

**OFFICE OF MANAGEMENT AND BUDGET****OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations"**

**AGENCY:** Office of Management and Budget, Executive Office of the President.

**ACTION:** Proposed revision.

**SUMMARY:** This notice offers interested parties an opportunity to comment on a proposed revision to OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations." Pub. L. 105-277 directs OMB to amend Section \_\_\_\_ .36 of OMB Circular A-110 to require Federal awarding agencies "to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act" (FOIA). The Act further states that "if the agency obtaining the data does so solely" in response to a FOIA request, the agency "may authorize a reasonable user fee equaling the incremental cost of obtaining the data." Pursuant to the direction of Pub. L. 105-277, OMB is proposing to revise Circular A-110 as shown below.

**DATES:** Comments must be received by April 5, 1999.

**ADDRESSES:** Comments on this proposed revision should be addressed to: F. James Charney, Policy Analyst, Office of Management and Budget, Room 6025, New Executive Office Building, Washington, DC 20503. If possible, please include a word processing version of comments on a computer disk. Comments may also be submitted via E-mail to: fcharney@omb.eop.gov. Please include the full body of E-mail comments in the text of the message and not as an attachment. Please include the name, title, organization, postal address, and E-mail address in the text of the message.

**FOR FURTHER INFORMATION CONTACT:** F. James Charney, Policy Analyst, Office of Management and Budget, at (202) 395-3993.

**SUPPLEMENTARY INFORMATION:** Pub. L. 105-277 includes a provision that directs OMB to amend Section \_\_\_\_ .36 of OMB Circular A-110 "to require Federal awarding agencies to ensure that all data produced under an award will be made available to the public

through the procedures established under the Freedom of Information Act." Pub. L. 105-277 further provides that "if the agency obtaining the data does so solely at the request of a private party, the agency may authorize a reasonable user fee equaling the incremental cost of obtaining the data." According to congressional floor statements made in support of the provision, its aim is to "provide the public with access to federally funded research data" that is "used by the Federal Government in developing policy and rules." 144 Cong. Rec. S12134 (October 9, 1998) (Statement of Sen. Lott); *see id.* (Statement of Sen. Shelby) (the provision "represents a first step in ensuring that the public has access to all studies used by the Federal Government to develop Federal policy").

In describing the foregoing provisions of Pub. L. 105-277, congressional proponents stated that it requires OMB "to amend OMB Circular A-110 to require Federal awarding agencies to ensure that all research results, including underlying research data, funded by the Federal Government are made available to the public through the procedures established under the Freedom of Information Act." *Id.* (Statement of Sen. Lott). The proponents also stated that "the amended Circular shall apply to all Federally funded research, regardless of the level of funding or whether the award recipient is also using non-Federal funds." *Id.* (Statement of Sen. Campbell). They also explained that "[t]he Conferees recognize that this language covers research data not currently covered by the Freedom of Information Act. The provision applies to all Federally funded research data regardless of whether the awarding agency has the data at the time the request is made" under the FOIA. *Id.* Under the Supreme Court's decision in *Forsham v. Harris*, 445 U.S. 169, 179-80 (1980), data that is in the files of a recipient of a Federal award, but not in the files of a Federal agency, would not otherwise be available under FOIA.

The proposed revision to Section \_\_\_\_ .36 of Circular A-110 implements the requirements of Pub. L. 105-277 by providing that, after publication of research findings used by the Federal government in developing policy or rules, the research results and underlying data would be available to the public in accordance with the FOIA. Pursuant to the direction of Pub. L. 105-277, the proposed revision requires Federal awarding agencies, in response to a FOIA request, to obtain the requested data from the recipient of the Federal award. Since the agency must

take steps to obtain the data, the agency is afforded a reasonable time to do so. Once the agency has obtained the data, the agency will then process the FOIA request in accordance with the standard procedural and substantive rules that govern FOIA requests. These standard FOIA rules include the statutory concept of what constitutes a "record" and the statutory "exemptions" (found in 5 U.S.C. 552(b)) from the FOIA's requirement to disclose records. Accordingly, after obtaining and reviewing the requested data, the agency will have to determine whether any of the FOIA exemptions, which permit an agency to withhold requested records, would apply to some or all of the data. For example, FOIA Exemption 6, 5 U.S.C. 552(b)(6), exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". If the Federal awarding agency obtained the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

OMB recognizes that this proposed revision required by Pub. L. 105-277 raises a number of important issues. Accordingly, OMB encourages interested parties to provide comment at this time so that any concerns may be addressed in OMB's development of the final revision to the Circular, to be published after the close of the comment period.

In conclusion, pursuant to the direction contained in Pub. L. 105-277 OMB is proposing to revise Circular A-110 as shown below.

Issued in Washington, DC, January 26, 1999.

**Norwood J. Jackson,**  
Acting Controller.

Pursuant to the direction of Pub. L. 105-277, OMB hereby proposes to amend Section \_\_\_\_ .36(c) of OMB Circular A-110 to read as follows:

(c) The Federal Government has the right to (1) obtain, reproduce, publish or otherwise use the data first produced under an award, and (2) authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes. In addition, in response to a Freedom of Information Act (FOIA) request for data relating to published research findings produced under an award that were used by the Federal Government in developing policy or

rules, the Federal awarding agency shall, within a reasonable time, obtain the requested data so that they can be made available to the public through the procedures established under the FOIA. If the Federal awarding agency obtains the data solely in response to a FOIA request, the agency may charge the requester a reasonable fee equaling the full incremental cost of obtaining the data. This fee should reflect costs incurred by the agency, the recipient, and applicable subrecipients. This fee is in addition to any fees the agency may assess under the FOIA (5 U.S.C. 552(a)(4)(A)).

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## SECURITIES AND EXCHANGE COMMISSION

[Rel No. IC-23671; File No. 812-11344]

### Rydex Variable Trust, et al.

January 29, 1999.

**AGENCY:** Securities and Exchange Commission (the "SEC" or the "Commission").

**ACTION:** Notice of application for an order under Section 6(c) of the Investment Company Act of 1940 (the "1940 Act") granting exemptive 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.

**SUMMARY OF APPLICATION:** Applicants seek an order to the extent necessary to permit shares of the Rydex Variable Trust and shares of any other investment company that is designed to fund insurance products and for which PADCO Advisors II, Inc. ("PADCO"), or any of its affiliates, may serve as investment advisor, administrator, manager, principal underwriter, or sponsor (collectively, the "Trust") to be sold to and held by: (a) Variable annuity and variable life insurance separate accounts of both affiliated and unaffiliated life insurance companies (the "Participating Insurance Companies"); and (b) qualified pension and retirement plans outside the separate account context (the "Qualified Plans").

*Applicants:* Rydex Variable Trust and PADCO Advisors II, Inc.

*Filing Date:* The application was filed on October 7, 1998, amended and restated on December 17, 1998, and amended and restated on January 28, 1999.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a

hearing. Interested persons may request a hearing on this application by writing to the Secretary of the SEC and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on February 24, 1999, and accompanied by proof of service on the Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the interest, the reason for the request and the issues contested. Persons may request notification of the date of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Morgan, Lewis & Bockius LLP, Attention: John H. Grady, Jr., Esq., and C. Ronald Rubley, Esq., One Logan Square, Philadelphia, PA 19103-6993.

**FOR FURTHER INFORMATION CONTACT:** Martha Peterson, Attorney, or Susan Olson, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 942-0670.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application is available for a fee from the Public Reference Branch of the SEC, 450 Fifth Street, NW, Washington, DC (tel. (202) 942-8090).

### Applicants' Representations

1. Rydex Variable Trust, a Delaware business trust, currently consists of 22 separate series, each for a separate portfolio (such portfolios, and additional portfolios that may be added in the future, are referred to herein individually as a "Portfolio" and collectively as "Portfolios").

2. PADCO serves as the investment advisor to Rydex Variable Trust and is registered as an investment advisor under the Investment Advisers Act of 1940.

3. Applicants state that shares of Portfolios of the Trust may be offered to variable annuity separate accounts and variable life insurance separate accounts established by Participating Insurance Companies that may or may not be affiliated with one another, and to Qualified Plans.

4. The Participating Insurance Companies will establish their own separate accounts (the "Separate Accounts") and design their own variable annuity and variable life insurance contracts ("Variable Contracts"). Applicants state that the role of the Trust under this arrangement will consist of offering shares to the Separate Accounts and fulfilling any

conditions that the Commission may impose upon granting the order requested in the application.

5. Applicants state that the Trust can increase its asset base through the sale of shares of the Trust to the Qualified Plans. The Qualified Plans may choose the Trust as the sole investment option under a Plan or as one of several investment options. Participants in the Qualified Plans may be given an investment choice depending upon the Qualified Plan. Shares of the Trust sold to a Qualified Plan will be held by the trustees of the Qualified Plans as mandated by Section 403(a) of the Employee Retirement Income Security Act ("ERISA").

### 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 ("UIT"), Rule 6e-2(b)(15) provides partial exemptions from Sections 9(a), 13(a), 15(a) and 15(b) of the 1940 Act. The exemptions provided under Rule 6e-2(b)(15) are available only where the management investment company underlying the UIT offers its shares "exclusively to variable life insurance separate accounts of the life insurer, 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 is referred to as "mixed funding." The use of a common investment company as the underlying investment medium for separate accounts of unaffiliated insurance companies is referred to as "shared funding." The relief provided under Rule 6e-2(b)(15) is not applicable to a scheduled premium variable life insurance separate account that owns shares of an underlying fund where the underlying fund offers its shares to a variable annuity separate account of the same company or of any other affiliated or unaffiliated insurance company. Therefore, Rule 6e-2(b)(15) does not provide exemptive relief for either mixed funding or shared funding.

2. Applicants state that with respect to Rule 6e-2, exemptive relief is also necessary if shares of the Trust are to be sold to Qualified Plans since the relief under Rule 6e-2 is available only where shares are offered exclusively to separate accounts of insurance companies.

3. In connection with flexible premium variable life insurance contracts issued through a separate account registered under the 1940 Act