§ 966.323 Handling regulation.

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(a) *Grade, size, container and inspection requirements.*

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(2) *Size.* (i) Tomatoes shall be at least 2⁹⁄₃₂ inches in diameter and be sized with proper equipment in one or more of the following ranges of diameters. Measurements of diameters shall be in accordance with the methods prescribed in Paragraph 51.1859 of the U.S. Standards for Grades of Fresh Tomatoes.

* * * * *

(3) *Containers.*

* * * * *

(ii) Each container or lid shall be marked to indicate the designated net weight and must show the name and address of the registered handler (as defined in § 966.7) in letters at least one-fourth (¼) inch high, and such containers must be packed at the registered handler's facilities.

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(e) *Definitions.*

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"Adequate facilities" as referred to in the definition of registered handler in §§ 966.7 and 966.113 are defined as those being in a permanent location with nonportable equipment for the proper grading, sizing and packing of tomatoes.

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

Dated: November 27, 1984.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 84–31440 Filed 11–30–84; 8:45 am]

BILLING CODE 3410-02-M

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7 CFR Part 991

Hops of Domestic Production; Expenses of the Hop Administrative Committee, and Rate of Assessment for the 1984–85 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses and a rate of assessment for the 1984–85 marketing year, to be collected from handlers to support activities of the Committee which locally administers the Federal marketing order covering hops of domestic production.

DATES: Effective August 1, 1984 through July 31, 1985.

FOR FURTHER INFORMATION CONTACT: Frank M. Grasberger, Acting Chief, Specialty Crops Branch, Fruit and Vegetable Division, AMS, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447–5053.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512–1 and Executive Order 12291 and has been designated a "non-major" rule.

William T. Manley, Deputy Administrator, Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities.

The hop marketing order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). This action is based upon the recommendation and information submitted by the Committee established under the marketing order, and upon other information. Pursuant to this, it is found that the expenses and rate of assessment as hereinafter provided, will tend to effectuate the declared policy of the act.

The Committee recommended for approval expenses totalling $338,829. That total included $68,759 for legal fees and economists' fees associated with a hearing to amend the hop marketing order held in June 1984. Payment of these fees must be approved separately by USDA and the matter of these fees is still under review.

Hence, at this time, only those expenses associated with the Committee's day-to-day administrative operating expenses are being approved. These expenses total $320,070 and are derived by subtracting the expenses for legal and economists' fees totalling $68,759 from $388,829, the total expenses recommended by the Committee for the 1984–85 marketing year.

Assessment income for the 1984–85 marketing year is expected to total $342,600. This is obtained by applying the recommended assessment rate of 0.6 cent per pound to 57.1 million pounds, the quantity of assessable hops expected during the 1984–85 marketing year. In addition, interest on invested funds is expected to earn approximately $6,000. This results in estimated total income of $348,600, or $28,530 more than the reduced expenses of $320,070.

Section 991.56(b) requires any funds in excess of a marketing year's expenses to be placed in an operating reserve not to exceed approximately one year's operational expenses or such lower limits as the Committee, with the approval of the Secretary, may establish. Funds in the operating reserve can be used by the Committee only to pay expenses which are authorized by the Secretary pursuant to § 991.55.

The Committee has approximately $100,004 in its operating reserve. All of the excess funds expected to be generated during the 1984–85 marketing year will have to be placed in the Committee's operating reserve and only used to pay expenses authorized pursuant to § 991.55.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and good cause exists for not postponing the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553). The order requires that the rate of assessment for a particular marketing year shall apply to all assessable hops handled from the beginning of such year. The 1984–85 marketing year began August 1, 1984. To enable the Committee to meet its marketing year obligations, approval of the expenses and assessment rate is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 991

Marketing agreements and orders, Hops.

PART 991—[AMENDED]

The following section prescribes annual expenses and assessments and will not be published in the Code of Federal Regulations.

Therefore, § 991.318 is removed and § 991.319 is added as follows:

§ 991.319 Expenses and assessment rate.

Expenses of $320,070 by the Hop Administrative Committee are authorized, and an assessment rate payable by each handler in accordance with § 991.56 is fixed at 0.6 cent per pound of salable hops for the marketing year ending July 31, 1985. Pursuant to § 991.56(b), at the end of a marketing year, funds in excess of the year's expenses shall be placed in an operating reserve not to exceed approximately one marketing year's operational expenses or such lower limits as the Committee, with the approval of the Secretary, may establish. Funds in such reserve shall be available for use by the Committee for expenses authorized pursuant to § 991.55.

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

Dated: November 28, 1984.

Thomas R. Clark,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 84-31547 Filed 11-30-84; 8:45 am]

BILLING CODE 3410-02-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 110

Export and Import of Nuclear Equipment and Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations pertaining to the export and import of nuclear equipment and material. The amended regulations expand the authority to export nonsensitive nuclear equipment and minor quantities of nuclear material without applying for and obtaining a specific NRC license authorizing the action. These amendments are intended to reduce the total number of required licensing actions without affecting the Commission's existing rigorous controls over the export of proliferation-sensitive nuclear commodities.

EFFECTIVE DATE: January 2, 1985.

FOR FURTHER INFORMATION CONTACT: Marvin R. Peterson, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-4599 or Joanna M. Becker, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-7630.

SUPPLEMENTARY INFORMATION: On March 1, 1984, the Nuclear Regulatory Commission (NRC) published a proposed amendment in the **Federal Register** to 10 CFR Part 110, its regulation governing the export and import of nuclear equipment and material (49 FR 7572). These proposed amendments contained provisions that would expand the authority to export nonsensitive nuclear equipment and minor quantities of nuclear material under a general license.

These amendments would reduce the number of actions that would require an exporter to apply for and obtain a specific NRC license that would authorize the export of certain types of nuclear equipment and certain quantities of nuclear material, thereby reducing the regulatory burden on the public and the administrative burden on the NRC staff. The proposed amendments also contained several miscellaneous changes to simplify and clarify the provisions of 10 CFR Part 110.

The final rule which follows, with only minor exceptions, adopts the admendments as proposed. The amendments can be divided into four broad categories: (1) New or revised general licenses; (2) elimination of unnecessary paperwork and other regulatory burdens on licensees; (3) simplification and clarification of certain sections of Part 110; and (4) corrections and other nonsubstantive technical amendments.

The new and revised general licenses incorporate for the first time in NRC's regulations the U.S. Government policy of facilitating nuclear cooperation with countries sharing U.S. nonproliferation goals. The Departments of Commerce and Energy have adopted similar general licensing provisions for nuclear-related commodities and technology under their respective export licensing and approval authorities. Under this concept, the general licenses are divided into essentially two categories. Those in the first category permit exports to all countries except certain embargoed countries: Cuba, Kampuchea, North Korea, and Vietnam. The Commission and the Executive Branch have reviewed these general licenses and concluded that the material involved is insignificant from the standpoint of possible proliferation concerns, regardless of the country of destination. The general licenses in the second category apply to a narrower category of countries, i.e., those states, except for Libya, Iraq, Syria, and Iran, which are adherents to the Nuclear Nonproliferation Treaty (NPT), plus France, Spain, and the Peoples Republic of China. While additional commodities could be exported under the general licenses in this category, they are only moderately more significant from a proliferation standpoint than those in the first category. As a further caution, a general license may not be used if the exporter knows, or has reason to believe, that the material will be used in any activities related to isotope separation, chemical reprocessing, heavy water production or the fabrication of nuclear fuel containing plutonium. The new component general license is further limited to only those countries which, in addition to sharing good nonproliferation credentials, have provided the U.S. with generic assurances that they meet the criteria set out in section 109 of the Atomic Energy Act. For easy reference, a detailed comparison of the new or revised general licenses with the former general licenses is included at the end of this statement of considerations.

The Commission believes that this new approach to general licenses can benefit U.S. nonproliferation objectives by demonstrating to countries abroad the advantages of supporting effective nonproliferation policies. It also conforms to section 2 of the Nuclear Non-Proliferation Act of 1978 (NNPA) with respect to confirming the reliability of the United States as a supplier of nuclear equipment and material to those countries which adhere to effective nonproliferation policies. At the same time, the Commission remains concerned about the further spread of sensitive nuclear activities (i.e., isotope separation, chemical reprocessing, heavy water production and plutonium fuel fabrication) beyond those advanced nations that are already engaging in those activities. The Commission intends to monitor developments in these areas closely and, should additional countries make any significant moves that are inconsistent with U.S. law and policy, such as the design or acquisition of sensitive nuclear facilities or the commencement of research and development programs to acquire such facilities, the Commission will promptly initiate steps, after consulting with the Executive Branch, to revoke the eligibility of these countries for favorable general license treatment.

The new or revised general licenses are as follows:

1. Paragraph 110.21(a)(1): New general license for the export of low-enriched uranium in contaminated items or substances.

2. Paragraph 110.21(b)(1): New general license for the export of up to 0.001 effective kilogram per shipment of any special nuclear material.

3. Paragraph 110.21(b)(2): New general license for the export of replacements for damaged or defective fuel elements.

4. Paragraph 110.22(a)(2): Revision to the general license for export of thorium to conform with revisions in the international export control (COCOM) embargo list.

5. Section 110.23: Revisions to general licenses to export byproduct material to provide for expanded authority to export tritium and other byproduct material with an atomic number greater than 83 (e.g., californium-252, neptunium-237 and berkelium-249).

6. Paragraph 110.23(b): Revision to the general license to export americium-241 to restrict generally-licensed exports to certain destinations (i.e., the general license is limited to americium-241

incorporated in petroleum exploration equipment).

7. Section 110.24: Increase in the amount of deuterium authorized for export under a general license.

8. Section 110.25: Revision to the general license to export nuclear grade graphite to cover exports of fabricated nonnuclear-related commercial products (e.g., electrodes, golf clubs, fishing rods, etc.).

9. Paragraph 110.22(b): Increase from 1 to 10 kilograms of source material authorized for export under general license. This revision conforms with revisions of the COCOM embargo list and is consistent with the export control guidelines in IAEA INFCIRC/254, "Guidelines for Nuclear Transfers" (Supplier Guidelines).

10. Section 110.26: New general license for the export of nuclear reactor components to light water- or heavy water-moderated research or power reactors in designated countries which have acceptable nonproliferation credentials and which have also provided the U.S. with generic assurances that they meet the Section 109 criteria of the Atomic Energy Act. Except for France, NPT adherence or acceptance of full-scope IAEA safeguards is a necessary condition for placing a country on the authorized list. Persons making exports under this new general license are also required to submit an annual report of all components shipped during the previous calendar year.

11. Section 110.27: New general license for the import of special nuclear material, except for spent fuel in quantities exceeding 100 kilograms.

In addition to the new and revised general licenses, the following amendments have been made to Part 110:

1. Sections 110.1 and 110.3 through 110.5 are revised and simplified.

2. In § 110.2, editorial changes are made and definitions added for "NPT" and "IAEA." The "Nuclear grade graphite" definition is also revised to conform with international export control guidelines and the definition of a "person" is revised to clarify that, with respect to imports, the Department of Energy is not considered a person.

3. Section 110.6 is revised to (1) cover produced SNM and (2) eliminate the requirement for approvals in cases where the retransfer has been approved in the context of a previously issued NRC export license.

4. Former §§ 110.11 and 110.12 are deleted because they are replaced or encompassed by the proposed new general licenses in § 110.27 and § 110.21(b)(1), respectively. Former § 110.13 is redesignated § 110.11.

5. Paragraph 110.30(d), concerning consolidated license applications, has been revised to eliminate the two year time period limitation and the restriction to "reasonably similar circumstances." These provisions, which stem from subsection 126a.(2) of the Atomic Energy Act, apply only to single Commission findings involving multiple export license applications.

6. Section 110.30 is revised and expanded in scope to encompass the provisions of existing §§ 110.30, 110.35, and 110.36 [except that the requirement in former § 110.36(b) is deleted as unnecessary].

7. Section 110.31 is revised to incorporate, in simplified form, the provisions of former §§ 110.31 through 110.34.

8. Former § 110.35(b) is deleted as unnecessary.

9. Sections 110.40 and 110.41 are revised for clarification and to expand the categories of cases not requiring Executive Branch review.

10. In § 110.42, editorial changes are made and certain provisions from former § 110.44 are added so that § 110.42 contains a comprehensive listing of all the applicable export licensing criteria for NRC-licensed equipment and material. The changes also specify that health and safety findings (pertaining to health and safety in the U.S.) are required only for issuance of licenses to export production and utilization facilities.

11. In § 110.43, the provision for "countrywide" physical security findings has been expanded to cover exports of all categories of nuclear material.

12. In § 110.44, editorial changes are made to accommodate the transfer of certain provisions to § 110.42. Changes are also made to reflect the fact that byproduct material export license applications, for which the Commission cannot make the requisite statutory findings after receipt of favorable Executive Branch judgments, will not be referred to the President for action since applicable statutes do not contemplate referral. These applications will be denied by the Commission.

13. Section 110.45 is revised to specify that its provisions do not apply to byproduct material exports.

14. In § 110.50, paragraph (b)(3) is deleted as unnecessary.

15. Section 110.51 is revised to specify that license amendments are not required for certain changes in intermediate consignees.

16. In § 110.70, the categories of license applications noticed in the **Federal Register** are revised to eliminate noticing requirements for imports and for low-enriched uranium export license applications and applications for export of less than five effective kilograms of plutonium, high-enriched uranium or uranium-233.

17. Editorial changes are made in §§ 110.83 and 110.84.

18. Section 110.89 is revised to clarify certain filing and service requirements.

19. Paragraphs (b) and (c) of § 110.91 are deleted since their provisions for public dissemination of Commission staff and Executive Branch views are adequately covered in § 110.72. The Commission intends to adhere to its practice of making unclassified staff and Executive Branch views promptly available to the public.

20. Paragraph 110.103(a) is revised to eliminate the requirement for binding hearing documents on the left side.

21. The contents of former Appendix A are incorporated into new §§ 110.8 and 110.9.

22. A new Appendix A is added which lists gas centrifuge enrichment plant components which are under NRC's export licensing authority. This appendix was published in the **Federal Register** originally as part of an interpretative rule on January 24, 1984 (49 FR 2881).

23. Appendix C is redesignated Appendix B and footnote c to the appendix is revised to conform to IAEA INFCIRC/225-Rev. 1.

Analysis of Public Comment

The public comment period on the proposed rule expired April 17, 1984. The NRC received comments from six sources including individuals, businesses, and the Executive Branch. The following discussion summarizes the comments received and describes the actions taken in response to these suggestions.

Nuclear Control Institute. The Nuclear Control Institute (NCI) comments, in general, objected to any amendments which would relax the Commission's existing export licensing regulations. The Commission shares NCI's concern regarding the continued necessity of strong export licensing regulations which are rigorously implemented and enforced. The Commission has exercised proper caution in this regard by assuring that the amendments, insofar as they alter current requirements, involve only nonsensitive matters which do not affect existing rigorous controls over proliferation-sensitive nuclear commodities.

NCI also suggested that the Commission delay action which affects component exports until completion of action on several pending legislative proposals directed at nuclear component exports. Although these proposals failed to pass during the 98th Congress, the Commission recognizes that eventual passage of some of the bills if resubmitted would require changes in Part 110. The Commission will take action to amend Part 110 promptly upon the passage of any legislation requiring amendments to the regulations. However, in view of the delay in final consideration of the contemplated legislative changes, the Commission believes that the pending Part 110 amendments should be implemented as planned. This is particularly so since only one portion of the amendments would be affected by the legislation as originally proposed.

NCI also had several comments directed at specific proposed amendments to which the Commission responds as follows:

1. Section 110.6: NCI objects to the proposed amendment to § 110.6 which would clarify that retransfers of material and equipment approved in the context of an export license do not require separate Department of Energy (DOE) approval as a "subsequent arrangement" under the requirements of the Nuclear Non-Proliferation Act of 1978 (NNPA).

The Commission does not agree that this amendment would conflict with the requirements for separate DOE review under section 131 of the Atomic Energy Act. The amendment simply clarifies what has, in fact, been Commission and Executive Branch practice since enactment of the NNPA in 1978. Separate reviews are required only when the ultimate end use is not known at the time of the original export license application. A typical case involves the export of low-enriched uranium fuel for fabrication in one country and then reexport to a second country for installation in a power reactor. In these cases, the Commission views the application as an export to the second country with an intermediate consignee in the first country. The Executive Branch and the Commission have agreed that it is unnecessary to require a separate (and duplicate) DOE review of the reexport to the ultimate consignee in the second country. The Commission notes that such retransfer approvals do not extend to retransfers for such sensitive end uses as reprocessing. These types of retransfers will continue to be subject to separate DOE review as a "subsequent arrangement" under section 131 of the Atomic Energy Act.

2. Section 110.7: NCI objects to the Commission's practice (since 1978) of conforming its export licensing jurisdiction with the international export control "Trigger List" and suggests the Commission's jurisdiction should be expanded to cover additional proliferation-sensitive items.

The Commission agrees with NCI that there are many commodities outside NCR's jurisdiction which may be significant from a nuclear proliferation standpoint. Nevertheless, the Commission does not believe there is any need to change the scope of NRC's export licensing jurisdiction because section 309(c) of the NNPA provides for adequate nonproliferation export controls over nuclear commodities licensed by the Department of Commerce. The Commission staff has worked closely with the Executive Branch in establishing the Commerce Department's export control "Nuclear Referral List" and consults with the Executive Branch on frequent occasions with regard to individual export license applications for items on this list. It is also relevant to note that the great majority of items licensed by the Commerce Department are so-called "dual-use" items, such as high speed computers, which have predominantly nonnulcear end uses. The Commission believes that, as a general matter, it is good administrative practice to limit the Commission's export licensing authority exclusively to nuclear items, where NRC's expertise is greatest, and to rely on the Commerce Department to consult with the Commission on those Commerce-licensed dual-use exports with potential proliferation significance.

3. Paragraph 110.21(b)(2): NCI objects to the scope of the Commission's proposed new general license for the export of replacement fuel elements. To reduce the risk of misreporting as a means of accumulating low-burn-up spent fuel containing weapons-grade plutonium, NCI recommends that the general license be valid only until fuel elements are used in a reactor or for a period of one year after the initial export authorization.

The Commission does not agree with NCI's contention that the proposed general license would pose a realistic proliferation threat. Licensing experience since 1975 indicates that its provisions would need to be used only on rare occasions and where expeditious export is critical. In addition, there are only a limited number of exporters of enriched uranium fuel and significant exports of this material would also probably be subject to DOE enrichment contracts. These factors significantly minimize the risk of proliferation concerns with respect to the proposed general license. Accordingly, the Commission does not believe it necessary to make any change to the proposed general license.

4. Section 110.26: NCI recommends that the proposed component general license be revised to require notifications to the Commission of shipments under the license within 60 days of each export rather than a single annual report. NCI believes that this more rigorous reporting requirement would reduce the risk of the piecemeal accumulation of sensitive component exports.

While the suggested change would moderately increase the Commission's ability to monitor shipments, the significant increase in administrative reporting requirements on licensees that this change would entail (i.e., several hundred individually reportable shipments can be expected to be made under the general license at various times throughout a typical year) would far outweigh the modest decrease in proliferation concern, particularly since the general license would not apply to countries with significant potential proliferation concerns. In view of the limited number of countries involved and the lengthy period of time which would be required to construct an unauthorized reactor via the diversion route, the Commission concludes that an annual reporting requirement would be sufficient. However, the Commission will, as NCI proposed, review annually the proliferation implications of the components exported under the general license, and place the annual reports in the Public Document Room.

NCI also questioned the inclusion of Taiwan and South Korea on the list of countries which would be eligible to receive U.S. components under the proposed component general license.

In view of Taiwan's and South Korea's status as parties to the Nuclear Nonproliferation Treaty (NPT) and their nonproliferation credentials, the Commission has decided not to revise the list of countries as proposed. The Commission shares, however, NCI's general concern that exports under the proposed general license warrant careful monitoring. Accordingly, the Executive Branch has been notified formally by the Commission that NRC intends to monitor closely the activities of countries on the eligible lists and will not hesitate to take steps, after consulting with the Executive Branch, to revise a country's status if changed circumstances warrant.

5. Paragraph 110.30(d): NCI objects to the proposal to relax the existing limitations on consolidated license applications.

The Commission has decided not to accept the comment and change the amendment as requested. In view of the extremely wide range in proliferation significance of the various commodities licensed by NRC, it is not possible to devise any practical general guidelines for the scope and duration of individual export licenses. Conversely, a detailed set of export licensing guidelines for each commodity (and form of commodity) would be excessively complicated for incorporation into Part 110. Accordingly, the Commission will continue to exercise its careful case-by-case judgment regarding the appropriateness of any requested consolidated license application. For example, exports of high-enriched uranium will continue to be licensed individually. On the other hand, because of the limited proliferation concerns involved, unnecessary burdens would be imposed on exporters and the NRC staff if separate export licenses for each shipment of low-enriched uranium (LEU) fuel to power reactors in countries with good nonproliferation credentials are required. Furthermore, even for these countries, all long-term licenses are reviewed on an ongoing basis by the Commission. Should a material change in circumstances arise in the importing country, the Commission has sufficient authority to take appropriate action, including suspension or revocation of active export licenses.

6. Paragraph 110.35(b): NCI objects to the proposed deletion of the requirement for license applicants to amend their applications whenever substantive changes occur before the license is issued.

The Commission continues to believe that this provision should be deleted. If there should be a significant change in the export request, such as a change in the type of quantity of material or its destination, an applicant would be required, in its own self-interest, to notify the Commission. Otherwise the license as eventually issued by the Commission would not reflect the change in facts and could not be used.

7. Sections 110.40 and 110.41: NCI objects to the proposed revised guidelines for referring export license applications to the Commission and the Executive Branch for review.

The Commission does not agree that these proposed internal procedures for processing the less significant export license applications are inappropriate. The lack of Commissioner or Executive Branch review of certain categories of exports does not lessen in any way the substantive review of each application by the NRC staff with respect to compliance with statutory requirements. In addition, if there are significant changes in circumstances involving particular exports or recipient countries, the NRC staff will continue its practice of referring these cases to the Executive Branch and/or the Commissioners. Such referrals are contemplated by §§ 110.41(a)(8) and 110.40(b)(7).

8. Paragraph 110.41(d)(8): NCI objects to the proposed deletion of the dollar limit ($10,000) cutoff for those cases requiring Executive Branch review.

The Commission believes that a more meaningful basis for judging the proliferation significance of a particular export is the country of destination. This consideration led to the proposal to amend § 110.41 to delete the dollar cutoff criterion and replace it with a requirement that *all* export license applications for countries with questionable nonproliferation credentials be referred to the Executive Branch. Accordingly, the Commission has not retained the dollar limit.

9. Sections 110.44, 110.45(c): NCI objects to the proposed editorial amendment to § 110.45(c) which would *require* the Commission to issue an export license if "applicable statutory provisions are met." NCI prefers leaving license issuance optional and also revising the related provision in § 110.44 to conform with § 110.45(c).

The Commission does not agree with this position since, if all applicable statutory provisions have been determined by the Commission to be met, there is clearly no basis for the Commission to withhold issuance of the requested export license. Further, Section 126 b. of the Atomic Energy Act of 1954, as amended, *requires* the Commission to issue an export license when all applicable statutory requirements have been met.

10. Section 110.70: NCI objects to the proposal to eliminate **Federal Register** noticing requirements for low-enriched uranium fuel export license applications.

While the Commission agrees with NCI that public participation in the Commission's export license reviews should be permitted, it does not believe that this necessitates that all low enriched fuel export license applications be noticed in the **Federal Register.** Copies of all applications will continue to be placed in the Commission's Public Document Room. In addition, the great majority of persons interested in the Commission's export license proceedings are on a mailing list which provides a monthly list of all new NRC export license applications received. (Others desiring this listing can be added to the mailing list by contacting NRC's Office of International Programs). The list of applications received will normally be received in time for recipients to submit comments to the Commission on the pending applications prior to license issuance. The Commission believes that these latter means are more effective than **Federal Register** noticing in making interested parties aware of pending NRC export license applications. As an extra precaution, however, the Commission will continue to notice in the **Federal Register** receipt of license applications with potential proliferation significance, such as all proposed exports of significant quantities of high-enriched uranium.

Mr. E. Nemethy. Mr. Nemethy had 4 comments, none of which, in the Commission's view, warranted any revisions to the amendments as proposed. Mr. Nemethy's comments, and the Commission's responses to them, are as follows:

1. Paragraph 110.41(a)(7) requires Executive Branch review for export license applications to embargoed countries (i.e., those listed in § 110.28). Mr. Nemethy asked how it is possible to consider approving exports to "embargoed" countries.

The Commission would not normally consider licensing exports to countries listed in § 110.28 in view of the U.S. Government's general embargo on U.S. trade with those countries. However, although there have been no export licenses to an embargoed country issued to date, the Commission recognizes that it may be appropriate to consider exceptions to the general embargo in certain situations, such as the export of medical radioisotopes for humanitarian purposes.

2. Mr. Nemethy asked why the USSR isn't included on the lists of embargoed or restricted destinations. If the USSR is permitted to receive imports under the proposed general licenses, what would prevent it from reexporting the material to an embargoed destination?

With regard to Mr. Nemethy's first point, the Executive Branch and the Commission do not believe that the USSR poses any foreign policy concern or any proliferation risk with respect to any of the non-sensitive commodities under NRC's existing or proposed general licenses. With regard to Mr. Nemethy's second point, if the USSR should begin to retransfer NRC general-licensed commodities to embargoed countries in violation of Part 110, the Commission would clearly have grounds to consider placing the USSR on the restricted or embargoed country lists.

3. Mr. Nemethy asked what would prevent the USSR, or any other country, from retransferring any NRC-licensed

export to a third country without obtaining DOE approval as required by § 110.6.

The Commission acknowledges that foreign countries could subvert U.S. export controls by diverting NRC-licensed exports from their original intended end use. There are actions that the U.S. Government can take, and has taken, however, to counter these concerns. For exports of proliferation significance, such as exports of reactors and significant quantities of special nuclear material, exports must be made under formal agreements for cooperation which contain explicit requirements for obtaining the prior consent of the U.S. Government before retransfers of U.S.-origin material can take place. As a result, any unauthorized retransfer would be a violation of the terms of the agreement and grounds for taking appropriate diplomatic action including cessation of further nuclear cooperation. For less significant commodities, the primary means for controlling reexports is through the export licensee. The Commission has the authority to impose appropriate sanctions on such licensees in cases of violations of any export license terms. In addition, the Commission could refuse to issue any new licenses for export to countries which permit the unauthorized retransfer of NRC-licensed commodities to third countries. To date, the Commission is not aware of any examples of the unauthorized retransfer by any country of any NRC-licensed commodity.

4. Mr. Nemethy asked, with reference to the proposed general license in § 110.21, what would prevent an exporter from exporting material for use in the specified proscribed sensitive activities and then later denying that he had any advance knowledge of the activities.

The Commission recognizes that in certain instances it may be difficult to establish that a violation is willful. This is particularly the case with respect to the proposed end use restrictions in § 110.21. Because of this situation, the Commission has limited severely the quantities and forms of materials that may be exported under a general license so that, even in the case of a deliberate violation, the proliferation risk would be minimal.

The Atomic Industrial Forum (AIF). AIF was generally in favor of the proposed amendments. It commented that reactor pressure tubes should be eligible for export under the proposed general license in § 110.26.

The Commission agrees with AIF's comment that reactor pressure tubes are eligible for export under the proposed general license in § 110.26 and the final rule has been correspondingly modified. The Commission also notes AIF's suggestion that NRC replace DOE as the agency responsible for obtaining official assurance letters from foreign governments with respect to proposed nuclear exports. The Commission plans to consult further with the Executive Branch on this matter.

The Department of Energy (DOE). DOE raised questions concerning the proposed general license for the export of Neptunium-237.

After consultation with DOE and the other Executive Branch agencies, it was concluded that it would be appropriate to adopt a limited Neptunium-237 general license which will permit the export of up to 1 gram per shipment and 10 grams per year to any one country. The previously proposal general license would have permitted the export of up to 1 kilogram of Neptunium-237 per year to any one country.

The Petroleum Equipment Suppliers Association (PESA). PESA claimed that the proposed general license for the export of Americium-241 could place undesirable constraints on the development of oil and gas resources around the world and recommended that the general license be modified.

The Commission has consulted with the Executive Branch on this matter and agreement has been reached to modify the proposed general license to permit exports of Americium-241 when contained in petroleum exploration equipment in quantities of up to 20 curies per device and 200 curies per year to countries listed in § 110.28. This modification will permit the unrestricted export of Americium-241 for the oil and gas exploration purposes cited by PESA.

3M Company. 3M objected to the revised general license in § 110.23(a)(4) because it would revoke the provisions of the former general license in § 110.24(c)(4) which permitted the essentially unrestricted export of polonium-210 in static eliminators.

The restriction on static eliminator exports was unintentional. The Commission has consulted with the Executive Branch and agreement has been reached to reinstate the former general license which will permit the continued export under general license of polonium-210 when contained in static eliminators. In addition, the Executive Branch has requested additional time to review the proposed general license for the export of polonium-210 when *not* incorporated in static eliminators. Accordingly, that proposed general license will not be adopted at this time.

Miscellaneous. The proposed language covering end use restrictions on general licenses in §§ 110.21(b) and 110.22(b) has been moved to § 110.20(d) so that the restrictions now apply to all exports under general license. The proposed general license for the export of nuclear grade graphite has been modified to make it simpler and clearer. The list of restricted destinations in § 110.29 has been updated. Finally, the definition of a "person" in § 110.2 has been revised to specify that, with respect to imports, DOE is not defined as a person.

Note.—DOE has separate statutory authority to import nuclear equipment and material. As a result of this latter change, the proposed DOE contractor import exemption in § 110.11 is no longer necessary and it has been deleted. The Commission has concluded that the amendments are not inimical to the common defense and security, do not constitute an unreasonable risk to the public health and safety, and will not result in any activity which adversely affects the environment. Furthermore, the amendments are consistent with the Atomic Energy Act of 1954, as amended by the Nuclear Non-Proliferation Act of 1978, and do not conflict with the safeguards criteria of the International Atomic Energy Agency.

The amendments are not inconsistent with the obligations of the United States under any treaty or international arrangement, including the Treaty on the Non-Proliferation of Nuclear Weapons.

COMPARISON OF FORMER REGULATIONS WITH NEW CHANGES

New	Former
I. General License Revisions	
A. Special nuclear material:	
1. Low-enriched uranium as residual contamination (§ 110.21(a)(1)).	None.
2. One effective gram or less of SNM to countries not listed in § 110.28 or § 110.29 § (110.21(b)(1)).	None.
3. Replacement fuel elements to countries not listed in § 110.28 or § 110.29 (§ 110.21(b)(2)).	None.
B. Source material:	
1. Thorium in alloys in concentrations of 5% or less to countries not listed in § 110.28 (§ 110.22(a)(2)).	Thorium in aircraft parts only (§ 110.23(b)(2)).
2. Source material in individual shipments of 10 kilograms or less to countries not listed in § 110.28 or § 110.29 (§ 110.22(b)).	Individual shipments of 1 kilogram or less (§ 110.23(a)(1)).
C. Byproduct material:	
1. Byproduct material with an atomic number greater than 83, except polonium-210, americium-241 and neptunium-237 (§ 110.23(a)(1)).	Americium-241 only (§ 110.24(d)).

COMPARISON OF FORMER REGULATIONS WITH NEW CHANGES—Continued

New	Former
2. Tritium in light sources up to 10,000 curies per shipment (§ 110.23(a)(2)).	100 curies per shipment limitation (except in aircraft safety devices) § 110.24 (b) and (c)).
3. Tritium in any dispersed form in shipments of 100 curies or less (§ 110.23(a)(3)).	Same, but limited to certain dispersed forms only (§ 110.24(c)).
4. Neptunium-237 in shipments of 1 gram or less. (§ 110.23(a)(5)).	None.
5. Tritium in any form in shipments of 100 curies or less to countries not listed in § 110.28 or § 110.29 (§ 110.23(b)).	None.
D. Deuterium:	
1. Deuterium in shipments of 1 kilogram or less (§ 110.24(a)).	90 grams of heavy water (18 grams of deuterium) or less per shipment (§ 110.25).
2. Deuterium in shipments of 10 kilograms or less to countries not listed in § 110.28 or § 110.29 (§ 110.24(b)).	None.
E. Nuclear grade graphite in shipments of up to 100 kilograms or in fabricated non-nuclear related commercial products (§ 110.25).	Shipments of up to 100 kilograms only (§ 110.26).
F. Nuclear reactor components to certain countries (§ 110.26).	None.
G. Imports (§ 110.27)	Formerly authorized under exemption except no authority for SNM imports (§ 110.11).

II. Significant Other Changes to Part 110

(Other than general license)

A. Section 110.6	Elimination of requirements for prior approval of retransfers when such retransfers have been approved in the context of issuing the original export license.
B. Section 110.30(d)	Elimination of provision limiting consolidated license applications to two year duration.
C. Section 110.41	Expansion of authority for NRC to process minor applications without referral to the Executive Branch (i.e., emphasis would be placed on reviewing exports for sensitive end uses or initial exports to new facilities).
D. Section 110.42	Clarification that health and safety findings are not required with respect to the impact abroad of reactor exports.
E. Section 110.50	Elimination of requirement to return expired licenses to NRC.
F. Section 110.51	Elimination of requirement to obtain license amendments for: (1) Changes in value (but not quantity) of nuclear equipment; (2) changes in addresses of consignees; and (3) addition of new intermediate consignees for component licensees.
G. Section 110.70	Elimination of requirement to notice receipt in the FEDERAL REGISTER of applications for imports and for export of LEU and less than 5 kgs. of HEU, U-233 or plutonium.

Environmental Impact: Categorical Exclusion

The NRC has determined that these amendments are a categorical exclusion under 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for these amendments.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget approval number 3150-0027.

Regulatory Analysis

The Commission has prepared a regulatory analysis on this final regulation. This analysis examines the costs and benefits of the alternatives considered by the Commission. The analysis is available for inspection in the NRC Public Document Room, 1717 H Street NW, Washington, DC. Single copies of the analysis may be obtained from Marvin R. Peterson, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-4599.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities, except to reduce the regulatory burden on licensees by reducing significantly the number of specific license applications required. It is estimated that, among the approximately 125 exporters/importers affected, the number of specific license applications per year will be reduced from about 450 to 200. Assuming an average of one hour to prepare an application, this will reduce the cost to the public from about $27,000 to $12,000 per year.

List of Subjects in 10 CFR Part 110

Administrative practice and procedures, Classified information, Export, Import, Incorporation by reference, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements, Scientific equipment.

Under the authority of the Atomic Energy Act of 1954, as amended, and 5 U.S.C. 552 and 553, the following amendments to 10 CFR Part 110 are published as a document subject to codification.

PART 110—EXPORT AND IMPORT OF NUCLEAR FACILITIES AND MATERIAL

1. The authority citation for Part 110 is revised to read as follows:

Authority: Sec. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2071, 2073, 2074, 2077, 2092-2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154-2158, 2201, 2231-2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sec. 110.1(b)(2) also issued under Pub. L. 96-533, 94 Stat. 3138 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c. and 57d., 88 Stat. 473, 475 (42 U.S.C. 2074, 2077). Sec. 110.21 also issued under sec. 54c., 88 Stat. 473 (42 U.S.C. 2074). Sec. 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Sec. 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sec. 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Secs. 110.80-110.113 also issued under 5 U.S.C. 552, 554. Secs. 110.130-110.135 also issued under 5 U.S.C. 553.

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 110.20-110.29, 110.50, and 110.120-110.129 also issued under secs. 161b. and i., 68 Stat. 948, 949, as amended (42 U.S.C. 2201 (b) and (i); and § 110.53 also issued under sec. 161o., 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. The table of contents of Subparts A through E of Part 110 is revised to read as follows:

Subpart A—General Provisions

Sec.
110.1 Purpose and scope.
110.2 Definitions.
110.3 Interpretations.
110.4 Inquiries.
110.5 License requirements.
110.6 Retransfers.
110.7 Information collection requirements: OMB approval.
110.8 List of nuclear equipment and material under NRC export licensing authority.
110.9 List of nuclear equipment and material under NRC import licensing authority.

Subpart B—Exemptions

110.10 General.
110.11 Export of IAEA safeguard samples.

Subpart C—General Licenses

110.20 General.
110.21 Export of special nuclear material.
110.22 Export of source material.
110.23 Export of byproduct material.
110.24 Export of deuterium.
110.25 Export of nuclear grade graphite.
110.26 Export of nuclear reactor components.
110.27 Imports.
110.28 Embargoed destinations.
110.29 Restricted destinations.

Subpart D—Applications for Specific Licenses

Sec.
110.30 Filing license applications.
110.31 Information required in license applications.

Subpart E—Review of License Applications

110.40 Commission review.
110.41 Executive Branch review.
110.42 Export licensing criteria.
110.43 Physical security standards.
110.44 Issuance or denial of licenses.
110.45 Conduct resulting in termination of nuclear exports.

* * * * *

Subpart A—General Provisions

3. Section 110.1 is revised to read as follows:

§ 110.1 Purpose and scope.

(a) The regulations in this part prescribe licensing, enforcement, and rulemaking procedures and criteria, under the Atomic Energy Act, for the export for nuclear equipment and material, as set out in § 110.8, and the import of nuclear equipment and material, as set out in § 110.9.

(b) The regulations in this part apply to all persons in the United States except: (1) The Departments of Defense and Energy for activities authorized by sections 54, 65, 82, and 91 of the Atomic Energy Act, except when the Department of Energy seeks an export license under section 111 of the Atomic Energy Act; (2) persons who export uranium depleted in the isotope 235 and incorporated in defense articles or commodities solely to take advantage of high density or pyrophoric characteristics, as authorized by section 110 of the International Security and Development Cooperation Act of 1980,[1] and (3) persons who import deuterium, nuclear grade graphite or nuclear equipment other than production or utilization facilities.

4. Section 110.2 is amended by: (1) Removing the paragraph designations of the definitions; (2) removing the definitions of "Agreement State," "Depleted uranium," "Energy Reorganization Act"; "Government agency," "Nuclear equipment," and "Nuclear material;" (3) revising the definitions of "Classified information," "General license," "Nuclear grade graphite and "Person;" and (4) adding, in appropriate alphabetical order, definitions for "IAEA" and "NPT." The added and revised definitions read as follows:

[1] These exports are subject to the controls of the State Department and the Commerce Department under the general authority of the Arms Export Control Act and the Export Administration Act. The Commerce Department also has export licensing authority over additional nuclear-related commodities, such as advanced computers, bulk zirconium and beryllium.

§ 110.2 Definitions.

* * * * *

"Classified information" means National Security Information classified under Executive Order 12356.

* * * * *

"General license" means an export or import license effective without the filing of a specific application with the Commission or the issuance of licensing documents to a particular person.

* * * * *

"IAEA" means the International Atomic Energy Agency.

* * * * *

"NPT" means the Treaty on the Non-Proliferation of Nuclear Weapons (TIAS 6839).

* * * * *

"Nuclear grade graphite" means graphite with a boron equivalent content of less than 5 parts per million and density greater than 1.5 grams per cubic centimeter.

* * * * *

"Person" means any individual, corporation, partnership, firm, association, trust, estate, institution, group, Government agency other than the Commission or, with respect to imports, the Department of Energy; and State or political entity within a State; any foreign government or political entity of such government; and any authorized representative of the foregoing.

* * * * *

5. Section 110.4 is revised to read as follows:

§ 110.4 Inquiries.

Inquiries concerning this part should be addressed to the Office of the Assistant Director for Export/Import and International Safeguards, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (telephone (301) 492–4599 or 492–7984).

6. Section 110.5 is revised to read as follows:

§ 110.5 License requirements.

Except as provided under Subpart B, no person may export any nuclear equipment or material listed in § 110.8, or import any nuclear equipment or material listed in § 110.9, unless authorized by a general or specific license issued under this part.

7. Section 110.6 is revised to read as follows:

§ 110.6 Retransfers.

(a) Retransfer of any nuclear equipment or material listed in § 110.8, including special nuclear material produced through the use of U.S.-origin source material or special nuclear material, requires authorization by the Department of Energy, unless the export to the new destination is authorized under a specific or general license or an exemption from licensing requirements. Under certain agreements for cooperation, Department of Energy authorization is also required for the retransfer of special nuclear material produced through the use of non-U.S.-supplied nuclear material in U.S.-supplied utilization facilities.

(b) Requests for authority to retransfer are processed by the Department of Energy, Office of International Nuclear and Non-Proliferation Policy, Washington, D.C. 20585.

8. Section 110.8 is redesignated as § 110.7 and revised to read as follows:

§ 110.7 Information collection requirements: OMB approval.

The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et. seq.). OMB has approved the information collection requirements in §§ 110.26, 110.30, 110.31, 110.50 and 110.53 under control number 3150–0036, and has approved the use of Form NRC–7, as referenced in § 110.30, under control number 3150–0027. No other information collection requirements are contained in Part 110.

9. A new § 110.8 is added to read as follows:

§ 110.8 List of Nuclear equipment and material under NRC export licensing authority.

(a) Nuclear reactors and parts and components for nuclear reactors as follows:

(1) Reactor pressure vessels, i.e., metal vessels, as complete units or major shop-fabricated parts, specially designed or prepared to contain the core of a nuclear reactor and capable of withstanding the operating pressure of the primary coolant.

(2) On-line (e.g., CANDU) reactor fuel charging and discharging machines, i.e., manipulative equipment specially designed for inserting or removing fuel in an operating nuclear reactor.

(3) Reactor control rods, i.e., rods specially designed or prepared for the control of the reaction rate in a nuclear reactor.

(4) Reactor primary coolant pumps, i.e., pumps specially designed or prepared for circulating the primary coolant in a nuclear reactor.

(5) Reactor pressure tubes, i.e., tubes specially designed or prepared to contain fuel elements and the primary coolant in a nuclear reactor at an operating pressure in excess of 50 atmospheres.

(6) Zirconium tubes, i.e., zirconium metal and alloys in the form of tubes or assemblies of tubes specially designed or prepared for use in a nuclear reactor.

(7) Reactor internals, e.g., core support structures, control and rod guide tubes, thermal shields, baffles, core grid plates and diffuser plates specially designed or prepared for use in a nuclear reactor.

(8) Reactor control rod drive mechanisms, including detection and measuring equipment to determine flux levels.

(9) Any other components specially designed or prepared for use in a nuclear reactor or in any of the components described in this paragraph.

(b) Plants for the separation of the isotopes of source material, special nuclear material or lithium, and components for those plants as follows:[2]

(1) Uranium hexafluoride (UF_6) corrosion resistant valves.

(2) Units capable of separating isotopes of source material, special nuclear material or lithium, such as: (i) Gas centrifuges, (ii) jet nozzle separation units, (iii) vortex separation units, and (iv) laser isotope separation units.

(3) Uranium hexafluoride (UF_6) corrosion resistant axial or centrifugal compressors and specially designed or prepared seals for those compressors.

(4) Gaseous diffusion barriers specially designed or prepared for use in separating isotopes of source material, special nuclear material or lithium.

(5) Gaseous diffuser housings specially designed or prepared for use in plants for separating isotopes of source material, special nuclear material or lithium.

(6) Heat exchangers specially designed or prepared for use in gaseous diffusion plants.

(7) Any other components specially designed or prepared for use in an isotope separation plant or in any of the components described in this paragraph.

(c) Plants for the reprocessing of irradiated nuclear reactor fuel elements and components for those plants as follows:

(1) Fuel element chopping machines, i.e., remotely operated equipment specially designed or prepared to cut, chop or shear irradiated nuclear reactor fuel assemblies, bundles, or rods.

(2) Criticality safe tanks, i.e., small diameter, annular or slab tanks specially designed or prepared for the dissolution of irradiated nuclear reactor fuel.

(3) Countercurrent solvent extractors specially designed or prepared for use in a reprocessing plant.

(4) Process control instrumentation specially designed or prepared for monitoring or controlling the processing of material in a reprocessing plant.

(5) Any other components specially designed or prepared for use in a reprocessing plant or in any of the components described in this paragraph.

(d) Plants for the fabrication of nuclear reactor fuel elements and specially designed or prepared parts and components for those plants.

(e) Plants for the production of heavy water, deuterium and deuterium compounds, and specially designed or prepared parts and components for those plants.

(f) Special nuclear material.

(g) Source material.

(h) Byproduct material.

(i) Deuterium.

(j) Nuclear grade graphite.

[2] See Appendix A for a detailed listing of the components of a gas centrifuge enrichment plant which have been interpreted to be covered by the general entries in this paragraph.

10. A new § 110.9 is added to read as follows:

§ 110.9 List of nuclear equipment and material under NRC import licensing authority.

(a) Production and utilization facilities.

(b) Special nuclear material.

(c) Source material.

(d) Byproduct material.

11. Subpart B is revised to read as follows:

Subpart B—Exemptions

§ 110.10 General.

(a) In response to a request or on its own initiative, the Commission may grant an exemption from the regulations in this part, if it determines that the exemption—

(1) Is authorized by law;

(2) Is not inimical to the common defense and security; and

(3) Does not constitute an unreasonable risk to the public health and safety.

(b) An exemption from statutory licensing requirements, as authorized by sections 57d, 62, and 81 of the Atomic Energy Act, will be granted only after coordination with the Executive Branch and after completion of rulemaking proceedings under Subpart L.

(c) The granting of an exemption does not relieve any person from complying with the regulations of other Government agencies applicable to exports or imports under their authority.

§110.11 Export of IAEA safeguards samples.

A person is exempt from the requirements for a license to export special nuclear material set forth in sections 53 and 54d. of the Atomic Energy Act and from the regulations in this part to the extent that the person exports special nuclear material in IAEA safeguards samples, if the samples are exported in accordance with § 75.42(e)(1) of this chapter, or a comparable Department of Energy order, and are in quantities not exceeding a combined total of 100 grams of contained plutonium, U-233 and U-235 per facility per year. This exemption does not relieve any person from complying with Parts 71 or 73 of this chapter or any Commission order pursuant to section 201(a) of the Energy Reorganization Act of 1974 (42 U.S.C. 5841(a)).

12. Subpart C is revised to read as follows:

Subpart C—General Licenses

§ 110.20 General.

(a) In response to a petition or on its own initiative, the Commission may issue a general license for export or import if it determines that any exports or imports made under the general license will not be inimical to the common defense and security or constitute an unreasonable risk to the public health and safety and otherwise meet applicable statutory requirements.

(b) All general licenses will be coordinated with the Executive Branch and will be subject to rulemaking proceedings under Subpart L.

(c) A general license does not relieve a person from complying with the regulations of other Government agencies applicable to exports or imports under their authority.

(d) A general license for export may not be used if the exporter knows, or has reason to believe, that the material will be used in any activity related to isotope separation, chemical reprocessing, heavy water production or the fabrication of nuclear fuel containing plutonium, unless these activities are generically authorized under an appropriate agreement for cooperation.

(e) As specified in §§ 110.21 through 110.26, only certain countries are eligible to receive imports of material or equipment under NRC general license. The Commission will closely monitor these countries and may at any time remove a country from its general license eligibility in response to significant adverse developments in the country involved. A key factor in this regard is the nonproliferation credentials of the importing country.

§ 110.21 Export of special nuclear material.

(a) A general license is issued to any person to export the following to any country not listed in § 110.28:

(1) Low-enriched uranium as residual contamination (17.5 parts per million or less) in any item or substance.

(2) Plutonium containing 80 percent or more by weight of plutonium-238 in cardiac pacemakers.

(3) Special nuclear material in sensing components in instruments, if no more than 3 grams of enriched uranium or 0.1 gram of plutonium or U-233 are contained in each sensing component.

(b) A general license is issued to any person to export the following to any country not listed in § 110.28 or § 110.29:

(1) Special nuclear material in individual shipments of 0.001 effective kilograms or less (e.g., 1.0 gram of plutonium, U-233 or U-235, or 10 kilograms of 1 percent enriched uranium). No person may export more than 0.1 effective kilogram per year to any one country.

(2) Special nuclear material in fuel elements as replacements for damaged or defective unirradiated fuel elements previously exported under a specific license, subject to the same terms as the original export license and the condition that the replaced fuel elements must be returned to the United States within a reasonable time period.

§ 110.22 Export of source material.

(a) A general license is issued to any person to export the following to any country not listed in § 110.28:

(1) Uranium or thorium in any substance in concentrations of less than 0.05 percent by weight.

(2) Thorium in incandescent gas mantles or in alloys in concentrations of 5 percent or less.

(b) A general license is issued to any person to export uranium or thorium in individual shipments of 10 kilograms or less to any country not listed in § 110.28 or § 110.29. No person may export more than 1,000 kilograms per year to any one country.

(c) A general license is issued to any person to export uranium or thorium in individual shipments of 1 kilogram or less to any country listed in § 110.29. No person may export more than 100 kilograms per year to any one country.

§ 110.23 Export of byproduct material.

(a) A general license is issued to any person to export the following to any country not listed in § 110.28:

(1) All byproduct material, except tritium, polonium-210, neptunium-237, and americium-241.

(2) Tritium in luminescent light sources in individual shipments of 10,000 curies or less.

(3) Tritium in any dispersed form (i.e., not in bulk gaseous form) in individual shipments of 100 curies or less. A person may not export more than 1,000 curies per year to any one country.

(4) Polonium-210 in individual shipments of 100 curies or less when contained in static eliminators.

(5) Neptunium-237 in individual shipments of 1 gram or less. No person may export more than 10 grams per year to any one country.

(b) A general license is issued to any person to export americium-241 to any country not listed in § 110.28, except that exports of americium-241 exceeding one curie per shipment or 100 curies per year to countries listed in § 110.29—

(1) Must be contained in petroleum exploration equipment in quantities not exceeding 20 curies per device; and

(2) May not exceed 200 curies per year to any one country.

(c) A general license is issued to export tritium in bulk, undispersed form in individual shipments of 100 curies or less to any country not listed in § 110.28 or § 110.29. No person may export more than 10,000 curies per year to any one country.

§ 110.24 Export of deuterium.

(a) A general license is issued to any person to export deuterium in individual shipments of 10 kilograms or less (50 kilograms of heavy water) to any country not listed in § 110.28 or § 110.29. No person may export more than 200 kilograms (1000 kilograms of heavy water) per year to any one country.

(b) A general license is issued to any person to export deuterium in individual shipments of 1 kilogram or less (5 kilograms of heavy water) to any country listed in § 110.29. No person may export more than 5 kilograms (25 kilograms of heavy water) per year to any one country.

§ 110.25 Export of nuclear grade graphite.

(a) A general license is issued to any person to export bulk nonfabricated nuclear grade graphite in individual shipments of 100 kilograms or less to any country not listed in § 110.28. No person may export more than 2,000 kilograms per year to any one country.

(b) A general license is issued to any person to export nuclear grade graphite in fabricated nonnuclear-related commercial products to any country not listed in § 110.28, except that graphite electrodes weighing more than 1 kilogram per electrode may not be exported to any country listed in § 110.29. Fabricated products are those in final manufactured form except for detailed maching and other final steps necessary for the intended end use of the product.

§ 110.26 Export of nuclear reactor components.

(a) A general license is issued to any person to export any nuclear reactor component, listed in § 110.8 (a)(5) through (a)(9), for use in any light or heavy water-moderated power or research reactor in any of the following countries:

Canada	Philippines
EURATOM [3]	Spain
Indonesia	Sweden
Japan	Switzerland
South Korea	Taiwan

[3] Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, the United Kingdom and West Germany.

(b) This general license does not authorize the export of essentially complete reactors through piecemeal exports of facility components. When individual exports of components would amount in the aggregate to export of an essentially complete nuclear reactor, a facility export license is required.

(c) Persons making exports under the general license established by paragraph (a) of this section shall submit by February 1 of each year one copy of a report of all components shipped during the previous calendar year. This report must include:

(1) A description of the components keyed to the categories listed in § 110.8(a).

(2) Approximate shipment dates.

(3) A list of recipient countries and endusers keyed to the items shipped.

§ 110.27 Imports.

A general license is issued to any person to import byproduct, source or special nuclear material, other than 100 kilograms or more of irradiated fuel, if the consignee is authorized to possess the material under: (a) A contract with the Department of Energy or (b) an exemption from licensing requirements issued by the Commission or a general or specific license issued by the Commission or a State with which the Commission has entered into an agreement under section 274b. of the Atomic Energy Act. Importers of special nuclear material under this general license shall provide advance notification of imports to the Commission as specified in § 73.27 of this chapter.

§ 110.28 Embargoed destinations.

Cuba, Kampuchea, North Korea, Vietnam.

§ 110.29 Restricted destinations.

Afghanistan	Libya
Albania	Malawi
Algeria	Mauritania
Andorra	Mozambique
Angola	Niger
Argentina	Oman
Bahrain	Pakistan
Belize	Qatar
Bhutan	Saudi Arabia
Brazil	Seychelles
Burma	South Africa
Chile	St. Kitts
Comoros	St. Vincent and the Grenadines
Djibouti	Syria
Equatorial Guinea	Tanzania
Guyana	United Arab Emirates
India	Vanuatu
Iran	Yemen Arab Republic
Iraq	Zambia
Israel	Zimbabwe
Kiribati	
Kuwait	

13. Subpart D is revised to read as follows:

Subpart D—Applications for Specific Licenses

§ 110.30 Filing license applications.

(a) A person shall file a license application with the Assistant Director for Export/Import and International Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, or deliver the application in person to the Commission's offices at 1717 H Street, NW., Washington, DC.

(b) An export license application should be filed on Form NRC 7 unless it is for a license to export a production or utilization facility. An import license application and a production or utilization facility export license application should be filed by letter. Upon request, applications may be filed by telegram.

(c) Each person shall provide in the license application, as appropriate, the information specified in § 110.31. The Commission may also require the submission of additional information if necessary to complete its review.

(d) A consolidated license application may be filed covering multiple shipments.

(e) Information in a previous license application may be incorporated by reference.

(f) An applicant shall withdraw an application whenever it is no longer needed. The Commission's official files retain all documents related to a withdrawn application.

§ 110.31 Information required in license applications.

(a) Name and address of applicant.

(b) Name and address of supplier of equipment or material.

(c) Country of origin of equipment or material, if known.

(d) Names and addresses of all intermediate and ultimate consignees, other than intermediate consignees performing shipping services only.

(e) Dates of proposed first and last shipments.

(f) Description of the equipment or material including, as appropriate, the following:

(1) Maximum quantity of material in grams or kilograms (curies for byproduct material) and its chemical and physical form.

(2) For enriched uranium, the maximum weight percentage of enrichment and maximum weight of contained U-235.

(3) For nuclear equipment, total dollar value.

(4) For nuclear reactors, the name of the facility and its design power level.

(5) Description of end use by all consignees in sufficient detail to permit accurate evaluation of the justification for the proposed export or import, including the need for shipment by the dates specified.

14. Section 110.40 is amended by revising paragraph (b) to read as follows:

§ 110.40. Commission review.

* * * * *

(b) The Commissioners shall review a license application for export of the following:

(1) A production or utilization facility.

(2) More than one effective kilogram of high-enriched uranium, plutonium or U-233.

(3) 1,000 kilograms or more of heavy water or nuclear grade graphite.

(4) An export involving assistance to end uses related to isotope separation, chemical reprocessing, heavy water production, advanced reactors or the fabrication of nuclear fuel containing plutonium, except for categories of exports approved in advance by the Commission as constituting permitted incidental assistance.

(5) The initial export to a country since March 10, 1978 of source or special nuclear material for nuclear end use.

(6) An export involving over: (i) 10 grams of plutonium, U-233 or high-enriched uranium; (ii) 1 effective kilogram of low-enriched uranium; (iii) 250 kilograms of source material, heavy water or nuclear grade graphite; or (iv) 1,000 curies of tritium, to any country listed in § 110.28 or § 110.29.

(7) Any export subject to special limitations as determined by the staff or a majority of the Commissioners.

* * * * *

15. Section 110.41 is amended by removing paragraph (d) and revising paragraph (a) to read as follows:

§ 110.41 Executive Branch review.

(a) A license application for export of the following will be promptly forwarded to the Executive Branch for review:

(1) A production or utilization facility.

(2) More than one effective kilogram of high-enriched uranium or 10 grams of plutonium or U-233.

(3) Deuterium, nuclear grade graphite, or over 100 curies of tritium.

(4) Source or special nuclear material to be exported under the US–IAEA Agreement for Cooperation.

(5) An export involving assistance to end uses related to isotope separation, chemical reprocessing, heavy water production, advanced reactors or the fabrication of nuclear fuel containing plutonium, except for categories of exports approved in advance by the Executive Branch as constituting permitted incidental assistance.

(6) The initial export of nuclear material or equipment to a foreign reactor.

(7) An export to any country listed in § 110.28 or § 110.29.

(8) An export subject to special limitations as determined by the Commission or the Executive Branch.

* * * * *

16. Section 110.42 is revised to read as follows:

§ 110.42 Export licensing criteria.

(a) The review of license applications for the export for peaceful nuclear uses of production or utilization facilities,[4]

[4] Exports of complete nuclear reactors, complete reactor pressure vessels, primary coolant pumps, control rods and reactor fuel charging and discharging machines are subject to the comprehensive export criteria in § 110.42(a). A complete nuclear reactor includes those parts and components, as specified in § 110.8(a), which are within or attached directly to the reactor vessel, which control the level of power in the reactor core, or which normally contain or come in direct contract with or control the primary coolant of the reactor. Nuclear reactor parts and components (other than complete pressure vessels, primary coolant pumps, control rods or fuel charging and discharging machines) when exported separately are subject to the export criteria in § 110.42(b).

special nuclear material and source material is governed by the following criteria:

(1) IAEA safeguards as required by Article III (2) of the NPT will be applied with respect to any such facilities or material proposed to be exported, to any such material or facilities previously exported and subject to the applicable agreement for cooperation, and to any special nuclear material used in or produced through the use thereof.

(2) No such material or facilities proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such material or facilities, will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.

(3) Adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear material used in or produced through the use thereof. Physical security measures will be deemed adequate if such measures provide a level of protection equivalent to that set forth in § 110.43.

(4) No such material or facilities proposed to be exported, and no special nuclear material produced through the use of such material, will be retransferred to the jurisdiction of any other country or group of countries unless the prior approval of the United States is obtained for such retransfer.

(5) No such material proposed to be exported and no special nuclear material produced through the use of such material will be reprocessed, and no irradiated fuel elements containing such material removed from a reactor will be altered in form or content, unless the prior approval of the United States is obtained for such reprocessing or alteration.

(6) With respect to exports of such material or facilities to nonnuclear weapon states, IAEA safeguards will be maintained with respect to all peaceful activities in, under the jurisdiction of, or carried out under the control of such state at the time of export. This criterion will not be applied if the Commission has been notified by the President in writing that failure to approve an export because this criterion has not been met would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security, in which case the provisions of Section 128 of the Atomic Energy Act regarding Congressional review will apply.

(7) The proposed export of a facility or of more than 0.003 effective kilograms of special nuclear material, other than plutonium containing 80 percent or more by weight of plutonium-238, would be under the terms of an agreement for cooperation.

(8) The proposed export is not inimical to the common defense and security and, in the case of facility exports, does not constitute an unreasonable risk to the public health and safety in the United States.

(b) The review of license applications for the export of nuclear equipment, other than a production or utilization facility, and for deuterium and nuclear grade graphite, is governed by the following criteria:

(1) IAEA safeguards as required by Article III (2) of the NPT will be applied with respect to such equipment or material.

(2) No such equipment or material will be used for any nuclear explosive device or for research on or development of any nuclear explosive device.

(3) No such equipment or material will be retransferred to the jurisdiction of any other country or group of countries without the prior consent of the United States.

(4) The proposed export is not inimical to the common defense and security.

(c) The review of license applications for the export of byproduct material and for source material for nonnuclear end uses is governed by the criterion that the proposed export is not inimical to the common defense and security.

17. Section 110.43 is revised to read as follows:

§ 110.43 Physical security standards.

(a) Commission determinations on the adequacy of physical security programs in recipient countries for Category I quantities of nuclear material (see Appendix B) are based upon the following:

(1) Review of the physical security program established by the recipient country and of the implementation of the national requirements, as considered through country visits and other information exchanges, to ensure that the physical security measures provide, as a minimum, protection comparable to that set forth in International Atomic Energy publication INFCIRC/225/Rev. 1, entitled "The Physical Protection of Nuclear Material" (INFCIRC/225), which is incorporated by reference in this part. This incorporation by reference was approved by the Director of the Federal Register on May 3, 1978. Notice of any changes to the publication will be published in the Federal Register. Copies of INFCIRC/225 may be obtained from the Assistant Director for Export/Import and International Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and are available for inspection in the Commission Public Document Room. A copy is on file in the library of the Office of the Federal Register.

(2) Written assurances from the recipient country or group of countries that physical security measures providing, as a minimum, protection comparable to that set forth in INFCIRC/225 will be maintained.

(b) Commission determinations on the adequacy of physical security programs in recipient countries for Category II and III quantities of material (see Appendix B) are based on available relevent information and written assurances from the recipient country or group of countries that physical security measures providing, as a minimum, protection comparable to that set forth in INFCIRC/225 will be maintained.

(c) Commission determinations on the adequacy of physical security programs in recipient countries for exported facilities are made in accordance with the categories of material (see Appendix B) in use or in storage at the exported facilities and are based on available relevant information and written assurances from the recipient country or group of countries that physical security measures providing, as a minimum, protection comparable to that set forth in INFCIRC/225 will be maintained.

(d) Commission determinations may be based on a country-wide finding rather than on case-by-case analysis. The Commission will reexamine a determination whenever there are changed circumstances within a country that might reduce the effectiveness of its physical security program.

18. Section 110.44 is revised to read as follows:

§ 110.44 Issuance or denial of licenses.

(a) The Commission will issue an export license if it has been notified by the State Department that it is the judgment of the Executive Branch that the proposed export will not be inimical to the common defense and security; and—

(1) Finds, based upon a reasonable judgment of the assurances provided and other information available to the Federal government, that the applicable criteria in § 110.42, or their equivalent, are met. (If an Executive Order provides an exemption pursuant to section 126a of the Atomic Energy Act, proposed exports to EURATOM countries are not

required to meet the critieria in § 110.42(a) (4) and (5)); or

(2) Finds that there are no material changed circumstances associated with an export license application (except for byproduct material applications) from those existing at the time of issuance of a prior license to export to the same country, if the prior license was issued under the provisions of paragraph (a)(1) of this section.

(b) The Commission will issue an import license if it finds that the proposed import would not be inimical to the common defense and security or constitute an unreasonable risk to the public health and safety and that any applicable requirements of Subpart A of Part 51 of this chapter have been satisfied.

(c) If, after receiving the Executive Branch judgment that the issuance of a proposed export license will not be inimical to the common defense and security, the Commission does not issue the proposed license on a timely basis because it is unable to make the statutory determinations required under the Atomic Energy Act, the Commission will publicly issue a decision to that effect, and will submit the license application to the President. The Commission's decision will include an explanation of the basis for the decision and any dissenting or separate views. The provisions in this paragraph do not apply to byproduct material export license applications.

(d) The Commission will deny: (1) Any export license application for which the Executive Branch judgment does not recommend approval; (2) any byproduct material export license application for which the Commission is unable to make the finding in paragraph (a)(1) of this section; or (3) any import license application for which the Commission is unable to make the finding in paragraph (b) of this section. The applicant will be notified in writing of the reason for denial.

19. Section 110.45 is amended by revising the introductory text of paragraphs (a) and (b) and revising paragraph (c) to read as follows:

§ 110.45 Conduct resulting in termination of nuclear exports.

(a) Except as provided in paragrah (c) of this section, no license will be issued to export nuclear equipment or material, other than byproduct material, to any nonnuclear weapon state that is found by the President to have, after March 10, 1978:

* * * * *

(b) Except as provided in paragraph (c) of this section, no license will be issued to export nuclear equipment or material, other than byproduct material, to any country or group of countries that is found by the President to have, after March 10, 1978:

* * * * *

(c) Under section 129 of the Atomic Energy Act, the President may waive the requirement for the termination of exports to a country described in paragraph (a) or (b) of this section after determining in writing that the cessation of exports would seriously prejudice the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. If the President makes this determination, the Commission will issue licenses to export to that country, if other applicable statutory provisions are met.

20. Section 110.50 is amended by revising paragraph (b) to read as follows:

§ 110.50 Terms.

* * * * *

(b) Specific licenses.

(1) Each specific license will have an expiration date.

(2) A licensee may export or import only for the purpose stated in the license application.

(3) Unless a license specifically authorizes the export of foreign-origin nuclear material or equipment, a licensee shall notify in writing the Assistant Director for Export/Import and International Safeguards at least 40 days prior to export of Australian-origin nuclear material or equipment. A license may not ship this material or equipment until authorized by the Assistant Director for Export/Import and International Safeguards. The Assistant Director will not authorize shipment until after obtaining the consent of the Australian Government.

(4) A licensee authorized to export or import special nuclear material is responsible for compliance with the physical protection requirements of Part 73 of this chapter, unless a domestic licensee of the Commission has assumed that responsibility and the Commission has been so notified.

(5) A license may be transferred, disposed of or assigned to another person only with the approval of the Commission by license amendment.

21. Section 110.51 is revised to read as follows:

§ 110.51 Amendment and renewal of licenses.

(a) A licensee may submit an application to renew a license or to amend a license.

(b) If an application to renew a license is submitted 30 days or more before the license expires, the license remains valid until the Commission acts on the renewal application. An expired license is not renewable.

(c) An amendment is not required for—

(1) Changes in value (but not amount or quantity);

(2) Changes in the mailing addresses within the same countries of intermediate or ultimate consignees; or

(3) The addition of intermediate consignees in any of the importing countries specified in the license (for a nuclear equipment license only).

(d) In acting upon license renewal and amendment applications, the Commission will use, as appropriate, the same procedures and criteria it uses for original license applications.

22. Section 110.53 is amended by revising paragraph (b) to read as follows:

§ 110.53 United States address, records, and inspection.

* * * * *

(b) Each licensee shall maintain a record of each export or import for 5 years (2 years for byproduct material).

* * * * *

23. Section 110.70 is amended by revising paragraph (b) to read as follows:

§110.70 Public notice of receipt of an application.

* * * * *

(b) The Commission will also publish in the **Federal Register** a notice of receipt of an application for a license to export the following:

(1) A production or utilization facility.

(2) Five effective kilograms or more of plutonium, high-enriched uranium or uranium-233.

(3) 10,000 kilograms or more of heavy water or nuclear grade graphite.

* * * * *

24. Section 110.82 is amended by revising the introductory text of paragraph (b) and paragraph (b)(3) to read as follows:

§ 110.82 Hearing request or intervention petition.

* * * * *

(b) Hearing requests and intervention petitions must—

* * * * *

(3) Explain why a hearing or an intervention would be in the public interest and how a hearing or intervention would assist the

Commission in making the determinations required by § 110.44.

* * * * *

25. Section 110.83 is amended by revising paragraph (a) to read as follows:

§ 110.83 Answers and replies.

(a) Unless otherwise specified by the Commission, an answer to a hearing request or intervention petition may be filed within 30 days after the request or petition has been served.

* * * * *

26. Section 110.84 is amended by revising paragraph (d) to read as follows:

§ 110.84 Commission action on a hearing request or intervention petition.

* * * * *

(d) Before granting or denying a hearing request or intervention petition, the Commission will review the Executive Branch's views on the license application and may request further information from the petitioner, requester, the Commission staff, the Executive Branch or others.

* * * * *

27. Section 110.89 is amended by revising paragraphs (a), (b), and (d)(1); and the introductory text of paragraph (d) is set out for the convenience of the user to read as follows:

§ 110.89 Filing and service.

(a) Hearing requests, intervention petitions, answers, replies and accompanying documents must be filed with the Commission by delivery or by mail or telegram to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Chief, Docketing and Service Branch. Filing by mail or telegram is complete upon deposit in the mail or with a telegraph company.

(b) All filing and Commission notices and orders must be served upon the applicant; the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Executive Secretary, Department of State, Washington, DC 20520; and participants if any. Hearing requests, intervention petitions, and answers and replies must be served by the person filing those pleadings.

* * * * *

(d) Proof of service, stating the name and address of the person served and the manner and date of service, shall be shown, and may be made by—

(1) Written acknowledgment of the person served or an authorized representative; or

* * * * *

28. Section 110.91 is revised to read as follows:

§ 110.91 Commission consultations.

The Commission may consult at any time on a license application with the staff, the Executive Branch or other persons.

29. Section 110.103 is amended by revising paragraph (a) to read as follows:

§ 110.103 Acceptance of hearing documents.

(a) Each document filed or issued must be clearly legible and bear the docket number, license application number and hearing title.

* * * * *

30. Appendix A is revised to read as follows:

Appendix A—List of gas centrifuge enrichment plant components under NRC's export licensing authority.

1. *Assemblies and components especially designed or prepared for use in gas centrifuges.*

Note.—The gas centrifuge normally consists of a thin-walled cylinder(s) of between 75mm (3 ins.) and 400 mm (16 ins.) diameter contained in a vacuum environment and spun at high peripheral speed (of the order of 300 m/per second and more) with the central axis vertical. In order to achieve high speed, the materials of construction for the rotating rotor assembly, and hence its individual components, have to be manufactured to very close tolerances in order to minimize the unbalance. In contrast to other centrifuges, the gas centrifuge for uranium enrichment is characterized by having within the rotor chamber a rotating disc-shaped baffle(s) and a stationary tube arrangement for feeding and extracting UF_6 gas and featuring at least 3 separate channels of which 2 are connected to scoops extending from the rotor axis towards the periphery of the rotor chamber. Also contained within the vacuum environment are a number of critical items which do not rotate and which, although they are especially designed, are not difficult to fabricate nor are they fabricated out of unique materials. A centrifuge facility, however, requires a large number of these components so that quantities can provide an important indication of end use.

1.1 *Rotating Components.*

(a) Complete Rotor Assemblies: Thin-walled cylinders, or a number of interconnected thin-walled cylinders, manufactured from one of the high strength-to-density ratio materials described in the Footnote to this Section.

If interconnected, the cylinders are joined together by flexible bellows or rings as described in § 1.1(c). The rotor is fitted with an internal baffle(s) and end caps, as described in § 1.1 (d) and (e), if in final form. However, the complete assembly may be delivered only partly assembled.

(b) Rotor Tubes: Especially designed or prepared thin-walled cylinders with thickness of 12mm (.50 in.) or less, a diameter of between 75mm (3 ins.) and 400mm (16 ins.), and manufactured from one of the high strength-to-density ratio materials described in the Footnote to this Section.

(c) Rings or Bellows: Components especially designed or prepared to give localized support to the rotor tube or to join together a number of rotor tubes. The bellows in a short cylinder of wall thickness 3mm (.125 in.) or less, a diameter of between 75mm (3 ins.) and 400mm (16 ins.), having a convolute, and manufactured from one of the high strength-to-density ratio materials described in the footnote to this section.

(d) Baffles: Disc shaped components of between 75mm (3 ins.) and 400mm (16 ins.) diameter especially designed or prepared to be mounted inside the centrifuge rotor tube, in order to isolate the take-off chamber from the main separation chamber and, in some cases, to assist the UF_6 gas circulation within the main separation chamber of the rotor tube, and manufactured from one of the high strength-to-density ratio materials described in the Footnote to this Section.

(e) Top Caps/Bottom Caps: Disc shaped components of between 75mm (3 ins.) and 400mm (16 ins.) diameter especially designed or prepared to fit to the ends of the rotor tube, and so contain the UF_6 within the rotor tube, and in some cases to support, retain or contain as an integrated part, an element of the upper bearing (top cap) or to carry the rotating elements of the motor and lower bearing (bottom cap), and manufactured from one of the high strength-to-density ratio materials described in the Footnote to this Section.

Footnote

The materials used for centrifuge rotating components are:

(a) Maraging steel capable of an ultimate tensile strength of 2.050×10^9 N/m² (300,000 lb/in.²) or more.

(b) Aluminium alloys capable of an ultimate tensile strength of 0.460×10^9 N/m² (67,000 lb/in.²) or more.

(c) Filamentary materials suitable for use in composite structures and having a specific modulus of 12.3×10^6 or greater and a specific ultimate tensile strength of 0.3×10^6 or greater ("Specific Modulus" is the Young's Modulus in N/m² divided by the density in Kg/m³. "Specific Ultimate Tensile Strength" is the ultimate tensile strength in N/m² divided by the density in Kg/M³).

1.2 *Static Components.*

(a) Magnetic Suspension Bearings: Especially designed or prepared bearing assemblies consisting of an annular magnet suspended within a housing containing a damping medium. The housing will be manufactured from a UF_6 resistant material (see footnote to section 2). The magnet couples with a pole piece or a second magnet fitted to the top cap described in Section 1.1(e). The magnet may be ring-shaped with a relation between outer and inner diameter smaller or equal to 1.6.1. The magnet may be in a form having an initial permeability of 0.15 Henry/meter (120,000 in CGS units) or more, or an energy product of greater than 80,000 joules/m³ (10×10^6 gauss-oersteds.) In addition to the usual material properties, it is a prerequisite that the deviation of the magnetic axes from the geometrical axes is limited to very small tolerances (lower than 0.1mm) or that homogeneity of the material of the magnet is specially called for.

(b) Bearings/Dampers: Especially designed or prepared bearings comprising a pivot/cup assembly mounted on a damper. The pivot is normally a hardened steel shaft polished into a hemisphere at one end with a means of attachment to the bottom cap described in Section 1.1(e) at the other. The shaft may, however, have a hydrodynamic bearing attached. The cup is pellet-shaped with hemispherical indentation in one surface. These components are often supplied separately to the damper.

(c) Molecular Pumps: Especially designed or prepared cylinders having internally machined or extruded helical grooves and internally machined bores. Typical dimensions are as follows: 7mm (0.3 ins.) to 400mm (16 ins.) internal diameter, 10mm (0.4 ins.) or more wall thickness, 1 to 1 length to diameter ratio. The grooves are typically rectangular in cross-section and 2mm (0.08 in.) or more in depth.

(d) Motor Stators: Especially designed or prepared ring shaped stators for high speed multi-phase AC hysteresis (or reluctance) motors for synchronous operation within a vacuum in the frequency range of 600–2000 Hz and a power range of 50–100 volts amps. The stators consist of multi-phase windings on a laminated low loss iron core comprised of thin layers typically 2.0mm (0.08 in.) thick or less.

2. *Especially designed or prepared auxiliary systems, equipment and components for gas centrifuge enrichment plants.*

Note.—The auxiliary systems, equipment and components for a gas centrifuge enrichment plant are the systems of the plant needed to feed UF_6 to the centrifuges to link the individual centrifuges to each other to form cascades (or stages) to allow for progressively higher enrichments and to extract the product and tails of UF_6 from the centrifuges, together with the equipment required to drive the centrifuges or to control the plant.

Normally UF_6 is evaporated from the solid using heated autoclaves and is distributed in gaseous form to the centrifuges by way of cascade header pipework. The "product" and "tails" of UF_6 gaseous streams flowing from the centrifuges are also passed by way of cascade header pipework to cold traps (operating at about −70 °C where they are condensed prior to onward transfer into suitable containers for transportation or storage. Because an enrichment plant consists of many thousands of centrifuges arranged in cascades, there are many kilometers of cascade header pipework incorporating thousands of welds with a substantial amount of repetition of layout. The equipment, component and piping systems are fabricated to very high vacuum and cleanliness standards.

The following items either come into direct contact with UF_6 process gas or directly control the centrifuge and the passage of the gas from centrifuge to centrifuge and cascade to cascade.

(a) Feed Systems/Product and Tails Withdrawal Systems:

Especially designed or prepared process systems including:

1. Feed autoclaves (or stations), used for passing UF_6 to the centrifuge cascades at up to 100 Kg/m² (15 lb/in.²)

2. Desublimers (or cold traps) used to remove UF_6 from the cascades up to 3 Kg/m² (0.5 lb/in²) pressure. The desublimers are capable of being chilled to −70 °C and heated to 70 °C.

3. Product and tails stations used for trapping UF_6 into containers.

This plant equipment and pipework are wholly made of or lined with UF_6 resistant materials (see Footnote to this Section) and are fabricated to very high vacuum and cleanliness standards.

(b) Machine Header Piping Systems:

Especially designed or prepared piping systems and header systems for handling UF_6 within the centrifuge cascades.

This piping network is normally of the "triple" header system with each centrifuge connected to each of the headers. There is thus a substantial amount of repetition in its form. It is wholly made of UF_6 resistant materials (see Note to this Section) and is fabricated to very high vacuum and cleanliness standards.

(c) UF_6 Mass Spectrometers/Ion Sources: Especially designed or prepared magnetic or quadrapole mass spectrometers capable of taking "on-line" sample of feed, product or tails from UF_6 gas streams and having all of the following characteristics:

1. Unit resolution for mass greater than 320.

2. Ion sources constructed of or lined with nichrome, monel or nickel-plate.

3. Electron bombardment ionization sources.

4. Having a collector system suitable for isotope analysis.

(d) Frequency Changers: Frequency changers (also known as converters or invertors) especially designed or prepared to supply motor stators as defined under Section 1.2(d), or parts, components and subassemblies of such frequency changers having all of the following characteristics:

1. A multiphase output of 600 Hz to 2000Hz.

2. High stability (with frequency control better than 0.1%).

3. Low harmonic distortion (less than 2%).

4. An efficiency of greater than 80%.

Footnote

Materials resistant to corrosion by UF_6 include stainless steel, aluminum, aluminum alloys, nickel or alloys containing 60% or more nickel.

31. Appendix C to Part 110 is redesignated as Appendix B and amended by revising footnote C to read as follows:

Appendix B—Categorization of nuclear material

* * * * *

[c] Natural uranium, depleted uranium, thorium and quantities of uranium enriched to less than 10% not falling into Category III should be protected in accordance with prudent management practice.

* * * * *

Dated at Washington, DC this 28th day of November 1984.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 84-31548 Filed 11-30-84; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 24319; Amdt. 321]

Air Traffic and General Operating Rules; IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rule) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. These regulatory actions are needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

EFFECTIVE DATE: December 20, 1984.

FOR FURTHER INFORMATION CONTACT: Donald K. Funai, Flight Procedures Standards Branch (AFO–230), Air Transportation Division, Office of Flight Operations, Federal Aviation Administration, 800 Independence Avenue SW., Washington, D.C. 20591; telephone: (202) 426–8277.

SUPPLEMENTARY INFORMATION: This amendment to Part 95 of the Federal Aviation Regulations (14 CFR Part 95) prescribes new, amended, suspended, or revoked IFR altitudes governing the operation of all aircraft in IFR flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in Part 95. The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference.

The reasons and circumstances which create the need for this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment is unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

List of Subjects in 14 CFR Part 95

Aircraft, Airspace.

Adoption of the Amendment

PART 95—[AMENDED]

Accordingly and pursuant to the authority delegated to me by the Administrator, Part 95 of the Federal Aviation Regulations (14 CFR Part 95) is amended as follows effective at 0901 G.m.t. December 20, 1984.

(Secs. 307 and 1110, Federal Aviation Act of 1958 (49 U.S.C. 1348 and 1510); 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983); and 14 CFR 11.49(b)(3))

Note.—The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Issued in Washington, D.C. on December 20, 1984.

Kenneth S. Hunt,

Director of Flight Operations.

BILLING CODE 4910-13-M

REVISIONS TO MINIMUM ENROUTE IFR ALTITUDES & CHANGEOVER POINTS

AMENDMENT 321 EFFECTIVE DATE, DECEMBER 20, 1984

§95.1001 DIRECT ROUTES-U.S.

ATLANTIC ROUTES

R507 IS ADDED TO READ

FROM	TO	MEA
UTAHS, PR FIX *24000 - MRA **1200 - MOCA	*CONCH, BI FIX	**24000 MAA-45000
*CONCH, BI FIX *24000 - MRA **1200 - MOCA	GRAND TURK, BF VORTAC	**24000 MAA-45000

R763

FROM	TO	MEA
BORINQUEN, PR VORTAC *1200 - MOCA	GRAND TURK, BF VORTAC	*14000 MAA-45000

§95.6005 VOR FEDERAL AIRWAY 5
IS AMENDED TO READ IN PART

FROM	TO	MEA
TANDS, TN FIX	BOWLING GREEN, KY VORTAC	2700

§95.6018 VOR FEDERAL AIRWAY 18
IS AMENDED TO READ IN PART

FROM	TO	MEA
FANEN, MS FIX VIA S ALTER. *2000 - MOCA	MERIDIAN, MS VORTAC VIA S ALTER.	*3000

§95.6020 VOR FEDERAL AIRWAY 20
IS AMENDED TO READ IN PART

FROM	TO	MEA
SPARTANBURG, SC VORTAC	CHECK, NC FIX	3000
CHECK, NC FIX	MOPED, NC FIX	3700
MOPED, NC FIX	BARRS, NC FIX	3000

§95.6066 VOR FEDERAL AIRWAY 66
IS AMENDED TO READ IN PART

FROM	TO	MEA
RALEIGH-DURHAM, NC VORTAC	FRANKLIN, VA VORTAC	2500

§95.6095 VOR FEDERAL AIRWAY 95
IS AMENDED TO READ IN PART

FROM	TO	MEA
GUNNISON, CO VORTAC	BALOO, CO FIX	
	NE BND	16200
	SW BND	12000
BALOO, CO FIX	BALIF, CO FIX	
	NE BND	16200
	SW BND	15000

§95.6095 VOR FEDERAL AIRWAY 95—Continued

FROM	TO	MEA
BALIF, CO FIX	TREES, CO FIX	16200
TREES, CO FIX	*CHILT, CO FIX	
	SW BND	16000
	NE BND	13600
*12600 - MCA CHILT FIX, SW BND		
CHILT, CO FIX	MONTH, CO FIX	11800
MONTH, CO FIX	FOLES, CO FIX	10200

§95.6096 VOR FEDERAL AIRWAY 96
IS AMENDED TO READ IN PART

FROM	TO	MEA
KOKOMO, IN VORTAC	*FORCE, IN FIX	2600
*6000 - MCA FORCE FIX, NE BND		
FORCE, IN FIX *2300 - MOCA	FORT WAYNE, IN VORTAC	*6000

§95.6106 VOR FEDERAL AIRWAY 106
IS AMENDED TO READ IN PART

FROM	TO	MEA
COBOL, CT FIX *3000 - MOCA	BARNES, MA VORTAC	*3500

§95.6119 VOR FEDERAL AIRWAY 119
IS AMENDED TO READ IN PART

FROM	TO	MEA
BURGS, WV FIX *3100 - MOCA	OTOWN, PA FIX	*3700

§95.6133 VOR FEDERAL AIRWAY 133
IS AMENDED BY ADDING

FROM	TO	MEA
INTERNATIONAL FALLS, MN VORTAC *2800 - MOCA	U.S. CANADIAN BORDER	*6500

IS AMENDED TO READ IN PART

FROM	TO	MEA
FORT MILL, SC VORTAC	STANN, NC FIX	3400

§95.6146 VOR FEDERAL AIRWAY 146
IS AMENDED TO READ IN PART

FROM	TO	MEA
PROVIDENCE, RI VORTAC	MARTHAS VINEYARD, MA VOR	2000

FROM	TO	MEA
§95.6157 VOR FEDERAL AIRWAY 157 IS AMENDED TO READ IN PART		
WEBBS, FL FIX *1500 - MOCA	OCALA, FL VORTAC	*2000
TAR RIVER, NC VORTAC	LAWRENCEVILLE, VA VORTAC	2400
§95.6162 VOR FEDERAL AIRWAY 162 IS AMENDED TO READ IN PART		
LUCKE, VA FIX	CARIS, PA FIX	5000
§95.6164 VOR FEDERAL AIRWAY 164 IS AMENDED TO READ IN PART		
GANIS, NY FIX	BUFFALO, NY VORTAC	2500
§95.6198 VOR FEDERAL AIRWAY 198 IS AMENDED TO READ IN PART		
FORT STOCKTON, TX VORTAC *4700 - MOCA	OZMOS, TX FIX	*8000
§95.6214 VOR FEDERAL AIRWAY 214 IS AMENDED TO READ IN PART		
GALLS, PA FIX *3100 - MOCA	OTOWN, PA FIX	*3700
§95.6222 VOR FEDERAL AIRWAY 222 IS AMENDED TO READ IN PART		
FORT STOCKTON, TX VORTAC *4700 - MOCA	OZMOS, TX FIX	*8000
§95.6225 VOR FEDERAL AIRWAY 225 IS AMENDED TO READ IN PART		
HOMEY, FL FIX *1300 - MOCA	DIDDY, FL FIX	*2000
§95.6234 VOR FEDERAL AIRWAY 234 IS AMENDED TO READ IN PART		
BRAKR, OK FIX *4700 - MOCA	LIBERAL, KS VORTAC	*5700
§95.6259 VOR FEDERAL AIRWAY 259 IS AMENDED TO READ IN PART		
FORT MILL, SC VORTAC	MIDET, NC FIX	3700
§95.6267 VOR FEDERAL AIRWAY 267 IS AMENDED TO READ IN PART		
GREMM, FL FIX *2000 - MRA **1400 - MOCA	*DOUGS, FL FIX	**5000
§95.6408 VOR FEDERAL AIRWAY 408 IS AMENDED TO READ IN PART		
LUCKE, VA FIX	SCOBY, MD FIX	5000
§95.6454 VOR FEDERAL AIRWAY 454 IS AMENDED TO READ IN PART		
LIBERTY, NC VORTAC *2500 - MOCA	LAWRENCEVILLE, VA VORTAC	*6000
§95.6415 HAWAII VOR FEDERAL AIRWAY 15 IS AMENDED TO READ IN PART		
*CANON, HI FIX *32000 - MRA **6000 - MRA	**VANDA, HI FIX W BND	32000
	E BND	6000

§95.7007 JET ROUTE NO. 7

IS AMENDED TO READ IN PART

LOS ANGELES, CA VORTAC	FRIANT, CA VORTAC	18000	45000
FRIANT, CA VORTAC	RENO, NV VORTAC	18000	45000

[FR Doc. 84-31474 Filed 11-30-84; 8:45 am]

BILLING CODE 4910-13-C

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 274

[Release No. IC-14234; S7-35-84]

Separate Accounts Funding Flexible Premium Variable Life Insurance Contracts

AGENCY: Securities and Exchange Commission.

ACTION: Temporary adoption of rule, final rule, form amendments, and request for comments.

SUMMARY: The Commission is adopting, on a temporary basis, a rule that will provide insurance company separate accounts with exemptions from the Investment Company Act of 1940 to the extent necessary to permit them to offer a new type of insurance product known as flexible premium variable life insurance. Concurrently, the Commission is requesting public comment on that rule. These actions will offer companies the opportunity to sell this product immediately, pending adoption of a permanent rule.

DATES: Effective December 3, 1984. Comments must be received on or before January 31, 1985.

ADDRESSES: All communications on this matter should be sent, in triplicate, to Shirley E. Hollis, Acting Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. Such communications should refer to File No. S7-35-84 and will be available for public inspection at the Commission's Public Reference Room 450 Fifth Street NW., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Brian M. Kaplowitz, Special Counsel (202) 272-2061, or Robert E. Plaze, Attorney (202) 272-2622, Office of Insurance Products and Legal Compliance, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") today is adopting, on a temporary basis, rule 6e-3(T) [17 CFR 270.6e-3(T)] under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] ("Act") relating to flexible premium variable life insurance ("flexible life" or "flexible contracts"). The rule provides extensive exemptive relief from various provisions of the Act and rules thereunder to any separate account[1] established by a life insurance company ("life insurer") and offering flexible life.[2] Rule 6e-3(T) is based in large part upon a suggested rule contained in a rulemaking petition (the "petition") submitted by the American Council of Life Insurance ("Petitioner") and published for comment in Investment Company Act Release No. 13632 ("Release 13632").[3] The temporary rule is intended to be a companion to rule 6e-2 under the Act [17 CFR Part 270 6e-2], the existing exemptive rule relating to scheduled premium variable life insurance ("scheduled life" or "scheduled contracts") (hereinafter flexible life and scheduled life collectively are referred to as "variable life" or "variable contracts"). Because the scope and nature of the relief provided by the temporay rule differs in certain respects from that in Petitioner's suggested rule, the Commission has decided to request public comment on the revisions before adopting a permanent rule. The Commission is also adopting, on a temporary basis, and at the same time proposing for comment, related technical amendments to rule 6c-3 [17 CFR 270.6c-3] and Form N-6EI-1 under the Act [17 CFR 274.301].

Background

1. The Petition

On June 29, 1983, as supplemented on September 15, 1983, Petitioner submitted a petition urging the Commission to adopt a comprehensive exemptive rule under the Act for separate accounts proposing to offer flexible life.[4] The petition describes flexible life as a new type of whole life insurance product that will be funded by separate accounts and will provide for flexible payments and death benefits.[5] Petitioner argued that adoption of its suggested rule was the best way to resolve the issues this new product raises under the Act, and asserted that adoption of that rule would be consistent with the statutory standards for exemptive relief prescribed in section 6(c) of the Act [15 U.S.C. 80a-6(c)].[6]

2. Request for Comment on the Suggested Rule

In Release 13632 the Commission requested public comment on the issues arising under the Act relating to flexible life. The Commission included the petition and suggested rule as part of the release, but it expressly took no position as to the need for or appropriateness of adopting Petitioner's rule.

The Commission received forty comment letters, thirty-seven of which were filed by or on behalf of life insurers, many of whom participated directly in formulating the petition. These commentators urged adoption of the suggested rule with only minor clarifications. The other commentators either supported adoption of the suggested rule generally or raised matters not directly related to the treatment of flexible life under the Act.[7]

3. The Commission's Decision to Adopt a Temporary Rule While Seeking Comment Thereon

After reviewing the petition, the suggested rule, and comments received in response to Release 13632, the Commission has decided to adopt, on a temporary basis, a modified version of Petitioner's suggested rule. In addition, in view of the changes made, the Commission has decided to seek public comment prior to adoption of a final rule. As a result, life insurers will be able to offer flexible life immediately, based on rule 6e-3(T) while comment is sought on it.[8] Following the comment period, a final rule will be adopted.

Since the rule is a companion to rule 6e-2, and the latter rule has provided workable standards, rule 6e-3(T), like Petitioner's suggested rule, follows the same general approach as rule 6e-2. Modifications have been made only where (1) necessary to accommodate the differing characteristics of flexible life or (2) experience has shown that the provisions of rule 6e-2 need to be

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[1] A separate account may be organized under the Act either as a management investment company ("management account") or as a unit investment trust ("trust account").

[2] The relief provided by rule 6e-3(T) is also available to the account's investment adviser, principal underwriter, and depositor.

[3] (Nov. 23, 1983) [48 FR 54043 (Nov. 30, 1983); 29 SEC Docket 365 (Dec. 6, 1983)].

[4] The specific nature of the exemptions requested by Petitioner are discussed more fully in Release 13632 and the petition.

[5] For a more complete description of the features of flexible life, *see* discussion in Section I, *infra* and the petition at 8-23. Page citations to the petition refer to the pagination of the petition as submitted to the Commission and available in the Commission's Public Reference Room in File No. S7-1004.

[6] Section 6(c) gives the Commission authority to exempt any person from any provision of the Act or rule thereunder if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the policy and provisions of the Act.

[7] Among the matters raised was the importance of assuring full and fair disclosure concerning registered insurance products and sales and disclosure practices pertaining to whole life insurance generally.

[8] If the provisions of the final rule differ from those of rule 6e-3(T), the Commission anticipates providing issuers relying on rule 6e-3(T) with a one year transition period to comply with the final rule.

revised or updated.[9] The Commission has not otherwise reconsidered the policy determinations underlying specific provisions of rule 6e-2.

Due to staffing limitations and the Commission's desire to expedite adoption of a final rule of general applicability, the Commission does not encourage life insurers to file individual flexible life exemptive applications during the comment period seeking relief different from, or in addition to, that provided by rule 6e-3(T). The staff will, however, process applications relating to the rule if they involve technical or unforeseen matters.

Discussion

Rule 6e-3(T) provides exemptions from various provisions of the Act and rules under it where necessary to permit separate accounts to offer flexible life.

I. Flexible Life [10]

A flexible contract will provide an immediate cash benefit many times the amount of the initial purchase payment. So long as the contract is in force, the death benefit payable under the contract will never be less than the current face amount of death benefit under the contract. The amount of the death benefit may vary depending on the investment experience of the separate account used to fund the contract. The contract holder generally will have the right to elect one of two benefit options: a death benefit equal to the face amount of the contract or, if greater, the cash value plus a pure risk amount [11] ("Option I"); or a death benefit equal to a pure risk amount plus cash value ("Option II").[12] Investment experience also may have a bearing on the duration of the death benefit because a flexible contract generally will remain in force only so long as cash surrender value [13]—which will vary based on investment experience—is sufficient to meet the cost of insurance [14] and various other fees and charges deducted periodically.

A flexible contract generally will permit the contractholder to determine both the timing and amount of payments, subject to certain limitations.[15] Contracts may stipulate a target payment schedule intended to provide the level of insurance benefits selected by the contractholder, who will be encouraged, but not required, to make payments pursuant to the schedule. Failure to pay a target payment will not necessarily cause the contract to lapse if, as noted above, there is sufficient cash surrender value available under the contract to pay the fees and charges necessary to keep it in force.

The sales load structures under flexible contracts will vary among companies. Some life insurers may design contracts under which sales load is deducted from payments (a "front-end sales load") while others may deduct sales load other than from payments (a "subsequent sales load"). [16]

A flexible contract will lapse when the "grace period" expires.[17] The grace period generally begins on any day on which cash surrender value is insufficient to meet the various fees and charges due that day. If an additional payment is not received within a specified period after the grace period begins (at least 61 days), the contract will lapse.

Finally, contracts generally will have features found in other insurance contracts, such as those permitting the contractholder to take out a loan using the contract as security and to redeem the contract and receive its cash value less deductions for sales load and other charges. In addition, most, if not all, flexible contracts will be designed to conform to applicable requirements of the Internal Revenue Code, which are contained in section 7702 (formerly section 101(f)).[18]

II. Rule 6e-3(T)

The rule is divided into four paragraphs. Paragraph (a) defines generally the type of separate account that may use the rule, and paragraph (b) provides relief from specific sections of the Act and rules thereunder. Terms used in the rule are defined in paragraph (c), while paragraph (d) sets forth certain computational rules to be used in applying the rule.

Each provision of the rule is described below. Significant similarities and differences between the rule, rule 6e-2[19] and Petitioner's suggested rule [20] are also noted.

A. *Paragraph (a)—The Separate Account.* Paragraph (a) provides that a separate account of a life insurer [21]

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[9] Given that rule 6e-3(T) and rule 6e-2 are intended as companion rules, the Commission intends to propose for comment in the near future a number of conforming changes to rule 6e-2.

[10] The discussion is based on Petitioner's generic description of flexible life (*see* petition at 8-23).

[11] The manner in which the pure risk amount is determined is described *infra* note 14.

[12] The relationship between the pure risk amount and the cash value of any flexible contract is governed by section 7702 of the Internal Revenue Code of 1954, as amended [I.R.C. section 7702 (1984)] ("Code") (*see infra* note 14), which requires that for contracts issued on or after January 1, 1985 the death benefit must be at least 250% of cash value for insured aged 40 and under. This percentage drops in varying increments each year and is 105% for insureds between the ages of 75 and 90. Absent this relationship between cash value and death benefit, the contract will not qualify for the favorable tax treatment afforded life insurance.

[13] Generally speaking, cash value accumulates from that portion of payments made under a life insurance contract not necessary to purchase immediate life insurance coverage. In a traditional level payment whole life insurance product, cash value accumulated in early years of the contract (and interest paid thereon) is used to pay the increasingly large insurance costs in later years. Cash surrender value is equal to the cash value of the policy less any deductions made upon redemption (*see* Section II.C.11., *infra*).

[14] Simply stated, the "cost of insurance" is the charge made periodically by the life insurer for the net amount of death benefit under the contract for which the insurer is "at risk" during that period. The insurer is at risk for that amount of the death benefit equal to the face amount of the contract less its current cash value; this is the "pure risk amount." The amount of the cost of insurance charge is calculated by multiplying the net amount at risk by the "cost of insurance rate," a rate which is based on factors such as the sex, age, and rate class of the insured.

[15] Life insurers may reserve the right to limit the amount and number of payments and may prescribe minimum payments.

[16] The two most likely types of subsequent sales loads are (1) a deferred sales load and (2) a periodic charge directly on the cash value of a contract. A deferred sales load generally is a sales load deducted upon redemption (either partial or full) of a contract. The imposition of the sales load, and the rate at which the sales load is deducted, may be contingent on the number of years the contract has been in effect. A sales load that is a periodic charge against cash value would provide, for example, that each day a percentage deduction from cash value would be made for sales load.

[17] The grace period provisions are required by article IV, section 3(b)(2) and article IX, section 3 of the Variable Life Insurance Model Regulation ("Model Regulations"). The Model Regulation, which has been adopted by many states, was amended by the National Association of Insurance Commissioners in December 1982 specifically to permit flexible life. A copy of the amended provisions as they were proposed, with commentary, is attached to Release 13632.

[18] Section 7702 defined a life insurance contract for purposes of the Code generally as any contract which is a life insurance contract under the applicable state law, but only if the contract meets either of two alternative tests designed to limit investment-motivated payment of large amounts of cash under the contract.

[19] As noted above, the Commission intends to propose certain actions with respect to rule 6e-2 in a future release.

[20] Citations to Petitioner's June 29 submission will refer to the "petition;" citations to the September 15 supplemental submission will refer to the "petition supplement." Paragraphs of Petitioner's suggested rule will be referred to as "items" throughout this release in order to distinguish them from portions of rule 6e-2 and 6e-3(T), which will be referred to as "paragraphs" or "provisions."

[21] Paragraph (a)(1) of the rule provides that the life insurance company which establishes and maintains the separate account will be referred to throughout the rule as the "life insurer." Similarly, various other changes in language used in rule 6e-2 and in Petitioner's suggested rule have been made throughout rule 6e-3(T) in order to improve its readability. These changes are discussed in this release only where they are substantive.

which meets six conditions will be exempt from the registration provisions of the Act. However, such a separate account will be subject to all other provisions of the Act as if it were registered, except as specifically provided in paragraph (b) of the rule. The conditions, which are similar to those contained in rule 6e–2(a), are designed to ensure the segregated nature of the separate account and also to limit the availability of the rule to separate accounts offering flexible contracts as defined in paragraph (c)(1) of the rule (*see* discussion in Section II.C.1., *infra*).[22] The principal differences from rule 6e–2(a) are that: (1) Paragraph (a)(1) now includes a reference to the definition of "separate account" in section 2(a)(37) of the Act [15 U.S.C. 80a–2(a)(37)];[23] (2) the prohibition in rule 6e–2(a)(3) on holding funds in the separate account corresponding to dividend accumulations has been deleted;[24] and (3) paragraph (a)(2) permits the assets of the separate account to be derived from the sale of flexible contracts and scheduled premium variable life insurance contracts.[25] Regarding the latter matter, to the extent a separate account offers scheduled contracts it will, of course, continue to be governed by rule 6e–2 rather than rule 6e–3(T).

B. *Paragraph (b)—The Exemptive Provisions.* Paragraph (b) provides that if the separate account meets the requirements of paragraph (a), then it shall be exempt from certain enumerated provisions of the Act with respect to flexible contracts funded by the account. This provision, like rule 6e–2(b), sets forth fifteen exemptions, many of which are substantively similar or identical to the exemptions provided by rule 6e–2(b) or requested by Petitioner in the suggested rule. The discussion below describes these exemptions and focuses particularly on the relief which differs from or is in addition to that provided by rule 6e–2(b) or the suggested rule.[26]

1. Paragraph (b)(1)—Sales Load Definition

Like rule 6e–2(b)(1) for scheduled life separate accounts, this paragraph exempts flexible life separate accounts from section 2(a)(35) [15 U.S.C. 80a–2(a)(35)], which defines the term "sales load." The purpose of this exemption is to make the special definition of sales load contained in paragraph (c)(4) of the rule (*see* discussion in Section II.C.4., *infra*) applicable to the sales load provisions of the Act as they relate to flexible life separate accounts. Relief also is provided from various other sections of the Act and rules thereunder necessary to permit a subsequent sales load.[27] This relief is necessary because the Act and rule 6e–2, which were drafted when sales loads were uniformly front-end, only contemplates sales loads being deducted in this manner.

2. Paragraphs (b)(2) and (b)(3)—Registration

Paragraph (b)(2) exempts a flexible life separate account from the prohibitions of section 7 [15 U.S.C. 80a–7] regarding transactions by unregistered investment companies and paragraph (b)(3) provides relief from the requirements of section 8 [15 U.S.C. 80a–8], provided that the account files a notification of claim of exemption under rule 6e–3(T) on Form N–6EI–I [28] and a registration statement on a form designated by the Commission, generally within ninety days thereafter. Both provisions are substantively identical to rule 6e–2 (b)(2) and (b)(3), respectively. Until a registration form specifically designed for variable life separate accounts is adopted, a flexible life separate account organized as a management account should file on Form N–1 [17 CFR 274.11], and a flexible life separate account organized as a trust account should file on Forms N–8B–2 [17 CFR 274.12] and S–6 [17 CFR 239.16]. In each case the first page of such form should make special notation that the filing is made pursuant to rule 6e–3(T).

3. Paragraph (b)(4)—Eligibility Restrictions

Like rule 6e–2(b)(4), this provision provides a partial exemption from the restrictions of section 9(a) [15 U.S.C. 80a–9(a)] on certain persons serving in various positions with an investment company so that the restrictions are not applicable to personnel of the life insurer who do not participate directly in the administration or management of the separate account or in the sale of flexible contracts.

4. Paragraph (b)(5)—Investment Policies

This provision provides flexible life separate accounts with the same relief from section 13(a) [15 U.S.C. 80a–13(a)] provided by rule 6e–2(b)(5) to permit the life insurer in limited instances to disapprove changes in investment policies initiated by contractholders.

5. Paragraph (b)(6)—Initial Capital Requirements

This provision exempts a flexible life separate account from the minimum capital requirements of section 14(a) [15 U.S.C. 80a–14(a)] on the same terms as are provided in rule 6e–2(b)(6).

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[22] Paragraph (a)(2) of the rule provides that flexible premium variable life insurance contracts will be referred to throughout the rule as "flexible contracts." The Commission believes it is appropriate in the rule to refer to flexible life as *contracts*, rather than *policies* as suggested by Petitioner, because these instruments are investment contracts for purposes of the federal securities laws, notwithstanding that in insurance terminology they are "insurance policies."

[23] Section 2(a)(37) of the Act defines a separate account essentially as an account maintained by an insurance company under which income and losses are credited to and charged against the account's contracts without regard to the income or losses of the insurance company. The reference to section 2(a)(37) in paragraph (a)(1) has made it unnecessary to include in the rule a provision similar to rule 6e–2(a)(4).

[24] Rule 6e–2(a)(3) prohibits a scheduled life separate account from being used for dividend accumulations, and this restriction is explained in the petition at note 24 as an industry suggestion to help assure that a scheduled contract would function as little as possible as an investment vehicle. In light of the arguments set forth in the petition at 33–34, the Commission believes it is appropriate not to include such a prohibition in this rule.

[25] Paragraph (a)(2) of the rule provides that scheduled premium variable life insurance contracts will be referred to throughout the rule as "scheduled contracts."

[26] Because rule 6e–3(T) provides a comprehensive and interrelated set of exemptions from the Act, a separate account relying on the rule should comply with each exemptive provision to the extent that the provision or the underlying section of the Act applies thereto.

[27] The relief provided by paragraph (b)(1) would permit a flexible life separate account to deduct a subsequent sales load in any of the three manners Petitioner envisions (*see* petition at 57). First, relief is provided from sections 2(a)(32) [15 U.S.C. 80a–2(a)(32)], 22(c) [15 U.S.C. 80a–22(c)], 26(a)(2)(C) [15 U.S.C. 80a–26(a)(2)(C)], 27(c)(1) [15 U.S.C. 80a–27(c)(1)], and 27(d) [15 U.S.C. 80a–27(d)] and rule 22c–1 [17 CFR 270.22c–1] to permit a deferred sales load (*see* description *supra* note 16). Second, additional relief is provided from section 12(b) [15 U.S.C. 80a–12(b)] and rule 12b–1 thereunder [17 CFR 270.12b–1] to permit a sales load to be deducted periodically from cash value (*see* description *supra* note 16). Third, this paragraph would permit any combination of a front-end, deferred, and periodic sales load. In all cases, as in rule 6e–2, the definition of sales load set forth in paragraph (c)(4) would be controlling, and the amount of sales load actually deducted would have to comply with the limitations set forth in paragraph (b)(13) and, if applicable, paragraph (d) of the rule (*see* discussion in Sections II.B.12. and II.D., *infra*).

The suggested rule contains no relief from section 12(b) and rule 12b–1 for subsequent sales loads based on Petitioner's "belief that these provisions are inapplicable to a charge (in whatever form) to recover sales and distribution expense * * * "that complies with section 27 (petition at note 34). While agreeing with the practical result of Petitioner's position, the Commission believes relief is nevertheless necessary, and it has been included in the rule.

[28] As noted above, the Commission is adopting, on a temporary basis, amendments to Form N–6EI–1 in order to make it available to separate accounts relying on rule 6e–3(T) as well as those relying on rule 6e–2.

6. Paragraph (b)(7)—Selection of Investment Adviser

A limited exemption from section 15(a) [15 U.S.C. 80a–15(a)] is provided by paragraph (b)(7)(i) to permit the initial selection of the account's investment adviser to be made without prior contractholder approval. Paragraph (b)(7)(ii) provides an exemption from sections 15 (a), (b), and (c) to permit state insurance authorities in certain cases to disapprove the advisory contract and the life insurer to disapprove changes in the account's principal underwriter or investment adviser. These provisions are substantially identical to the corresponding provisions of rule 6e–2.

7. Paragraph (b)(8)—Selection of Board of Directors

This provision, like rule 6e–2(b)(8), provides a limited exemption from the requirements of section 16(a) [15 U.S.C. 80a–16(a)] to permit persons to serve as directors of the separate account without prior contractholder approval.

8. Paragraph (b)(9)—Custodianship Assets

This paragraph provides an exemption from section 17(f) [15 U.S.C. 80a–17(f)] generally to allow the securities and similar investments of a management account to be maintained in the custody of the life insurer or of an affiliated life insurer, provided certain conditions designed to ensure safekeeping of such assets are satisfied. The relief is substantially identical to rule 6e–2(b)(9), with two minor modifications.[29] Petitioner's suggested rule includes similar relief, but also provides relief from section 17(f) if the management account complies with rule 17f–2 [17 CFR 270.17f–2.][30] The need for such an alternative test is unclear, however, because rule 6e–2(b)(9) provides relief comparable to, and in some cases exceeding, that provided by rule 17f–2. Accordingly, this suggestion has not been incorporated into the rule, although comment is requested as to whether such an alternative test is necessary.

9. Paragraph (b)(10)—Voting Rights

This provision, which is substantively identical to rule 6e–2(b)(10), provides an exemption from the voting rights requirements of section 18(i) [15 U.S.C. 80a–18(i)] if, *inter alia*, flexible life contractholders receive one vote for each $100 of cash value. The Commission has determined not to incorporate Petitioner's suggestion to add the words "registered management" to describe the type of investment company which is the subject of the contractholder voting requirements discussed in this part of the rule. Such an addition could lead to confusion about the scope of the relief provided in cases where, for example, a flexible life separate account organized as a management company elects, in reliance on the rule, not to register under the Act.

10. Paragraph (b)(11)—Dividends

As in the case of rule 6e–2(b)(11), this provision exempts from section 19 [15 U.S.C. 80a–19] any dividend paid on a participating flexible contract on the ground that such "dividends" are not dividends in the sense used in the Act.

11. Paragraph (b)(12)—Pricing and Processing

This paragraph provides relief from sections 22(d) [15 U.S.C. 80a–22(d)], 22(e) [15 U.S.C. 80a–22(e)], and 27(c)(1) and rule 22c–1 in connection with certain pricing and processing provisions. The pricing relief provided by paragraph (b)(12)(i) is similar to rule 6e–2(b)(12)(i), although the language has been updated to reflect an amendment to rule 22c–1 effected after the adoption of rule 6e–2.[31] Paragraph (b)(12)(i)(B)(*1*) incorporates Petitioners's suggestion that the rule provide pricing relief specifically to permit deductions from cash value for items such as the cost of insurance and administrative fees and charges to be made at such times as specified in the contract,[32] and paragraph (b)(12)(i)(B)(*2*) requires the death benefit to be determined only on days when it could be affected by the investment experience of the separate account.[33] In addition, this paragraph permits a subsequent sales load to be deducted from cash value at specified times.

One significant difference in terminology between rule 6e–2 and rule 6e–3(T) that first appears in this provision is the use of the terms "cash value" and "cash surrender value." Rule 6e–2 uses these terms interchangeable [34] because it was drafted for contracts in which these amounts would be equal. In the case of a flexible contract subject to a deferred sales load, however, the contract's cash value and its cash surrender value may not be equal since the latter may reflect a deduction for the deferred sales load. Accordingly, definitions of these terms have been included in paragraph (c)(10) and (c)(11) of the rule.

Petitioner urges that the pricing provisions should only require that a contract's cash value and death benefit be "determinable" on valuation days, rather than "determined" as required by rule 6e–2(b)(12)(i), apparently because some contracts may provide that daily investment experience may not affect the death benefit and charges may be deducted from cash value other than on a daily basis (*see* petition at 73–74). Since these situations already are specifically excepted from the general pricing requirements by paragraphs (b)(12)(i)(B) (*1*) and (*2*), Petitioner's suggestion has not been incorporated into the rule.

12. Paragraph (b)(13)—Sales Load and Other Deductions

This provision provides exemptions from section 27 and related provisions in connection with the deduction of sales load and certain fees and charges from the assets of a flexible life separate

[29] The first modification is to paragraph (b)(9)(iv) of the rule. It has been revised to permit securities to be deposited in any manner permitted by any rule under section 17(f), and the language therein referring to a national securities exchange or association has been deleted in light of the enactment of section 17A of the Securities Exchange Act of 1934 [15 U.S.C. 78q–1] as part of the Securities Exchange Act Amendments of 1975 [Pub. L. No. 94–29, 89 Stat. 97]. The effect of this modification is to permit a separate account, in accordance with rule 17f–4 [17 CFR 270.17f–4], to deposit its securities in a clearing agency registered with the Commission under section 17A of the 1934 Act or the book-entry system as provided by the book-entry regulations of federal agencies.

Second, paragraphs (b)(9)(iii) and (b)(9)(vi) have been modified to clarify that the life insurer may retain an independent public accountant on behalf of the account.

[30] Rule 17f–2, a rule not specifically drafted for insurance company separate accounts, specifies certain conditions under which a management investment company may maintain its securities and similar investments in its own custody.

[31] Former rule 22c–1(b) required that an investment company price its shares not less frequently than once daily at the close of trading on the New York Stock Exchange. This rule was amended in 1979 (Investment Company Act Rel. No. 10827 (Aug. 13, 1979) [44 FR 486549 (Aug. 20, 1979); 18 SEC Docket 120 (Aug. 28, 1979)]) to require pricing on any day there is a sufficient degree of trading in the portfolio securities of the investment company that the current net asset value of the investment company's redeemable securities might be materially affected and to permit a company's board of directors to designate a time during the day at which pricing would occur.

[32] The relief provided by paragraph(b)(12)(i)(B)(*1*) provides explicit relief for practices already permitted for scheduled life separate accounts by rule 6e–2(b)(12)(ii).

[33] For example, investment experience (either positive or negative) would not affect the death benefit under an Option I contract (*see* description in Section I, *supra*) until the cash value plus pure risk amount exceeded the current face amount of death benefit under the contract.

[34] *Compare* rule 6e–2(b)(10)(i)(A) and rule 6e–2(b)(12)(i).

account. Like rule 6e–2(b)(13), this provision is divided into nine sections, discussed below.

a. Paragraph (b)(13)(i)—Sales Load Limitation. Paragraph (b)(13)(i) provides exemptions comparable to those provided by rule 6e–2(b)(13)(i) and incorporates part of Petitioner's suggested rule. The nature of the relief provided by this provision is most easily understood by first examining the nature and scope of the exemptions provided to scheduled contracts in rule 6e–2 and the reasons underlying that relief.

Rule 6e–2(b)(13)(i) provides separate accounts offering scheduled contracts with an exemption from the requirement of section 27 that sales load deducted under any periodic payment plan certificate not exceed 9% of payments "to be made thereon." Since scheduled contracts provide coverage for an indeterminate period—*i.e.*, for the whole of life—it was necessary to specify an artificial time period, which in the case of rule 6e–2 is the lesser of 20 years or the anticipated life expectancy of the insured.[35] In adopting this time period, the Commission believed it to be a reasonable estimate of the period during which payments would be made. Petitioner argues that flexible contracts similarly are of indeterminate length and that the same relief should be granted.[36] This time period appears equally reasonable in the case of flexible contracts and has been incorporated into the rule.

Petitioner asserts, however, that flexible life requires additional relief because the sales load provisions of rule 6e–2 contemplate payments which are scheduled and in a fixed amount. It is for this purpose that Petitioner has developed the concept of a "guideline annual premium" which, as discussed in Section II.C.8., *infra*, is defined generally as the level annual payment necessary to provide the future benefits under the contract through maturity, based on certain assumptions. The guideline annual premium, in effect, corresponds to scheduled payments under rule 6e–2, and the sum of 20 years' guidelines, like the sum of twenty years' scheduled payments under rule 6e–2, provides the base against which to measure compliance with the 9% limitation. Petitioner urges the Commission to incorporate this approach into a flexible life rule because it "has substantive and procedural virtues superior to those of other possible methods of specifying premium payments" (petition at 48).[37]

The Commission believes that, on balance and in the absence of a readily apparent alternative, the guideline annual premium approach for measuring compliance with the sales load requirements can be adopted in the case of flexible life without frustrating the intent of the relevant statutory provisions. Moreover, although it is somewhat troublesome to permit the amount of sales load to be based on other than actual payments, particularly with a product like flexibile life which may permit significant variations in actual payments, the use of artificial tests in connection with both scheduled life [38] and variable annuity contracts [39] has proven to be a practical way to accommodate insurance products under the Act. Separate issues are presented regarding the appropriateness of the various assumptions to be used in defining the amount of the guideline annual premium, and they are discussed in Section II.C.8., *infra* in connection with the definition of this term set forth in paragraph (c)(8) of the rule.

Thus, paragraph (b)(13)(i)(A) of the rule provides relief from the sales load limitations of sections 27(a)(1) [15 U.S.C. 80a–27(a)(1)], 27(h)(1) [15 U.S.C. 80a–27(h)(1)], and 27(h)(4) [15 U.S.C. 80a–27(h)(4)], provided that sales load does not exceed 9% of the sum of the guideline annual premiums that would be paid during the relevant contract periods.[40] Like rule 6e–2(b)(13)(i), the relevant contract periods are equal to the lesser of 20 years or the anticipated life expectancy of the insured named in the contract. The 1980 Commissioners Standard Ordinary Mortality Table ("1980 CSO Table") is prescribed for determining anticipated life expectancy, rather than the 1958 Commissioners Standard Ordinary Mortality Table ("1958 CSO Table") as specified in rule 6e–2(b)(13)(i), and the reason for this change is explained in Section II.C.8., *infra*.[41]

Where payments in excess of the guideline amount are made during any contract period, Petitioner proposes that sales load be permitted to be deducted from the excess amount. This additional sales load would be limited to the lesser of 9% of the guideline single premium—*i.e.*, the amount necessary to pay up the contract until maturity [42]—or 9% of the payments in excess of the guideline annual premium. The Commission has decided not to adopt this suggestion because it would permit a contractholder, who takes advantage of the contract's flexibility and concentrates his payments during the early contract years, to be charged more than a 9% sales load on payments equal to the sum of 20 guideline annual premiums. Similarly, two otherwise comparable contractholders could, depending on the timing and amount of their payments, pay different amounts of sales load even though the total amount of their payments was equal.[43]

Under this paragraph, a life insurer has wide latitude to design a schedule of sales load deductions so long as the total amount deducted does not exceed 9% of the guideline annual premiums which would be paid during 20 years or the insured's life expectancy, if less.

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[35] While section 27 limits sales load to 9% of payments made, it permits proportionately more sales load to be deducted in the early years of a periodic payment plan certificate. For example, it permits up to 50% of the first year's payment to be deducted as sales load, so long as the issuer can demonstrate prospectively that the total sales load deducted over the life of the certificate will not exceed 9% of total payments made. Since variable contracts are of indeterminate length, an artificial test (such as the 20 year or life expectancy test) is necessary to permit the life insurer to demonstrate compliance with the 9% limitation on a prospective basis.

[36] *See* petition at 44.

[37] Petitioner argues, among other things, that such an approach would provide life insurers with some certainty as to a compliance with the Act and would assist them in structuring commission payments to life insurance agents. Absent use of the guideline annual premium approach, Petitioner suggests that life insurers might be forced to limit sales loads to 9% of payments as they are actually paid, which would create problems for the life insurer given the heavily front-end loaded nature of traditional insurance agent commission schedules (*see* petition at 45–51).

[38] *See* rule 6e–2(b)(13)(i).

[39] *See* rule 27a–1 [17 CFR 270.27a–1].

[40] The term "contract period" is defined in paragraph (c)(5) of the rule generally as the period from a contract issue or anniversary date to the earlier of the next following anniversary date or the contract's termination date. *See* discussion in Section II.C.5., *infra*.

[41] A mortality table is an actuarial device which estimates life expectancy. The 1958 CSO Table, developed jointly by the Society of Actuaries and the National Association of Insurance Commissioners ("NAIC"), prescribes the minimum basis upon which certain insurance-related calculations must be made. The NAIC recently promulgated a mortality table embodying contemporary mortality assumptions—the 1980 CSO Table—which generally will be mandatory for all life insurance contracts by 1989.

[42] The term "guideline single premium" is defined in paragraph (c)(9) of the rule and is discussed in Section II.C.9., *infra*.

[43] For example, assume a flexible contract that contains an excess front-end sales load which declines to 0% before the 10th contract year and that contractholder X pays exactly the guideline annual premium (*e.g.*, $1,000) each year for 20 years. X could pay sales load of up to 9% of his total premium payments (9% of $20,000=$1,800). Contractholder Y has an identical contract, but makes annual premium payments equal to twice the guideline annual premium in each of the first 10 contract years. Under Petitioner's suggested rule, Y could pay sales load of up to 9% of 20 guideline annual premiums ($1,800), plus up to 9% of the excess of his payments over the guideline amount for each of the first 10 years (9% of $10,000=$900), *i.e.*, Y could pay sales load equal to 13.5% of his premium payments ($2,700), which is 150% of what X could be charged for the same amount of payments.

subject, of course, to the other relevant limitations in the Act and this rule.[44] In addition, subject to the "stair step" provisions which are discussed immediately below, a life insurer would be permitted to deduct a sales load from any payments made in excess of 20 guideline annual premiums, or, if less, the number of guideline annual premiums corresponding to the insured's life expectancy.[45] Finally, paragraph (b)(13)(i)(B) has been included as an alternate sales load test to clarify that a life insurer who deducts sales load from actual payments in a manner permitted by section 27(a)(1) can also rely on the rule.

b. Paragraph (b)(13)(ii)—"Stair Step" Relief. This provision provides exemptions similar to those in rule 6e-2(b)(13)(ii) from the requirements of sections 27(a)(13) [15 U.S.C. 80a-27(a)(3)] and 27(h)(3) [15 U.S.C. 80a-27(h)(3)] that the amount of any sales load deducted from any payment not exceed the proportionate amount deducted from any prior payment—commonly known as "stair step" requirements.[46] Paragraph (d)(1)(ii) provides comparable relief from the stair step requirements relating to other than front-end sales loads (*see* discussion in Section II.D.1., *infra*).

c. Paragraph (b)(13)(iii)—Deduction of Fees and Charges and Custodianship of Assets. This provision provides relief from sections 27(c)(2), 26(a)(1), and 26(a)(2) to permit certain fees and charges to be deducted from account assets and to permit various custodianship activities regarding those assets. The relief is modeled upon comparable relief afforded variable annuity separate accounts by rules 26a-1 and 26a-2 [17 CFR 270.26a-1 and 270.26a-2] and relief proposed to be codified in rule 26a-3,[47] but differs from rule 6e-2(b)(13)(iii) to the extent that conditional, rather than blanket, relief is provided.

Although the exemptions provided by this provision generally are routine, the treatment of any charges for mortality, expense, and guaranteed death benefit risks ("risk charges") in paragraph (b)(13)(iii)(F) differs from the approach of rule 6e-2. Despite the potential that the proceeds from risk charges may be used to finance distribution, the scheduled life rule imposes no conditions in this regard, primarily because at the time the rule was adopted state insurance regulations effectively limited these charges to no more than .50%.[48] Recent action at the state level, however, has effectively rescinded this limitation.[49] In light of this action, and the concerns noted above, the Commission has determined to incorporate into the rule conditions comparable to those required of variable annuity separate accounts that deduct risk charges.

This provision also requires that the amount of the risk charge be disclosed in the prospectus and be at least one half of the maximum charge permitted under the contract. This requirement is identical to that contained in rule 6e-2(c)(1)(iii) and, in that context was intended to assure that the life insurer would not initially set an unrealistically low risk charge in order to induce persons to purchase a scheduled contract, and later raise the charge to the contract maximum. Petitioner would delete this requirement, although the explanation given does not address the concern noted above (*see* petition at 35). The Commission has determined not to make this change absent evidence that this concern is no longer valid or is not relevant to flexible, as opposed to scheduled, contracts. Comment on this issue is requested.

d. Paragraph (b)(13)(iv)—Redeemability and Contract Lapses. This provision provides relief from sections 27(c)(1) and 27(d) to the extent that the insurance nature of flexible contracts prevents them from being redeemable for a pro rata share of the separate account's assets within the meaning of these provisions.[50] The specific relief provided differs from the corresponding provisions of rule 6e-2(b) in two ways.

First, paragraph (b)(13)(iv)(B) provides that the life insurer may include a provision in the contract requiring that, if on a contract processing day [51] there is insufficient cash surrender value to pay the charges necessary to keep the contract in force until the next such day, that amount shall be applied to purchase a non-forfeiture option [52] specified by the life insurer. This provision differs from rule 6e-2(b)(13)(iv), which permits the contractholder to elect to receive either the contract's cash surrender value or any of several non-forfeiture options. In suggesting this approach, Petitioner argues that this different treatment for flexible contracts is appropriate because a lapse typically will occur only when cash surrender value is minimal and, under these circumstances, it is fair to permit the life insurer to recover some of its expenses in providing the grace period. The Commission agrees, but it has included a proviso in the rule that this approach may be used only where contract processing days occur not less frequently than monthly because it believes Petitioner's assumption of minimal cash surrender value is reasonable only if processing days occur at least that often.[53]

In addition, paragraph (b)(13)(iv)(B)(*2*) requires that before the life insurer may apply a contract's cash value to a non-forfeiture option in the manner described above, any excess paid for sales loading (calculated pursuant to paragraph (b)(13)(v)(A) and discussed in Section II.B.12.e.i., *infra*) shall be applied to keep the contract in force.[54]

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[44] *See e.g.*, Section 27(a)(2) of the Act [15 U.S.C. 80a-27(a)(2)], and paragraphs (b)(13)(ii) and (b)(13)(v) of this rule, discussed *infra*.

[45] For example, assume a contractholder with a life expectancy of at least 20 years purchases a flexible contract with a guideline annual premium of $1,000. The life insurer is permitted to deduct $1,800 in sales load (9% of $20,000) from the contractholder's first $20,000 in payments, regardless of the timing of those payments. If, and only if, the contractholder subsequently makes payments in addition to the $20,000, the life insurer can deduct a sales load from such additional payments, subject to the "stair step" provisions.

[46] Because the Commission had decided not to adopt the petition's approach to payments in excess of the guideline, the petition's "ratio" approach to this stair step provision is unnecessary and has not been included as part of this paragraph.

Similar to rule 6e-2(b)(13)(ii), the paragraph provides an exception to the "stair-step" requirements for increases caused by the grading of cash surrender values into reserves. The administrative history of the provision in rule 6e-2 does not provide specific guidance regarding the types of situations contemplated by this exception. Comment is requested on the types of situations in the context of flexible life in which it is anticipated that this exception would be operative.

[47] Rule 26a-3 was proposed for comment in Investment Company Act Rel. No. 14190 (Oct. 11, 1984).

[48] *See* Article VI, Section 7(5) of the former Variable Life Insurance Model Regulation.

[49] *See* Commentary on the Model Regulation at 108, *reprinted in* Appendix A of the petition.

[50] In addition, this section provides relief from sections 2(a)(32), 22(c) and Rule 22c-1.

[51] The term "contract processing day" is defined in paragraph (c)(13) generally as any day on which fees and charges under the contract are deducted from the separate account. *See* discussion in Section II.C.13., *infra*.

[52] Generally speaking, an non-forfeiture option is a contract feature required under state law which provides for the application of any cash value remaining upon lapse to purchase a paid-up life insurance policy.

[53] Thus, while the life insurer has discretion to designate how often contract processing days will occur under its contracts, this provision requires that if they occur less frequently than monthly, the contractholder (in the circumstances described in the text above) must be given the right to choose a cash refund or a non-forfeiture option.

[54] The Commission has determined not to incorporate two of Petitioner's suggestions into this paragraph. First, Petitioner would permit the life insurer upon a contract lapse to keep any excess sales loading, primarily because of "the absence of nonforfeiture options with cash value" (petition at

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If the contractholder subsequently makes a payment, paragraph (b)(13)(iv)(B)(*2*) permits the life insurer to recapture the excess sales loading previously applied to keep the contract in force.

Second, paragraph (b)(13)(iv)(C) specifies that, subject to other provisions of the rule, sales load may be deducted upon a redemption.[55]

e. Paragraph (b)(13)(v)—Surrender and Refund of Excess Sales Load Right and Conversion Right. This paragraph, like rule 6e–2 (b)(13)(v), provides exemption from the requirement of section 27(d) that the holder of a periodic payment plan certificate must have the right to surrender the certificate within the first 18 months after issuance and receive the value of his account plus any amount paid for sales loading which exceeds 15% of gross payments made. Relief is provided so long as the flexible contractholder is given a surrender and refund right and a conversion right, as discussed separately below.

i. Surrender and Refund Right. Paragraph (b)(13)(v)(A) provides that the contractholder must be given the right to surrender the contract within the first 24 months and receive its cash surrender value plus a refund of any "excess" paid for sales loading. This provision defines the "excess" amount of sales loading refundable as that amount of sales load which exceeds the sum of (1) the lesser of 30% of the guideline annual premium or 30% of actual payments made during the first contract period[56] plus (2) the lesser of 10% of the guideline annual premium or 10% of actual payments made during the second contract period plus (3) 9% of payments made during either the first or the second contract period in excess of the guideline annual premium in each period.

Petitioner's formula in the suggested rule for determining excess sales load subject to the refund right would permit the life insurer to retain sales load at higher rates where the contractholder chooses to pay less than the guideline annual premium during the first two contract year.[57] Petitioner asserts that this relief is necessary to protect life insurers since they will bear expenses in early contract years irrespective of the amount of payments made. While this concern appears valid, the Commission is reluctant to reduce the amount of refund to be received by contractholders. Moreover, a more direct way to address Petitioner's concern is to permit the life insurer to fix the timing and minimum amount of payments during the first two contract years. This approach has been incorporated into the definition of a flexible contract (*see* discussion in Section II.C.1., *infra*).

ii. Conversion Right. In addition to the surrender and refund right discussed above, paragraph (b)(13)(v)(B) of the rule provides that the contractholder must be given the right to convert the flexible contract during the first 24 months into a different type of life insurance policy. While the corresponding provision of rule 6e–2 specifies that conversion must be to a whole life policy, this provision of Rule 6e–3(T) permits the life insurer to specify conversion into any policy other than a variable contract. As noted by Petitioner, the purposes underlying the conversion right are satisfied so long as the contractholder has the right to convert to any type of fixed-benefit life insurance policy (*see* petition at 56).[58]

As further suggested by Petitioner, the new policy must provide for either the same death benefit or the same amount at risk to the life insurer as the flexible contract at the time of conversion and must provide for premiums based on the same issue age and risk classification of the insured as the flexible contract, subject to an equitable adjustment. The suggested rule would permit the life insurer to select whether the new policy would provide the same death benefit or amount at risk. The Commission believes, however, that the insured should have the option of making this determination, and this requirement has been included in paragraph (b)(13)(v)(B)(*1*).

f. Paragraph (b)(13)(vi)—Reserve Requirements. This provision provides exemption from the reserve requirements of rule 27d–1 [17 CFR 270.27d–1] imposed on the principal underwriter and depositor of periodic payment plan certificates subject to sections 27(d) or section 27(f) on terms identical to those of rule 6e–2(b)(13)(vi) and the suggested rule.

g. Paragraph (b)(13)(vii)—Notification of Surrender and Refund Right and Conversion Right. This provision implements the notification requirements of section 27(e) [15 U.S.C. 80a–27(e)] and rule 27e–1 thereunder [17 CFR 270.27e–1] by prescribing the form, manner of delivery, and timing of the notice of the surrender and refund right specified in paragraph (b)(13)(v)(A). It preserves the basic requirements of rule 6e–2(b)(13)(vii), with certain modifications discussed below.

The first modification is that this provision has been expanded to permit the notice requirement to be satisfied by providing the contractholder with a written document containing information comparable to that required by Form N–27I–1 [17 CFR 274.301]. This approach, which is based on a suggest by Petitioner, will permit life insurers to design the form of the notice they must provide.

A second modification to this provision relates to the timing of the required notice regarding the surrender and refund right. Petitioner points out that the requirement of rule 6e–2(b)(13)(vii)(B) that the notice be provided if the contractholder fails to make a scheduled payment is not meaningful in the case of a flexible contract. Alternatively, Petitioner suggests that the notice should be given generally within 30 days after the first and second contract anniversaries and that the surrender and refund right should not expire until not less than 15 days after the last notice is mailed (*see* petition at 69). While the nature of flexible contracts clearly warrants an alternative notice requirement, notice would appear most appropriately given at times during the surrender and refund period when a contract is likely to terminate. Accordingly, paragraph (b)(13)(vii)(B) requires that the notice be sent whenever the amounts available on

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56). To the extent this may be true, the Commission nevertheless believes it would be inequitable to permit the life insurer to keep any excess loading which it otherwise would have been obligated to refund had the contractholder surrendered (rather than lapsed). Although this suggestion has not been incorporated into the rule, paragraph (b)(13)(iv)(B)(*2*), as noted above, does permit the life insurer to apply any excess loading to keep the contract in force. If the application of any excess load is insufficient to keep the contract in force, the life insurer may then apply the excess load, together with any remaining cash surrender value, to the purchase of a specified non-forfeiture option.

Second, Petitioner's suggestion to insert the word "additional" to describe the type of "interest" charge that may not be included in any option that may be imposed automatically under a contract has not been incorporated because the basis for this suggestion is unclear and is not discussed in the petition.

[55] For purposes of clarity and consistency with the terminology of the Act, the term "redemption" has been substituted in various parts of the rule for the phrase "complete or partial surrender or withdrawal," as used in the suggested rule, and similar phrases used in rule 6e–2.

[56] The term contract period is defined in paragraph (c)(5) of the rule generally as the period from a contract issue or anniversary date to the earlier of the next following anniversary date or the contract's termination date. *See* discussion in Section II.C.5., *infra*.

[57] In the first contract year, the suggested rule defines excess sales loading as the amount in excess of the lesser of 30% of the guideline annual premium or 50% of actual payment, and in the second year these amounts are 10% and 17%, respectively.

[58] Of course, the conversion right would not be available to a contractholder while the grace period is in effect since in that circumstance paragraph (b)(13)(iv) is controlling.

any contract processing day to pay the charges authorized by the contract are insufficient to keep the contract in force until the next contract processing day.[59] Since Article IX, section 3 of the Model Regulation (*see supra* note 16) requires a report to be sent in similar circumstances, paragraph (b)(13)(vii)(B) indicates that the required notice and report may be sent together.

A third modification is that the rule permits notice to be provided through personal delivery by sales representatives, as an alternative to delivery of the notice by first class mail. Petitioner suggested this modification to conform the rule with common industry practice.

h. Paragraph (b)(13)(viii)—"Free Look" Period. In addition to the surrender and refund right and the conversion right discussed above, rule 6e–2(b)(13)(viii) requires that the contractholder be provided a 45 day "free look" period during which he may elect to return his scheduled contract and receive a refund of the present value of his gross payments, and a similar withdrawal right is set forth in paragraph (b)(13)(viii). As suggested by Petitioner, this provision permits the life insurer to design the form of the notice, provided it contains information comparable to that required by Form N–27I–2 [17 CFR 274.303].

This provision permits the life insurer to impose the investment risk during the free look period on the contractholder. The corresponding provision of rule 6e–2, on the other hand, imposes that risk on the life insurer, apparently because state law at the time rule 6e–2 was adopted mandated this result. Petitioner points out that this result is no longer required under state law,[60] and argues that it is inequitable to impose the investment risk during the free look period on the life insurer, especially given the possibility under flexible life of large voluntary initial payments which, if made, could impose substantial risk on the life insurer (*see* petition at 70). In view of the fact that the corresponding free look period of section 27 imposes all investment risk on the purchaser, Petitioner's suggestion has been incorporated into the rule.[61]

Finally, the Commission has determined not to revise the length of the withdrawal period as required by Petitioner. Rule 6e–2(b)(13)(viii)(A) permits the contractholder to elect withdrawal anytime up to the latest of (i) 45 days from the date of the application for insurance, (ii) 10 days from receipt of the contract by the insured, or (iii) 10 days from the mailing of the notice of right to withdraw. Petitioner's proposed rule would delete the first alternative solely on the ground that at the time rule 6e–2 was being developed, the Model Regulation had a similar requirement which has since been deleted (*see* petition at 71). However, the 45 day provision in rule 6e–2 already represents a shortening of the 60 day withdrawal period provided by section 27(f), and the Commission is reluctant to shorten this period further. Moreover, the fact that the flexible contractholder will bear the investment risk during the free look period further lessens any need to shorten the withdrawal period.

i. Paragraph (b)(13)(ix)—When Contract Submitted. Similar to Rule 6e–2(b)(13)(ix), this paragraph deems the postmark date on the envelope returning the contract to be the date the contract is submitted for surrender, conversion, or withdrawal.

13. Paragraph (b)(14)—Selection of Independent Public Accountant

Similar to the relief provided by paragraphs (b)(7) (selection of investment adviser) and (b)(8) (selection of board of directors) of the rule, this paragraph provides a limited exemption from section 32(a) [15 U.S.C. 80a–32(a)] to permit the initial selection of the account's independent public accountant to be made without prior contractholder approval. The relief is identical to that contained in rule 6e–2(b)(14) and the suggested rule.

14. Paragraph (b)(15)—Trust Accounts

This provision provides certain exemptions specifically tailored for any separate account organized as a unit investment trust ("trust account"). The relief is similar to that contained in rule 6e–2(b)(15), except that relief also is provided to permit (1) trust accounts to be used to fund either scheduled life or flexible life and (2) underlying funds to offer their shares to both variable life separate accounts and variable annunity separate accounts. While this latter practice, commonly referred to as "mixed funding," is precluded by the literal language of rule 6e–2(b)(15), the Commission has granted exemptions on several occasions permitting this practice.[62] The conditions under which this relief has been granted have been included in the rule, with limited exceptions.[63]

C. *Paragraph (c)—The Definitions.* Paragraph (c) of the rule, like the corresponding paragraph of rule 6e–2, defines various terms used in the rule.

1. Paragraph (c)(1)—Definition of Flexible Premium Variable Life Insurance

This provision defines a flexible contract for purposes of the rule as a contract of life insurance, subject to regulation under the insurance laws of every jurisdiction in which it is offered, which contains certain features discussed below. Like rule 6e–2(c)(1), this provision defines the type of contract for which the rule's exemptions are designed. Although comparable to the definition in rule 6e–2, the definition of flexible life has been modified to reflect the differing character of the product. The specific language of the definition is based in large part on the suggested rule, with certain modifications discussed below.

Paragraph (c)(1) states that a flexible contract shall provide for payments which are not fixed by the life insurer as to both timing and amount. Limited exceptions from these requirements are provided to permit the

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[59] Of course, a notice would not be required to be sent on each day during a grace period, rather only at the beginning of each grace period.

[60] *See* Model Regulation, Article IV, section 3(a)(5).

[61] Although the language of the suggested rule requires the life insurer to refund any contract fees and charges deducted from premium payments, it would not require the life insurer to refund any fees or charges deducted from cash value. The Commission believes such a result is inconsistent with the intent of section 27, and it has added a new provision to Petitioner's suggested language, paragraph (b)(13)(viii)(A)(*3*), to preclude this possibility.

[62] *See, e.g.*, Investment Company Act Rel. No. 13580 (Oct. 18, 1983); Investment Company Act Rel. No. 13464 (Aug. 26, 1983). Since the prohibition in rule 6e–2(b)(15) against mixed funding was based in part on concerns that conflicts could arise between the interests of variable life and variable annuity contract-holders, recipients of exemptive orders have represented, among other things, that the life insurer would monitor for the existence of any material irreconcilable conflicts and, if one arose, would notify the separate account and take appropriate action, at its own cost, to remedy such conflict.

[63] The Commission is not codifying three conditions contained in individual applications and requests comment on whether these omission are appropriate. First, the requirement that state insurance authorities be notified of mixed funding has not been included because the Commission is not aware of any problems under state law that have arisen in connection with mixed funding. Second, the rule does not require the life insurer to obtain an opinion of counsel to the effect that mixed funding will not have any adverse federal tax consequences because several life insurers recently have advised the staff that provisions of the Tax Reform Act of 1984 [P.L. 98–369] have effectively eliminated the need for such an opinion by clarifying the consequences of mixed funding. Finally, the rule does not explicitly require prospectus disclosure regarding certain risks of mixed funding because the Commission does not believe it would be appropriate to specify disclosure requirements in this type of rule, although such disclosure may nevertheless be appropriate.

life insurer to fix the timing and minimum amount of payments for the first two contract periods (*see* discussion in Section II. C.5., *supra*) and to prescribe a reasonable minimum amount for any additional payment.

While Petitioner expects that generally *both* the amount and timing of payments will be flexible and determined by the contractholder (*see* petition at 16), the definition does permit the life insurer to fix the timing or the amount of payments, but not both. Life insurers should be aware, however, that the definition is not intended to include a contract which provides only a limited range of flexibility with respect to either timing or amount of payments, while the other element is set by the life insurer, or a contract which provides a very limited range of flexibility with respect to both timing and amount of payments. Such contracts are effectively scheduled contracts and may not rely on this rule or use the guideline annual premium approach for determining permissible sales load.

Paragraph (c)(1)(ii) states that a flexible contract shall provide a death benefit the amount or duration of which may vary to reflect the separate account's investment experience.[64]

Paragraph (c)(1)(iii) states that the cash value of a flexible contract must vary to reflect the investment experience of the separate account. This requirement is also contained in rule 6e-2(c)(1)(i).[65]

The rule does not include a proviso to paragraph (c)(1), as suggested by Petitioner, stating that a flexible contract shall not include that portion of a contract treated under state law as providing any annuity benefits other than as a settlement option. The petition fails to explain the purpose or need for such a provision. Comment is requested on the need for such a provision.

2. Paragraph (c)(2)—Definition of Incidental Insurance Benefits

This provision defines the term "incidental insurance benefits" in generally the same way this term is defined in rule 6e-2(c)(2), except that, consistent with the general design of flexible life, the requirement that the duration of the benefits may not vary with investment experience has been deleted.

Petitioner would define incidental insurance benefits as insurance benefits "lacking discrete cash values that vary" in accordance with investment experience (petition at 75). This approach, according to Petitioner, would permit incidental benefits the duration and amount of which may change with investment experience. Although it is, as noted above, consistent with the design of flexible life to permit the duration of incidental benefits to vary with investment experience, the petition does not explain why this design also necessitates that the amount of the benefits so vary nor does the petition define the concept of "discrete" cash values. Moreover, if the amount of an incidental benefit changes with investment experience, it is questionable whether such a benefit should be treated as "fixed" for purposes of the rule as suggested by Petitioner (*see* petition at 75). In light of these concerns, the Commission has not incorporated Petitioner's suggestion into the rule, although comment is requested on the matters raised above.

3. Paragraph (c)(3)—Definition of Guaranteed Death Benefit

The term "guaranteed death benefit" is defined generally as any amount guaranteed by the life insurer to be paid upon death without regard to the investment experience of the separate account. Although, as noted above in connection with the definition of a flexible contract (*see supra* note 65), a flexible contract is not required to include a guaranteed death benefit, this provision recognizes that life insurers nevertheless may elect to include this feature in their contracts. This definition corresponds to the definition of "minimum death benefit" in rule 6e-2(c)(3), and except for several non-substantive changes, it is identical to the definition suggested by Petitioner.

4. Paragraph (c)(4)—Definition of Sales Load

Similar to rule 6e-2(c)(4), this provision defines "sales load" for purposes of the rule as the difference between payments made and the sum of certain enumberated deductions deemed not to be sales load. Given the scheduled nature of payments under scheduled life, rule 6e-2(c)(4) measures sales load at the time payments are made. Because sales and other expenses under flexible contracts may not necessarily be deducted from payments, this provision measures sales load during a contract period, as defined in paragraph (c)(5) (*see* discussion in Section II.C.5., *infra*).

For the most part, the deductions are similar to those permitted by rule 6e-2(c)(4). This provision, however, differs from rule 6e-2(c)(4), and the suggested rule, in several respects. First, paragraph (c)(4)(i) refers to increases in cash value for that contract period that are "attributable to payments made" in order to exclude from sales load any increase in cash value attributable to a dividend accumulation.[66] Second, paragraph (c)(4)(ii) specifies the 1980 CSO Table for purposes of the cost of insurance deduction. Petitioner urges that the rule, like rule 6e-2, specify the 1958 CSO Table. The reason for this change is discussed in Section II.C.8., *infra*. Third, paragraph (c)(4)(vii) permits deduction of an additional charge in the nature of an interest charge when payments which may be required by the life insurer during the first two contract periods are made more frequently than annually but limits this charge to payments made to fulfill any minimum payment that may be required.[67] The suggested rule would incorporate the standard of rule 6e-2(c)(4)(viii), which permits deduction of an additional interest or service charge or administrative fee assessed when payments are made more frequently than annually. Although the interest portion of this type of deduction appears appropriate in the context of a scheduled contract, which is priced on the assumption of annual payments, it appears less relevant, and perhaps inappropriate, when the contract does not require scheduled payments. Accordingly, a deduction is permitted only when the life insurer, pursuant to paragraph (c)(1)(i), requires minimum payments during the first two contract periods.[68]

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[64] In the case of a flexible contract with an Option I death benefit, for example, the amount of the death benefit will vary based on investment experience only in the circumstances described *supra* note 33. Similarly, a flexible contract could guarantee that so long as the prescribed payments are paid, the contract will provide for a minimum death benefit. In such a case, while the amount of any death benefit in excess of the guaranteed death benefit would vary based on investment experience, the duration of that death benefit would vary only based on the incidence of the prescribed payments.

[65] As suggested by Petitioner (*see* petition at 34-35), the definition of a flexible contract does not require the contract to provide a guaranteed minimum death benefit of a stated amount as does rule 6e-2(c)(1)(ii).

[66] *See* discussion in Section II.A., *supra*.

[67] Thus, if a contract required a $1000 payment in the second year, and a contractholder made a $400 payment on January 1 (the normal due date) and a $750 payment on June 1, an interest charge would be placed on $600 ($1000 − $400 = $600). Because this charge is designed to compensate the life insurer for the time value of the money it anticipated collecting on the normal due date (January 1), no charge should be assessed against the first $400 payment, but only against $600 of the second payment which is the amount the life insurer anticipated receiving 5 months earlier.

[68] The deduction for an additional service charge or administrative fee in the case of frequent payments has not been included in this part of the definition because a deduction for these items would be allowed by paragraph (c)(4)(iv).

Finally, two changes suggested by Petitioner have not been incorporated into this definition. The first change concerns the rate of return assumed in calculating the deduction for dividends paid under a participating flexible contract. The suggested rule replaces the "gross annual investment return" standard of rule 6e–2(c)(4)(ix) with a "net investment earnings rate", thereby apparently permitting a greater dividend deduction (and correspondingly a higher sales load) than rule 6e–2.[69] This basis for this particular change is not discussed in the petition and appears unwarranted. Second, Petitioner's "catch-all" deduction for unforeseen fees and charges set forth in item (c)(4)(xii) of the suggested rule has not been incorporated into the rule. The Petitioner did not present adequate justification for this deduction and the Commission can see no need for it at this time.

5. Paragraph (c)(5)—Definition of Contract Period

As noted above, the rule makes frequent use of the term "contract period," which is defined by this provision generally as the period from a contract issue or anniversary date to the earlier of the next following anniversary date or the last day of the grace period. The language suggested by Petitioner has been modified slightly so as to clearly encompass the first year a contract is in effect.

6. Paragraph (c)(6)—Definition of Variable Death Benefit

This provision defines the term "variable death benefit" generally as the death benefit payable under a flexible contract which varies to reflect the investment experience of the separate account and which would be payable in the absence of any guaranteed death benefit. This term is used in paragraphs (c)(2) and (c)(4)(iii) of the rule and the definition is substantively identical to rule 6e–2(c)(6) and item (c)(6) of the suggested rule.

7. Paragraph (c)(7)—Definition of Payment

Like rule 6e–2(c)(7), paragraph (c)(7) defines "payment" in two ways depending on where it is used in the rule. Generally, "payment" means gross premiums paid. For purposes of calculating sales load and any refund, "payment" means gross premiums less certain charges for substandard risks, incidental insurance, or more frequent than annual payments. This bifurcated approach is intended to assure that the sales load and refund provisions will apply only to the amount of sales load charged for the variable benefits. Excluded for all purposes from the definition is that portion of the payment deducted by the insurer to recapture excess sales loading applied by the life insurer to maintain contract benefits pursuant to paragraph (b)(13)(iv)(B)(*2*).[70]

The rule does not incorporate Petitioner's suggestion that the three charges noted above be excluded from the definition of payment only if they are deducted from payments as they are made. Petitioner argues that this approach is necessary because where such charges are deducted from cash value, it would be impossible to attribute them to particular payments. Attribution is not necessary in this case, or generally for any purpose under the rule, however, because the rule uses the guideline annual premium, rather than payments made, as the concept against which to measure compliance. Moreover, Petitioner's suggestion would in effect permit different amounts of sales load to be deducted from identical flexible contracts based solely on the timing of the deduction of these three charges.[71]

8. Paragraph (c)(8)—Definition of Guideline Annual Premium

As noted above (*see* Section II.B.12.a., *supra*), the design of a flexible contract makes it necessary to create a concept corresponding to scheduled payments under rule 6e–2. This construct is the "guideline annual premium," which this paragraph defines generally as the level annual payment necessary to provide the future benefits under the contract through its maturity. Because it is a future-oriented concept, the guideline annual premium necessarily must include certain assumptions as to the timing and amount of payments. In the Commission's view, the assumptions used should be designed, to the maximum extent possible, to produce a guideline annual premium that could reasonably be expected to be paid by a purchaser of a flexible contract.

In defining the guideline annual premium, paragraph (c)(8)(i)(A) provides that payments are assumed to be fixed by the life insurer both as to timing and amount.[72] The timing of each payment is, of course, assumed to be annual, while the amount of each payment includes four additional assumptions specified by paragraph (c)(8)(i)(B). They are: (1) Payments are based on the 1980 CSO Table; (2) net investment earnings are earned at the greater of 5% or the rate specified in the contract at issuance; (3) sales load is deducted at the rate specified in the contract; and (4) various fees and charges under the contract are deducted at rates specified in the contract.[73]

The definition is similar to that suggested by Petitioner, except it uses different assumptions for the CSO Table used [74] and net investment earnings.[75] The practical effect of not using Petitioner's assumptions is that the rule permits a smaller guideline annual premium than would be permitted by the suggested rule. The Commission believes this is appropriate because Petitioner's assumptions result in a guideline annual premium that exceeds the amount that could reasonably be expected to be paid by a purchaser of a flexible contract, as discussed below.

Petitioner's definition of the guideline annual premium is "derived from" section 101(f) (now section 7702) of the Code (petition at 45) which, as relevant here, prescribes the *maximum* amount which may be paid under a flexible contract and still allow it to be taxed as "life insurance." [76] Since the Code prescribes a *maximum* amount, it seems unlikely at best that a contractholder could reasonably be expected to make payments in excess of the Code limitation, even assuming that the life insurer would permit such payments, because to do so would put the tax status of the contract in jeopardy. Yet Petitioner's formulation of the guideline annual premium in fact produces a

[69] The assumed gross annual investment return used in calculating this deduction has been increased from 4% to %5 to reflect a more reasonable expectation of return. *See* discussion in Section II.C.8., *infra*.

[70] This treatment is necessary to ensure that the recaptured sales load will not be treated as "new" sales load. The circumstances under which sales load may be recaptured are described in Section II.B.12.d., *supra*.

[71] In addition, since the Commission, as noted above (*see* Section II.C.4, *supra*), has not incorporated Petitioner's "catch-all" deduction into the rule, the suggested rules's reference to that charge has not been included in this provision.

[72] The amount of each payment is equal to the payment that would be required under a comparable scheduled contract.

[73] A life insurer offering a scheduled contract would make assumptions concerning these four items in formulating the amount of each scheduled payment under the contract.

[74] The suggested rule assumes payments are based on the 1958 CSO Table.

[75] The suggested rule assumes net investment earnings at 4%.

[76] *See supra* note 16. When it originally incorporated the guideline annual premium concept into the Code, Congress explained that its purpose was to prevent flexible contracts that were "overly investment oriented." *S. Comm. on Finance Report on the Tax Equity and Fiscal Responsibility Act of 1982*, S. Rep. No. 494, 97th Cong., 2d Sess. 352–53 (1982) (Vol. 1).

guideline annual premium that is greater than the amount permitted to be paid by the Code. This is because Petitioner's guideline annual premium, although identical in all other respects to the corresponding Code concept, uses different assumptions for the CSO Table [77] and net investment earnings [78] that produce a larger guideline annual premium. The practical effect of these differences is that the suggested rule permits compliance with the sales load limitation to be measured against a guideline annual premium that would not, and in fact under the Code could not, reasonably be expected to be paid by a flexible contractholder. Formulating the guideline annual premium in this manner, in the Commission's view, would be inconsistent with the protection of investors and the policy and provisions of the Act.

On the other hand, merely to conform the assumptions used in the rule to those in the Code similarly would not produce a guideline annual premium approaching reasonable expectations. As noted above, the Code prescribes the *maximum* amount which a contractholder may pay. If the definition of guideline annual premium in the rule incorporated the same assumptions as are used in the Code, it would produce a guideline annual premium that would be based on the questionable assumption that an insurer could reasonably anticipate the contractholder paying the maximum amount permitted by the Code. While the Commission has accepted the Code-derived guideline annual premium concept as an appropriate tool for measuring permissible sales load, the differing purposes and objectives of the Code and the Act preclude using the same assumptions in actually calculating the guideline annual premium.

The Commission believes that, on balance, use of the 1980 CSO Table and the 5% net investment rate assumptions produces a reasonable guideline annual premium against which to measure sales load compliance. Notwithstanding Petitioner's assertion that the 1958 CSO Table "remains the standard mortality table in use in the insurance industry today" (petition at 37), the 1980 CSO Table is the standard which most closely reflects the actual mortality experience upon which flexible life will be priced. In fact, a number of life insurers already are using this table and, as Petitioner points out, it will become mandatory in 1989 (*see* petition at 38). Regarding the net investment rate assumption, any particular rate of return necessarily must be somewhat arbitrary. The 5% rate, however, is within the range of assumed rates specified in the Code and is itself a conservative estimate of long-term investment performance.[79] In the Commission's view, these factors support use of the 1980 CSO Table and the 5% net investment rate assumptions to limit the guideline annual premium to an amount that can reasonably be expected to be paid by purchasers of flexible life.

As discussed above, the 1980 CSO Table has been specified in four places in the rule.[80] The Commission believes this treatment is appropriate in light of its primary decision to use the 1980 CSO Table in the definition of guideline annual premium. It must be emphasized, however, that in specifying the 1980 CSO Table in the rule, the Commission is not attempting to require life insurers to use that table for insurance-related purposes such as calculating the cost of insurance or valuing reserves. Rather, in the four places where the 1980 CSO Table is specified, it is for the sole purpose of providing an assumption for purposes of calculating sales load under the rule.

In addition to the matters discussed above, several other changes have been made to Petitioner's suggested definition of guideline annual premium. First, the terminology used to describe the maturity date for purposes of the guideline annual premium and the guideline single premium (*see* Section II.C.9., *infra*) has been standardized through a common cross-reference to the description in paragraph (c)(8)(ii)(B). Second, the initial sentence of paragraph (c)(8)(ii) has been revised to provide that the provisions of that part of the rule are designed to clarify the "future benefits under the contract" referred to in the introductory language of paragraph (c)(8)(i).[81]

9. Paragraph (c)(9)—Definition of Guideline Single Premium

The term "guideline single premium" is designed as the single amount payable which would provide the future benefits under the contract until maturity. Otherwise, this amount is computed on the same basis as the guideline annual premium.

10. Paragraph (c)(10)—Definition of Cash Value

"Cash Value" is defined generally as the amount available in cash upon a voluntary termination of a contract, without regard to termination charges or deduction for any policy loans. The language used is substantively identical to the corresponding item in the suggested rule.

11. Paragraph (c)(11)—Definition of Cash Surrender Value

"Cash surrender value" is defined essentially as the cash value of a contract less any sales load or other charges that may be deducted upon redemption. It is a companion provision to the definition of cash value (*see* Section II.C.10., *supra*). The definition is substantively identical to the corresponding item of the suggested rule.

12. Paragraph (c)(12)—Definition of Net Investment Earnings

The term "net investment earnings" is used in paragraphs (c)(4)(i) and (c)(8)(i)(B) of the rule and is defined as investment earnings in the separate account after deduction of any asset charges. It is similar to the corresponding item of the suggested rule, with certain modifications. First, the phrase "interest rate guarantees" has been deleted from the list of examples of asset charges to compute net investment earnings because this concept is not explained in the petition

[77] The suggested rule specifies the 1958 CSO Table irrespective of whether that table or the 1980 CSO Table is actually used in the contract design whereas section 7702 requires use of the same table that is guaranteed under the contract.

[78] The suggested rule assumes net investment earnings at the annual effective rate of 4% whereas section 7702 assumes: (1) The greater of 4% or the minimum rate or rates guaranteed upon issuance of the contract for purposes of the Code concept corresponding to the guideline annual premium, and (2) the greater of 6% or the minimum rate of issuance for purposes of the Code concept which corresponds to the guideline single premium used in this rule (*see* discussion in section II.C.9., *infra*).

[79] For example, the rate of return for an unmanaged portfolio of common stocks averaged 12.2% for the 32 20-year periods commencing December 31, 1925 through December 31, 1956. L. Fisher & J. Lorrie, *A Half Century of Returns on Stocks and Bonds* 24–25 (1977). A 5% return was exceeded in all but two of these 32 periods.

[80] See paragraphs (b)(13)(i), (c)(4)(ii), (c)(8)(i)(B) and (d)(1)(i).

[81] In addition, the references to permissible charges in paragraph (c)(8)(i)(B) does not include item (c)(4)(xii) of the suggested rule which, as discussed above (*see* Section II.C.4., *supra*), has not been incorporated into the rule. In addition, this paragraph includes a deduction for item (c)(4)(viii) (a charge where payments are made more frequently than annually, *see* Section II.C.4., *supra*) of the suggested rule only during the first two years of the contract because this is the only period during which such a charge may be made (*see* Section II.C.1., *supra*). A deduction for item (x) has not been included in the rule because it is unclear why the definition of sales load under a participating flexible contract should include a deduction for amounts that in fact will be credited to the contract. Comment on the latter matter is requested.

and its relevance to flexible life is not readily apparent. Second, the last clause of the definition has been clarified to specifically exclude deductions for sales load in the form of asset charges. Finally, this paragraph specifically excludes for purposes of the definition of sales load in paragraph (c)(4) any asset charge deducted pursuant to paragraphs (c)(4)(ii)–(viii) in order to prevent double-counting of any such charges.

13. Paragraph (c)(13)—Definition of Contract Processing Day

The term "contract processing day" is used several times in paragraph (b)(13) and this provision defines it as any day on which charges under the contract are deducted from the separate account.[82]

D. *Paragraph (d)—The Computational Rules.* Paragraph (d) sets forth several computational rules to be used in applying rule 6e-3(T). These computational rules have no counterpart in rule 6e-2, and are based largely on the suggested rule, with certain modifications discussed below.

1. Paragraph (d)(1)—Subsequent Sales Loads

As discussed above (*See* Section II.B.12.a., *Supra*), the rule provides generally that sales load imposed on a flexible contract may not exceed 9% of the sum of twenty guideline annual premiums. This provision permits sales load to be deducted other than from payments, *i.e.*, as a subsequent sale load.[83] This paragraph essentially provides that the 9% limit on sales load shall be deemed satisfied with respect to any subsequent sales load if the amount of sales load deducted (together with any front-end load that may have been deducted previously) is not more than the amount that could have been deducted as a front-end sales load.[84]

Paragraph (d)(1)(ii) provides relief from the "stair step" requirements of section 27 for subsequent sales loads and corresponds to the relief provided by paragraph (b)(13)(ii) for front-end sales loads (*see* discussion in Section II.B.12.b., *supra*). It provides that the amount of any subsequent sales load deducted shall not exceed the proportionate amount of sales load previously deducted pursuant to the same method.[85]

Petitioner suggests an "economic value approach" in determining whether a subsequent sales load satisfies the rule's sales load requirements. Under this approach, any subsequent sales load would be permitted so long as the contractholder would be in the same financial condition as would have resulted from a completely front-end sales loaded contract (*see* petition at 60). Petitioner acknowledges that this approach would not preclude the possibility that sales load would exceed 9% of twenty guideline payments because the life insurer would be entitled, in effect, to receive the benefit of positive investment experience (*see* petition at 58).

Petitioner's "economic value approach", however, is inconsistent with the conditions under which both variable annuity and scheduled life issuers have been permitted to impose a subsequent sales load. Consistent with section 27 of the Act, permissible sales load in all such cases has been limited to 9% of payments, and the Commission codified this condition for variable annuity separate accounts imposing a deferred sales load in rule 6c–8(b)(1) under the Act [17 CFR 270.6c–8(b)(1)]. Moreover, while a deferred load could be considered a deterrent to redemption that is inconsistent with the intent of section 22(e) of the Act, relief to deduct a deferred load has been deemed appropriate in part because deferring the sales load benefits investors by permitting them to receive any positive investment experience on the portion of the sales load which is deferred. Under Petitioner's approach, however, the life insurer, rather than the contractholder, would be the primary beneficiary of any such positive investment experience.[86] Because the petition offers no persuasive arguments to support reversal of the Commission's long-standing position, and does not justify why issuers of flexible contracts should be treated differently from other issuers, this change has not been incorporated into the rule.[87]

2. Paragraph (d)(2)—Sales Load on Changes on Contract Benefits

This paragraph prescribes the computational rules to be used in determining whether the sales load on an increase in or an addition of insurance benefits requested by a contractholder after issuance of the contract complies with the requirements of the rule. Paragraph (d)(2)(i) permits sales load in such a case provided that during each contract period it does not exceed the sales load that would be permissible under the "base test contract" and the "incremental test contract," and that the total sales load does not exceed the sum of the corresponding loads under these test.[88]

Generally speaking, paragraph (d)(2)(iii)(B) defines the base test contract as the actual contract before the increase or charge occurred, while paragraph (d)(2)(iii)(C) defines the incremental test contract as the actual contract after the increase or charge. Included in the definition of the latter test is a requirement that the amount of sales load deducted shall not exceed 50% of the amount otherwise permitted by the rule and an exemption from the surrender, conversion, and withdrawal provisions set forth in paragraphs (b)(13)(v)(A), (b)(13)(v)(B), and (b)(13)(viii). On the other hand, if the increase or change is subject to those provisions, the proviso to paragraph (d)(2)(iii)(C) permits 100% of the sales load otherwise permitted by the rule to be deducted.[89]

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[82] Petitioner also requests that the Commission include in the rule a provision which would define the term "insurance company," as otherwise defined by section 2(a)(17) of the Act [15 U.S.C. 80a-2(a)(17)], to include life insurers whose primary business is the writing of flexible or scheduled life. Because this request raises issues applicable to insurers offering any type of variable insurance product, the Commission does not believe it is appropriate to address this matter in a flexible life rule.

[83] As discussed *supra* at note 16, the petition identifies three types of subsequent sales load that are expected to be imposed on flexible contracts: (1) A deferred sales load upon full or partial redemption; (2) a periodic deduction directly from a contract's cash value; or (3) a combination of (1) and (2) (*see* petition at 57).

[84] Paragraph (d)91)(i) is the operative provision. It contains two assumptions which have the effect of permitting the amount of a subsequent load to be calculated on the assumption that a payment in the amount of a guideline annual premium or a guideline single premium had been made during each contract period even if one had not been made.

[85] For example, if a contract were subject to both a daily charge for sales load and a deferred sales load, the amount of any daily charge could not exceed the proportionate amount of any prior daily charge and the amount of any deferred sales load could not exceed the proportionate amount of any prior deferred sales load. On the other hand, the amount of any deferred sales load could exceed any daily charge, and vice versa.

[86] While permitting the life insurer to be the primary beneficiary of positive investment experience, Petitioner's approach would not require the life insurer to assume the risk of negative investment experience.

[87] Since the rule does not incorporate Petitioner's "economic value approach," any life insurer deducting sales load periodically from cash value must monitor the aggregate amount of sales load deducted in order to ensure it does not exceed the 9% limitation on sales load.

[88] Paragraph (d)(2)(ii) prescribes certain assumptions regarding payments and redemptions to be used in applying paragraph (d)(2)(i). As suggested by Petitioner, the two tests "together test representative payment patterns and otherwise police abuses contrary to the purpose and policies of the 1940 Act" (petition supplement at 15).

[89] The reference to paragraph (d)(1)(ii) in the first sentence of paragraph (d)(2)(i) has the effect of permitting the "stair step" requirement of the rule and Act (*see* discussion in Section II.D.1., *supra*) to be applied independently to any subsequent sales load imposed in connection with an addition of an

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Finally, paragraph (d)(2)(iii)(D) specifically precludes reliance on this provision in connection with any automatic changes in insurance benefits, regardless of whether the contractholder has the opportunity to disapprove such changes, and any exchange of one type of flexible contract for another, such as a change from an Option I to an Option II contract.

Petitioner's suggested rule differs from these requirements in three respects. First, the suggested rule incorporates Petitioner's "economic value approach" (*see* discussion in Section II.D.1., *supra*) in the item corresponding to paragraph (d)(2)(i)(A) of the rule. In light of the Commission's decision not to incorporate that approach elsewhere in the rule, it has not been incorporated here.

Second, Petitioner's definition of the incremental test contract would permit life insurers to deduct a full sales load on any increase or change under a contract while at the same time dispensing with any surrender, conversion, or free look right. Petitioner's arguments in favor of this treatment do not, in the Commission's view, support the requested relief. The petition states that these rights are not necessary in the case of an increase or change because these actions involve an adjustment to an existing contract with which the contractowner "is presumably experienced and satisfied" (petition supplement at 19). On the other hand, this same familiarity with the contract apparently does not affect the need for a full sales load because, according to Petitioner, the sales effort "usually will involve additional sales effort * * * [which] will approach, and in some cases be equivalent to, the sales effort required for a new sale * * * " (petition supplement at 6–7). The Commission believes that if a full sales load is to be imposed on an increase or change, the surrender, conversion, and free look rights ought to be provided to the contractholder, but that the need for these protections diminishes to the extent that less than a full sales load may be deducted. On balance, the Commission believes the approach of paragraph (d)(2)(iii) discussed above is a reasonable compromise in this regard.

One of Petitioner's arguments in support of a full sales load on an increase or change is of particular concern to the Commission. Petitioner implies that if the rule permits less than a full sales load, the commissions paid to sales personnel will be correspondingly decreased and thus sales personnel will have an incentive to approach contractholders "and suggest the purchase of a second policy where an increase or addition would be suitable, thereby earning the higher commission" (petition supplement at 7). While the Commission recognizes that sales practices and commission schedules for flexible life are not the immediate subject of this rule, in its view the practice described above would be inconsistent with the standards of conduct expected of persons selling insurance or any other products subject to the federal securities laws.

Finally, Petitioner would permit sales load to be imposed on two types of increases or changes specifically excluded by paragraph (d)(2)(iii)(D) of the rule. Regarding sales load on automatic changes not specifically declined by the contractholder, a grant of additional relief does not seem appropriate because it appears that any sales effort in connection with such an adjustment would be minimal. Regarding sales load on changes from a contract with an Option I death benefit to one with an Option II death benefit (*see* Section I, *supra*), the basis for Petitioner's proposed method of making the change, which appears highly disadvantageous to the contractholder, is not explained or justified and thus has not been incorporated into the rule.

List of Subjects in 17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rule 6e-3(T) and Amendments to Rule 6c-3 and Form N-6EI-1

PART 270—[AMENDED]

Part 270 of Chapter II of Title 17 of the Code of Federal Regulations is amended as follows:

1. By adding new § 270.6e-3(T) to read as follows:

§ 270.6e-3(T) Temporary exemptions for flexible premium variable life insurance separate accounts.

(a) A separate account, and its investment adviser, principal underwriter and depositor, shall, except as provided in paragraph (b) of this Rule, comply with all provisions of the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] and the rules under it that apply to a registered investment company issuing periodic payment plan certificates if:

(1) It is a separate account within the meaning of section 2(a)(37) of the Act [15 U.S.C. 80a-2(a)(37)] and is established and maintained by a life insurance company pursuant to the insurance laws or code of (i) any state or territory of the United States or the District of Columbia, or (ii) Canada or any province thereof, if it complies with Rule 7d-1 [17 CFR 270.7d-1] under the Act (the "life insurer"):

(2) The assets of the separate account are derived solely from (i) the sale of flexible premium variable life insurance contracts ("flexible contracts") as defined in paragraph (c)(1) of this Rule, (ii) the sale of scheduled premium variable life insurance contracts ("scheduled contracts") as defined in paragraph (c)(1) of Rule 6e-2 [17 CFR 270.6e-2] under the Act, (iii) funds corresponding to dividend accumulations with respect to such contracts, and (iv) advances made by the life insurer in connection with the operation of such separate account;

(3) The separate account is not used for variable annuity contracts or other contract liabilities not involving life contingencies;

(4) The separate account is legally segregated, and that part of its assets with a value approximately equal to the reserves and other contract liabilities for such separate account are not chargeable with liabilities arising from any other business of the life insurer;

(5) The value of the assets of the separate account, each time adjustments in the reserves are made, is at least equal to the reserves and other contract liabilities of the separate account, and at all other times approximately equals or exceeds the reserves and liabilities; and

(6) The investment adviser of the separate account is registered under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.].

(b) A separate account that meets the requirements of paragraph (a) of this Rule, and its investment adviser, principal underwriter and depositor shall be exempt with respect to flexible contracts funded by the separate account from the following provisions of the Act:

(1) Section 2(a)(35) [15 U.S.C. 80a-2(a)(35)], *Provided, however*, That the term "sales load," as used in the Act and rules under it, shall have the meaning set forth in paragraph (c)(4) of this Rule. *And provided further*, That in connection with any sales load deducted pursuant to paragraph (d)(2) of this Rule, the separate account and other persons shall be exempt from Sections 2(a)(32) [15 U.S.C. 80a-2(a)(32)], 12(b) [15 U.S.C. 80a-12(b)], 22(c) [15

insurance benefit requested by a contractholder. Thus, the proportionate amount of sales load deducted upon an addition may not exceed the proportionate amount deducted in connection with a prior addition.

U.S.C. 80a-22(c)], 26(a) [15 U.S.C 80a-26(a)], 27(c)(1) [15 U.S.C. 80a-27(c)(1)], and 27(d) [15 U.S.C. 80a-27(d)] and Rules 12b-1 [17 CFR 270.12b-1] and 22c-1 [17 CFR 270.22c-1].

(2) Section 7 [15 U.S.C. 80a-7].

(3) Section 8 [15 U.S.C. 80a-8], to the extent that:

(i) For purposes of paragraph (a) of Section 8, the separate account shall file with the Commission a notification on Form N-6EI-1 [17 CFR 274.301] which identifies the separate account; and

(ii) For purposes of paragraph (b) of Section 8, the separate account shall file with the Commission the form designated by the Commission within ninety days after filing the notification on Form N-6E-1, *Provided, however,* That if the fiscal year of the separate account ends within this ninety day period, the form may be filed within ninety days after the end of such fiscal year.

(4) Section 9 [15 U.S.C. 80a-9], to the extent that:

(i) The eligibility restrictions of Section 9(a) shall not apply to persons who are officers, directors or employees of the life insurer or its affiliates and who do not participate directly in the management or administration of the separate account or in the sale of flexible contracts; and

(ii) A life insurer shall be ineligible under paragraph (3) of Section 9(a) to serve as investment adviser, depositor of or principal underwriter for the separate account only if an affiliated person of such life insurer, ineligible by reason of paragraph (1) or (2) of Section 9(a), participates directly in the management or administration of the separate account or in the sale of flexible contracts.

(5) Section 13(a) [15 U.S.C. 80a-13(a)], to the extent that:

(i) An insurance regulatory authority may require pursuant to insurance law or regulation that the separate account make (or refrain from making) certain investments which would result in changes in the sub-classification or investment policies of the separate account;

(ii) Changes in the investment policy of the separate account initiated by its contractholders or board of directors may be disapproved by the life insurer, if the disapproval is reasonable and is based on a good faith determination by the life insurer that:

(A) The change would violate state law; or

(B) The change would not be consistent with the investment objectives of the separate account or would result in the purchase of securities for the separate account which vary from the general quality and nature of investments and investment techniques used by other separate accounts of the life insurer or of an affiliated life insurance company with similar investment objectives;

(iii) Any action described in paragraph (b)(5) (i) or (ii) of this Rule and the reasons therefor shall be disclosed in the proxy statement for the next meeting of contractholders.

(6) Section 14(a) [15 U.S.C. 80a-14(a)], *Provided,* That until the separate account has total assets of at least $100,000, the life insurer shall have (i) a combined capital and surplus, if a stock company, or (ii) an unassigned surplus, if a mutual company, of not less than $1,000,000 as set forth in the balance sheet of such life insurer contained in the registration statement for flexible contracts filed under the Securities Act of 1933 [15 U.S.C. 77a et seq.] (the "1933 Act").

(7)(i) Section 15(a) [15 U.S.C. 80a-15(a)], to the extent it requires that the initial written contract with the investment adviser shall have been approved by the vote of a majority of the outstanding voting securities of the registered investment company, *Provided,* That:

(A) The investment adviser is selected and a written contract is entered into before the effective date of the 1933 Act registration statement for flexible contracts, and that the terms of the contract are fully disclosed in the registration statement, and

(B) A written contract is submitted to a vote of contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement, unless the Commission upon written request and for good cause shown extends the time for the holding of such meeting;

(ii) Sections 15 (a), (b) and (c), to the extent that:

(A) An insurance regulatory authority may disapprove pursuant to insurance law or regulation any contract between the separate account and an investment adviser or principal underwriter;

(B) Changes in the principal underwriter for the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided,* That such disapproval is reasonable;

(C) Changes in the investment adviser of the separate account initiated by contractholders or the board of directors of the separate account may be disapproved by the life insurer, *Provided,* That such disapproval is reasonable and is based on a good faith determination by the life insurer that:

(*1*) The proposed investment advisory fee will exceed the maximum rate specified in any flexible contract that may be charged against the assets of the separate account for such services; or

(*2*) The proposed investment adviser may be expected to employ investment techniques which vary from the general techniques used by the current investment adviser to the separate account, or advise the purchase or sale of securities which would not be consistent with the investment objectives of the separate account, or which would vary from the quality and nature of investments made by other separate accounts with similar investment objectives of the life insurer or an affiliated life insurance company;

(D) Any action described in paragraph (b)(7)(ii) (A), (B) or (C) of this Rule and the reasons for it shall be disclosed in the proxy statement for the next meeting of contractholders.

(8) Section 16(a) [15 U.S.C. 80a-16(a)], to the extent that:

(i) Directors of the separate account serving before the first meeting of the account's contractholders are exempt from the requirement of Section 16(a) that they be elected by the holders of outstanding voting securities of the account at an annual or special meeting called for that purpose, *Provided,* That:

(A) Such persons were appointed directors of the account by the life insurer before the effective date of the 1933 Act registration statement for flexible contracts and are identified in the registration statement (or are replacements appointed by the life insurer for any such persons who have become unable to serve as directors), and

(B) An election of directors for the account is held at the first meeting of contractholders and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by the Commission upon written request and for good cause shown;

(ii) A member of the board of directors of the separate account may be disapproved or removed by an insurance regulatory authority if the person is not eligible to be a director of the separate account under the law of the life insurer's domicile.

(9) Section 17(f) [15 U.S.C. 80a-17(f)], to the extent that the securities and similar investments of a separate account organized as a management investment company may be maintained in the custody of the life insurer or of an affiliated life insurance company, *Provided,* That:

(i) The securities and similar investments allocated to the separate account are clearly identified as owned by the account, and the securities and similar investments are kept in the vault of an insurance company which meets the qualifications in paragraph (b)(9)(ii) of this Rule, and whose safekeeping function is supervised by the insurance regulatory authorities of the jurisdiction in which the securities and similar investments will be held;

(ii) The insurance company maintaining such investments must file with an insurance regulatory authority of a state or territory of the United States or the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, must be subject to supervision and inspection by such authority and must be examined periodically as to its financial condition and other affairs by such authority, must hold the securities and similar investments of the separate account in its vault, which vault must be equivalent to that of a bank which is a member of the Federal Reserve System, and must have a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than $1,000,000 as set forth in its most recent annual statement filed with such authority;

(iii) Access to such securities and similar investments shall be limited to employees of the Commission, representatives of insurance regulatory authorities, independent public accountants retained by the separate account (or on its behalf by the life insurer), accountants for the life insurer, and to no more than 20 persons authorized by a resolution of the board of directors of the separate account, which persons shall be directors of the separate account, officers and responsible employees of the life insurer or officers and responsible employees of the affiliated life insurance company in whose vault the investments are kept (if applicable), and access to such securities and similar investments shall be had only by two or more such persons jointly, at least one of whom shall be a director of the separate account or officer of the life insurer;

(iv) The requirement in paragraph (b)(9)(i) of this Rule that the securities and similar investments of the separate account be maintained in the vault of a qualified insurance company shall not apply to securities deposited with insurance regulatory authorities or deposited in accordance with any rule under Section 17(f), or to securities on loan which are collateralized to the extent of their full market value, or to securities hypothecated, pledged, or placed in escrow for the account of such separate account in connection with a loan or other transaction authorized by specific resolution of the board of directors of the separate account, or to securities in transit in connection with the sale, exchange, redemption, maturity or conversion, the exercise of warrants or rights, assents to changes in terms of the securities, or to other transactions necessary or appropriate in the ordinary course of business relating to the management of securities;

(v) Each person when depositing such securities or similar investments in or withdrawing them from the depository or when ordering their withdrawal and delivery from the custody of the life insurer or affiliated life insurance company, shall sign a notation showing (A) the date and time of the deposit, withdrawal or order, (B) the title and amount of the securities or other investments deposited, withdrawn or ordered to be withdrawn, and an identification thereof by certificate numbers or otherwise, (C) the manner of acquisition of the securities or similar investments deposited or the purpose for which they have been withdrawn, or ordered to be withdrawn, and (D) if withdrawn and delivered to another person, the name of such person. The notation shall be sent promptly to an officer or director of the separate account or the life insurer designated by the board of directors of the separate account who is not himself permitted to have access to the securities or investments under paragraph (b)(9)(iii) of this Rule. The notation shall be on serially numbered forms and shall be kept for at least one year;

(vi) The securities and similar investments shall be verified by complete examination by an independent public accountant retained by the separate account (or on its behalf by the life insurer) at least three times each fiscal year, at least two of which shall be chosen by the accountant without prior notice to the separate account. A certificate of the accountant stating that he has made an examination of such securities and investments and describing the nature and extent of the examination shall be sent to the Commission by the accountant promptly after each examination;

(vii) Securities and similar investments of a separate account maintained with a bank or other company whose functions and physical facilities are supervised by federal or state authorities under any arrangement whereby the directors, officers, employees or agents of the separate account or the life insurer are authorized or permitted to withdraw such investments upon their mere receipt are deemed to be in the custody of the life insurer and shall be exempt from the requirements of section 17(f) so long as the arrangement complies with all provisions of this paragraph (b)(9), except that such securities will be maintained in the vault of a bank or other company rather than the vault of an insurance company.

(10) Section 18(i) [15 U.S.C. 80a-18(i)], to the extent that:

(i) For the purposes of any section of the Act which provides for the vote of securityholders on matters relating to the investment company:

(A) Flexible contractholders shall have one vote for each $100 of cash value funded by the separate account, with fractional votes allocated for amounts less than $100;

(B) The life insurer shall have one vote for each $100 of assets of the separate account not otherwise attributable to contractholders under paragraph (b)(10)(i)(A) of this Rule, with fractional votes allocated for amounts less than $100, *Provided*, That after the commencement of sales of flexible contracts, the life insurer shall cast its votes for an against each matter which may be voted upon by contractholders in the same proportion as the votes cast by contractholders; and

(C) The number of votes to be allocated shall be determined as of a record date not more than 90 days before any meeting at which such vote is held, *Provided*, That if a quorum is not present at the meeting, the meeting may be adjourned for up to 60 days without fixing a new record date;

(ii) The requirement of this section that every share of stock issued by a registered management investment company (except a common-law trust of the character described in section 16(c) [15 U.S.C. 80a-16(c)]) shall be a voting stock and have equal voting rights with every other outstanding voting stock shall not be deemed to be violated by actions specifically permitted by any provisions of this Rule.

(11) Section 19 [15 U.S.C. 80a-19], to the extent that the provisions of this section shall not apply to any dividend or similar distribution paid or payable under provisions of participating flexible contracts.

(12) Sections 22(d) [15 U.S.C. 80a-22(d)], 22(e) [15 U.S.C. 80a-22(e)], and 27(c)(1) and Rule 22c-1, to the extent:

(i) That the death benefit and cash value of each flexible contract shall be determined:

(A) No less frequently than once daily on each day (other than a day on which no payment or request for redemption is received by the separate account) in which there is a sufficient degree of trading in the portfolio securities of the separate account that the cash value of the contracts might be materially affected; and

(B) At such specific time during the day as determined by a majority of the board of directors of the separate account no less frequently than annually; *Except*, That:

(*1*) To the extent that the calculation of the cash value reflects deductions for the cost of insurance and other insurance benefits or administrative expenses and fees or sales load, such deductions need only be made at such times as specified in the contract or as necessary for compliance with insurance laws and regulations; and

(*2*) Unless required by insurance laws and regulations, the death benefit need not be calculated on any day that the investment experience of the separate account would not affect the death benefit;

(ii) Necessary to comply with this Rule or with insurance laws and regulations and established administrative procedures of the life insurer for issuance, transfer and redemption of flexible contracts, including, but not limited to, premium rate structure and premium processing, insurance underwriting standards, and the particular benefit afforded by the contract, *Provided, however*, That any procedure or action shall be reasonable, fair and not discriminatory to the interests of the affected contractholders and to all other holders of contracts of the same class or series funded by the separate account, *And provided further*, That any such action shall be disclosed in the form filed by the separate account with the Commission under paragraph (b)(3)(ii) of this Rule.

(13) Section 27 [15 U.S.C. 80a–27], to the following extent:

(i) Section 27(a)(1) [15 U.S.C. 80a–27(a)(1)], 27(h)(1) [15 U.S.C. 80a–27(h)(1)], and 27(h)(4) [15 U.S.C. 80a–27(h)(4)], to the extent that sales load, as defined in paragraph (c)(4) of this Rule, deducted does not exceed that permitted by either subparagraph (A) or (B) below:

(A) 9 per centum of the sum of the guideline annual premiums that would be paid during the period equal to the lesser of 20 years or the anticipated life expectancy of the insured named in the contract based on the 1980 Commissioners Standard Ordinary Mortality Table, *Provided*, That this subparagraph (b)(13)(i)(A) shall not prohibit deduction of sales load, in any manner permitted by this Rule, from payments made in excess of the sum of the guideline annual premiums that would be paid during the lesser of 20 years or the anticipated life expectancy of the insured based on the 1980 Commissioners Standard Ordinary Mortality Table; or

(B) 9 per centum of payments made thereon; *Provided*, That the separate account elects by written notice to the Commission to be governed (with respect to each class of flexible contract offered) by either subparagraph (b)(13)(i)(A) or (B).

(ii) Sections 27(a)(3) [15 U.S.C. 80a–27(a)(3)] and 27(h)(3) [15 U.S.C. 80a–27(h)(3)], *Provided*, That the proportionate amount of sales load deducted from any payment shall not exceed the proportionate amount deducted from any prior payment unless an increase is caused by the grading of cash surrender values into reserves or reductions in the annual cost of insurance;

(iii) Sections 27(c)(2) [15 U.S.C. 80a–27(c)(2)], 26(a)(1) [15 U.S.C. 80a–26(a)(1)], and 26(a)(2) [15 U.S.C. 80a–26(a)(2)], to the extent necessary to permit the actions described in paragraphs (A) through (F) of this section, *Provided*, That the life insurer complies with all other applicable provisions of section 26 as if it were a trustee, depositer or custodian for the separate account; files with the insurance regulatory authority of a state or territory of the United States or of the District of Columbia an annual statement of its financial condition in the form prescribed by the National Association of Insurance Commissioners, which most recent statement indicates that it has a combined capital and surplus, if a stock company, or an unassigned surplus, if a mutual company, of not less than $1,000,000; and is examined from time to time by the insurance regulatory authority of such state, territory or District of Columbia as to its financial condition and other affairs and is subject to supervision and inspection with respect to its separate operations.

(A) Payment of a fee to the life insurer, or to any affiliated person or agent of the insurer, for bookkeeping or other administrative services provided to the separate account, *Provided*, That the fee is not greater than the expenses, without profit: (*1*) Actually paid by the life insurer for the services provided and (*2*) increased by the value of any services provided directly by the life insurer, as determined in accordance with generally accepted accounting principles consistently applied. The standard set forth in this paragraph shall be applied as follows: if the separate account reserves the right to increase the fee, the fee shall not exceed the cost of the services to be provided for one year; or if the fee is guaranteed not to increase for a specified period of time, the fee shall not exceed the average expected cost of the services to be provided during the period of the guarantee;

(B) The holding of the assets of the separate account by the life insurer without a trust indenture or other such instrument;

(C) When the separate account is organized as a unit investment trust, the holding of the securities of any registered management investment company which offers its shares to the separate account in uncertificated form;

(D) When the separate account is organized as a management investment company, the holding of its assets in any manner permitted by paragraph (b)(9) of this Rule or by section 17(f) or the rules under it;

(E) The deduction of premium taxes imposed by any state or other governmental entity, the cost of insurance, and, if the separate account is organized as a management investment company, an investment advisory fee;

(F) The deduction of a charge for mortality, expense, and any guaranteed death benefit risks assumed by the life insurer under the flexible contracts (collectively, a "risk charge"), *Provided*, That the registration statement under the 1933 Act for flexible contracts includes:

(*1*) A representation that this section is being relied on;

(*2*) A representation that the level of the risk charge either is:

(*i*) Within the range of industry practice for comparable flexible or scheduled contracts, or

(*ii*) Reasonable in relation to the risks assumed by the life insurer under the contracts;

(*3*) A brief description of the methodology used to support the representation made in response to paragraph (b)(13)(iii)(F)(*2*) of this Rule and an undertaking to keep and make available to the Commission on request the documents used to support that representation;

(*4*) A representation that either:

(*i*) The proceeds from explicit sales loads will cover the expected costs of distributing the flexible contracts; or

(*ii*) (*A*) The life insurer has concluded that there is a reasonable likelihood that the distribution financing arrangement of the separate account will benefit the separate account and contractholders and will keep and make available to the Commission on request a memorandum setting forth the basis for this representation; and

(*B*) (*1*) If the separate account is organized as a management investment company, a representation that the account will have a board of directors, a majority of whom are not interested persons of the separate account, formulate and approve any plan under Rule 12b–1 to finance distribution expenses; or

(*2*) If the separate account is organized as a unit investment trust, a representation that the account will invest only in management investment companies which have undertaken to have a board of directors, a majority of whom are not interested persons of the company, formulate and approve any plan under Rule 12b–1 to finance distribution expenses.

Notwithstanding the provisions of this paragraph (b)(13)(iii)(F), no risk charge may be deducted in reliance thereupon if the registration statement or amendment thereto which initially sets forth the deduction of such charge or its increase becomes effective by lapse of time pursuant to Section 8(a) of the 1933 Act or Rule 486 [17 CFR 230.486] thereunder. Such charge shall be disclosed in the prospectus and shall not be less than fifty per centum of the maximum charge for risk assumption as disclosed in the prospectus and as provided for in the contract. Any separate account organized under the act as a management investment company and deducting a risk charge pursuant to this section shall be exempt from section 12(b) and Rule 12b–1 thereunder to the extent that monies derived from the risk charge may be used to finance distribution of the flexible contracts;

(iv) Sections 27(c)(1) and 27(d), and sections 2(a)(32) and 22(c) and Rule 22c–1 thereunder, to the extent that:

(A) Such sections require that the flexible contract be redeemable or provide for a refund in cash, *Provided*, That the contract provides for election by the contract holder of a cash surrender value or certain non-forfeiture and settlement options which are required or permitted by the insurance law or regulation of the jurisdiction in which the contract is offered, *And provided further*, That unless required by the insurance law or regulation of the jurisdiction in which the contract is offered or unless elected by the contract-holder, the contract shall not provide for the automatic imposition of any option, including, but not limited to, an automatic premium loan, which would involve the accrual or payment of an interest or similar charge.

(B) Notwithstanding the provisions of paragraph (b)(13)(iv)(A) of this Rule, if the cash surrender value of the contract on any contract processing day is less than the amount necessary to pay the charges due under the contract, the contract may provide that the cash surrender value (and any excess paid for sales loading not used to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(*2*) of this Rule) shall be applied to purchase a non-forfeiture option specified by the life insurer in such contract, *Provided*, That the contract also provides that:

(*1*) Contract processing days occur not less frequently than monthly, and

(*2*) The amount of any excess paid for sales loading (as provided in paragraph (b)(13)(v)(A) of this Rule) shall first be applied to keep the contract in force, *Provided, however*, That if the contractholder subsequently makes a payment, the life insurer may recover such excess loading;

(C) Subject to other provisions of this Rule, sales loads may be deducted upon redemption.

(v) Section 27(d), *Provided*, that the flexible contract gives the holder thereof the right to:

(A) Surrender the contract at any time during the first 24 months after issuance and receive in cash an amount not less than the sum of the present value of his contract which is the cash surrender value next computed after receipt by the life insurer of the request for surrender in proper form, plus, depending upon the period over which such contract has been retained by the contractholder, an amount which is a refund of any excess paid for sales loading prior to or in connection with the surrender. The amount of sales loading to be refunded shall be equal to that part of the sales loading in excess of the sum of (*1*) the lesser of 30 per centum of the guideline annual premium or 30 per centum of the actual payments made during the first contract period, plus (*2*) the lesser of 10 per centum of the guideline annual premium or 10 per centum of the actual payments made during the second contract period, plus (*3*) 9 per centum of the payments made during the first or the second contract period after such payments exceed the guideline annual premium;

(B) Convert the contract at any time during the first 24 months after issuance so long as the contract is in force to a life insurance policy on the life of the insured under a plan of insurance (other than a plan involving a flexible contract as defined in paragraph (C)(1) of this Rule or a scheduled contract as defined in paragraph (c)(1) of Rule 6e–2) specified in the contract, issued by the life insurer or by an affiliated life insurance company, which provides for (*1*) at the election of the contract-holder, either the same death benefit or the same net amount at risk as the flexible contract at the time of conversion and (*2*) premiums which are based on the same issue age and risk classification of the insured as the flexible contract. The conversion shall be subject to an equitable adjustment in payments and cash values to reflect variances, if any, in the payments and cash values under the flexible contract and the new policy. The method of computing such adjustment shall be filed with the Commission as an exhibit to the form required under paragraph (b)(3)(ii) of this Rule;

(vi) A depositor or principal underwriter for a flexible contract sold subject to section 27(d) or Section 27(f), or both, shall be exempt from the requirements of Rule 27d–1 [17 CFR 270.27d–1] if an insurance company undertakes in writing to guarantee the performance of all obligations of such depositor or principal underwriter under sections 27(d) and 27(f) to refund charges and such insurance company, depositor and principal underwriter comply with all provisions of Rule 27d–2 [17 CFR 270.27d–2];

(vii) Section 27(e) [15 U.S.C. 80a–27(e)] and Rule 27e–1 [17 CFR 270.27e–1] thereunder, to the extent that the separate account and the depositor and principal underwriter therefor, when such persons are subject to paragraph (b)(13)(v)(A) of this Rule, are required to provide a notice of right of surrender and refund to holders of flexible contracts, if the life insurer or a duly authorized agent provides a notice of surrender and refund rights on a written document containing information comparable to that required by Form N–27I–1 [17 CFR 274.301] to the holder of any flexible contract under which a refund may be available, *Provided*, That such notice shall be sent by first class mail or personal delivery to the contractholder:

(A) Upon issuance of the flexible contract, which notice may be sent together with the issued contract and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums, death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured; and

(B) On any contract processing day, prior to the expiration of the surrender and refund right provided in paragraph (b)(13)(v)(A) of this Rule, on which the amounts available under the contract on such day to pay the charges authorized by the contract are less than the amount necessary to keep the contract in force until the next following contract processing day. This notice may be sent together with any notice required by applicable state authority to be sent in these circumstances; *Provided, however,* That the right of surrender and refund provided by paragraph (b)(13)(v)(A) of this Rule shall not expire until not less than 15 days after the mailing or receipt if personally delivered of the last notice referred to in this paragraph (b)(13)(vii)(B);

(viii) Section 27(f) and Rule 27f-1 thereunder [17 CFR 270.27f-1], *Provided,* That:

(A) The contractholder may elect to return the contract within 45 days of the date of the execution of the application for insurance, or within 10 days after receipt of the issued contract by the contractholder, or within 10 days after mailing or personal delivery of the notice of the right of withdrawal referred to in paragraph (b)(13)(viii)(C) of this Rule, whichever is later, and receive a refund equal to the sum of (*1*) the difference between the payments made, including any contract fees or other changes, and the amounts allocated to the separate account under the contract, (*2*) the value of the amounts allocated to the separate account under the contract on the date the returned contract is received by the insurer or its agent, and (*3*) any contract fees and other charges imposed on the amounts allocated to such separate account, *Provided, however,* That if state law or the contract so require, the redeeming contractholder shall receive a refund of all payments made for such contract;

(B) A refund in accordance with paragraph (b)(13)(viii)(A) of this Rule to redeeming contractholders will not in any way affect the interests in the separate account or the benefits of other flexible or scheduled contractholders;

(C) Notice of such withdrawal right and a statement of contract fees and other charges on a written document containing information comparable to that required by Form N-27I-2 [17 CFR 274.303] is sent by first class mail or personal delivery to the contractholder, which notice and statement may be accompanied by the flexible contract, and an illustration, in a form appropriate for inclusion in the prospectus for the flexible contract, of guideline annual premiums (or, if the contract is subject to paragraph (b)(13)((i)(B), payments), death benefits and cash surrender values applicable to the age, sex and underwriting classification of the insured;

(D) The contractholder, in conjunction with the notice of withdrawal right referred to in paragraph (b)(13)((viii)(C), is provided with a form of request for refund of the amount computed in accordance with paragraph (b)(13)(viii)(A), which form shall set forth:

(*1*) Instructions as to the manner in which a refund may be obtained, including the address to which the request form should be mailed; and

(*2*) Spaces necessary to indicate the date of such request, the contract number and the signature of the contractholder; and

(E) Within 7 days from the receipt of such duly executed timely request for refund, the life insurer will refund in cash to the contractholder the amount computed in accordance with paragraph (b)(13)(viii)(A) of this Rule; and

(ix) Solely for purposes of paragraphs (b)(13)(v) and (b)(13)(viii) of this Rule, the postmark date on the envelope containing the flexible contract shall determine whether such contract has been submitted for surrender, conversion, or withdrawal within the designated period.

(14) Section 32(a)(2) [15 U.S.C. 80a-32(a)(2)], *Provided:* That:

(i) The independent public accountant is selected before the effective date of the 1933 Act registration statement for flexible contracts, and the identity of the accountant is disclosed in the registration statement, and

(ii) The selection of the accountant is submitted for ratification or rejection to flexible contractholders at their first meeting and within one year after the effective date of the 1933 Act registration statement for flexible contracts, unless the time for holding the meeting is extended by order of the Commission.

(15) If the separate account is organized as a unit investment trust, all the assets of which consist of the shares of one or more registered management investment companies which offer their shares exclusively to separate accounts of the life insurer, or of any affiliated life insurance company, offering either scheduled contracts or flexible contracts, or both; or which also offer their shares to variable annuity separate accounts of the life insurer or of an affiliated life insurance company, *Provided,* That: the board of directors of each investment company, constituted with a majority of disinterested directors, will monitor such company for the existence of any material irreconcilable conflict between the interests of variable annuity contractholders and scheduled or flexible contractholders investing in such company; the life insurer agrees that it will be responsible for reporting any potential or existing conflicts to the directors; and, if a conflict arises, the life insurer will, at its own cost, remedy such conflict up to and including establishing a new registered management investment company and segregating the assets underlying the variable annuity contracts and the scheduled or flexible contracts; Then:

(i) The eligibility restrictions of section 9(a) shall not apply to those persons who are officers, directors or employees of the life insurer or its affiliates who do not participate directly in the management or administration of any registered management investment company described in this paragraph (b)(15);

(ii) The life insurer shall be ineligible under paragraph (3) of section 9(a) to serve as investment adviser of or principal underwriter for any registered management investment company described in this paragraph (b)(15) only if an affiliated person of such life insurer, ineligible by reason of paragraphs (1) or (2) of section 9(a), participates in the management or administration of such company;

(iii) The life insurer may vote shares of the registered management investment companies held by the separate account without regard to instructions from contractholders of the separate account if such instructions would require such shares to be voted:

(A) To cause such companies to make (or refrain from making) certain investments which would result in changes in the sub-classification or investment objectives of such companies or to approve or disapprove any contract between such companies and an investment adviser when required to do so by an insurance regulator authority subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of this Rule; or

(B) In favor of changes in investment objectives, investment adviser of or principal underwriter for such companies subject to the provisions of paragraphs (b)(5)(ii) and (b)(7)(ii) (B) and (C) of this Rule;

(iv) Any action taken in accordance with paragraph (b)(15)(iii) (A) and (B) of this Rule and the reasons therefor shall be disclosed in the next report to contractholders made under Section 30(d) [15 U.S.C. 80a-29(d)] and Rule 30d-2 [17 CFR 270.30d-2];

(v) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from section 14(a), *Provided,* That until the company has total assets of at least $100,000, the life insurer shall have at least the minimum net worth prescribed in paragraph (b)(6) of this Rule; and

(vi) Any registered management investment company established by the life insurer and described in this paragraph (b)(15) shall be exempt from sections 15(a), 16(a), and 32(a)(2), to the extent prescribed by paragraphs (b)(7)(i), (b)(8)(i), and (b)(14) of this Rule, *Provided,* That the company complies with the conditions set forth in those paragraphs as if it were a separate account.

(c) When used in this Rule:

(1) "Flexible premiuim variable life insurance contract" means a contract of life insurance, subject to regulation under the insurance laws or code of every jurisdiction in which it is offered, funded by a separate account of a life insurer, which contract provides for:

(i) Payments which are not fixed by the life insurer as to both timing and amount, *Provided, however,* That the life insurer may fix the timing and minimum amount of payments for the first two contract periods and may prescribe a reasonable minimum amount for any additional payment;

(ii) A death benefit the amount or duration of which may vary to reflect the investment experience of the separate account; and

(iii) A cash value which varies to reflect the investment experience of the separate account.

(2) "Incidental insurance benefits" means insurance benefits provided pursuant to the flexible contract, other than any guaranteed and variable death benefit, which do not vary in amount in accordance with the investment experience of the separate account, and include, but are not limited to, accidental death and dismemberment benefits, disability income benefits, guaranteed insurability options, and family income or fixed benefit term riders.

(3) "Guaranteed death benefit" is any amount guaranteed by the life insurer to be paid pursuant to a flexible contract in the event of the death of the insured without regard to the investment experience of the separate account, if there are no outstanding loans or partial surrenders, but does not include any incidental insurance benefits.

(4) "Sales load" charged during a contract period is the excess of any payments made during the period over the sum of the following:

(i) The amount of the increase in the cash value for the period that is attributable to payments made and not to net investment earnings for the period;

(ii) The cost of insurance for the period based on the 1980 Commissioners Standard Ordinary Mortality Table and net interest at the annual effective rate specified for purposes of paragraph (c)(8)(i)(B) of this Rule;

(iii) A reasonable charge necessary to cover the risk assumed by the life insurer that the variable death benefit will be less than any guaranteed death benefit;

(iv) Any administrative expenses or fees which are deducted pursuant to paragraph (b)(13)(iii)(A) of this Rule;

(v) A deduction for and approximately equal to state premium taxes;

(vi) Any additional charge assessed if the insured does not meet standard underwriting requirements;

(vii) Any additional charge assessed specifically for any incidental insurance benefits;

(viii) Any additional charge, in the nature of an interest charge, assessed when payments are made more frequently than annually, but only to the extent that such payments are made to fulfill a minimum payment requirement imposed pursuant to paragraph (c)(1)(i) of this Rule;

(ix) Any amounts redeemed by the contractholder or paid out to the beneficiary upon the death of the insured which are not attributable to net investment earnings for the period; and

(x) For a participating flexible contract, a deduction for dividends to be paid or credited in accordance with the dividend scale in effect on the issue date of the contract assuming a gross annual investment return for the separate account which funds the contract of 5 per centum. The deduction may be determined by either of the following methods, but the same method must be used for each contract period:

(A) The actuarial level annual equivalent of dividends to be paid or credited over the contract periods described in paragraph (b)(13)(i) of this Rule, based upon the mortality, interest and lapse assumptions used in computing the dividend scale for the contract (and, if the contract is subject to paragraph (b)(13)(i)(A), the assumption that the guideline annual premium will be paid in each contract period) multiplied by the fraction of the contract year represented by the contract period; or

(B) That portion of the dividend to be paid for the contract year which does not depend on the making of payments in addition to those made during the period.

(5) "Contract period" means the period from a contract issue or anniversary date to the earlier of the next following anniversary date (or, if later, the last day of any grace period commencing before such next following anniversary date) or the termination date of the contract.

(6) "Variable death benefit" is the amount of death benefit, other than incidental insurance benefits, payable under a flexible contract which varies to reflect the investment experience of the separate account and which would be payable in the absence of any guaranteed death benefit.

(7) "Payment," as used in paragraphs (b)(13)(i), (b)(13)(ii), and (b)(13)(v)(A) of this Rule and in sections 27(a)(2) and 27(h)(2) solely with respect to flexible contracts, means for a contract period the gross premiums paid less any portion of such gross premiums charged for the items specified in paragraphs (c)(4)(vi), (c)(4)(vi), and (c)(4)(viii) of this Rule. "Payment," as used in any other section of this Rule, means the gross premiums paid or payable for the flexible contract, *Except,* That "Payment" shall not include any amount deducted by the life insurer to recover excess sales loading previously applied to keep the contract in force pursuant to paragraph (b)(13)(iv)(B)(*2)* of this Rule.

(8)(i) "Guideline annual premium" means the level annual amount that would be payable through the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule for the future benefits under the contract if, subject to the provisions of paragraph (c)(8)(ii) of this Rule:

(A) The payments were fixed by the life insurer as to both timing and amount, and

(B) The payments were based on the 1980 Commissioners Standard Ordinary Mortality Table, net investment earnings at the greater of an annual effective rate of 5 per centum or rate or rates guaranteed at issuance of the flexible contract, the sales load under the contract, and the fees and charges associated with the contract specified in paragraphs (c)(4)(iii), (c)(4)(iv), (c)(4)(v), (c)(4)(vi), (c)(4)(vii), and (c)(4)(viii), (for the first two contract periods as permitted by paragraph (c)(1)(i)) of this Rule.

(ii) In computing the future benefits under the flexible contract for determining the guideline annual premium:

(A) The excess of the amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) over the cash value of the contract shall be deemed to be not greater than such excess at the time the contract was issued,

(B) The maturity date shall be the latest maturity date permitted under the contract but not less than 20 years after the date of issue or (if earlier) age 95, and

(C) The amount of any endowment benefit (or sum of endowment benefits) shall be deemed not to exceed the least amount payable by reason of the death of the insured (determined without regard to any incidental insurance benefits) at any time under the contract.

(9) "Guideline single premium" means the single amount payable at a specified time which would provide the future benefits under the contract until the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule and which otherwise is computed on the same basis as the guideline annual premium.

(10) "Cash value" means the amount that would be available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, without regard to any changes that may be assessed upon such termination and before deduction of any outstanding contract loan.

(11) "Cash surrender value" means the amount available in cash upon voluntary termination of a contract by its owner before it becomes payable by death or maturity, after any charges assessed in connection with the termination have been deducted and before deduction of any outstanding contract loan.

(12) "Net investment earnings" means investment earnings in the separate account after deduction of any asset charges, including but not limited to, such charges for income tax; brokerage and other investment expenses; mortality, expense, and guaranteed death benefit risks; and an investment advisory fee, but not including deductions for sales load. However, "net investment earnings" as used in paragraph (c)(4)(i) of this Rule shall not include any amount deducted pursuant to subparagraphs (ii) through (viii) of paragraph (c)(4).

(13) "Contract processing day" means any day on which charges under the contract are deducted from the separate account.

(d) The following computational rules shall be used in applying this Rule:

(1)(i) Paragraphs (b)(13)(i) and (b)(13)(ii) of this Rule shall be deemed to be satisfied with respect to any flexible contract under which sales load is deducted other than from payments prior to the allocation of net payments to the separate account if during each contract period through the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule, the amount of sales load deducted is not more than the amount of sales load that could be deducted under a flexible contract that is identical to the actual contract except that sales load is deducted only from payments prior to the allocation of net payments to the separate account in any manner satisfying the provisions of the Act and this Rule; *Provided*, That, solely for a contract subject to paragraph (b)(13)(i)(A), during the period equal to the lesser of 20 years or the life expectancy of the insured named in the contract based on the 1980 Commissioners Standard Ordinary Mortality Table, payments may be assumed to be made in each of the alternative amounts:

(A) Level annual payments equal to the guideline annual premium for the actual contract, and

(B) A single payment made at issue equal to the guideline single premium at issue for the actual contract.

(ii) The amount of sales load deducted pursuant to any method permitted under paragraph (d)(1)(i) shall not exceed the proportionate amount of sales load deducted prior thereto pursuant to the same method unless an increase in such proportionate amount is caused by the grading of cash surrender values into reserves, or reductions in the annual cost of insurance.

(2)(i) Solely with respect to increases in or additions of insurance benefits requested by a contractholder after issuance of a flexible contract, the contract shall be deemed to satisfy paragraphs (b)(13)(i)(A), (b)(13)(ii), (b)(13)(v), (b)(13)(viii), and (d)(1)(ii) of this Rule, *Provided*, That during each contract period through the maturity date specified in paragraph (c)(8)(ii)(B) of this Rule:

(A) The amount of sales load imposed is not more than the amount of sales load that would be permissible under the base test contract, as defined in paragraph (d)(2)(iii)(B) of this Rule, and the incremental test contract, as defined in paragraph (d)(2)(iii)(C) of this Rule, and

(B) The sum of the sales loads charged in the contract period and all preceding contract periods shall not exceed the sum of the corresponding sales loads under the base test contract and the incremental test contract.

(ii) The following assumptions shall be used in applying paragraph (d)(2)(i):

(A) Payments for the actual contract, as defined in paragraph (d)(2)(iii)(A) of this Rule, and the base and incremental test contracts are paid in each of the following alternative amounts:

(*1*) Level annual payments for the base test contract equal to the guideline annual premium for the contract, commencing upon issuance; level annual payments for the incremental test contract equal to the difference between the guideline annual premium for the actual contract after the increase in or addition of insurance benefits and before such increase or addition, commencing upon such increase or addition; and level annual payments for the actual contract equal to the guideline annual premium for such contract, commencing upon issuance and adjusted for such increase or addition as of the date of such increase or addition; and

(*2*) A single payment at issue for the base test contract and for the actual contract in an amount equal to the guideline single premium for the actual contract at issue; and a single payment for the actual contract and the incremental test contract equal to the additional guideline single premium needed for the actual contract upon the increase in or addition of insurance benefits, as of the date of such increase or addition;

(B) Net investment earnings are earned at an annual effective rate specified in paragraph (c)(8)(i)(B) of this Rule; and

(C) No redemptions are made under the actual and test contracts.

(iii) For purposes of this paragraph (d)(2):

(A) "Actual contract" shall mean the flexible contract issued to the contractholder, and adjusted for the increase in or addition of insurance benefits, as of the date of the increase or addition;

(B) "Base test contract" shall mean the actual contract had the increase or addition not occurred;

(C) "Incremental test contract" shall mean a flexible contract that: (*1*) Is issued on the date of the increase or addition; (*2*) provides insurance benefits identical to the incremental change in insurance benefits under the actual contract upon such increase or addition; (*3*) deducts, in any manner permitted by this Rule, not more than 50 per centum of the sales load which would be permitted under the act and this Rule; and (*4*) is not subject to the surrender, conversion, and withdrawal provisions set forth in paragraphs (b)(13)(v) (A) and (B) and (b)(13)(viii) of this Rule: *Provided, however*, That if the increased or added benefit is subject to the surrender, conversion, and withdrawal provisions set forth in paragraphs (b)(13)(v) (A) and (B) and (b)(13)(viii) of this Rule, this paragraph (d)(2)(iii)(C) shall be applied by substituting "100" for

"50". For purposes of satisfying the provisions of the Act and this Rule, the amounts specified in paragraph (d)(2)(ii)(A) (*1*) and (*2*) of this Rule as paid for the incremental test contract shall be treated as the guideline annual premium and guideline single premium, respectively, for such contract;

(D) Any change in insurance benefits which would occur automatically under a contract, with or without the opportunity for contractholder disapproval, or any change in death benefit option shall not be considered an "increase in or addition of insurance benefits requested by a contractholder" for purposes of imposing additional sales load.

2. By revising § 270.6c-3 to read as follows:

§ 270.6c-3 Exemptions for certain registered variable life insurance separate accounts.

A separate account which meets the requirements of paragraph (a) of Rule 6e-2 [17 CFR 270.6e-2] or paragraph (a) of Rule 6e-3(T) [17 CFR 270.6e-3(T)] and registers as an investment company under Section 8(a) of the Act [15 U.S.C. 80a-8(a)], and the investment adviser, principal underwriter and depositor of such separate account, shall be exempt from the provisions of the Act specified in paragraph (b) of Rule 6e-2 or paragraph (b) of Rule 6e-3(T), except for sections 7 [15 U.S.C. 80a-7] and 8(a) of the Act, under the same terms and conditions as a separate account claiming exemption under Rule 6e-2 or Rule 6e-3(T).

PART 274—[AMENDED]

Part 274 of Chapter II of Title 17 of the Code of Federal Regulations is amended as follows:

1. By revising § 274.301 and amending Form N-6EI-1 to read as follows:

§ 274.301 Notification of claim of exemption pursuant to Rule 6e-2 or Rule 6e-3(T) under the Investment Company Act.

This form shall be filed with the Commission as required by § 270.6e-2 or § 270.6e-3(T) of this chapter by each insurance company with respect to each separate account for which exemption is claimed pursuant to § 270.6e-2 or § 270.6e-3(T).

Form N-6EI-1

Notification of Claim of Exemption Pursuant to Rule —— Under the Investment Company Act of 1940

* * * * *

1. Rule as to use of Form:

This form shall be used as the notification of claim of exemption filed with the Commission under either Rule 6e-2 or 6e-3(T) under the Investment Company Act of 1940.

* * * * *

NOTIFICATION OF CLAIM OF EXEMPTION

The undersigned life insurer hereby notifies the Securities and Exchange Commission that it has established a separate account that will be maintained and operated in compliance with Rule —— under the Investment Company Act of 1940, and submits the following information:

* * * * *

SIGNATURE

Pursuant to Rule —— under the Investment Company Act of 1940, the undersigned ——————
(Name of Separate Account
and ——————
(Name of Life Insurer)
have caused this Notification of Claim of Exemption to be duly executed on behalf of the separate account claiming exemption in the city of ——————
county of ——————
state of ——————
on the —— day of ——————, 19—
Attest: ——————
(Name)
——————
(Title)
——————
(Name of Separate Account)
By ——————
(Chairman of the Board of Directors)
Attest: ——————
(Name)
——————
(Title)
——————
(Name of Life Insurer)
By ——————
(Director, Trustee or Senior Officer)

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act [5 U.S.C. 605(b)], the Chairman of the Commission previously certified that rule 6e-3(T) and amendments to rule 6c-3 and Form N-6EI-1 will not have a significant economic impact on a substantial number of small entities. No comments were received on that certification.

Paperwork Reduction Act

The information collection required by rule 6e-3(T) and Form N-6EI-1 has been submitted to the Office of Management and Budget for clearance. Rule 6c-3 is not subject to the Act because it does not impose an information collection requirement.

Statutory Authority

Rule 6e-3(T) is issued and Form N-6EI-1 is amended pursuant to the provisions of sections 6(e) [15 U.S.C. 80a-6(e)] and 38(a) [15 U.S.C. 80a-37(a)] of the Act. Rule 6c-3 is amended pursuant to the provisions of sections 6(c) [15 U.S.C. 80a-6(C)] and 38(a) of the Act. Because this rulemaking is exemptive in nature, the Commission finds, pursuant to section 553(d)(1) of the Administration Procedure Act [5 U.S.C. 553(d)(1)], that the 30 day delay in effectiveness is not required, and, accordingly, the rule and rule and form amendments will become effective immediately upon publication in the **Federal Register.**

By the Commission.

Shirley E. Hollis,

Acting Secretary.

November 14, 1984.

[FR Doc. 84-31516 Filed 11-30-84; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 81

[Docket No. 76N-0366]

Provisional Listing of FD&C Red No. 3 and of FD&C Yellow No. 5 in Cosmetics and Externally Applied Drugs and of Their Lakes in Food and Ingested Drugs; Provisional Listing of FD&C Yellow No. 6 for Use in Food, Drugs, and Cosmetics; Provisional Listing of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 in Drugs and Cosmetics; Postponement of Closing Date

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is postponing the closing date for the provisional listing of FD&C Red No. 3 and of FD&C Yellow No. 5 for use in coloring cosmetics and externally applied drugs and of the lakes of these color additives for use in coloring food and ingested drugs; of FD&C Yellow No. 6 for use in food, drugs, and cosmetics; and of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 for use in drugs and cosmetics. The new closing date for the provisional listing of all of these color additives will be February 1, 1985. This postponement will provide additional time for the determination of the applicability of the statutory standard for the listing of color additives to the results of the scientific investigations of FD&C Red No. 3, FD&C Yellow No. 5, FD&C Yellow No. 6, D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36.

DATES: Effective December 3, 1984, the new closing date for FD&C Red No. 3 and its lakes, FD&C Yellow No. 5 and its lakes, FD&C Yellow No. 6, D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 will be February 1, 1985.

FOR FURTHER INFORMATION CONTACT: Gerad McCowin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5676.

SUPPLEMENTARY INFORMATION: FDA established the current closing date of December 3, 1984, for the provisional listing of FD&C Red No. 3 and of FD&C Yellow No. 5 for use in cosmetics and in externally applied drugs and for the provisional listing of the use of the lakes of FD&C Red No. 3 and of FD&C Yellow No. 5 in food and ingested drugs; of FD&C Yellow No. 6 for use in foods, drugs, and cosmetics and of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 for use in drugs and cosmetics by a rule published in the **Federal Register** of October 2, 1984 (49 FR 38935). The agency had previously extended the closing dates for these color additives on several occasions. For a full procedural history of the provisional listing of these color additives, see 48 FR 45237 for FD&C Red No. 3, 48 FR 45760 for FD&C Yellow No. 5, 49 FR 13344 for FD&C Yellow No. 6, 48 FR 42807 for D&C Red No. 8 and D&C Red No. 9, 48 FR 44773 for D&C Red No. 33, and 49 FR 38935 for D&C Red No. 36.

FDA extended the closing dates for the provisional listing of each of these color additives and of the lakes of FD&C Red No. 3 and of FD&C Yellow No. 5 to permit the consideration of the scientific and legal aspects of the data concerning the safety of their provisionally listed uses. FDA expected that the current closing dates would provide time for the preparation and publication of appropriate regulations in the **Federal Register** regarding the final decision on the petitions for the permanent listing of the aforementioned uses of these color additives and of the lakes of FD&C Red No. 3 and of FD&C Yellow No. 5.

The review of the data relevant to the provisionally listed uses of FD&C Red No. 3 and FD&C Yellow No. 5 and their lakes, FD&C Yellow No. 6, D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 has required more time than anticipated, however. Additional time is still needed to determine the applicability of the statutory standard for listing color additives to D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, D&C Red No. 36, and FD&C Yellow No. 6, as well as to FD&C Red No. 3 and FD&C Yellow No. 5 and their lakes.

This postponement will provide additional time for the preparation and publication of the appropriate **Federal Register** documents setting forth the decision on the petitions for the permanent listing of FD&C Red No. 3 and FD&C Yellow No. 5 for use in coloring cosmetics and externally applied drugs and of the lakes of FD&C Red No. 3 and of FD&C Yellow No. 5 for use in coloring food and ingested drugs; for the permanent listing of FD&C Yellow No. 6 for use in food, drugs, and cosmetics; and for the permanent listing of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, and D&C Red No. 36 for use in coloring drugs and cosmetics. The continued use of these color additives for the short time needed for a fully coordinated review of the data and for the preparation of the **Federal Register** documents will not pose a hazard to the public health.

Because of the short time until the December 3, 1984 closing date, FDA concludes that notice and public procedure on these amendments are impracticable, and that good cause exists for issuing this postponement as a final rule. This final rule will permit the uninterrupted use of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, D&C Red No. 36 and FD&C Yellow No. 6, as well as FD&C Red No. 3 and FD&C Yellow No. 5 and their lakes, until February 1, 1985. To prevent any interruption in the provisional listing of D&C Red No. 8, D&C Red No. 9, D&C Red No. 33, D&C Red No. 36, and FD&C Yellow No. 6, as well as FD&C Red No. 3 and FD&C Yellow No. 5 and their lakes, and in accordance with 5 U.S.C. 553(d) (1) and (3), this regulation is being made effective on December 3, 1984.

List of Subjects in 21 CFR Part 81

Color additives, Color additives provisional list, Food, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 701, 706 (b), (c), and (d), 52 Stat. 1055-1056 as amended, 74 Stat. 399-403 (21 U.S.C. 371, 376 (b), (c), and (d))) and the transitional provisions of the Color Additive Amendments of 1960 (Title II, Pub. L. 86-618, sec. 203, 74 Stat. 404-407 (21 U.S.C. 376, note)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), Part 81 is amended as follows:

PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

§ 81.1 [Amended]

1. In § 81.1 *Provisional lists of color additives*, by revising the closing dates for "FD&C Yellow No. 5," "FD&C Yellow No. 6," and "FD&C Red No. 3" in paragraph (a) to read "February 1, 1985" and by revising the closing dates for "D&C Red No. 8," "D&C Red No. 9," "D&C Red No. 33," and "D&C Red No. 36" in paragraph (b) to read "February 1, 1985."

§ 81.27 [Amended]

2. In § 81.27 *Conditions of provisional listing*, by revising the closing dates for "FD&C Yellow No. 5," "FD&C Yellow No. 6," "FD&C Red No. 3," "D&C Red No. 8," "D&C Red No. 9," "D&C Red No. 33," and "D&C Red No. 36" in paragraph (d) to read "February 1, 1985" and by revising the closing dates for "FD&C Red No. 3" and "D&C Red No. 33" in paragraph (e) to read "February 1, 1985."

Effective date. This final rule is effective December 3, 1984.

(Secs. 701, 706 (b), (c), and (d), 52 Stat. 1055-1056 as amended 74 Stat. 399-403 (21 U.S.C. 371, 376 (b), (c), and (d)); sec. 203, 74 Stat. 404-407 (21 U.S.C. 376, note))

Dated: November 14, 1984.

Joseph P. Hile

Associate Commissioner for Regulatory Affairs.

[FR Doc. 84-31580 Filed 11-30-84; 8:45 am]

BILLING CODE 4160-01-M

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21 CFR Part 81

[Docket No. 76N-0366]

Provisional Listing of D&C Orange No. 17, D&C Red No. 19, and D&C Red No. 37 for Use in Externally Applied Drugs and Cosmetics; Postponement of Closing Date

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is postponing the closing date for the provisional listing of D&C Orange No. 17, D&C Red No. 19, and D&C Red No. 37 for use as color additives in externally applied drugs and cosmetics. The new closing date will be February 1, 1985. This postponement will provide additional time for determining the applicability of the statutory standard for the listing of noningested color additives to the results of the scientific investigations of D&C Orange No. 17, D&C Red No. 19, and D&C Red No. 37.

DATES: Effective December 3, 1984, the new closing date for D&C Orange No. 17, D&C Red No. 19, and D&C Red No. 37 will be February 1, 1985.

FOR FURTHER INFORMATION CONTACT: Gerad McCowin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5676.