proves more than sufficient, the excess will be a profit to AUSA Life. The mortality and expense risk charge will be deducted from the Variable Account both during the accumulation period and after the maturity date. The mortality and expense risk charge will not be assessed against the fixed account value or against monies that have been applied to purchase an annuity option under the fixed account annuity payments provisions. AUSA Life expects to earn a profit from the mortality and expense risk charge.

Applicants' Legal Analysis and Conditions

1. Applicants request an order of the Commission pursuant to Section 6(c) of the 1940 Act for exemptions from Sections 26(a)(2)(C) and 27(c)(2) thereof to the extent necessary to permit the deduction of a charge of 0.70% for the assumption of mortality and expense risks from the assets of: (a) The Variable Account in connection with the issuance of the Contracts; and (b) any other separate account established in the future by AUSA Life in connection with the issuance of Contracts.

2. Section 6(c) of the 1940 Act authorizes the Commission, by order upon application, to conditionally or unconditionally grant an exemption from any provision, rule or regulation of the 1940 Act to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

3. Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act, in relevant part, prohibit a registered unit investment trust, its depositor or principal underwriter, from selling periodic payment plan certificates unless the proceeds of all payments, other than sales loads, are deposited with a qualified bank and held under arrangements which prohibit any payment to the depositor or principal underwriter except a reasonable fee, as the Commission may prescribe, for performing bookkeeping and other administrative duties normally performed by the bank itself.

4. Applicants submit that their request for exemptive relief for deduction of the 0.70% mortality and expense risk charge from the assets of the Variable Account or any other separate accounts established in the future by AUSA Life in connection with the issuance of Future Contracts, would promote competitiveness in the variable annuity contract market by eliminating the need for AUSA Life to file redundant exemptive applications, thereby reducing AUSA Life's administrative expenses and maximizing the efficient use of its resources. Applicants further submit that the delay and expense involved in having repeatedly to seek exemptive relief would impair AUSA Life's ability effectively to take advantage of business opportunities as they arise. Further, if AUSA Life were required repeatedly to seek exemptive relief with respect to the same issues addressed in this Application, investors would not receive any benefit or additional protection thereby. Thus, Applicants believe that the requested exemptions are appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the 1940 Act.

5. Applicants represent that the 0.70% mortality and expense risk charge under the Existing Contracts is reasonable in relation to the risks assumed by AUSA Life under the Existing Contracts and is within the range of industry practice for comparable annuity contracts. This representation is based upon AUSA Life's analysis of publicly available information about similar industry products, taking into account such factors as current charge levels, existence of charge level guarantees, and guaranteed annuity rates. AUSA Life undertakes to maintain at its principal office, available to the Commission and its staff upon request, a memorandum setting forth in detail the products analyzed in the course of, and the methodology used in making these determinations.

6. Applicants represent that, prior to offering Future Contracts, they will conclude that the mortality and expense risk charge under such contracts (which cannot exceed in amount the mortality and risk charge under the Existing Contracts) will be reasonable in relation to the risks assumed by AUSA Life under the Contracts and is within the range of industry practice for comparable annuity contracts. AUSA Life will maintain at its principal offices, and make available to the Commission and its staff upon request, a memorandum setting forth in detail the products analyzed in the course of, and the methodology used in, making that determination.

7. Applicants acknowledge that, if a profit is realized from the mortality and expense risk charge under the Contracts, all or a portion of such profit may be available to pay distribution expenses not reimbursed under the Contracts. AUSA Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements will benefit the Variable Account (or future accounts) and the owners of the Existing Contracts (or Future Contracts). The basis for that conclusion is set forth in a memorandum which will be maintained by AUSA Life at its principal office and will be made available to the Commission and its staff upon request.

8. Applicants also represent that the Accounts will invest only in underlying management investment companies which undertake, in the event they should adopt a plan pursuant to Rule 12b–1 under the 1940 Act to finance distribution expenses, to have such plan formulated and approved by a board of directors or trustees, a majority of whom are not ''interested persons'' of such investment company within the meaning of Section 2(a)(19) of the 1940 Act.

Conclusion

For the reasons set forth above, Applicants represent that the exemptions requested are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan F. Katz,

Secretary.

[FR Doc. 95–20047 Filed 8–14–95; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–21274; File No. 812–9382]

Landmark VIP Funds, et al.

August 8, 1995.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''1940 Act'').

APPLICANTS: Landmark VIP Funds (the ''Trust''), Citibank, N.A. (''Citibank'') and certain life insurance companies and their accounts investing now or in the future in the Trust (''Separate Accounts'').

RELEVANT 1940 ACT SECTIONS: Order requested under Section 6(c) of the 1940 Act for exemptions from the provisions of Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules (6e–2(b)(15) and 6e–3(T)(b)(15).

SUMMARY OF APPLICATION: Applicants seek an order to the extent necessary to permit shares of any current or future series of the Trust to be sold to and held by separate accounts funding variable

annuity and variable life insurance contracts issued by both affiliated and unaffiliated life insurance companies.

FILING DATE: The application was filed on December 20, 1994. An amendment was filed on July 19, 1995. Applicants have represented that they will file another amendment to the application during the notice period to include the representations contained herein.

HEARING AND NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on September 5, 1995, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, Lea Anne Copenhefer, Esq., Bingham, Dana & Gould, 150 Federal Street, Boston, Massachusetts 02110.

FOR FURTHER INFORMATION CONTACT: Mark C. Amorosi, Staff Attorney, or Wendy Finck Friedlander, Deputy Chief, at (202) 942–0670, Office of Insurance Products, Division of Investment Management.

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. The Trust is an open-end management investment company organized as a Massachusetts business trust on August 22, 1991. The Trust currently consists of four separate series: (1) the Landmark VIP U.S. Government Portfolio, (2) the Landmark VIP Balanced Portfolio, (3) the Landmark VIP Equity Portfolio and (4) the Landmark VIP International Equity Portfolio (each individually a ''Portfolio'' and collectively the ''Portfolios''). The Board of Trustees may establish additional portfolios at any time.

2. Shares of the Portfolios initially will be offered only to Citicorp Life Variable Annuity Separate Account and First Citicorp Life Variable Annuity Separate Account, separate accounts of Citicorp Life Insurance Company and first Citicorp Life Insurance Company (the ''Citicorp Insurance Companies''), respectively, to serve as an investment vehicle for variable annuity contracts issued by the Citicorp Insurance Companies. The Citicorp Insurance Companies are affiliated companies by virtue of both being indirect subsidiaries of Citicorp, a bank holding company organized under the laws of Delaware. Shares of the Portfolios, and of any future series of the Trust that serves exclusively as an investment vehicle for Separate Accounts (hereinafter referred to as ''Other Portfolios''), will be offered to separate accounts of other insurance companies, including insurance companies that are not affiliated with the Citicorp Insurance Companies, to serve as the investment vehicle for various types of insurance products, which may include variable annuity contracts, single premium variable life insurance contracts, scheduled premium variable life insurance contracts and flexible premium variable life insurance contracts (collectively ''variable contracts''). Insurance companies whose separate account or accounts own shares of the Portfolios or of any Other Portfolio are referred to herein as ''Participating Insurance Companies.''

3. Citibank will serve as the investment adviser for each Portfolio. the Landmark Funds Broker-Dealer Services, Inc. will serve as administrator and distributor for each Portfolio.

Applicants' Legal Analysis

1. In connection with the funding of scheduled premium variable life insurance contracts issued through a separate account registered under the 1940 Act as a unit investment trust, Rule 6e–2(b)(15) provides exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The relief provided by Rule 6e–2 is available to a separate account's investment adviser, principal underwriter, and sponsor or depositor. The exemptions granted by Rule 6e–2(b)(15) are available only where a management investment company underlying a unit investment trust (''underlying fund'') offers its shares ''exclusively to variable life insurance separate accounts of the life insurer, or of any affiliated life insurance company.'' Therefore, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers it shares to a variable annuity or a flexible premium variable life insurance separate account of the same company or of any affiliated life insurance company. The use of a common management investment company as the underlying investment medium for both variable annuity and variable life insurance separate accounts of the same life insurance company or of any affiliated life insurance company is referred to herein as ''mixed funding.''

2. In addition, the relief granted by Rule 6e–2(b)(15) is not available with respect to a scheduled premium variable life insurance separate account that owns shares of an underlying fund that also offers its shares to separate accounts funding variable contracts of one or more unaffiliated life insurance companies. The use of a common management investment company as the underlying investment medium for variable life insurance separate accounts of one insurance company and separate accounts funding variable contracts of one or more unaffiliated life insurance companies is referred to herein as ''shared funding.''

3. In connection with the funding of flexible premium variable life insurance contracts through a unit investment trust, Rule 6e–3(T)(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a), and 15(b) of the 1940 Act. The relief provided by Rule 6e–3(T) is available to a separate account's investment adviser, principal underwriter, and sponsor or depositor. The exemptions granted by Rule 6e–3(T) are available only where a unit investment trust's underlying fund offers its 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 * * *.'' Therefore, Rule 6e–3(T) permits mixed funding with respect to a flexible premium variable life insurance separate account, subject to certain conditions. However, Rule 6e–3(T) does not permit shared funding because the relief granted by Rule 6e–3(T)(b)(15) is not available with respect to a flexible premium variable life insurance separate account that owns shares of a management company that also offers its shares to separate accounts (including variable annuity and flexible premium and scheduled premium variable life insurance separate accounts) of unaffiliated life insurance companies.

4. Applicants therefore request that the Commission, under its authority in Section 6(c) of the 1940 Act, grant relief from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act and Rules 6e–2(b)(15) and 6e–3(T)(b)(15) thereunder for

themselves and for variable life insurance separate accounts of the Participating Insurance Companies, and the principal underwriters and depositors of such separate accounts, to the extent necessary to permit mixed funding and shared funding.

5. Section 9(a) of the 1940 Act makes it unlawful for any company to serve as an investment adviser to, or principal underwriter for, any registered open-end investment company if an affiliated person of that company is subject to any disqualification specified in Sections 9(a)(1) or 9(a)(2). Rule 6e–2(b)(15)(i) and (ii) and Rule 6e–3(T)(b)(15)(i) and (ii) provide exemptions from Section 9(a) under certain circumstances, subject to limitations on mixed and shared funding. The relief provided by Rules 6e–2(b)(15)(i) and 6e–3(T)(b)(15)(i) permits a person disqualified under Section 9(a) to serve as an officer, director, or employee of the life insurer, or any of its affiliates, so long as that person does not participate directly in the management or administration of the underlying fund. The relief provided by Rules 6e–2(b)(15)(ii) and 6e–3(T)(b)(15)(ii) permits the life insurer to serve as the underlying fund's investment adviser or principal underwriter, provided that none of the insurer's personnel who are ineligible pursuant to Section 9(a) participate in the management or administration of the fund.

6. Applicants state that the partial relief granted in Rules 6e–2(b)(15) and 6e–3(T)(b)(15) from the requirements of Section 9(a), in effect, limits the monitoring of an insurer's personnel that would otherwise be necessary to ensure compliance with Section 9 to that which is appropriate in light of the policy and purposes of Section 9. Applicants state that Rules 6e–2 and 6e–3(T) recognize that it is not necessary for the protection of investors or for the purposes of the 1940 Act to apply the provisions of Section 9(a) to the many individuals in an insurance company complex, most of whom typically will have no involvement in matters pertaining to an investment company. Applicants submit that there is no regulatory reason to apply the provisions of Section 9(a) to the many individuals in various unaffiliated insurance companies (or affiliated companies of Participating Insurance Companies) that may utilize the Trust as the funding medium for variable contracts.

7. Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii) provide partial exemptions from Sections 13(a), 15(a), and 15(b) of the 1940 Act to the extent that those sections have been deemed by the Commission to require ''pass-through'' voting with respect to management investment company share held by a separate account, to permit the insurance company to disregard the voting instructions of its contract owners in certain limited circumstances.

Rules 6e–2(b)(15)(iii)(A) and 6e–3(T)(b)(15)(iii)(A) provide that the insurance company may disregard voting instructions of its contract owners in connection with the voting of shares of an underlying fund if such instructions would require such share to be voted to cause such companies to make, or refrain from making, certain investments which would result in changes in the subclassification or investment objectives of such companies, or to approve or disapprove any contract between an underlying fund and its investment adviser, when required to do so by an insurance regulatory authority, subject to the provisions of paragraphs (b)(5)(i) and (b)(7)(ii)(A) of each Rule.

Rules 6e–2(b)(15)(iii)(B) and 6e–3(T)(b)(15)(iii)(B) provide that the insurance company may disregard contract owners' voting instructions in the contract owners initiate any change in such company's investment policies or any principal underwriter or investment adviser, provided that disregarding such voting instructions is reasonable and subject to the other provisions of paragraphs (b)(5)(ii) and (b)(7)(ii)(B) and (C) of each Rule.

8. Applicants submit that shared funding by unaffiliated insurance companies does not present any issues that do not already exist where a single insurance company is licensed to do business in several or all states. In this regard, Applicants state that a particular state insurance regulatory body could require action that is inconsistent with the requirements of other states in which the insurance company offers its policies. Accordingly, Applicants submit that the fact that different insurers may be domiciled in different states does not create a significantly different or enlarged problem.

9. Applicants state further that, under Rules 6e–2(b)(15)(iii) and 6e–3(T)(b)(15)(iii), the rights of the insurance company to disregard the voting instructions of its contract owners do not rise any issues different from those raised by the authority of state insurance administrators over separate accounts, and that affiliation does not eliminate the potential, if any, for divergent judgments as to the advisability or legality of a change in investment policies, principal underwriter, or investment adviser initiated by contractowners. Applicants state that the potential for disagreement is limited by the requirement in Rules 6e–2 and 6e–3(T) that the insurance company's disregard of voting instructions be reasonable and based on specific good faith determinations.

10. Applicants submit that mixed funding and shared funding should benefit variable contract owners by: (a) eliminating a significant portion of the costs of establishing and administering separate funds; (b) allowing for a greater amount of assets available for investment by the Portfolios, thereby promoting economies of scale, permitting greater safety through greater diversification, and/or making the addition of new portfolios more feasible; and (c) encouraging more insurance companies to offer variable contracts, resulting in increased competition with respect to both variable contract design and pricing, which can be expected to result in more product variation and lower charges. Each Portfolio will be managed to attempt to achieve its investment objectives and not to favor or disfavor any particular Participating Insurance Company or type of insurance product.

11. Applicants assert that there is no significant legal impediment to permitting mixed and shared funding. Applicants state that separate accounts organized as unit investment trusts have historically been employed to accumulate shares of mutual funds which have not been affiliated with the depositor or sponsor of the separate account. Applicants also represent that mixed and shared funding will have no adverse federal income tax consequences.

Applicants' Conditions

The Applicants have consented to the following conditions:

1. A majority of the Board of Trustees of the Trust (''Board'') shall consist of persons who are not ''interested persons,'' as defined by Section 2(a)(19) of the 1940 Act and Rules thereunder and as modified by any applicable orders of the Commission, except that, if this condition is not met by reason of death, disqualification, or bona fide resignation of any trustee or trustees, then the operation of this condition shall be suspended: (i) for a period of 45 days, if the vacancy or vacancies may be filled by the Board; (ii) for a period of 60 days, if a vote of shareholders is required to fill the vacancy or vacancies; or (iii) for such longer period as the Commission may prescribe by order upon application.

2. The Board will monitor the Trust for the existence of any material

irreconcilable conflict between the interests of the contract owners of all separate accounts investing in any Portfolio or Other Portfolio. A material irreconcilable conflict may arise for a variety of reasons, including: (a) state insurance regulatory authority action; (b) a change in applicable federal or state insurance, tax, or securities laws or regulations, or a public ruling, private letter ruling, no-action or interpretive letter, or any similar action by insurance, tax, or securities regulatory authorities; (c) an administrative or judicial decision in any relevant proceeding; (d) the manner in which the investments of a Portfolio or Other Portfolio are being managed; (e) a difference in voting instructions given by variable annuity and variable life insurance contract owners; or (f) a decision by a Participating Insurance Company to disregard contract owner voting instructions.

3. Participating Insurance Companies and Citibank will report any potential or existing conflicts, of which they become aware, to the Board and will be obligated to assist the Board in carrying out its responsibilities by providing the Board with all information reasonably necessary for it to consider any issues raised. This responsibility includes, but is not limited to, an obligation by each Participating Insurance Company to inform the Board whenever contract owner voting instructions are disregarded. These responsibilities will be contractual obligations of all Participating Insurance Companies investing in a Portfolio or Other Portfolio under their agreements governing participation therein, and such agreements shall provide that such responsibilities will be carried out with a view only to the interests of the contract owners.

4. If a majority of the Board, or a majority of the disinterested members of the Board, determine that a material irreconcilable conflict exists, the relevant Participating Insurance Companies shall, at their expense and to the extent reasonably practicable (as determined by a majority of disinterested members of the Board), take whatever steps are necessary to remedy or eliminate the irreconcilable material conflict, up to and including: (a) withdrawing the assets allocable to some or all of the separate accounts from the Trust or any Portfolio or Other Portfolio therein and reinvesting such assets in a different investment medium (including another Portfolio, if any, of the Trust), or submitting the question whether such segregation should be implemented to a vote of all affected contract owners and, as appropriate, segregating the assets of any appropriate group (*i.e.*, annuity contract owners, life insurance contract owners, or variable contract owners of one or more participating Insurance Companies) that votes in favor of such segregation, or offering to the affected contract owners the option of making such a change; and (b) establishing a new registered management investment company or managed separate account. If a material irreconcilable conflict arises because of a Participating Insurance Company's decision to disregard contract owner voting instructions, and that decision represents a minority position or would preclude a majority vote, the Participating Insurance Company may be required, at the election of the Portfolio or Other Portfolio, to withdraw its separate account's investment therein, and no charge or penalty will be imposed as a result of such withdrawal. The responsibility to take remedial action in the event of a Board determination of an irreconcilable material conflict and to bear the cost of such remedial action shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in a Portfolio or Other Portfolio and these responsibilities will be carried out with a view only to the interests of the contract owners.

For the purposes of condition (4), a majority of disinterested members of the Board shall determine whether or not any proposed action adequately remedies any irreconcilable material conflict, but in no event will the Trust or Citibank be required to establish a new funding medium for any variable contract. No Participating Insurance Company shall be required by this condition (4) to establish a new funding medium for any variable contract if an offer to do so has been declined by a vote of a majority of contract owners materially affected by the irreconcilable material conflict.

5. The determination by the Board of the existence of an irreconcilable material conflict and its implications shall be made known promptly in writing to all Participating Insurance Companies.

6. Participating Insurance Companies will provide pass-through voting privileges to all variable contract owners so long as the Commission continues to interpret the 1940 Act as requiring pass-through voting privileges for variable contract owners. Accordingly, each Participating Insurance Company will vote shares of each Portfolio or Other Portfolio held in its separate accounts in a manner consistent with timely voting instructions received from contract owners. Each Participating Insurance Company also will vote shares of each Portfolio and Other Portfolio held in its separate accounts for which no timely voting instructions from contract owners are received, as well as shares it owns, in the same proportion as those shares for which voting instructions are received. Each Participating Insurance Company shall be responsible for assuring that each of their separate accounts participating in a Portfolio or Other Portfolio calculates voting privileges in a manner consistent with all other Participating Insurance Companies. The obligation to calculate voting privileges in a manner consistent with all other separate accounts investing in the Trust shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in the Trust.

7. Each Portfolio or Other Portfolio will notify all Participating Insurance Companies that prospectus disclosure regarding potential risks of mixed and shared funding may be appropriate. Each Portfolio and Other Portfolio shall disclose in its prospectus that: (a) its shares are offered to separate accounts which fund both annuity and life insurance contracts of both affiliated and unaffiliated Participating Insurance Companies; (b) because of differences of tax treatment or other considerations, the interests of various contract owners participating in the Trust might at some time be in conflict; and (c) the Board will monitor the Trust for any material conflicts and determine what action, if any, should be taken.

8. All reports received by the Board regarding potential or existing conflicts, and all Board action with respect to determining the existence of a conflict, notifying Participating Insurance Companies of a conflict, and determining whether any proposed action adequately remedies a conflict, will be properly recorded in the minutes of the Board or other appropriate records, and such minutes or other records shall be made available to the Commission upon request.

9. If and to the extent Rule 6e–2 and Rule 6e–3(T) are amended, or Rule 6e–3 is adopted, to provide exemptive relief from any provision of the 1940 Act or the rules thereunder with respect to mixed and shared funding on terms and conditions materially different from any exemptions granted in the order requested, then each Portfolio and Other Portfolio and the Participating Insurance Companies, as appropriate, shall take such steps as may be necessary to comply with Rule 6e–2 and Rule 6e–3(T), as amended, and Rule 63–3, as

adopted, to the extent such rules are applicable.

10. The Trust will comply with all provisions of the 1940 Act requiring voting by shareholders (which, for these purposes, shall be the persons having a voting interest in the shares of the Trust), and in particular the Trust either will provide for annual meetings (except insofar as the Commission may interpret Section 16 of the 1940 Act not to require such meetings) or comply with Section 16(c) (although Applicants assert that the Trust is not one of the trusts described in this section) as well as with Sections 16(a) and, if and when applicable, Section 16(b). Further, the Trust will act in accordance with the Commission's interpretation of the requirements of Section 16(a) with respect to periodic elections of directors (or trustees) and with whatever rules the Commission may promulgate with respect thereto.

11. The Participating Insurance Companies and Citibank, at least annually shall submit to the Board such reports, materials or data as the Board may reasonably request so that it may fully carry out the obligations imposed upon it by these stated conditions, and said reports, materials, and data shall be submitted more frequently if deemed appropriate by the Board. The obligations of the Participating Insurance Companies to provide these reports, materials, and data to the Board when it so reasonably requests, shall be a contractual obligation of all Participating Insurance Companies under their agreements governing participation in each Portfolio or Other Portfolio.

Conclusion

For the reasons stated above, Applicants believe that the requested exemptions, in accordance with the standards of Section 6(c), are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 95–20048 Filed 8–14–95; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–36076; File No. SR–NASD–95–12]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Advertising and Sales Literature Filing and Review Requirements Under the Rules of Fair Practice and the Government Securities Rules

August 9, 1995.

I. Introduction

On May 10, 1995, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change[1] pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder.[3] The rule change amends Article III, Section 35 of the Rules of Fair Practice and Section 8 of the Government Securities Rules.

Notice of the proposed rule change, together with its terms of substance was provided by issuance of a Commission release[4] and by publication in the **Federal Register**.[5] Two comments were received in response to the Commission release, both raising concerns about the proposal. This order approves the proposed rule change.

II. Description

Under the rules as amended, the definitions of ''advertisement'' and ''sales literature'' will include electronic messages. The inclusion of the term ''electronic'' with regard to advertisements is intended to apply to communications available to all network subscribers including items displayed over network bulletin boards. As it applies to sales literature, the term ''electronic'' is intended to apply to messages sent directly to individuals or targeted groups. The term ''sales literature'' also will include telemarketing scripts. Generally, these scripts are intended to be read to prospective and existing customers or delivered electronically through a telemarketing service. They differ from other forms of telephone prospecting and customer contact in that these scripts are followed without variation by the caller.

Further, the rules will require that advertising and sales literature be approved internally by a registered principal prior to filing such materials with the NASD. Currently, the rules only require internal approval prior to the use of advertising and sales literature. Also, a registered principal will no longer be able to delegate his or her responsibility regarding internal approval procedures.

When material must be filed within a specified time frame, the rules will require members to provide the actual or anticipated date of first use or publication. For example, a firm that has never filed material with the Advertising Regulation Department is required to file its first advertisement at least ten days prior to first use and, therefore, under the rules as amended, will be required to provide the actual or anticipated date of first use.

The proposed rule change also will amend the scope of the rules relating to the use of recommendations by members. The amendment will make clear that the price of the security at the time the recommendation is made must be provided only when the recommendation is for corporate equities.

III. Comments

As noted above the Commission received two comment letters in response to the NASD's proposed rule change. The Investment Company Institute (''ICI'') expressed general support for the NASD's initiative, but indicated a number of concerns about the proposal.[6] First the ICI believes the requirements that only registered principals may approve advertising and sales literature would impose unnecessary burdens on members. The ICI believes legal or compliance officers are, in most cases, more qualified to handle the review and approval of advertising and sales literature than are registered principals. The ICI argues that since most legal or compliance officers are not registered principals, members will be forced to register such officers as principals, transfer review procedures to less qualified principals, or allow principals to rely on the opinions of the officers. The ICI sees no benefit in achieving such results. The ICI recommends that, instead of disrupting an industry practice that appears to be working well, the NASD should deal directly with the problem firms.

The ICI also recommends that the proposal to require materials to be

[1] The proposed rule change was initially submitted on April 10, 1995, and was amended on May 10, 1995, prior to the publication in the **Federal Register**.

[2] 15 U.S.C. § 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] Securities Exchange Act Release No. 35801 (June 2, 1995).

[5] 60 FR 30618 (June 9, 1995).

[6] Letter from Craig S. Tyle, Vice President & Senior Counsel, Securities and Financial Regulation, Investment Company Institute, to Jonathan G. Katz, Secretary, SEC (June 30, 1995).