

certain of the Commission's exemptive rules. More specifically, the term "independent legal counsel," as defined in rule 0-1, sets out conditions that funds must meet in order to rely on any of ten exemptive rules under the Act ("exemptive rules").<sup>4</sup>

The Commission amended rule 0-1 to include the definition of the term "independent legal counsel" in 2001.<sup>5</sup> This amendment was designed to enhance the effectiveness of fund boards of directors and to better enable investors to assess the independence of those directors. The Commission also amended the exemptive rules to require that any person who serves as legal counsel to the independent directors of any fund that relies on any of the exemptive rules must be an "independent legal counsel." This requirement was added because independent directors can better perform the responsibilities assigned to them under the Act and the rules if they have the assistance of truly independent legal counsel.

If the board's counsel has represented the fund's investment adviser, principal underwriter, administrator (collectively, "management organizations") or their "control persons"<sup>6</sup> during the past two years, rule 0-1 requires that the board's independent directors make a determination about the adequacy of the counsel's independence. A majority of the board's independent directors are required to reasonably determine, in the exercise of their judgment, that the counsel's prior or current representation of the management organizations or their control persons was sufficiently limited to conclude that it is unlikely to adversely affect the counsel's professional judgment and legal representation. Rule 0-1 also requires that a record for the basis of this determination is made in the minutes of the directors' meeting. In addition, the independent directors must have obtained an undertaking from the counsel to provide them with the information necessary to make their determination and to update promptly that information when the person begins

to represent a management organization or control person, or when he or she materially increases his or her representation. Generally, the independent directors must re-evaluate their determination no less frequently than annually.

Any fund that relies on one of the exemptive rules must comply with the requirements in the definition of "independent legal counsel" under rule 0-1. We assume that approximately 3870 funds rely on at least one of the exemptive rules annually.<sup>7</sup> We further assume that the independent directors of approximately one-third (1290) of those funds would need to make the required determination in order for their counsel to meet the definition of independent legal counsel.<sup>8</sup> We estimate that each of these 1290 funds would be required to spend, on average, 0.75 hours annually to comply with the recordkeeping requirement associated with this determination, for a total annual burden of approximately 968 hours. Based on this estimate, the total annual cost for all funds' compliance with this rule is approximately \$66,126. To calculate this total annual cost, the Commission staff assumed that two-thirds of the total annual hour burden (645 hours) would be incurred by compliance staff with an average hourly wage rate of \$89 per hour,<sup>9</sup> and one-third of the annual hour burden (323 hours) would be incurred by clerical staff with an average hourly wage rate of \$27 per hour.<sup>10</sup>

These burden hour estimates are based upon the Commission staff's experience and discussions with the

fund industry. The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information requirements of the rule is mandatory and is necessary to comply with the requirements of the rule in general. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or e-mail to: [David.Rostker@omb.eop.gov](mailto:David.Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F. Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 25, 2006.

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 3a-8; SEC File No. 270-516; OMB Control No. 3235-0574.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB"), a request for extension of the previously approved collection of information discussed below.

Rule 3a-8 of the Investment Company Act of 1940 (the "Act"), serves as a nonexclusive safe harbor from investment company status for certain research and development companies ("R&D companies"). The rule requires

<sup>4</sup> The relevant exemptive rules are: Rule 10f-3 [17 CFR 270.10f-3], Rule 12b-1 [17 CFR 270.12b-1], Rule 15a-4(b)(2) [17 CFR 270.15a-4(b)(2)], Rule 17a-7 [17 CFR 270.17a-7], Rule 17a-8 [17 CFR 270.17a-8], Rule 17d-1(d)(7) [17 CFR 270.17d-1(d)(7)], Rule 17e-1(c) [17 CFR 270.17e-1(c)], Rule 17g-1 [17 CFR 270.17g-1], Rule 18f-3 [17 CFR 270.18f-3], and Rule 23c-3 [17 CFR 270.23c-3].

<sup>5</sup> See Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 2, 2001) [66 FR 3735 (Jan. 16, 2001)].

<sup>6</sup> A "control person" is any person—other than a fund—directly or indirectly controlling, controlled by, or under common control, with any of the fund's management organizations. See 17 CFR 270.01(a)(6)(iv)(B).

<sup>7</sup> Based on statistics compiled by Commission staff, we estimate that there are approximately 4300 funds that could rely on one or more of the exemptive rules. Of those funds, we assume that approximately 90 percent (3870) actually rely on at least one exemptive rule annually.

<sup>8</sup> We assume that the independent directors of the remaining two-thirds of those funds will choose not to have counsel, or will rely on counsel who has not recently represented the fund's management organizations or control persons. In both circumstances, it would not be necessary for the fund's independent directors to make a determination about their counsel's independence.

<sup>9</sup> The staff estimates concerning the wage rate for professional time and for clerical time are based on salary information compiled by the Securities Industry Association. We use the annual salaries listed for the Director of Compliance and Executive Secretary positions to make our estimates. See Securities Industry Association, *Report on Management and Professional Earnings in the Securities Industry* (2004) (available in part at <http://www.careerjournal.com/salaryhiring> (last visited Sept. 14, 2005)). Note that the average hourly wage rate estimates are modified for an 1800-hour work-year, 2.7% inflation and adjusted upward by 35% to reflect possible overhead costs and employee benefits.

<sup>10</sup>  $(645 \times \$89/\text{hour}) + (323 \times \$27/\text{hour}) = (\$66,126)$ .

that the board of directors of an R&D company seeking to rely on the safe harbor adopt an appropriate resolution evidencing that the company is primarily engaged in a non-investment business and record that resolution contemporaneously in its minute books or comparable documents.<sup>1</sup> An R&D company seeking to rely on the safe harbor must retain these records only as long as such records must be maintained in accordance with state law.

Rule 3a-8 contains an additional requirement that is also a collection of information within the meaning of the PRA. The board of directors of a company that relies on the safe harbor under rule 3a-8 must adopt a written policy with respect to the company's capital preservation investments. We expect that the board of directors will base its decision to adopt the resolution discussed above, in part, on investment guidelines that the company will follow to ensure its investment portfolio is in compliance with the rule's requirements.

The collection of information imposed by rule 3a-8 is voluntary because the rule is an exemptive safe harbor, and therefore, R&D companies may choose whether or not to rely on it. The purposes of the information collection requirements in rule 3a-8 are to ensure that: (i) The board of directors of an R&D company is involved in determining whether the company should be considered an investment company and subject to regulation under the Act, and (ii) adequate records are available for Commission review, if necessary. Rule 3a-8 would not require the reporting of any information or the filing of any documents with the Commission.

Commission staff estimates that there is no annual recordkeeping burden associated with the rule's requirements. Nevertheless, the Commission requests authorization to maintain an inventory of one burden hour for administrative purposes.

There are approximately 33,000 R&D companies in the United States.<sup>2</sup> Rule 3a-8 impacts non-manufacturing R&D companies that would fall within the definition of investment company pursuant to section 3(a)(1)(C) of the Act [15 U.S.C. 80a-3(a)(1)(C)].<sup>3</sup> Of the

16,170 non-manufacturing R&D Companies, the Commission believes that companies in scientific R&D services are more likely to use the exemption provided by rule 3a-8.<sup>4</sup> This field comprises companies that specialize in conducting R&D for other organizations, such as many biotechnology companies.<sup>5</sup> It accounts for 18%, or approximately 2910 companies.<sup>6</sup> Given that the board resolutions and investment guidelines will generally need to be adopted only once (unless relevant circumstances change),<sup>7</sup> the Commission believes that all the companies that seek to rely on rule 3a-8 would have adopted their board resolutions and established written investment guidelines in 2003 when the rule was adopted. We expect that newly formed R&D companies would adopt the board resolution and investment guidelines simultaneously with their formation documents in the ordinary course of business.<sup>8</sup> Therefore, we estimate that rule 3a-8 will not create additional time burdens.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid control number.

General comments regarding the above information should be directed to the following persons: (i) Desk Officer

that is primarily engaged in a non-investment business. 15 U.S.C. 80a-3(b)(1). For purposes of this PRA analysis, we assume that all manufacturing R&D companies are primarily engaged in the manufacturing industry and, therefore, may rely on the exclusion for companies primarily engaged in a non-investment business. For example, the top two manufacturing R&D companies in terms of dollars spent are Ford Motor Company and General Motors, which are primarily engaged in motor vehicle manufacturing. See NSB Indicators, supra note 2.

<sup>4</sup> We believe that R&D Companies in this field are most likely to rely on the rule because they often raise and invest large amounts of capital to fund their research and product development and may make strategic investments in other R&D companies to develop products jointly. These activities may cause the R&D companies to fall within the definition of investment company and fail to qualify for statutory exclusions under the Act when using the Commission's traditional analysis. See Certain Research and Development Companies, Release No. 26077 (Jun. 16, 2003) [68 FR 37045 (Jun. 20, 2003)], at n. 12 and accompanying text ("Rule 3a-8 Release").

<sup>5</sup> See NSB Indicators, supra note 2.

<sup>6</sup> Id.

<sup>7</sup> In the event of changed circumstances, the Commission believes that the board resolution and investment guidelines will be amended and recorded in the ordinary course of business and would not create additional time burdens.

<sup>8</sup> In order for these companies to raise sufficient capital to fund their product development stage, we believe they will need to present potential investors with investment guidelines. Investors would want to be assured that the company's funds are invested consistent with the goals of capital preservation and liquidity.

for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or e-mail to: [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov); and (ii) R. Corey Booth, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 25, 2006.

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available  
From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 17a-7; SEC File No. 270-238; OMB Control No. 3235-0214.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for extension of the previously approved collection of information described below.

Rule 17a-7 [17 CFR 270.17a-7] under the Investment Company Act of 1940 (the "Act") is entitled "Exemption of certain purchase or sale transactions between an investment company and certain affiliated persons thereof." It provides an exemption from section 17(a) of the Act for purchases and sales of securities between registered investment companies ("funds"), that are affiliated persons ("first-tier affiliates") or affiliated persons of affiliated persons ("second-tier affiliates"), or between a fund and a first- or second-tier affiliate other than another fund, when the affiliation arises solely because of a common investment adviser, director, or officer. Rule 17a-7 requires funds to keep various records in connection with purchase or sale transactions effected in reliance on the rule. The rule requires the fund's board of directors to establish procedures reasonably designed to ensure that the rule's conditions have been satisfied.

<sup>1</sup> Rule 3a-8(a)(6). This requirement is modeled on the requirement in rule 3a-2 under the Act that provides a temporary exemption from the Act for transient investment companies. 17 CFR 270.3a-2.

<sup>2</sup> See National Science Board, Science and Engineering Indicators 2004 ("NSB Indicators") (available at <http://www.nsf.gov/statistics/seind04/>).

<sup>3</sup> The Act provides certain exclusions from the definition of investment company for a company