicant:

(1) Full and correct name and principal business address;

(2) Name, title, and address of the person to whom correspondence regarding the application should be addressed;

(3) A detailed description of the projects or activities for which assistance is sought, together with timetables which show estimated completion dates for each such project or activity;

(4) The total amount of assistance requested with a funding level justification for each project or activity;

(5) Evidence that the applicant has established, in accordance with Attachment G to Office of Management and Budget Circular A–102, adequate procedures for financial control, accounting, and performance evaluation, in order to assure proper use of the Federal funds;

(6) An assurance by the applicant that it will use Federal funds provided under the Act solely for the purposes for which assistance is sought and in conformance with the limitations on the expenditures allowed under the Act and applicable regulations;

(7) Two copies of a minority business enterprise plan prepared in accordance with 49 CFR Part 23;

(8) Assurances that the applicant will comply with the following Federal laws, policies, regulations, and pertinent directives:

(i) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), and DOT regulations issued thereunder (49 CFR Part 21);

(ii) If construction is involved, Executive Order 11246 and Department

of Labor regulations issued thereunder (41 CFR Part 60);

(iii) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and DOT regulations issued thereunder (49 CFR Part 27);

(iv) DOT regulations governing the use of minority business enterprises (49 CFR Part 23);

(v) which prohibits use of financial assistance for facilities on the Environmental Protection Agency's list of violating facilities pursuant to 40 CFR 15.20;

(9) An opinion of the applicant's legal counsel advising that (i) counsel is familiar with (A) the applicant's corporate or other organization powers; (B) section 1139(b) of the Act; (C) the other Acts referred to in these regulations; and (D) any regulations issued to implement those Acts; (ii) the applicant is authorized to make the application including all certifications, assurances, and affirmations required; (iii) the applicant has the requisite authority to carry out the actions proposed in the application and to fulfill the obligations created thereby; and (iv) the applicant has the authority to enter into all of the legal commitments referred to in paragraph (a)(8) of this section and that these commitments are legal and binding upon the applicant and enforceable in accordance with their terms; and

(10) Any other information the Administrators may deem necessary concerning an application filed under this part.

(b) *Applications for transfer allocation funds.* ACS shall be the applicant for transfer allocation funds for commuter services it operates. A commuter authority shall be the applicant for transfer funds for commuter service it operates for itself. Each application shall include the information submitted in paragraph (a) of this section except that any information or material that has been submitted by an applicant need not be resubmitted if the prior submission is identified and incorporated by reference in the application. Where the prior submission is in need of any changes, the changes may be submitted provided the prior submission is identified and incorporated by reference. Any assurance, certification, or affirmation previously made by the applicant, in connection with a prior submission, must be reaffirmed by the applicant when any identification and incorporation by reference of previously submitted materials is made. In addition to meeting the requirements of paragraph (a) of this section, applicants for transfer allocation funds shall submit the following information:

(1) If ACS is the applicant, two copies of each contract between ACS and a commuter authority; and

(2) Executed copies of agreements between the applicant and Conrail for the purchase of parts or fuel inventory.

(c) *Execution and filing of application.* (1) Each application shall bear the date of execution and be signed by the Chief Executive Officer of the applicant. Each person required to execute the application will execute a certificate in the form of Appendix B to this part.

(2) Each original application and certificate, and four copies thereof, shall be filed with the Urban Mass Transportation Administrator, Department of Transportation, 400 Seventh Street, SW., Washington, D.C. 20590. Each copy shall show the dates and signatures that appear in the original and shall be complete in itself.

§ 670.15 Waiver and modification.

The Administrators, upon good cause shown, may waive or modify any requirement of this part not required by law or make any additional requirements they deem necessary.

§ 670.17 Disbursement of commuter service transition assistance.

After receipt, review, and approval of an application meeting the requirements of this part, the Administrators will enter into a grant agreement with an applicant for the approved amount of transition assistance. The terms and conditions of payment shall be set forth in the grant agreement.

§ 670.19 Record, audit and examination.

(a) Each recipient of transition assistance under this part shall keep such records as the Administrators shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance was given or used, and such other records as will facilitate an effective audit.

(b) Until the expiration of three years after the completion of the project or undertaking referred to in paragraph (a) of this section, the Administrators and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of such receipts which, in the opinion of the Administrators or the Comptroller General, may be related or pertinent to such financial assistance.

§ 670.21 Effective date.

This Part is effective October 1, 1981.

§ 670.23 Termination date.

This regulation shall expire on October 1, 1986 at which time Federal financial assistance under this part shall lapse. It is also contemplated that all financial relationships, except any audit that may remain open, between the Department of Transportation and ACS will cease at that time.

APPENDIX A—CAR MILE—REVENUE PASSENGER ALLOCATION

[1980 Conrail data]

	A	B	C	D
	Car miles		Revenue passengers	
	(000's)	(percent)	(000's)	(percent)
MTA[1]	21,139	29.63	37,745	32.00
CDOT[2]	7,184	10.07	11,522	9.77
NJ Transit[3]	30,570	42.85	37,262	31.59
SEPTA[4]	12,307	17.25	31,071	26.35
Maryland DOT[5]	143	.20	340	.29
Total	71,343	100.00	117,940	100.00

COMMUTER AUTHORITY ALLOCATIONS

[In percent]

	B x 50	+	D x 50	=	Allocation
MTA	29.63 x 50	+	32.00 x 50	=	30.8
CDOT	10.07 x 50	+	9.70 x 50	=	9.9
NJ Transit.	42.85 x 50	+	31.59 x 50	=	37.2
SEPTA	17.25 x 50	+	26.35 x 50	=	21.8
Maryland Dot.	.2 x 50	+	.29 x 50	=	[6].3

[1] Metropolitan Transportation Authority.
[2] Connecticut Department of Transportation.
[3] New Jersey Transit Corporation.
[4] Southeastern Pennsylvania Transportation Authority.
[5] Maryland Department of Transportation.
[6] Rounding off results in this figure being increased slightly.

Appendix B—Certificate

The following is the form of the certificate to be executed by each person signing an application: (Name of Person) certifies that he is the Chief Executive Officer of (Name of Applicant); that he is authorized to sign and file this application with the Federal Railroad Administrator and the Urban Mass Transportation Administrator; that he has carefully examined all of the statements contained in the application; that he has knowledge of the matters set forth therein and that all statements made and matters set forth therein are true and correct to the best of his knowledge, information and belief.

[FR Doc. 82-2887 Filed 2-1-82; 1:54 pm]

BILLING CODE 4910-06-M
BILLING CODE 4910-57-M