

SUPPORTING STATEMENT
Rule 3a-8

A. JUSTIFICATION

1. Necessity for the Information Collection

Adopted in 2003, rule 3a-8 (17 CFR 270.3a-8) under the Investment Company Act of 1940 (the “Act”) (15 U.S.C. 80a), serves as a nonexclusive safe harbor from the Act’s definition of investment company for certain bona fide research and development companies (“R&D companies”). The rule is designed primarily to benefit R&D companies that 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. In the absence of rule 3a-8, these activities may cause an R&D company to fall within the Act’s definition of investment company and fail to qualify for an exclusion.¹

Among other things, rule 3a-8 requires 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.² The Commission believes that the involvement of the board of directors in determining whether an R&D company may rely on the rule is necessary to ensure that reliance on the rule is consistent with investor protection. The collection of information imposed by this requirement is voluntary because rule 3a-8 is an exemptive safe harbor, and therefore,

¹ See sections 3(a)(1)(A) and 3(a)(1)(C) of the Act (15 U.S.C. 80a-3(a)(1)(A), 80a-3(a)(1)(C)).

² Rule 3a-8(a)(6)(iv). 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(a)(2).

R&D companies may choose whether or not to rely on it. An R&D company seeking to rely on the safe harbor would need to 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.³

2. Purpose of the Information Collection

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.

3. Role of Improved Information Technology

Rule 3a-8 does not require reporting of any information or the filing of any documents with the Commission. The board of directors of an R&D company seeking to rely on the rule would need to adopt a board resolution and record that resolution contemporaneously in its minute books or comparable documents. Under the federal securities laws, the Commission does not prescribe how R&D companies keep records of board resolutions or minutes of board meetings. Accordingly, an R&D company could maintain these records electronically unless otherwise prohibited by state law.

4. Efforts to Identify Duplication

³ 17 CFR 270.3a-8(a)(7). The rule defines “capital preservation investment” as an investment that is made to conserve capital and liquidity until the funds are used in the issuer’s primary business or businesses. 17 CFR 270.3a-8(b)(4).

Rule 3a-8 does not impose any requirements that are duplicated elsewhere in the federal securities laws, and similar information is not available from other sources.

5. Effect on Small Entities

The Commission staff estimates that approximately 500 companies may rely on the rule, but anticipates that only a small percentage of these companies may be considered small entities. The only significant alternative to the rule would be for an R&D company to engage in its own analysis of existing statutory provisions and Commission orders and interpretations to determine the R&D company's status under the Act. The Commission therefore concludes that the rule, although it could affect small entities, would be less burdensome than this alternative and, thus, would minimize any impact upon, or cost to, small businesses. The Commission believes it could not adjust the rule to lessen the burden on small entities of complying with the rule without compromising the protection of investors in those small entities.

6. Consequences of Less Frequent Collection

The information collection requirements of rule 3a-8 would apply to an R&D company only if the R&D company relies on the rule. Under the rule, the board of directors of an R&D company relying on the rule, would need to adopt and record a resolution that the company is engaged in a non-investment business only once, unless the relevant circumstances change.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

None.

8. Consultation Outside of the Agency

The Commission requested public comment on the collection of information requirements in rule 3a-8 before it submitted this request for extension and approval to the Office of Management and Budget. The Commission received no comments in response to its request.

9. Payment or Gift to Respondents

Not applicable.

10. Assurance of Confidentiality

Not applicable.

11. Sensitive Questions

Not applicable.

12. Estimates of Hour Burden

Commission staff estimates that approximately 500 R&D companies may take advantage of rule 3a-8.⁴ Given that the board resolutions and investment guidelines will generally need to be adopted only once (unless relevant circumstances change),⁵ the Commission believes that all the R&D companies that rely on rule 3a-8 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

⁴ See National Science Board, Science and Engineering Indicators 2008 (“NSB Indicators”) (available at <http://www.nsf.gov/statistics/seind08/>).

⁵ 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.

the ordinary course of business.⁶ Therefore, we estimate that rule 3a-8 does not impose additional burdens.

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

13. Estimate of Total Annual Cost Burden

Rule 3a-8 does not impose any paperwork related cost burden that is not described above in item 12 above.

14. Estimate of Cost to the Federal Government

No costs to the federal government are associated with rule 3a-8. The rule does not require an R&D company to file any documents with the Commission.

15. Explanation of Changes in Burden

Rule 3a-8 has a current burden of 1 hour. Commission staff continues to estimate that newly formed R&D companies adopt the required board resolution and investment guideline in the ordinary course of business, and therefore results in an annual burden of 0 hours. We request authorization to maintain the inventory of one burden hour for administrative purposes.

16. Information Collection Planned for Statistical Purposes

Not applicable.

17. Approval to not Display Expiration Date

Not applicable.

⁶ In order for these companies to raise sufficient capital to fund their product development stage, Commission staff believes that they will need to present potential investors with investment guidelines. Investors generally want to be assured that the company's funds are invested consistent with the goals of capital preservation and liquidity.

18. Exceptions to Certification Statement

Not applicable.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.