

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release Nos. 34–50213; IA–2278; File No. S7–25–99]

RIN 3235–AH78

Certain Broker-Dealers Deemed Not To Be Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The Securities and Exchange Commission is reopening the period for public comment on a rule proposal under the Investment Advisers Act of 1940 that would address the application of the Advisers Act to brokers offering certain full service brokerage services (including advice) for an asset-based fee instead of traditional commissions, mark-ups, and mark-downs, and that would address electronic trading for reduced brokerage commissions.

DATES: Comments should be received on or before September 22, 2004.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7–25–99 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549–0609.

All submissions should refer to File No. S7–25–99. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post comments on the Commission's Internet Web site (<http://www.sec.gov>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

Robert L. Tuleya, Attorney-Adviser, or Nancy M. Morris, Attorney-Fellow, (202) 942–0719, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("SEC" or "Commission") is reopening the period for public comment on proposed rule 202(a)(11)–1 [17 CFR 275.202(a)(11)–1] and a proposed amendment to the instructions for Schedule I of Form ADV [17 CFR 279.1], both under the Investment Advisers Act of 1940. These amendments were proposed on November 4, 1999,¹ and the comment period initially closed on January 14, 2000. While the Commission received substantial commentary on the proposal during that period,² a substantial number of comments have been received by the Commission since that date. For example, in the sixty days between June 1 and August 1, 2004, we received more than 45 comment letters. One of these commenters, The Financial Planning Association,³ raised some new issues in its comment letter, and has also filed a petition for judicial review of the proposal.⁴ In view of the significant continuing public interest in the proposal and in order to provide all persons who are interested in this matter a current opportunity to comment, we believe that it is appropriate to reopen the comment period before we take action on the proposal.

We invite additional comment on the proposal, the issues raised in the proposing release, and on any other matters that may have an effect on the proposal. Do current fee-based programs more closely align the interests of investors with those of brokerage firms and their registered representatives than do traditional commission-based services? If the Commission determines not to adopt this rule as proposed, what would be the practical impact on

broker-dealers? Should we require broker-dealers who would seek to rely on the rule nevertheless to register if they market fee-based accounts based on the quality of investment advice provided? For example, should brokers be precluded from using certain terms like "investment advice" and "financial planning" in advertising these services, or is prominent disclosure that an account is a brokerage account sufficient to alert an investor to the nature of the account?

In light of the time that has elapsed since we proposed the rule, we desire to proceed as expeditiously as we reasonably can to complete this proceeding. Accordingly, we will extend the comment period until September 22, 2004, and we currently intend to reach a final decision on the proposal by December 31, 2004.

Dated: August 18, 2004.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–19258 Filed 8–18–04; 2:16 pm]

BILLING CODE 8010–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 772

[FHWA Docket No. FHWA–2004–18309]

RIN 2125–AF03

Procedures for Abatement of Highway Traffic Noise and Construction Noise

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: This document proposes to amend the FHWA regulation that specifies the traffic noise prediction method to be used in highway traffic noise analyses. This proposed revision would require the use of the FHWA Traffic Noise Model (FHWA TNM) or any other model determined by the FHWA to be consistent with the methodology of the FHWA TNM. The FHWA also proposes to update the specific reference to acceptable highway traffic noise prediction methodology and remove references to a noise measurement report and vehicle noise emission levels that no longer need to be included in the regulation. Finally, the FHWA proposes to make four ministerial corrections to the section on Federal participation.

DATES: Comments must be received by October 19, 2004.

¹ Certain Broker-Dealers Deemed Not To Be Investment Advisers, Investment Advisers Act Release No. 1845 (Nov. 4, 1999) [64 FR 61226 (Nov. 10, 1999)].

² Many of the comments received on the proposal are posted on the Commission's Web site at (<http://www.sec.gov>). All comments received are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549.

³ Letter from Duane R. Thompson, Group Director, Advocacy, The Financial Planning Association to Jonathan G. Katz, Secretary, SEC (June 21, 2004), File No. S7–25–99.

⁴ *Financial Planning Association v. SEC*, No. 04–1242 (DC Cir.) (case docketed on July 20, 2004).

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, or submit electronically at <http://dmses.dot.gov/submit> or fax comments to (202) 493-2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>. All comments must include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477-78) or you may visit <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Armstrong, Office of Natural and Human Environment, HEPN, (202) 366-2073, or Mr. Robert Black, Office of the Chief Counsel, HCC-31, (202) 366-1359, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may submit or retrieve comments online through the Document Management System (DMS) at: <http://dmses.dot.gov/submit>. Acceptable formats include: MS Word, MS Word for Mac, Rich Text File (RTF), American Standard Code for Information Interchange (ASCII)(TXT), Portable Document Format (PDF), and WordPerfect. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the web site.

An electronic copy of this document may also be downloaded by using a computer, modem, and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home

page at: <http://www.archives.gov> and the Government Printing Office's Web page at: <http://www.access.gpo.gov/nara>.

Background

The FHWA noise regulations were developed as a result of the Federal-Aid Highway Act of 1970 (Pub. L. 91-605, 84 Stat. 1713) and apply to highway construction projects where a State department of transportation has requested Federal funding for participation in the project. The FHWA noise regulations, found at 23 CFR part 772, require the State DOT to determine if there will be traffic noise impacts in areas adjacent to federally-aided highways when a project is proposed for the construction of a highway on a new location or the reconstruction of an existing highway to either significantly change the horizontal or vertical alignment or increase the number of through-traffic lanes.

Analysts must use a highway traffic noise prediction model to calculate future traffic noise levels and determine traffic noise impacts. The FHWA developed its first prediction model described in "FHWA Highway Traffic Noise Prediction Model" (Report No. FHWA-RD-77-108), December 1978.¹

To incorporate over two decades of improvements in the state-of-the-art of predicting highway traffic noise, as well as continued advancements in computer technology, the FHWA, with assistance from the Volpe National Transportation Systems Center in Cambridge, Massachusetts, developed a new state-of-the-art highway traffic noise prediction model in 1998, "FHWA Traffic Noise Model," Version 1.0 (FHWA TNM).² This model bases its calculations on totally new acoustical prediction algorithms as well as newly measured vehicle emission levels for automobiles, medium trucks, heavy trucks, buses and motorcycles.

The Volpe Center, using funds from the FHWA and 25 State departments of transportation, directed and assisted the development of the FHWA TNM to accurately analyze the extremely wide range of frequencies found in highway traffic noise. These include frequencies that typically range from as low as 63 Hertz (two octaves below Middle "C" on a piano) to as high as 8,000 Hertz (higher than any note on a piano and usually inaudible to the human ear). The FHWA TNM also allows noise analysts to predict noise for both

constant-flow and interrupted-flow traffic and enables them to accurately predict the results of multiple noise barriers, as well as the effects of vegetation and rows of buildings along highways.

The FHWA originally released the FHWA TNM, Version 1.0, on March 30, 1998. Since then, the FHWA has made improvements that resulted in six additional releases—v1.0a, v1.0b, v1.1, v2.0, and v2.1, and v2.5. The FHWA released Version 2.5 of the model on April 14, 2004. The model has been phased in since its original release and will now replace the earlier model distributed in 1978.

As part of the initial establishment of the FHWA technical procedures for the analysis of highway traffic noise, *i.e.*, traffic noise measurement and prediction methodologies, the FHWA's noise regulation included references to "Sound Procedures for Measuring Highway Noise: Final Report"³ and to vehicle emission levels. This was done to aid in everyone's knowledge and understanding of the new technology of highway traffic noise prediction. However, since this technology has now been well established and documented for more than two decades, the FHWA noise regulation no longer needs to include any reference to a measurement report or to vehicle emission levels. Therefore, the FHWA proposes to remove these references from the regulation.

Proposed Changes

The FHWA proposes to update the specific reference in the regulation to acceptable highway traffic noise prediction methodology and to remove references to a noise measurement report and vehicle noise emission levels. Additionally, the FHWA proposes to revise the regulation to make four ministerial corrections.

In § 772.17(a), we propose to require the use of the FHWA Traffic Noise Model (FHWA TNM), which is described in "FHWA Traffic Noise Model" Report No. FHWA-PD-96-010,⁴ including Revision No. 1, dated April 14, 2004, or any other model determined by the FHWA to be consistent with the methodology of the FHWA TNM. We intend to incorporate this report by reference into the

³ A printed copy of "Sound Procedures for Measuring Highway Noise: Final Report" (Report No. FHWA-DP-45-1R), August 1981, is available on the docket.

¹ A printed copy of "FHWA Highway Traffic Noise Prediction Model" (Report No. FHWA-RD-77-108), December 1978, is available on the docket.

² A printed copy of the "FHWA Traffic Noise Model Technical Manual" (Report No. FHWA-PD-96-010), February 1998, is available on the docket.

⁴ "FHWA Traffic Noise Model" (Report No. FHWA-PD-96-010), February 1998, is available for inspection and copying at the FHWA Headquarters Office, located at 400 Seventh Street, SW., Washington, DC 20590, as prescribed at 49 CFR part 7.

regulation. We also propose to remove all references to previous traffic noise prediction methodology, vehicle noise emission levels, and a noise measurement report.

In § 772.13(c), we propose to remove the words “except that Interstate construction funds may only participate in Type I projects” because Interstate construction funds no longer exist. These funds were specifically authorized by the Congress for the Interstate construction program and have been fully expended.

In § 772.13(c)(1), we propose to change “exclusive land designations” to “exclusive lane designations” to correct an earlier error where the word “land” appeared when it should have been the word “lane.”

In § 772.13(c)(4), we propose to remove “Interstate construction funds may not participate in landscaping,” since Interstate construction funds no longer exist.

Finally, in § 772.13(d), the FHWA proposes to change “Regional Federal Highway Administrator” to “the FHWA.” State departments of transportation should submit their alternate noise abatement measures to the FHWA Division Administrator for approval.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and U.S. DOT Regulatory Policies and Procedures

The FHWA has determined that this proposed rule would not be a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of the U.S. Department of Transportation regulatory policies and procedures.

The proposed amendment revises requirements for traffic noise prediction on Federal-aid highway projects to be consistent with the current state-of-the-art technology for traffic noise

prediction. It is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (RFA) (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this proposed rule on small entities and anticipates that this action would not have a significant economic impact on a substantial number of small entities. The proposed amendment addresses traffic noise prediction on certain State highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the RFA does not apply, and the FHWA certifies that the proposed action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This NPRM would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). The actions proposed in this NPRM would not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$120.7 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. Additionally, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and it has been determined that this proposed action does not have a substantial direct effect or sufficient federalism implications on States that would limit the policymaking discretion of the States. Nothing in this proposed rule directly preempts any State law or regulation or affects the States’ ability to

discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

National Environmental Policy Act

The FHWA has also analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and anticipates that this action would not have any effect on the quality of the human and natural environment, since it proposes to update the specific reference to acceptable highway traffic noise prediction methodology and remove unneeded references to a specific noise measurement report and vehicle noise emission levels.

Paperwork Reduction Act

This proposal contains no collection of information requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this proposed action under Executive Order 13175, dated November 6, 2000, and believes that this proposed action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. This proposed rulemaking primarily applies to noise prediction on State highway projects and would not impose any direct compliance requirements on Indian tribal governments and will not have any economic or other impacts on the viability of Indian tribes. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. We have determined that this proposed action would not be a significant energy action under that order because any action contemplated would not be a significant regulatory action under Executive Order 12866 and would not be likely to have a significant adverse effect on the

supply, distribution, or use of energy. Therefore, the FHWA certifies that a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this proposed rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this proposed action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this proposed action will not cause an environmental risk to health or safety that may disproportionately affect children.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 772

Highways and roads, Noise control.

Issued on: August 11, 2004.

Mary E. Peters,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend part 772 of title 23, Code of Federal Regulations, as follows:

PART 772—PROCEDURES FOR ABATEMENT OF HIGHWAY TRAFFIC NOISE AND CONSTRUCTION NOISE

1. The authority citation for part 772 continues to read as follows:

Authority: 23 U.S.C. 109(h) and (i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104–59, 109 Stat. 568, 605; 49 CFR 1.48(b).

2. In § 772.13 revise paragraphs (c) introductory text, (c)(1), (c)(4), and (d) to read as follows:

§ 772.13 Federal participation.

* * * * *

(c) The noise abatement measures listed below may be incorporated in Type I and Type II projects to reduce traffic noise impacts. The costs of such measures may be included in Federal-aid participating project costs with the Federal share being the same as that for the system on which the project is located.

(1) Traffic management measures (*e.g.*, traffic control devices and signing for prohibition of certain vehicle types, time-use restrictions for certain vehicle types, modified speed limits, and exclusive lane designations).

* * * * *

(4) Construction of noise barriers (including landscaping for aesthetic purposes) whether within or outside the highway right-of-way.

* * * * *

(d) There may be situations where severe traffic noise impacts exist or are expected, and the abatement measures listed above are physically infeasible or economically unreasonable. In these instances, noise abatement measures other than those listed in paragraph (c) of this section may be proposed for Types I and II projects by the highway agency and approved by the FHWA on a case-by-case basis when the conditions of paragraph (a) of this section have been met.

3. Revise § 772.17(a) to read as follows:

§ 772.17 Traffic noise prediction.

(a) Any analysis required by this subpart must use the FHWA Traffic Noise Model (FHWA TNM), which is described in “FHWA Traffic Noise Model” Report No. FHWA–PD–96–010,⁵ including Revision No. 1, dated April 14, 2004, or any other model determined by the FHWA to be consistent with the methodology of the FHWA TNM. This publication is incorporated by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 and is on file at the National Archives and Record Administration (NARA). For information on the availability of this material at NARA call (202) 741–6030,

⁵ “FHWA Traffic Noise Model” (Report No. FHWA–PD–96–010), February 1998, is available for inspection and copying at the FHWA Headquarters Office, located at 400 Seventh Street, SW., Washington, DC 20590, as prescribed at 49 CFR part 7.

or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. It is available for copying and inspection at the Federal Highway Administration, 400 Seventh Street, SW., Room 3240, Washington, DC 20590, as provided in 49 CFR part 7.

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[FR Doc. 04–18850 Filed 8–19–04; 8:45 am]

BILLING CODE 4910–22–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–7802–7]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to partially delete the Davenport and Flagstaff Smelters Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 8 is issuing a notice of intent to partially delete the Davenport and Flagstaff Smelters Superfund Site (Site), located in Salt Lake County, Utah, from the National Priorities List (NPL) and requests public comments on this notice of intent. Specifically, EPA intends to delete 23 residential properties within the Site. The NPL constitutes Appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 as amended. The EPA and the state of Utah, through the Utah Department of Environmental Quality, have determined that all appropriate response actions under CERCLA have been completed for the properties subject to the partial deletion. However, this partial deletion does not preclude future actions under Superfund.

In the “Rules and Regulations” section of today’s **Federal Register**, we are publishing a direct final notice of partial deletion of the Davenport and Flagstaff Smelters Superfund Site without prior notice of intent to partially delete because we view this as a non-controversial revision and anticipate no adverse comment. We have explained our reasons for this partial deletion in the preamble to the